

ANALYSIS OF THE LATEST VERSION OF THE NATIONAL EQUITABLE ECONOMIC EMPOWERMENT BILL (NEEEB)

This report provides a legal and economic impact analysis of the latest version of the NEEEB, which EPRA regards as an attempt at wholesale nationalisation of the Namibian private sector and a futile and destructive attempt to engineer socio-economic outcomes.

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EXECUTIVE SUMMARY

There is an old adage which states that *the road to hell is paved with good intentions*. NEEEB has the stated aim of promoting inclusive economic growth based on equitable and sustainable redistribution of wealth and income. Ironically, the most probable outcome is that **economic growth will decline** and **inequality and poverty will increase**. Most Namibians will be left significantly worse off as a direct result of this legislation.

Essentially, NEEEB aims to socially engineer preferred and utopian outcomes on a grand, national scale. It does so by introducing **vague and draconian legislation** where virtually **unfettered power and discretion** rests in the hands of a yet unnamed Minister and Commissioner to set standards and criteria for private sector participation in the economy. It includes the power to withhold licenses, permits and authorisations for economic activities, irrespective of whether private entities do business with government or not. Penalties for non-compliance include a fine not exceeding N\$1 million or imprisonment not exceeding 50 years (or both) for fronting, which is broadly defined and includes any act which undermines the achievement of NEEEB's objectives.

NEEEB expressly and deliberately divides Namibians along **racial lines**. Its purported beneficiaries include any and all Namibians previously disadvantaged, irrespective of past, current or future socio-economic status. It **excludes any and all white Namibian citizens**, including females, and residents, irrespective of past, current or future socio-economic status. NEEEB applies to all entities, occupational categories and productive assets (none of whom are defined). Standards are not transparent or uniform and can change over time. There is no sunset clause and it can in theory and practise carry on indefinitely. Sector transformation charters can, at the sole discretion of the Minister, be imposed on all industries. There is no transparency or certainty as to what criteria will be applicable. Criteria can be changed at any time. There is no duty on the Minister to meaningfully consult on any criteria or sector transformation charters.

All of the aforementioned adds significant uncertainty and discourages much needed foreign and domestic investment. No empirical evidence has been presented to support the purported positive effects on poverty and inequality, opportunity or "empowerment". It is a symptom-level effort to address deep imbalances in the economy, many of which have been perpetuated in the three decades since independence through a defunct education system, misallocation of public funds and sub-optimal investment legislation. While not addressing the causes of a real problem, the legislation presents an opportunity for bad actors in government to execute a wholesale nationalisation of the private sector. Multiple examples exist of similar policies failing elsewhere, but these have conveniently been left out or ignored in favour of dogmatic, ideological arguments in favour of centralising power to the hands of a single Minister and Commissioner.

NEEEB carries significant downside risk for all Namibians, but especially for the most vulnerable and disadvantaged Namibians. It sets the stage for substantive abuse of power, corruption,

nepotism and mismanagement. It actively discourages foreign and domestic investment, **encourages capital outflows**, and violates several key fundamental constitutional rights and international treaty obligations. It can only achieve sub optimal outcomes for the majority, while padding the pockets of a politically connected minority.

It is EPRA's submission that inequality and poverty can and should be reduced by sensible, pro-growth, business friendly policies based on sound economic and legal principles. NEEEB in its latest iteration (however well intended) is highly regressive and the very antithesis of such policies.

NEEEB pays lip service to transformation and inclusive economic growth and will act as a special purpose vehicle' to **centralise excessive power in the hands of a select few**. It cannot address the root causes of the socio-economic marginalisation of those who are most vulnerable and affected by poverty and unemployment.

Government would be well advised to discard efforts to engineer outcomes through symptom level, punitive and anti-investor policy, and to rather focus, with support from private sector, on improving inputs, including sensible **pro-growth** legislation, improved access to **quality education** for all, **access to housing** for all and access to **quality medical** care for all. Government should focus on optimising the use of its exceptionally large revenue pool to allocate funds collected from the relatively wealthy, via the tax system, to the relatively needy, for the aforementioned basic necessities. It is only with such a pro-growth, pro-investment and pro-equality of opportunity approach that Namibia will become a nation of shared prosperity.

No revision of NEEEB should be considered – the legislation should be confined to the dustbin of history as a failed attempted by a set of ideological bad-actors to introduce (proven to fail) policy for the purpose of self-enrichment.

PART ONE – ECONOMIC and HUMAN DEVELOPMENT PERSPECTIVE

1. Background

This section provides a general and historical background on NEEEB.

1.1. General

For a number of years, Namibia has had a policy focus on attempting to bring about development, in part by addressing the country's high levels of inequality and poverty. These objectives have been front and centre in most high-level policy documents since independence, including the country's National Development Plans as well as the long-term Vision2030.

The objective of poverty reduction is broadly supported, and indeed, great strides have been made, largely through government transfers, to reduce poverty. However, large swathes of the population, particularly subsistence farmers, remain vulnerable, as witnessed during the 2017-2019 drought.

Inequality is more complicated and while the issue has not been directly tackled by many, the objective of reduced inequality is broadly agreed upon; however the means of achieving such, less so. Inequality in general is the inevitable outcome of individual choice, individual freedom and individual effort. However, while inequality is inevitable, in Namibia the extreme inequality is the result of, at least in part, historical social engineering. Concern with regards to outcome level inequality of this nature is understandable, however policy to remedy such at outcome level is rarely successful, and indeed, inequality is a poor indicator of development success. That said, the setting aside of outcome level inequality as a measure of development success, depends heavily on a relatively level playing field, meaning that people across the income spectrum should have relatively similar opportunities, before outcome inequality can be set aside as a non-issue.

This raises the question of how inequality should be addressed – can outcomes be forced (and in so doing, individual liberties restricted), or is it only at input (or opportunity) level that real changes in inequality can be influenced, and ultimately outcome level inequality reduced?

Two further questions are: (a) is inequality an appropriate policy focus point, and (b) should it be a measure that concerns us? On the former, inequality is an outcome, not an input – to use a metaphor, it is the pain caused by a wound, not the wound itself. On the latter, two very wealthy people may easily be as unequal as two very poor people - thus is inequality the problem or are poverty and opportunity the problem? An example of this is that within Namibia, Oshiwambo speaking households are far more unequal than those of any other language group. However, this does not mean that the Owambo people are doing worse than other groups, but rather shows that many Owambo have moved into the middle-class post-independence, while fewer members of other language groups have achieved similar socio-economic status.

Whatever one's views of the above questions, few would say that extremely high levels of inequality, such as those seen in Namibia, are desirable. Whether from an altruistic or selfish perspective, high levels of inequality are empirically shown to destabilize economies and societies and thus, addressing this problem is in the interest of all Namibians.

1.2. History

Despite inequality featuring as a prominent target in many policy documents, efforts to reduce such have been met with little success. While the Gini coefficient (the common measure of inequality) has improved slightly since independence, inequality remains elevated in the country at amongst the highest levels in the world (second to seventh highest depending on the data set). Thus, it is fair to conclude that efforts to address inequality have, to date, not been hugely effective.

This may well occasion a change of course, however, for such a change of course to be effective, detailed research would be required. An understanding would need to be gleaned as to the reasons that efforts have so far been met with little success, and to identify the root cause for the perpetuation of inequality. To date, no rigorous research to this end has been conducted, and thus, new policy is being made in an information vacuum, without evidence or understanding, thus hampering the probability of success once again.

Nevertheless, pervasive inequality saw the introduction of the New Equitable Economic Empowerment Framework (NEEEF) and a subsequent bill, the National Equitable Economic Empowerment Bill (NEEEB) in 2016. The 2016 bill raised a number of concerns within the private sector and was heavily debated across the country at the time. After public consultations, a second draft was released later that year which did little to address the initial concerns. Further public outcry led to its withdrawal and promises of a more palatable iteration. However, no clear timelines were set and thus lead to increased investor uncertainty.

2. Current Draft

After much anticipation, the latest iteration of NEEEB bill has passed through Cabinet and is with the Cabinet Committee on Legislation, heading to the National Assembly. This latest draft has been a long time coming, promising to incorporate changes after government engaged various stakeholders over the intervening years, many of whom hoped the new draft would ease their apprehension.

At the Economic Growth Summit in 2019, the President declared that the contested mandatory 25% equity stake in the previous draft would be removed, and that the legislation would only be applicable to entities wishing to do business with government. The President also added that finalising NEEEB “will provide policy certainty, which in turn should reduce capital outflow and unlock domestic and foreign direct investments.”

However, far from assuaging investor concerns, reducing uncertainty and being applicable only to entities dealing with government, the current draft is, if anything, wider reaching and certainly not limited to parties wishing to do business with the government. Moreover, it will introduce more uncertainty in the short term (in that charters and regulations will still need to be seen) and ever-lasting uncertainty, as the ability to change or introduce wide ranging and high-powered regulations at any time will now prevail. Thus, the current legislation is no less flawed than its predecessor.

Built from a failed ideology, drawn from a failed South African example, NEEEB is the most Marxist policy ever introduced in Namibia, heavily centralising power in government and dramatically reducing individual liberties. This comes despite the very recent ‘Fishrot’ example of the results of centralised government power without accountability and transparency.

Indeed, NEEEB is a wolf in sheep’s clothing. Hiding behind the very real issues of poverty, inequality and historic injustice, it is a highly ideological and draconian piece of legislation, aimed at centralising power (and potentially wealth) to a very small group, likely at the expense of the majority and the economy.

2.1. Desired vs Expected Outcomes

While the broad objectives of the legislation, being reduced inequality, reduced poverty and improved opportunity are agreeable and shared by most, the outcomes of the legislation, as elaborated upon in the rest of this document, will be the polar opposite. Far from creating a utopian world of equality, it presents vast opportunity for legalised looting by an elite few; an opportunity for government to subtly suppress dissent; an opportunity to shut down any business; and an opportunity for government to involve itself and its cronies in every single business in the country.

We may give the drafters and advisors on NEEEB the benefit of the doubt and assume that there is no intention to abuse the vast powers that the bill will bestow upon a single Minister and a to-be-appointed Commissioner. However, even if good initial intentions is the case, the legislation sets a foundation for what could, through regulation, be used for a wholesale “business grab” or effective “capture” of the private sector.

This creation of positions of vast power comes shortly after the recent “Fishrot” scandal that laid bare the fact that concentrated power without accountability attracts maleficence. While the fishing quota honey pot was appealing to bad actors, the honey pot presented by NEEEB is orders of magnitude larger. That the latter is not the intention, as the parties responsible for NEEEB will no doubt argue, is of little solace – it is once again a gun to the head of Namibian business with the promise that the trigger will not be pulled.

2.2. Baseline, Targets and Abuse

The following section discusses the lack of baseline research, data and unattainability of targets.

2.2.1. Baseline

One of the foremost challenges presented by NEEEB is that it appears that little empirical research has been done. Thus, it is reliant on perceptions, anecdotes and hearsay. There is no baseline with regards to business ownership, management make-up and similar. Further, there appears to be no research as to the cause of the perpetuation of high inequality after independence, and why some individuals and communities have been more successful at increasing their incomes and assets than others.

In addition, there is no research to show why so few post-independence business success stories exist, and why natural transformation of the economy has been so slow. Finally, and most importantly, there has been no research as to the various options available as to how to address these concerns. Thus, we are left with an inadequately researched piece of far-reaching legislation; perceptions, anecdotes and ideology dictating a very torrid future for the country.

2.2.2. Targets

The fact that NEEEB includes anyone who was previously disadvantaged (except white woman) irrespective of current status, in itself sets an implicit and unattainable target. If overcoming historic disadvantage to become abnormally advantaged in present terms is not sufficient to exclude a party from further benefit from the legislation, the implied target of the legislation is infinite. No person could ever “graduate” to no longer be a beneficiary, as their historic status will never change. Similarly, NEEEB includes no provision for a sunset clause. This presents enormous scope for abuse. Indeed, it is not just likely, but absolutely inevitable, that the legislation will be used by the already well off, but previously disadvantaged, for further personal gain. This is not, and should not be, the objective of the legislation, but is a certain outcome.

As well as the lack of tangible targets, there is no mention of monitoring of (a) the intended outcomes, and (b) abuse and misuse. Further to this, the broad strokes of “empowerment” mean that many businesses could tick all the boxes, and yet have genuinely empowered no-one. Once again, this is not just a likely outcome, but an inevitable one.

2.3. Specific Concerns

One of the core definitions in NEEEB has changed: ‘Previously Disadvantaged Persons’ has now been replaced with ‘empowerment beneficiary’, as the former definition would apparently lead to the inclusion of persons who are not intended to benefit from this legislation, notably, white woman. This new term specifies disadvantage on the basis of race prior to independence (21

March 1990), and any descendants of these persons (whether by birth, descent, or naturalized citizens).

In an Explanatory Memorandum on NEEEB, it is stated that some definitions “are inspired by the Broad-Based Black Economic Empowerment (BBBEE) of South Africa and adjusted to fit the Namibian context. This is not a positive sign – it shows that Government is modelling NEEEB on the failed transformation policy adopted in South Africa, which did little to address poverty and unemployment but rather was used as a ruse to enrich cronies. There is no reference to current disadvantage, such as socio-economic background.

There are several problematic areas within the new iteration of NEEEB. Firstly, it establishes a Commissioner to investigate matters and appoint investigators (as well as special investigators). However, there are no real checks or balances in place against the Commissioner’s powers, especially where there may be a vested interest. For instance, the Commissioner can enforce compliance with the Act, initiate investigations and/or recommend criminal or civil charges. In the event that there is potential malicious intent, it would seem the only recourse would be to resort to the courts, a potentially expensive and protracted endeavour that many businesses would not be able to afford. There is thus wide scope for abuse of almost unlimited discretionary powers of the Commissioner.

Section 16 provides for the establishment of a unit within the (unspecified) Ministry to serve as an accreditation body for the purposes of NEEEB. This is a role that can be delegated to the Commissioner that will need to be established in any case, rather than needlessly replicating work and creating unnecessary additional expenditure for government, further bloating the already bloated, inefficient and expansive civil service.

Section 13 provides for the core ‘pillars of economic empowerment’, namely:

- Ownership
- Management Control & Employment Equity
- Human Resources & Skills Development
- Entrepreneurial Development
- Procurement
- Corporate Social Responsibility
- Value Addition, Technology and Innovation and
- Empower Financing.

As of yet, these pillars provide the guidelines but no strict regulations or standards which are to be adhered to. In other words, the fundamental uncertainty around NEEEB has not been addressed. There is no clear indication as to what each pillar will include, how these are to apply, how many pillars must be complied with, to what extent each one must be complied with, and whether some or all pillars will be mandatory.

Section 13 merely indicates that the “standards of equitable economic empowerment”, which give effect to the Act and the pillars, may be published in the Government Gazette by the accountable Minister. This means the substance of the pillars – such as the now removed 25% ownership clause – remain a mystery. What these standards will dictate, which private businesses will need to comply with, are now more uncertain than before. This uncertainty was one of the fundamental problems after the withdrawal of the previous version of NEEEB, a problem which has not at all been addressed despite the President’s earlier statement; and in fact worsened.

NEEEB provides some guidelines as to what the pillars should include or strive to achieve. The Entrepreneurial Development pillar includes indicators such as “covering overhead costs, providing services at no or discounted costs” of empowerment beneficiaries. In other words, this would mean that Government seeks to use legislation to coerce the private sector into subsidising companies belonging to empowerment beneficiaries.

Concerns about the previous pillar is highly problematic, as it could put highly inefficient businesses at a disproportionate advantage, at the expense of established companies who also have their own employees and in all likelihood are struggling already in the current economic environment. Furthermore, it is ripe for abuse as politically connected or wealthy empowerment beneficiaries could very well benefit from such measures, thereby not at all addressing the stated objectives of addressing income inequality, high unemployment, or the economic status of poor/currently disadvantaged empowerment beneficiaries.

The Empowerment Financing pillar suggests the introduction of cheaper or subsidised rates of funding for entities belonging to empowerment beneficiaries. How this is to be done is not specified. Will Government avail funding for this, or is money to be drawn from the private sector? If the latter, will this be money from taxes, or will additional taxes/levies be introduced in order to do so? Will favourable rates be legislated for qualifying entities, forcing lenders to provide financing at below market rates?

NEEEB does nothing to ease any concerns around the pillars. The highly contested 25% ownership clause has been removed, but it will most probably resurface, in unknown percentage, in the Ownership pillar standards to be gazetted. There are no limitations. NEEEB provides more questions, rather than clear directions, on the pillars – thereby providing no clarity but rather more uncertainty.

Regarding the standards, the as-yet-to-be-determined Minister must publish draft standards in the Gazette for comment (section 14). Interestingly, NEEEB provides for a maximum 60 days for interested persons to provide comment. Worryingly, it does not provide a minimum period for comments. The most concerning provisions in NEEEB are sections 14(7)(b) and 14(9)(b). The former states that any standards may include “qualification criteria for approval of licences, permits, or authorisations in terms of a law or for engaging in certain economic activities”. The latter states that public entities must apply the relevant standards “for the issuing of licences,

permits, or authorisations in terms of a law or for engaging in an economic activity". This means that any and every business entity is at the mercy of government should it wish to conduct business in Namibia, as this is not limited to entities wishing to do business with government.

If an entity does not meet the required equitable economic empowerment standard, these provisions give government power to stop them from "engaging in an economic activity". Every public entity must also apply the relevant standards when developing criteria for entering into partnerships with private sector entities. NEEEB goes further, stating that public entities must also take the standards into account for determining the awarding of incentives, grants, investment or entrepreneurial scheme.

In other words, government has extraordinary and far-reaching power to determine who may conduct business in Namibia, in similar vein to provisions that were published in the controversial Namibia Investment Promotion Act. Government may, quite simply, exclude entire businesses from participating in the economy for not meeting the published standards, irrespective of how onerous the standards may be.

Again, rather than ease uncertainty, these provisions suggest an even more uncertain operating environment where the entire private sector is vulnerable to the whims of the Minister responsible for gazetting these standards.

As is to be expected, NEEEB seeks to prevent 'fronting' as dealt with in Section 17. Issues here include the punishment of 'anticipating' outcomes of investigations or the very broad term of 'frustrating'. The concern here lies with the prescribed sentence for committing such an offense, being a fine not exceeding N\$1 million or imprisonment not exceeding 50 years (or both). The maximum sentence here seems to be extremely excessive, even though it is the ceiling. For comparison, the Anti-Corruption Act provides a maximum sentence of 25 years (or a fine not exceeding N\$500,000, or both). It can be deduced that Government seeks to take the offence of fronting far more seriously than it does corruption.

Section 18 deals with investigations conducted by the Commissioner. Subsection 5 hereof gives the Commissioner and investigators wide-ranging powers, privileges and immunities, granting them the same as the Ombudsman in Section 4 of the Ombudsman Act. This places the functionaries of the Commissioner on equal footing with the Ombudsman, granting them significant powers in terms of search and seizure.

Section 22(1)(b) gives the (unspecified) Minister the power to demand that any private sector institution must furnish the Minister "with any document in its possession or custody or under its control, within the period specified in the directive". The wording of this is incredibly broad and worrying, as nowhere in section 22 does it limit the application of his/her power. The order of magnitude of such almost unlimited power should not be vested in Government, let alone a single person who is far from infallible. This provision also does not denote any oversight, check

or balance for such far-reaching power. Frankly, the wording is dangerous and provides ample scope for abuse.

Section 26 introduces more, not less, uncertainty, giving the President the power to determine whether NEEEB will be administered by one Minister and Ministry, or different provisions are to be administered by different Ministers. Generally, statutes specify which Minister/Ministry is responsible for a specific piece of legislation, and which other Ministers/Ministries should be consulted for different provisions.

NEEEB perpetuates uncertainty as there is no clear indication of who will be charged with its administration, nor with modalities for administration across various Ministers and Ministries where co-ordination is required.

Overall, NEEEB concentrates vast power in just a few hands. It gives individuals in government the ability to co-opt private business in order to enrich select individuals. Furthermore, many of the provisions make use of broad definitions, or provide for unrestrained powers and no oversight, with the only recourse for aggrieved parties through the courts. Quite simply, these draconic and unspecified provisions not only provide opportunities for abuse, but seem to encourage it.

2.4. Implications on Investment

In addition to the general abuse of power that NEEEB will enable, there are wide-ranging economic implications, most notably around investment and all that flows from it.

NEEEB strikes at the very heart of the economy. By adding vast layers of bureaucracy, forcing management and ownership structures that may well be sub-optimal for businesses and requiring large additional business expenditure (such as on compliance), to name but a few, the legislation will reduce the return on invested capital available to investors. It is critical to bear in mind that the objectives of government and the objectives of businesses are not the same, and while the one may compliment or contribute to the other, they remain inherently different. The objectives of government are being forced onto businesses, and in so doing, are reducing the ability of businesses to achieve sustainable profit by creating an environment completely counterproductive to it.

Before NEEEB, Namibia is already a relatively investor unfriendly jurisdiction, with a plethora of challenges pertaining to over-regulation and inefficiency, from the number of days it takes to open a business (66 days), to the ability to claim back tax, to time taken to pay tax, to processes and time required to attain licenses. This relative investor-unfriendliness means that the hurdle rate to make sustainable profit is higher than would otherwise be the case.

Profit is fundamental to an economy. Without profit, private capital, however large or small, and whatever its geographic origin, does not invest. Without investment, goods and services are not

provided. Without businesses with goods and services to provide, no employment can be provided. Without employment, businesses, and goods or services to consume, tax cannot be levelled. Without tax, government does not exist. Without all of these, human development cannot take place.

Despite the critical nature of profit in the economy, NEEEB will put profit at risk for many businesses. The scope of the potential interference is so dramatic, that the legislation is all but a full-scale “business grab” by government, with ownership and management of private entities held hostage by the wide-scoped interference in the most fundamental parts of business.

The breadth of the legislation means that for all businesses operating in the country, government has absolute control over their fate with undisclosed and potentially ever-changing regulations. In this regard, the legislation is so draconian and uncertain that for many, it will make investing in the country so risky that it is not worthwhile. One altercation with the wrong public official, one attempt to challenge the discretion the accountable Minister(s), and enormous penalties and jail time could ensue. This is especially probable as NEEEB intends to allow standards to be general and unspecified, meaning that individual businesses (whether natural or juristic) can be targeted.

All in all, the effect of NEEEB is the enslaving of the private sector at the unrestrained discretion of government. The examples of the results of these sorts of policies, where tried throughout the world throughout history, have been negative. The same will undoubtedly apply for Namibia.

Far from achieving the objectives of reduced inequality, growth and employment, the extensive interference of the government in business decisions will without doubt exacerbate the issues highlighted. One need not look too far afield for evidence of this. Indeed, the explanatory note linked to NEEEB explains that the Namibian legislation draws from the South African equivalent. This legislation has not seen material improvement for the lives of the majority of South Africans, but rather has made an elite minority very wealthy under the pretence of ‘empowerment’.

The South African economy has stalled, stagnating over the past decade. The majority continue to suffer, with few jobs, little investment and a cash-strapped government. The same can be expected in Namibia - the enriching of a small, previously (but not currently) disadvantaged elite; a collapse in growth; a material deterioration in investment; increased unemployment; and, in the ultimate irony, increased inequality.

Legislation that adds costs to business, reduces profit, increases risk and uncertainty while undermining property rights for investors, means that only the most profitable, least risky or most naïve investment takes place. All of the more general investment, and any investment that is broadly movable (e.g. could as easily take place in Botswana as in Namibia), will not take place. This, unfortunately, is not speculation – it is the reality of the past four years, since the first NEEEB threat reared its head.

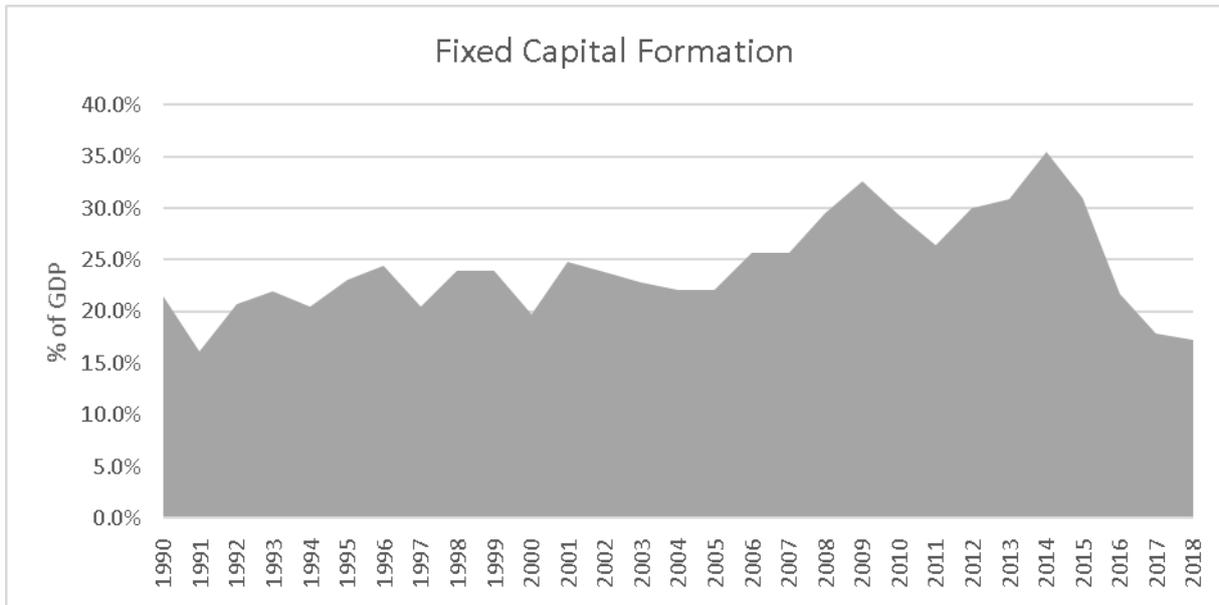
2.4.1. Investment

Namibia has already begun to feel the withdrawal of investment. The most recent data shows this both in terms of gross fixed capital formation and net direct investment. This coincides notably with a dramatic shift in policy. For much of her independent history, Namibia has enjoyed a relatively free market which attracted investment, spurred growth, and played an important role in much of the progress made since 1990 – whether directly, such as through upliftment thanks to employment or corporate social responsibility; or indirectly, by providing the finances for government to do so (through tax revenue).

However, over the past decade there has been a notable shift in policy and a clear ideological drift towards a more overtly government-controlled economy. This has seen the introduction of more interventionist policy from government, as exemplified by the controversial NIPA and different versions of NEEEB, as well as several other detrimental policies such as the sheep marketing scheme (which decimated the local industry), the Additional Conditions imposed on mineral exploration licences introduced in 2015 (which dramatically decreased exploration activity), and regulation 13 (previously 28) of the Pension Fund Act that allowed GIPF to allocate pensioners money to be invested by a small number of preferred funds in unlisted investments (Greenfields) and high risk projects.

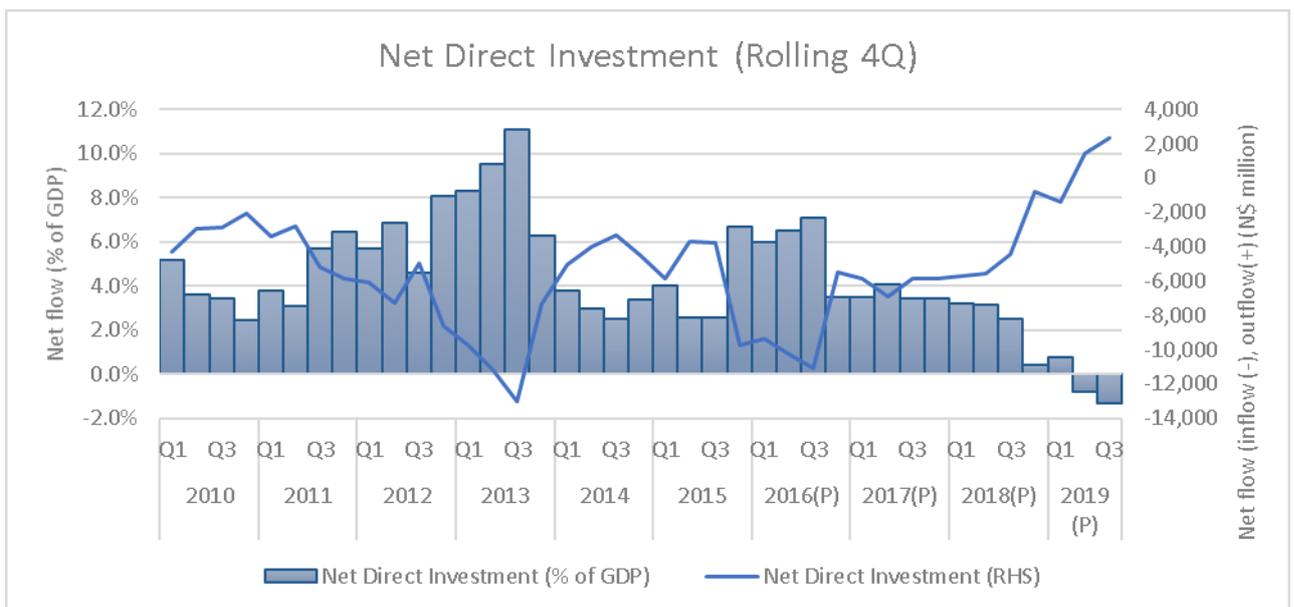
The ideological drift further left has coincided with a collapse in the economy. This has not resulted in a change in the direction of policy, but rather has reinforced it – as can be seen not just in the policies emanating from government, but even the ruling party solidifying ‘socialism with a Namibian flavour’ as its ideology. Frankly, this is an open declaration supporting an ideology which has led to the collapse of nations, from the GDR and USSR, to the more recent examples of Zimbabwe and Venezuela.

The reaction to the increasingly investor-unfriendly policy environment, which has also seen the government try to grow its direct control of the economy, is self-evident. Gross fixed capital formation, which is a leading indicator, is at an all-time low as a percentage of GDP. This shows that investment, whether local or foreign, in productive, fixed capital has slowed notably. Investors simply do not feel secure in committing and would rather wait out the uncertainty or deploy their capital elsewhere.



In a similar fashion, net direct investment has begun to dry up as well. Traditionally, Namibia has enjoyed relatively large inflows of foreign direct investment which has helped to sustain the balance of payments and maintain the currency peg with the rand. However, this has also changed in recent years.

With the introduction of anti-business and investor policy and rhetoric, local capital has slowly started to leave the country, and little foreign capital has entered the country. So far, Namibia has avoided dramatic capital flight, however much capital is waiting on the side-lines to observe what happens with policy, NEEEB in particular. Given a globalised world, this presents a major risk to Namibia. A bad policy, such as the current proposal, can cause much of this capital to leave Namibia, potentially resulting in more aggressive capital controls. Should this happen, it will see the final nail delivered to the coffin of investment into Namibia – money will simply not come into a country if it cannot leave again.



The effect of Namibia's policy environment has resulted in not only reduced net direct investment, but in 2019 it in fact turned negative, meaning Namibia recorded net direct investment outflows (or disinvestment). This is a clear message to policymakers that we are doing something wrong, and has severe implications on the macroeconomy. As earlier mentioned, Namibia ranks relatively lowly as a global investment destination, meaning there are dozens of other countries that are a better place to put your money – even before this legislation is introduced.

2.4.2. Employment

According to the 2018 Namibia Labour Force Survey, there are only 214,693 people employed in private companies, enterprises or co-operatives in Namibia. Assuming an average of around 10 employees per employer, there are probably no more than 20,000 companies active and employing people in the country.

The nature of the size of these companies, and the number of people that they employ is undoubtedly a pyramid. There are a small number of large companies at the top (many of the listed companies, for example), followed by a larger number of mid-sized, followed again by a larger number of small companies, and lots of micro enterprises. Many of the large and medium companies are public, not “white owned” and/or have “previously disadvantaged” shareholders or institutions as shareholders. There are perhaps some exceptions, but that is to be expected – there are also non-demographically representative “previously disadvantaged” owned companies.

It appears to be the next tier of companies that is of greatest concern – small companies. Indeed, there are a lot of small companies operating in Namibia, which account for a significant portion of paid employment, who stand to be negatively affected by not complying with the future regulations or which can afford the cost of compliance. NEEEB will add significant costs to all businesses, especially these small enterprises, which are likely marginal given their size alone.

Critical in all of this, however, is that Namibia does not lie with the shortage of employees – official unemployment was at 33.4% in 2018, with the youth (ages 15-24) facing the highest unemployment rate of 60.0%. Most of these unemployed persons, including the youth, would meet the criteria of ‘previously disadvantaged Namibians’ or ‘empowerment beneficiary’ (as per the NEEEB).

However, even those qualified with university diplomas and degrees and higher are struggling to find work in the country, with 23.8% of these educated Namibians being unemployed in 2018 (compared to 7.8% in 2014). Unemployment amongst postgraduates went up from 0.9% in 2014 to 9.5% in 2018.

The inability to find work, largely contributed to by uncertain the policy environment, perpetuates the lack of transformation cited by Government. Tellingly, NEEEB only makes reference to current socio-economic status in the preamble. Much like BBBEE in South Africa, NEEEB sets up ample opportunities for those who are politically connected or already incredibly wealthy to benefit, but does little to address those who have been left behind since independence 30 years ago, similar to what happened during the previous administrative regime where workers in the informal economy (survival entrepreneurs, contract workers with very limited employable competencies) could not, and still find it extremely challenging to, enter the formal economy (salaried and taxpayers).

There is no guarantee, comparable legislation or valid and reliable research findings that NEEEB can or will improve the lives of the more than 364,000 people who suffer the indignity of unemployment. Most worrying, the direction of this policy continues down the path that led to failed states and waste economies over the last century. Given this, it comes as no surprise that Namibia has experienced the worst economic period of her history over the past four years under the threat of NEEEB, while at a time when much of the rest of the world has been characterised by growth, including Africa, and the Sub-Saharan Africa region.



Furthermore, decreased investment in fixed capital and productive assets means we will not see increases in employment. The introduction of draconian, interventionist policy will only hasten disinvestment, resulting in direct job losses. With unemployment already at worryingly high levels, particularly for the youth, increased unemployment as business close down or move elsewhere will result in another generation left behind – a further great injustice to those who have been left behind by one administration after the other. This will only serve as a further barrier to reducing inequality.

2.4.3. Skills

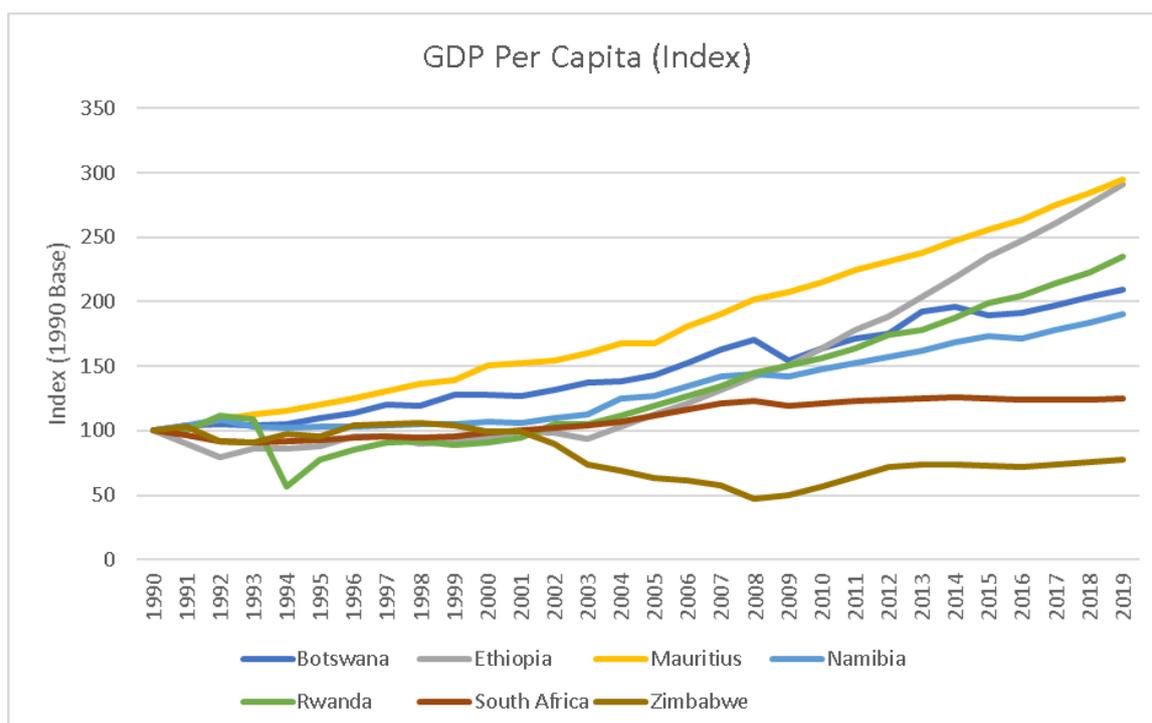
While capital moves quickly and with relative ease, skills tend to be sticky. Moreover, while the outflow of capital is a worrying leading indicator, the departing of skills is a long-term crisis. It is off the back of skills and capital that an economy is grown, and that the participants in that economy are developed. Despite this stickiness of skills, anecdotal evidence suggests that many skilled Namibians, white and black, have upped their roots in search of greener pastures over recent years.

Skills, as much as capital, are required for an economy to grow. However, in a globalised world, skilled and educated persons are global citizens, who can move and take their skills to wherever they are best rewarded. Many such skilled individuals in Namibia benchmark themselves to skilled persons elsewhere in the world and realise that there is a material risk of being “left behind” by global standards if they ply their trades in the small, shrinking, Namibian economy.

This is as true of the children of many Ministers as it is of any other skilled persons.

The danger here is that skilled individuals do not find it difficult to relocate in this globalised environment. However, not only do they leave Namibia bereft of their skills, but also their contributions to society, to Government’s revenue, and to potential employment (as they may well have been or become employers). They leave behind the poor and vulnerable, who will be reliant on transfers from an ever-less-resourced government. This is the very real risk presented by NEEEB, and the ideology that underpins it.

A simple assessment of performance of economies across the continent over the past three decades lays bare the simple fact that excessive government control and government intervention in the economy is counter-productive. The continent’s success stories over this



period have been those that have liberalised, have embraced the free market and private sector, and have implemented structural changes, for example Mauritius. Zimbabwe and South Africa have taken the opposite path, and are the laggards of the region. Botswana, Rwanda and Ethiopia are also the success stories. However, while Namibia has been a mid-range performer, we now seem hell-bent on turning towards the failed policies of Zimbabwe and South Africa, rather than the success stories aforementioned.

2.4.4. Growth

There are only four components of GDP, and unless these are seeing net expansion on a weighted basis, the economy will not grow. These components are household consumption (approximately 70% of GDP), government spending (approximately 24% of GDP), net exports (approximately -6% of GDP, as we are net importers) and investment (the remainder).

Given the current high levels of household debt, formal sector job losses and low wage adjustments, households will not be driving growth in coming years. Add to this legislation that will cause businesses to close, less local production and higher costs of doing business, and further job losses can be expected.

With regards to government spending, we have the third best-resourced government in the world relative to the size of our economy (third highest tax-to-GDP ratio in the world). However, despite these staggering resources, our Government still spends between N\$8 and N\$10 billion a year more than the revenue collected, a highly unsustainable situation. Importantly, Government will not be able to stimulate growth sustainably through more spending over the near term. Add to this legislation that causes fewer people to be employed, fewer businesses to exist, and less profit to be made, and large revenue reductions can be expected.

With regards to net exports, theoretically this could be improved either through reduced imports or increased exports. The former is currently happening as a result of weak household demand in the country, while the latter is likely to move in the opposite direction over the next two years, as mineral output falls or commodity prices soften, and as agriculture exports come under further pressure as a result of second-round effects from the drought and the impact of climate change.

This just leaves investment, and investment is without a doubt the silver bullet to our current situation. Without investment, we will not see a recovery in employment and household incomes, and thus will not see material recovery in personal income tax, VAT and corporate taxes. This will keep government under revenue pressure, particularly from domestic sources. Thus, government spending will likely remain under pressure until we see investment recovery.

In order to suitably increase exports and decrease imports, while improving living standards, we need investment. We are not going to produce more goods to sell to the rest of the world

without investment, and we are not going to reduce our dependencies on imported goods without investment.

2.4.5. Public Finances

The effect of reduced investment, less business activity, and increased unemployment will have a direct impact on the fiscus, as mentioned above. The government has been able to introduce several redistributive policies owing to being relatively well financed. These include efforts like the state old age grant, which has arguably been one of the most effective measures by government to alleviate the brunt of poverty, but also efforts to address rural electrification, access to safe drinking water, sanitation, etc.

However, an exodus of skills and capital would result in a significant decrease in tax revenues, which would result in government needing to introduce austerity measures. This would jeopardise infrastructure spending – placing further constraints on economic growth. It would also reduce the ability of government to further its redistributive policies and address service delivery.

3. General principles

3.1. Investment

Skirting around the issues is of no help to anyone. Since NEEEB was first introduced, it has created much uncertainty and left a bad taste in investors' mouths. Now that we have the latest iteration of the NEEEB, we are now worse off, mainly due to excessive discretion open for abuse by a handful of potentially bad actors.

Firstly, many of the provisions in NEEEB are problematic, opening up avenues for unchecked misuse.

Secondly, NEEEB does little to resolve uncertainty. In fact, this version only raises more questions and uncertainty than before.

Thirdly, the provisions in this draft provide for the exceptional concentration of power, which is not immune to abuse as we have witnessed in the ongoing "Fishrot" matter. The fall from grace of three members of Cabinet over the past year shows precisely why such broad and extraordinarily intrusive powers cannot vest in one or two individuals. Potentially, NEEEB gives excessive power to one individual to control industry and bend private sector to its fantasies.

It leaves private sector entities at the mercy of Government, who will be allowed to determine whether an entity is even allowed to engage in an economic activity. This is extremely regressive, and rather than providing any hope of economic freedom, we are witnessing Government

attempting to increase its direct control of the entire economy – as was the case with the highly problematic Namibia Investment Promotion Act.

Despite previous utterances from members of the Executive, the application of NEEEB is nowhere limited to entities who wish to conduct business with government. It also appears that NEEEB will apply to entities regardless of size, from micro through to large transcontinental organisations.

This creates an additional bureaucratic burden to doing business in Namibia – especially from the need for monitoring compliance – which also brings with it increased direct costs through managing compliance. This makes Namibia a far less attractive jurisdiction than ever before, which in turn will not stem the “capital outflow” or “unlock domestic and foreign direct investments.” The impact of policy like this can be seen in Namibia’s mining sector, such as the reduced exploration activity as a direct result of the Additional Conditions attached to exploration licences introduced in 2015 (which have since been scrapped).

Another point of concern is that many of the provisions of NEEEB read strikingly similar to some of the provisions the BBBEE draft regulations gazetted by South Africa’s Department of Trade and Industry on 17 February 2016.

Other countries have realised that a dramatic shift in policy is necessary to improve the future of their nation, as is the case with the recent announcement that eSwatini will be halving its corporate tax rate to 12.5% in order to entice business activity. Namibia’s legislature, on the other hand, is resolute in its determination to take us down failed roads.

There is lots of talk about empowerment in policy, including South Africa BBBEE which has only succeeded in enriching the politically connected elite. Similar phrasing was used to amend Namibia’s fisheries legislation, which amendments are at the heart of what allowed members of the Executive to engage in the “Fishrot” corruption scandal, together with their friends in private sector. Policies such as these pay much lip service to transformation, but in fact do little to address the socio-economic status of those who are most vulnerable and affected by poverty and unemployment.

3.2. Property rights

The broad powers and lack of oversight or accountability in NEEEB are a direct erosion of private property rights. Quite simply, private property rights are a fundamental condition for a functioning economic system. Without an absolute guarantee of property rights, very limited investment will take place in Namibia, and much current investment will seep away as already illustrated prior to the current NEEEB draft.

3.3. Inequality

The dilemma is this: In order to reduce inequality, we need to improve incomes for lower-income households. To do this sustainably, we need to sustainably create jobs faster than we are increasing the number of job seekers in the country (and there is a huge backlog to deal with, given the high unemployment rates). Jobs are created by investment, whether Namibian or foreign. Investors invest their capital in order to generate returns. NEEEB introduces an effective tax on capital, which disincentivises investment.

3.4. Currency Peg

In 2015 Government was warned of an eminent economic collapse. This was largely ignored. Government must hereby again be warned about the currency peg risk; and NEEEB is a contributing factor.

Namibia typically runs a Current Account deficit, due to the value of our imports exceeding the value of our exports. This draws down of our international reserves, which Namibia needs to maintain a minimum level of to guarantee the currency peg. Until recently, net portfolio inflows (e.g. money from pension funds), external debt issuance by the government, and net direct investment have been sufficient to offset the outflows from our trade deficit.

However, going forward, portfolio flows will be greatly reduced as most pension funds meet the increased statutory domestic asset allocations. As explained above, Namibia has also started recording net direct investment outflows. This means that Namibia stands the risk of seeing net outflows on both the Current Account, as well as the Capital and Financial Accounts.

The result of the previously stated is that there will be a net outflow of international reserves. Should they drop below the minimum level, the SARB will no longer guarantee the currency peg and the Namibia dollar will inherently depreciate against the rand. This would have a catastrophic result on the Namibian economy. Not only will it decimate the assets and balance sheets of businesses & individuals alike, it will also result in an immediate spike in inflation – eroding the value of pensions and other private contractual savings, and salaries, for instance.

The said mentioned matters for every Namibian, as their entire assets – their life's savings, their hard work – will immediately lose value. Equally prescient is the impact this would have on the buying power of low-income individuals' wages. A spike in inflation for low-wage earners would cause a dramatic reduction in buying power and living standards.

NEEEB presents a very real risk to the currency peg. The reason for this is simple: NEEEB not only discourages investments, but it will also encourage disinvestment, emigration, and people seeking to relocate their assets elsewhere. Disinvestment and the offshoring of assets will immediately result in an outflow of international reserves – and from the account that

traditionally boost reserves. This could easily force a currency decoupling, which would be catastrophic.

We suspect that to try and address this risk, we will see Government turning to capital controls in the relatively near future. This will be the death toll for the economy – no money comes into an economy that it cannot be easily taken out of.

Moreover, because we import most of what is locally consumed, we will continue to burn hard currency on imports. The only alternative is that we reduce imports in the short term, which would mean a dramatic reduction in the standard of living in the country. This would chase skills and capital away even more, which would in turn result in increased unemployment, reduced government tax revenue and fewer exports. This is an untenable, and arguably self-reinforcing, situation. It must be avoided.

4. Alternatives

30 years after independence, it is imperative that we address the root causes and contributors of the ongoing inequality: poverty and unemployment. While the stated objectives of NEEEB are to reduce inequality and improve opportunities and outcomes for previously disadvantaged Namibians (in general), simply stating so does not mean NEEEB will have that affect.

NEEEB appears to be a thinly-veiled attempt to amass more control of the economy in government, paving the way for further rent-seeking and enrichment of an elite minority. Those who are both previously disadvantaged but also currently advantaged will find no solace in this. Rather, they will continue to be left behind, and likely will end up worse off in the long run due to the impact of Marxist, anti-growth policy such as this.

Criticism of the NEEEF Bill does not equate to criticism of redress or progress. ERPA believes there are alternatives, which are far more palatable and can embrace the upliftment and inclusion of those who have been left behind or excluded. This will not be done as quickly as NEEEB seems to promise. However this does not mean that this destructive and regressive policy is to be preferred.

First, Government must begin by acknowledging the situation consisting of sets of related problems. Inequality is the symptom: we need to address that pervasive poverty and unemployment that exacerbate this inequality. We should therefore turn our attention to solving these problems.

To do this, we need to ensure that we focus on providing equality of opportunity – for instance by providing good, quality education; ensuring that all who need it have access to affordable housing; that investment is attracted and jobs are created so that people aren't subjected to the indignity of unemployment. We need to hold government accountable for the provision of services it should be provide to all indiscriminately. Instead, we fall far short – few politicians

would subject themselves or their families to public healthcare or education, and for good reason.

However, the approach taken in policy such as this latest iteration of NEEEB is highly regressive, creates vast scope for rent-seeking and abuse, and doesn't even make a half-hearted attempt to focus on those who are still disadvantaged today. As a result, investment will remain low or slow further. Jobs will be destroyed and not created. Household incomes for low income households will shrink. Inequality will rise. The latter mentioned needs to be averted at all cost.

PART TWO – LEGAL PERSPECTIVE

1. Introduction

This part primarily provides a legal analysis of NEEEB. Several well-placed sources warned that government has no intention to entertain any public consultations on NEEEB. All attempts to obtain confirmation that consultations will be held on NEEEB before it being passed into law, proved futile.

2. Summary of NEEEB

NEEEB is presented as a law to empower black, coloured and Indian Namibians, which law should supersede all other transformation and empowerment policies. However, this is misleading as it will for instance not repeal the affirmative action laws. It is further presented as a law to address income inequality. This is done only on the basis of skin colour. NEEEB does not contain a means test.

The latest version of the bill is far more draconian than the previous two versions. It will enable one decision-maker to potentially exclude a group of people from all economic activities and from all private and public sector jobs.

NEEEB is premised on the following assumption: If the rights and opportunities of one group of Namibians are reduced, the rights and opportunities of NEEEB beneficiaries will automatically increase, and as a result the economy in general will expand.

It is argued by the lawmakers that NEEEB is justified under Articles 23(2) and 95(a) of the Namibian Constitution. As explained in a later chapter, the aforementioned is not the case.

NEEEB is applicable to all “entities”, “all occupational categories” and “productive assets”. None of these terms are defined and can therefore be broadly interpreted.

A National Equitable Economic Empowerment Commissioner (the “Commissioner”) will be appointed. The Commissioner will issue “standards of equitable economic empowerment” (the

“standards”) to give effect to the eight “pillars of equitable economic empowerment” as discussed in part one above.

The Minister will also issue “sector transformation charters”. Such charters will be binding between all entities operating in a specific sector, thus including transactions between all private sector entities. So, for instance, procurement by one private sector entity from any other private sector entity, which is not owned by a sufficient number of NEEEB beneficiaries may be completely prohibited.

The Commissioner must enforce NEEEB and the enforcement mechanism will be through government procurement and licensing. So, for instance, a business may be refused a licence or permit, or allowed to “engage in certain economic activities” should it not comply with the standards, for example, should it not be owned by a certain number of NEEEB beneficiaries. This will effectively mean a closing down of such business. Arguably, new business registrations can be refused on the same basis.

There is no duty on the Minister or Commissioner to consult on either the standards or sector transformation charters, and these may simply be imposed. To assume the Commissioner will never do so is an extremely dangerous assumption and should not be the reason these draconian powers in the bill should be accepted. It is the proverbial gun to a person’s head with a promise not to shoot.

Standards may be of general or specific application, meaning a single private sector business, even individual, may be targeted. So, for instance, the Commissioner may set a standard which prescribes 100% of the Olthaver & List Group should be owned by NEEEB beneficiaries. A standard can prescribe that a specific farm, or rental property (as “productive assets”) must be fully owned by NEEEB beneficiaries.

The Commissioner has powers to investigate private entities, as well as the powers to implement “empowerment assessment tools”. The Commissioner has the same powers to investigate as the Ombudsman. In exercising these powers the Commissioner (or his appointed investigators) may:

- enter any premises or building (except a private home) and interrogate any person found there;
- access and make copies of books, vouchers, documents, or access any movable asset, which will include laptops and computers;
- seize and retain anything relevant to the investigation;
- summons any person and request any information.

The Commissioner also has “any power necessary or expedient for or incidental to achievement of the objectives” of NEEEB. As explained hereunder, such unconstrained powers are unconstitutional.

Investigators will be appointed, on recommendation of the Commissioner, to conduct investigations under NEEEB. The powers of investigators are unlimited as the Commissioner's statutory power to "assign" powers to investigators are not curtailed; or will at least be as extensive as the powers of the Ombudsman.

Private individuals or entities may be accredited to be "verification agencies". Criteria for verification by verification agencies may also be prescribed, and is currently unknown.

A "fronting practice" is a criminal offence, punishable by N\$1,000,000 or 50 years imprisonment, or both. A fronting practice is any "arrangement or act which undermines or frustrates¹ the achievement of the objectives or implementation" of NEEEB. This definition is so wide that this report can potentially be regarded as "frustrating" the implementation of the act, for the mere critique it expresses against the proposed NEEEB.

The crime of a "fronting practice" will also include any conduct whereby:-

- a NEEEB beneficiary employed by an entity is discouraged or inhibited from participating in the main activities of that entity;
- economic benefits are not received by NEEEB beneficiaries in the ratio expressed in "relevant legal documents";
- a NEEEB beneficiary does not receive the economic benefit "that would reasonably be expected to be associated with the status or position held" by that NEEEB beneficiary;
- an agreement is concluded with another entity to "enhance empowerment", in which agreement:
 - there are limitations on the identity of suppliers, service providers, clients or customers;
 - maintenance of operations is improbable, having regard to the resources available;
 - terms and conditions were not negotiated at arm's length and on a fair and reasonable basis.

The Commissioner may request information from any public entity, which will include any public enterprise under the Public Enterprises Governance Act or any entity "owned or controlled" by government.

The Minister may direct private sector institutions to provide any information, reports, or documents in their possession, and may direct such entities to perform any act "to meet obligations imposed by this Act".

A Commissioner who fails to declare all financial interests at appointment commits an offense punishable by a maximum of N\$60,000 or three years imprisonment, which punishment pales

¹ It is not clear exactly who needs to be frustrated in order for a frustrator to be jailed for 50 years for causing such frustration. It is conceivable that private sector's discontent with future standards can be very frustrating for the Commissioner.

in comparison to the punishment applicable to the subjects of NEEEB, who may be punished by a fine of N\$1,000,000 or 50 years imprisonment, or both, for an offense committed under NEEEB.

Other offenses under NEEEB, punishable by N\$500,000 or 25 years imprisonment, or both, include:

- improperly attempting to influence the Commissioner or verification agency;
- anything done calculatedly to improperly influence the Commissioner or verification agency;
- providing false information to the Commissioner or verification agency;
- anticipating² any findings of the Commissioner in a way that is calculated to improperly influence an investigation or finding;
- doing anything which would be regarded as contempt of court if the proceedings occurred before a court;
- misrepresenting or attempting to misrepresent empowerment status of an entity;

The Minister may by regulations create further offences and prescribe penalties.

The Commissioner may have other business interests, i.e. ownership in private sector businesses, as long as he is not involved in the day-to-day running of such businesses. It must be noted that the Commissioner establishes the unit which must accredit verification agencies, which may conduct NEEEB compliance verifications for reward. As explained, the latter situation is a potential positional conflict of interest that can be regarded as ‘legitimised personal gain’ that will be unchallenged because of no checks and balances to contest it except recourse in terms of the courts.

Removal of the Commissioner, for instance for misconduct, is onerous and only the National Assembly can remove a Commissioner. The National Assembly has the powers to override a decision by a board, which is appointed under NEEEB to investigate and make recommendations on the Commissioner’s guilt. The provisions of the Public Service Act do therefore not apply in this instance, and the Commissioner enjoys substantially more protection than other public service employees.

The President may, in his sole discretion, appoint an acting Commissioner, when that position is vacant, or the Commissioner is absent from duty.

The President must still decide which Minister will be responsible for administration of NEEEB. It may be more than one Minister. The Minister(s) may in any event delegate all powers under NEEEB to the Commissioner.

² Exactly how “anticipation” will be assessed or evaluated is baffling.

NEEEB amends Section 7 of the Racial Discrimination Prohibition Act. This will allow for discrimination on the basis of race, colour or ethnic origin in appointment of, and provision of benefits to employees. So, for instance, a standard by the Commissioner may prescribe that one racial group of employees must receive 50% less remuneration than NEEEB beneficiary employees at all private sector entities. Also, the standards may compel all private and public sector entities to refuse employment to certain job seekers, solely on the basis of the colour of their skin.

The Public Procurement Act is also amended to allow for the Commissioner's standards to supersede the current procurement legislation, and to give effect to the Commissioner's standards.

NEEEB does not contain any appeals body or procedure. There is thus no oversight over the Commissioner. If in conflict with any other law, NEEEB will prevail.

3. Dubious or False Premises

NEEEB, read with the accompanying Explanatory Memorandum, is based on several dubious or false premises, these include premises as follows.

- a) The premise that Article 23(2) allows for government to promulgate laws which limit any and all constitutional rights, including Fundamental Human Rights and Freedoms, other than the right not to be discriminated against based on one's race, as guaranteed in Article 10 of the Constitution. The Explanatory Memorandum in fact forwards Article 23(2) as the "principle justification" for NEEEB. The constitutional allowance to discriminate against people based solely on their skin colour cannot be the actual justification to do just that, discriminate. The actual constitutional position is discussed in a later chapter.
- b) The premise that past discrimination, thirty years ago, is a current threat to, inter alia, the rule of law, peace, justice and democracy. Opportunistic individuals who see an opportunity to receive something for nothing hardly constitutes a national threat. A government which anchors its policies on rent-seeking will destroy its economy. The latest Afro-barometer data illustrates that it is the declining economy that appears to pose a threat to democracy.
- c) The premise that Article 95(a) imposes the duty on government to promulgate NEEEB, while Article 95(a) is solely concerned with improving the rights of all woman. NEEEB specifically excludes white woman from being beneficiaries under NEEEB, which logically nullifies this premise.
- d) The premise that Article 95(g) imposes the duty on government to promulgate NEEEB. Article 95(g) is concern with the rights of inter alia unemployed, incapacitated, and disadvantaged people. NEEEB specifically excludes white unemployed, incapacitated and disadvantaged people from benefitting from NEEEB. This article is in any event limited to the government's duty to provide "social benefits and amenities", including to

- indigent persons. NEEEB does not provide any “social benefit” or “amenities”; it simply reduces economic participation and access to the job market for certain racial groups.
- e) The premise that “colonialism and apartheid” contributed to the economic inequalities in the country. The most notable law used to enforce apartheid was the Group Areas Act which was applicable in Namibia from 1950 to 1980. The premise does not recognise that current mismanagement, incompetence and corruption within our Government since 1990 have greatly contributed to inequalities. There is also no recognition of inequalities within different ethnic groups, nor valid and reliable researched evidence for such inequalities.
 - f) The premise that NEEEB will supersede “all other transformation and empowerment policies”. It will not. It will for example not repeal the affirmative action laws.
 - g) The premise that NEEEB will provide a mere framework, while in actual fact it provides for draconian enforcement mechanisms and criminal sanctions to force strict compliance with yet unknown, future indicators.
 - h) The premises that NEEEB will decrease inequalities and will increase employment. Reducing the ability of one ethnic group to participate in the economy, and creating uncertain standards that may be changed at any time in future, will further damage investor confidence and cause economic contraction, leading to an increase in job losses. Inequality may be reduced, but only because investors and wealthier people leave the country, as a result of investment uncertainty and fear for the bleak futures of their children. If investors and wealthier people leave, the portion of poor Namibians will increase, and inequality is reduced.
 - i) The premise that there is a “low level of participation in business” by empowerment beneficiaries. The complexities of this issue, if true, have not been addressed. So, for instance, do NEEEB beneficiaries not prefer not to formalise their businesses, perhaps for reasons of high compliance costs and vast statutory obligations? In 2018 there were 418,674 Namibians employed in the informal sector, far more than in private sector and government combined. Did government’s preferential treatment of NEEEB beneficiaries, while growing the most expensive public service sector in the world, not incentivise skilled and educated NEEEB beneficiaries to snub participation in private sector business? In 2018 public sector (including SOEs) employed 117,241 people. Government employment comes at no risk, while participation in private sector business carries significant financial risk.
 - j) The premise that there is a lack of socio-economic transformation in “traditional communities”. This premise is unclear.
 - k) The premise that NEEEB will improve the “economic status” of NEEEB beneficiaries. There is no mechanism contained in NEEEB to uplift poor NEEEB beneficiaries, and only a small portion of mostly already wealthy and educated NEEEB beneficiaries can possibly benefit from reducing a certain racial group’s access to participate in the economy and the job market. Even such gains will be short-lived due to economic contraction due to restrictive business conditions and policy uncertainty.
 - l) The Premise that NEEEB will contribute towards “building industries and local investment”. It is far more likely that NEEEB will cause substantial, further economic

contraction and job losses. There is no mechanism in NEEEB to incentivise the building of industries or to increase local or foreign investment. NEEEB adds an additional cost layer to doing business, and through that alone, will decrease economic activity.

No research was provided to justify NEEEB, except a reference to some research done by Bank of Namibia. That report however concluded that empowerment legislation, as was for instance done for the Bumiputra in Malaysia, is not advisable. This report could recently not be found on the Bank of Namibia website.

4. The Scope of NEEEB

NEEEB does not contain a clear government on the scope of application. To establish intended application is challenging, and only possible by analysis several, mostly non-related sub-sections.

NEEEB is applicable to all private sector (in terms of compliance) and public sector (in terms of enforcement) “entities”, as well as “productive assets” and “occupational categories”.

The Commissioner will make standards to set qualification criteria for purposes of procurement and approval of business licenses, permits and authorisations required by law or for engagement in certain economic activities. Such standards will cover all pillars, including the ownership pillar. Private sector entities which are non-compliant can and most probably will be refused the required licensing to commence, or continue doing business.

The sector transformation charters are binding between entities operating in each such sector, thus all private sector entities as well. Private sector entities can be forced to procure goods and services from other entities which have a prescribed level of ownership by NEEEB beneficiaries. As no limit is set on the prescribed level of ownership required to be from the black, coloured and Indian population, it can be as high as 100%.

The Minister may force “private sector institutions” to provide any information requested and perform any act as directed by the Minister in order “to meet the obligations imposed” by NEEEB. Considering the scope of the eight empowerment pillars, any information held by any private sector institution can be argued to be relevant.

4.1. Empowerment Beneficiaries

“Empowerment beneficiaries” are defined as those people who were racially disadvantaged by colonialism and apartheid laws, and their descendants who are also Namibians.

This definition clearly segregates black, Indian and coloured Namibians on the one end, and white Namibians on the other. Thus, all black, Indian and coloured males and females in Namibia before independence, and their descendants (in perpetuity) are NEEEB beneficiaries. No white male or female can be a beneficiary. All white Namibians’ access to the economy and job market

will be reduced, purely based on skin colour, and irrespective of any other factor such as the economic or employment status of any of the individuals within this groups.

The original version of NEEEB included white woman as previously disadvantaged, which would be in line with the Constitution which acknowledges that “*women in Namibia have traditionally suffered special discrimination*” who “*need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation*”, as per Article 23(3). Woman are also the first group mentioned in Article 95(a) of the Constitution, whose welfare must be promoted and maintained by the government. White woman have now been removed as potential beneficiaries under NEEEB.

The above segregation on the basis of skin colour appears to contradict the long-held credo of Government to establish a unified and inclusive nation in “One Namibian House”.

4.2. Application of NEEEB on “entities”

Chapter 3 contains the eight “Pillars of Equitable Economic Empowerment”. These include:

- Ownership of entities and productive assets.
- Management control and employment in entities.
- Human resources and skills development by employers.
- Entrepreneurial development and economic growth of entities owned by NEEEB beneficiaries.
- Procurement to empower entities owned by NEEEB beneficiaries. The relevant section (13(e)) is not limited to procurement by government, only to procurement of “Namibian goods, works or services”.
- Corporate social responsibility to promote NEEEB beneficiaries, which will include as indicator spending of after-tax profits to improve the wellbeing of NEEEB beneficiaries. It is not indicated who will be required to spend, Section 13(e).
- Value addition, technology and innovation, which will include transferring of skills to entities owned by NEEEB beneficiaries.
- Empowerment financing to establish and sustain entities owned by NEEEB beneficiaries.

From the above it is clear that “*entities*” fall within the scope of the NEEEB. The term “*entities*” is however not defined, nor is the phrase “*productive assets*”.

Arguably, “*productive assets*” may include mines, farms, rental properties, fishing vessels, vehicles used in the public transport and logistics industries, government concessions, exploration rights, fishing rights and even intellectual property rights such as licensing agreements, copyrights and patent rights.

In the previous version of the bill, “*private sector enterprise*” was defined to, very contentiously, include any business carried on for gain or reward, even by individuals. With the exclusion of a definition it appears the legislature intends to span the net even wider, through vagueness.

The previous version also intended to pertinently exclude businesses with revenue less than an amount that still had to be fixed. The current version of NEEEB does not provide such exclusion. It is unlikely that the standards may provide for exclusions based on revenue.

In summary, mostly through vagueness, it appears the application of NEEEB on “businesses” or “entities” is intended to be wider than in the previous version of NEEEB.

4.3. Applicable “Only to Government” – a False Sense of Security

Section 14(9) states that: “*Every public entity* [which includes all government agencies and government owned entities] *must apply the relevant standard...*”. This may create the impression that entities (and productive assets) are only bound to NEEEB when dealing with government. This may be true insofar as government procurement of goods and services is concerned, but the impact on private sector entities is far wider.

Section 9(b) states that all public entities must apply the standards in issuing licenses, permits, and other authorisations required in terms of a law or for engaging in economic activity.

So, for instance a government licensing agency, say NATIS, must apply all standards, say 50% ownership of an entity by NEEEB beneficiaries. This will result in a NATIS denying a non-compliant close corporation registration of business vehicles.

This denial of non-compliant entities can be so far reaching as to deny such entities the ability to do business. As the bill stands now, private sector entities with ownership by NEEEB beneficiaries below whatever the standard may prescribe, may be denied fitness certificates by municipalities, transport licenses, concessions, fishing licenses, vehicle registrations, telecommunication licenses, tourism board registrations, registration as financial services providers, banking licenses, mining licenses, licenses for transport and processing of meat and other products, licenses to operate in the fuel and energy sectors, import licenses, even tax registrations, and many more.

NEEEB is designed to control private sector entities in which one racial group have ownership or are employed, and more specifically, to reduce that groups participation in the economy and access to the private sector job market. As there is no limitation on the standards, total exclusion of a group of Namibians from the economy and job market is possible.

4.4. Standards of Equitable Economic Empowerment

A Minister or Ministers (still to be decided by the President) may issue “*Standards of Equitable Economic Empowerment*” (hereinafter referred to as “standards”). These standards shall “*give effect to the objects [of NEEEB] and the pillars...*”.

These standards remain unknown, but they are to include:

- **Qualification criteria** for purposes of **procurement** of goods, works or services. NEEEB does not expressly state procurement by whom.
- **Qualification criteria** for *“approval of licenses, permits or authorisations in terms of a law or for engaging in certain economic activities”* (Section 14(7)(b)). **In this subsection lies an extreme risk for the economy, and all private sector business entities and “productive assets”.**
- Indicators to measure compliance with all pillars.
- Weighting attached to the above indicators.

5. Consultative Processes – a False Sense of Security

NEEEB prescribes that the Minister(s), with power of delegation, must publish draft standards in newspapers and the government gazette. Interested persons may comment. No minimum period for comments is prescribed, but there is a maximum period of 60 days.

Similarly, the Minister(s) may issue sector transformation charters, and must publish in accordance as per the standards.

The above publication requirements may create a false sense of security in that those affected, i.e. “entities” or “sectors”, may harbour the impression that consultations must take place. Or even that comments provided must be incorporated in the final standards or charters. This is not the case. There is no mandatory consultative process and the Minister(s) (or Commissioner) is ultimately an unchallenged law upon his/her own, with unlimited powers to decide on the content of standards or charters.

6. Constitutionality

NEEEB is unconstitutional for numerous reasons as discussed hereunder.

6.1. Broad and Vague Powers

NEEEB contains several sections which provide seemingly unlimited powers to the Minister or the Commissioner. These include:

- Section 4(1) – whereby the Commissioner may investigate “other matters requiring investigation in terms of” NEEEB.
- Section 10(2)(a) – whereby investigators will have such powers as “assigned by the Commissioner”.
- Section 14 – whereby the Minister may publish standards on any of the eight pillars, with no duty to consult affected persons. Giving 60 days’ (maximum, and no minimum) notice for comments does not give any real protection to affected parties and does not confer a duty to consult. The Minister (and Commissioner by delegation) thus have full

discretion on the content of both the standards and the charters; including the discretion to set ANY criteria for procurement, ANY criteria for licencing, ANY indicators to measure compliance, and ANY weighting to be attached to the pillars.

The Minister may also differentiate between categories of beneficiaries within the wider definition of NEEEB beneficiaries. Thus, the Minister may also differentiate on ethnic basis, i.e. requiring at least 80% ownership by Oshiwambo speaking people (subsection 8(b)).

- Section 15 – The unlimited powers of the Minister under Section 14 apply to sector transformation charters as well. Subsection 5(d) allows for the Minister to include in a sector transformation charter “any other matter necessary to promote the object” of NEEEB. This unlimited power is on top of the powers to set ANY criteria for procurement purposes, to which procurement criteria all entities in the sector must comply with, also amongst private sector entities.
- Section 18 – whereby the Commissioner may conduct investigations “for the purpose of doing anything required or permitted to be done under” NEEEB. Investigators have similarly wide powers.
- Section 22 – whereby the Minister may direct private sector institutions (not defined) to provide information, reports and other documents, and also to perform such acts as the Minister may direct. The section specifically states that a private sector organisation “must give effect” to such directives. Healthcare facilities, legal practices, accountants and banks will fit the description of private sector institutions. This should be especially concerning for every Namibian.
- Section 25 – whereby the Minister may “create” new offences through regulation.

All powers of the Minister may be delegated to the Commissioner, and all powers of the Commissioner may be delegated to investigators.

In the case of **Medical Association of Namibia and Another vs Minister of Health and Social Services and Others** 2017 (2) NR 544 (SC) the Supreme Court expressed itself on broad and vague powers given to statutory bodies and functionaries by the legislature. The quoted text hereunder contains own emphasis throughout.

The judgement states in paragraph [63]: “...where the legislature confers a discretionary power, the delegation must not be so broad or vague that the body or functionary is unable to determine the nature and scope of the power conferred. That is because it may lead to arbitrary exercise of the delegated power. Broad discretionary powers must be accompanied by some restraints on the exercise of the power so that people affected by the exercise of the power will know what is relevant to the exercise of the power and the circumstances in which they seek relief from adverse decisions. Generally, the constraints must appear from the provisions of the empowering statute as well as its policies and objectives”.

The judgment continues to state in paragraph [80]: “A very important plank of the doctors’ challenge against the licencing scheme is that it has made the Council an ‘omnipotent

legislature'. It is said that the expressions in 'public need and interest' and 'required competence' permit the Council to disregard the doctors' rights as the vagueness, uncertainty and unintelligibility of that phraseology has the consequence of conferring wide and unfettered exercise of discretion on the Council. It is suggested in that context that those concepts do not provide any objective standard or norm and in that way imposes an unreasonable restriction on the fundamental right to carry on a doctor's profession, occupation, trade or business."

The judgment continues in paragraph [85]: "It is settled jurisprudence by the Constitutional Court that to pass the test of 'law of general application', a statutory measure conferring discretionary power on administrative officials or bodies must be sufficiently clear, accessible and precise to enable those affected by it to ascertain the extent of their rights and obligations (Dawood para 47); it must apply equally to all those similarly situated and must not be arbitrary in its application (S v Makwanyane para 156), and it must not simply grant a wide and unconstrained discretion without accompanying guidelines on the proper exercise of the power (Dawood para 47)"

As per paragraph [88] the Honourable Judges quotes as follows:

"And in the words of Justice Jackson in *Railway Express Agency v New York* 336 US 106 (1949) at 111-13:

'[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus escape the political retribution that might be visited upon them if larger numbers are affected.'"

NEEEB is definitely a law that is applicable only to a minority. Governments' attempts to argue against this fact is disingenuous

The Honourable Judges in the **Medical Association** case ruled that certain sections of the applicable legislation was "unconstitutional and therefore invalid".

Such broad discretionary powers, without constraints, is also offensive of Article 1(1) of the Constitution which states that Namibia is a democratic state founded on the principles of democracy, the rule of law and justice for all. As per the **Medical Association** case, NEEEB is offensive of the principles of the rule of law. The mere vigorous segregation of people based on the colour of their skin, and on that basis alone reducing access to the economy and the job market for one of the groups, with no regard for actual financial means, poverty, or employment status, NEEEB is not and cannot result in "justice for all".

The "Study by the International Commission of Jurists on Apartheid in South Africa and South West Africa" states: "As understood by the International commission of Jurists, the Rule of Law

requires an ordered legal and constitutional framework which will permit the full development of the individual by ensuring for him the rights and freedoms set out in the Universal Declaration of Human Rights ..." [1967, p. 3].

The human rights and freedoms discussed hereunder are anchored in this declaration, and NEEEB will thus offend this international declaration as well.

6.2. Fundamental Human Rights and Freedoms

Article 22(a) of the Namibian Constitution states that when any law sets a limitation on any fundamental right or freedom entrenched in the Constitution, such law shall be of general application and shall not negate the essential content thereof and shall not be aimed at a particular individual.

Section 14(5) of NEEEB states that standards may be of general application, or specific application, and as such these powers offend the principle of general applicability.

The "principle justification" for NEEEB as per the Explanatory Memorandum, is Articles 23(2) and (3) of the Constitution.

Articles 23(2) and (3) reads as follows (own emphasis throughout).

"(2) Nothing contained in Article 10 hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices, or for achieving a balanced structuring of the public service, the defence force, the police force, and the correctional service.

(3) In the enactment of legislation and the application of any policies and practices contemplated by Sub-Article (2) hereof, it shall be permissible to have regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation."

Claiming that these articles form the principle justification for NEEEB, while specifically excluding white woman as beneficiaries, is disingenuous, and ignores the Constitution.

Moreover, the legislator's interpretation of Article 23(2) is incorrect. This article clearly states that the limitation intended is a limitation of the fundamental rights and freedoms contain in **Article 10** of the Constitution, only.

Article 10 of the Constitution states:

“(1) All persons shall be equal before the law.

“(2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.”

Article 10 prohibits discrimination against anybody on the basis of “race, colour, ethnic origin, creed or social status or economic status”. Article 23(2) allows for discrimination against a single racial group of Namibians.

Article 23(2) does not allow for any other fundamental right or freedom as contained in Chapter Three of the Constitution to be limited or abolished. It is inconceivable that the authors of the Constitution envisaged that any law could be passed to effectively exclude any single racial group from participation in the economy and the private and public sector job markets. This is however exactly what NEEEB provides for.

The following constitutional rights and freedoms of all Namibians may not be limited by any law of parliament (except under Article 22, as also discussed hereunder), and NEEEB makes provision for limitation, even abolishment of these rights and freedoms:

- Respect of Human Dignity (Art 8):

“(1) The dignity of all persons shall be inviolable.

(2) (a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.

(b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.”

NEEEB explicitly aims to engineer the ownership structure of the Namibian economy job market. As per the Explanatory Memorandum (under paragraph 4 – Preamble) the intention of the legislature is to create an economy which is “representative of Namibia’s demographic”. This in effect means that the government can dictate which group, potentially divided along infinite lines and criteria, may own and work in each sector or each company.

As NEEEB’s scope encompasses the whole Namibian economy, there are no alternative options for non-beneficiary groups of Namibians to make a living. They can by law potentially be forced to cease participation in economic activity and the job market. They may accept this fate, and live in poverty, without any means to earn an income, or elect to leave the country and seek business and physical residency in other countries. This is an abolishment of the dignity of certain Namibians. The implication of NEEEB is that some Namibians can and will be valued as ‘more Namibian’ than others.

- Privacy (A 13)

“(1) No persons shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.

(2) Searches of the person or the homes of individuals shall only be justified:

(a) where these are authorised by a competent judicial officer;

(b) in cases where delay in obtaining such judicial authority carries with it the danger of prejudicing the objects of the search or the public interest, and such procedures as are prescribed by Act of Parliament to preclude abuse are properly satisfied.”

The powers of the Commissioner to enter premises and buildings, to interrogate any person found there, and to seize and retain anything, for the purpose of mere assessing compliance with empowerment standards, will likely be a breach of the constitutional right to privacy. The same will be applicable to the Minister’s powers to issue statutory directives to private sector institutions to provide information and do any act as directed.

- Family (A 14)

“(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

Access to and participation in the economy and the job market by some Namibian families is explicitly reduced by NEEEB. With only a 6% (or 0%) chance of making any form of living in Namibia (as explained above), certain families can and will most probably endure substantial hardship. This is not just true of white families, but also so called “mixed race” families, with one spouse being white, will also be affected, as a white spouse’s ability to earn an income is reduced, and potentially completely denied. NEEEB disincentivises mixed race marriages where one spouse will take a financial risk when marrying a white Namibian who does not have equal access to the economy and job market.

- Children’s Rights (A 15)

“(1) Children shall have the right ... to be cared for by their parents.”

Reducing (and potentially excluding) certain racial groups right to participate in the economy and job market will result in these Namibians’ inability to care for their children.

- Property (A 16)

“(1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees ...

(2) The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.”

The ownership pillar will expand to include all ownership in entities, including companies, close corporations, partnership, and even sole proprietors. It also expands to productive assets, which will include farms and rental properties, and many more. Prescribing a maximum ownership by “previously advantaged” Namibians in such properties denies them the property rights entrenched in this article. It is in fact a disingenuous method of forced expropriation without just compensation, which is unconstitutional. A forced sale of ownership is unlikely to happen for just compensation, as is guaranteed by the Constitution.

A business which requires and is refused a licence, permit or some other authorisation to conduct certain economic activity, is effectively destroyed and NEEEB enables such forced destruction of that business/property.

If the property, i.e. the business, is so destroyed, NEEEB also denies the owner the right to bequeath such property. A property bequeathed to a white Namibian may be destroyed in any event after passing ownership to the legatee, as refusal of a license or permit required to continue such business will by then destroy such business.

- Administrative Justice (A 18)

“Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.”

Namibians will be subjected to arbitrary standards, affecting their total existence. Any attempt to “frustrate” the Commissioner to do so, is punishable by 50 years in prison. There is no appeal procedure, and anything else but full compliance with any standard and directive issued may lead to criminal prosecution and imprisonment.

- Education (A 20)

“(d) no restrictions of whatever nature are imposed with respect to the recruitment of staff based on race or colour.”

NEEEB aims to do exactly this, restrict Namibians access to the job market based solely on the colour of their skin, under the management and employment equity pillar. The amendment of Section 7 of the Racial Discrimination Prohibition Act, to enable such discrimination in recruitment, is therefore also unconstitutional. In this regard also see Article 23 discussed hereunder.

- Fundamental Freedoms (A 21)

“(1) All persons shall have the right to:

(a) freedom of speech and expression, which shall include freedom of the press and other media;

(b) freedom of thought, conscience and belief, which shall include academic freedom in institutions of higher learning;

...

(d) assemble peaceably and without arms;

(e) freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties;

...

(j) practise any profession, or carry on any occupation, trade or business.”

Frustration of implementation of NEEEB is punishable by 50 years. The description of this crime is so wide that written or spoken opinion against the law may potentially be regarded as frustrating, so also any protest against anything done in its implementation, for example against draconian standards.

Anticipating a finding by the Commissioner or investigator is also punishable by 25 years.

The right to free association will be infringed by NEEEB, as business owners will in future be excluded from partnering and doing business with persons of their choice.

An untended consequence of NEEEB is to force “previously advantaged” Namibians to associate with NEEEB beneficiaries, but does not force NEEEB beneficiaries to associate with “previously advantaged” Namibians.

Lastly, as per sub-article (j) Namibians’ right to practice any profession and carry on any occupation, trade or business will be reduced, and potentially denied, based purely on race. This is in fact the main purpose of NEEEB, and thus unconstitutional.

Paradoxically, NEEEB promotes apartheid, as it disincentivise NEEEB beneficiaries from being in business with white Namibians, as the presence of white ownership reduces the level of compliance of a business owned by black, coloured or Indian Namibians.

- Limitation of rights and freedoms (A 22)

Article 22 does make provision for the limitation of the above-mentioned rights and freedoms, but then only if the law providing for such limitation is of general applicability (which NEEEB is not) and shall not negate from the essential content (which NEEEB does). The law must also be specific and ascertainable on the extent of such limitation. The unlimited powers to set “requirements” under all pillars, including the ownership pillar, does not provide such ascertainability.

Conversely, it can be argued that the Minister’s and Commissioner’s powers are so wide that it can be said with certainty that they may deny all certain Namibians the full extent of the rights and freedoms discussed herein, based solely on their skin colour. This is in fact what NEEEB allows.

Lastly, the law limiting these rights and freedoms must identify the specific article in the Constitution which provides authority for such limitation. As discussed hereinbefore, NEEEB provides only Articles 23(2) and 95(a) as authority, and neither articles actually provide such authority.

Article 23(2) only provides for a limitation of Article 10, and article 95(a) provides for upliftment of woman while NEEEB explicitly excludes white woman.

The legislator has thus not complied with the constitutional requirements to limit constitutional rights and freedoms as NEEEB aims to do, to a draconian extent.

- Apartheid and Affirmative Action (A 23)

This article states that racial discrimination will be prohibited by an Act of Parliament. Parliament did exactly that, through the Racial Discrimination Prohibition Act of 1991. NEEEB will amend this law to again make provision for racial discrimination.

Propagation of practices of racial discrimination is criminally punishable under this article of the Constitution. There can be little doubt that NEEEB propagates racial discrimination. It in fact attempts to legitimise racial discrimination again. Our lawmakers, and their functionaries at the Law Reform and Development Commission, should take note of this.

7. Breach of International Law

All entities and productive assets will be subject to NEEEB. This logically includes entities and productive assets of foreign investors.

Article 144 of the Constitution states: *“Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.”*

Namibia entered into investment treaties with several countries, which form part of the law of Namibia.

Namibia’s treaty with Malaysia states that investors from Malaysia shall receive treatment that is *“fair and equitable, and not less favourable than that accorded to investments made by investors [in Namibia]”* (Article 3(1)).

NEEEB provides that NEEEB beneficiaries receive far more favourable investment conditions, and in fact restricts investments by Malaysians, as much as it restricts investments by local Namibians. The treaty also guarantees that expropriation shall not happen on the basis of discrimination (Article 4(b)), and that the investor will be appropriately compensated (Article 4(c)).

NEEEB provides for a scheme that amounts to nothing else but expropriation, without guaranteed just compensation, and without government getting its hands dirty by doing the expropriation itself.

Similar treaties are in place with Austria, Germany, France, and several other countries, which treaties contain the same or similar clauses.

NEEEB is unconstitutional in that it breaches these treaties, which our constitution states have the same legitimacy as our domestic laws.

Most concerning is the broken trust. Foreign countries have realised that Namibia cannot be trusted to honour its treaties. NEEEB was evidence of this in 2016, and the latest version is far more damaging.

8. Laws Not for Proper Purpose

Namibians were recently shocked by the revelation that legislation (Marine Resources Act) can and was used for corrupt purposes. So, for instance legislation was passed to allow for increased quotas to the now infamous Fishcor, a SOE and thus a public entity, which stands in the centre of a grand corruption scheme and the loss of and expected N\$2.5 billion of Namibia’s natural resources. Deplorably, the Acting Minister of Fisheries continues to rely on this law to allocate even more quotas to this company as happened recently without amending the said mentioned Act

Similarly, a non-sensical law was recently passed to force testamentary benefits of all minors to be paid into the Guardian’s Fund, controlled by the State. The rationale behind this law never

made any sense, as minors would face substantially more risk. The affairs of the Guardian's Fund have been in shambles for decades. It would however be very beneficial for a specific asset manager who would manage to receive such funds to invest, especially if he could agree a fee with the same persons who pushed for the said amendment.

The true intent of NEEEB is similarly in question.

As there is no mechanism to ensure that poor people will benefit, the logical conclusion is that a small portion of the black, coloured and Indian population will benefit, like with so many BEE schemes before. NEEEB beneficiaries who may initially benefit may be those in the business of receiving mandatory pension fund investments, under the "unlisted investments" regulations applicable to all pension funds.

NEEEB may also initially benefit those in the business of peddling in ownership of established and successful current businesses. If businesses are forced to change ownership, the selling price reduces below the market value which would have been applicable if such restrictions did not apply.

A question, since 2016, which remains unanswered is: Who in government is really pushing for NEEEB? It is unlikely that "the people" are.

Since 2016 there is sufficient evidence that NEEEB, and especially now the newest version, will cause even deeper contraction of the economy, and possibly total economic collapse. The first who have suffered since 2016 were the workers, who were retrenched as companies started to fail. Workers will again be the first to suffer as the latest version causes further distrust in our country.

According to the media, the chairperson of the High Level Panel on the Namibia Economy (HLPNE) advised that "Namibia has run out of time to fool around and cannot continue taking half-hearted measures".

In a *Namibian* editorial column, the hope is expressed that the President now understands that "our 30-year-old so-called black economic empowerment schemes are a central cause of the economic woes the country faces". It is further stated that the HLPNE should be commended for including in their recommendations the crucial point that Namibia's BEE schemes (which have been going on since independence) have been hijacked and misused to enrich a few at the expense of most Namibians.

9. Conclusion

NEEEB is grossly unconstitutional. This policy cannot achieve empowerment, as it only promotes rent-seeking. It does not contain any mechanism to assist the poor, and the mechanisms put in place are wide open for abuse and further enrichment of an already wealthy, politically, but small portion of the population.

The policy breaches Namibia's international treaties and will create further distrust and uncertainty in the Namibian economy. Like the proposed versions of NEEEB during 2016, it will cause further, substantial economic decline; cause further capital outflows, business closures and job losses.

Because inequality is a systemic challenge, with various contributors, EPRA appeals to the government to retract NEEEB and coordinate efforts with the private sector to increase Namibia's efforts for human development. Inequality cannot be addressed by linear approaches of excluding some groups, namely the previously advantaged, as highlighted in this report, from participation in business. Excluding any group will be to the detriment of investment and employment creation. It will also be detrimental to the previously disadvantaged that have not yet shared in 'empowerment' since 1990 compared to the deviant and predatory 'disadvantaged and already empowered' that have been 'empowered' countless times (e.g. the Fishrot network of deviant elites) at the expense of the majority that are still excluded from employment opportunities and earning a decent living.

Inequality should be addressed by a holistic approach that recognises the intrinsic complexity of obstructions to development that include increasing employment for all who are willing to work. The powerless should be empowered to participate in decision making. Quality education should be provided to all that want to increase their competencies³. Affordable serviced land should be created for addressing the urban housing backlog. Hope to all should be provided for a better future by means of inspirational, moral and transformational leadership.

It is important that the business community is aware about the disastrous implications of NEEEB. It needs to engage with government at the highest level possible. The business community should use every possible avenue to point out the fallacies of reasoning of NEEEB, expected capital outflow and unsustainable outcomes. The business community should expose and resist the implementation of the bill and challenge the legality of it in terms of its unconstitutionality and contravention of international law and treaties.

It is appropriate to conclude with the words of Advocate Chuma Nwколо, "Tell them we have tried".⁴

³ Finland's educational system of public schools with no private schools is a best case example.

⁴ Nwколо, C. 2018. The Bribe Code. Lagos. Author of 7 books about African literature and Chairman of Project Consortium Africana.