



B-BBEE
COMMISSION

**Select Committee on Trade
and International Relations**

**Parliament, Cape Town
12 October 2016**



Delegation

Zodwa Ntuli, Acting Commissioner

Nontokozi Nokhwali-Mboyi, Operations

Siphamadla Kumkani, Investigations & Enforcement

Lindiwe Madonsela, Compliance



Overview of B-BBEE Commission and its Mandate

Who are we?



Mission

To facilitate the accelerated
productive implementation of
the Act



Values

An inclusive economy is our first
consideration

Open access and availability to
all economic citizens

Impartiality and Consistency

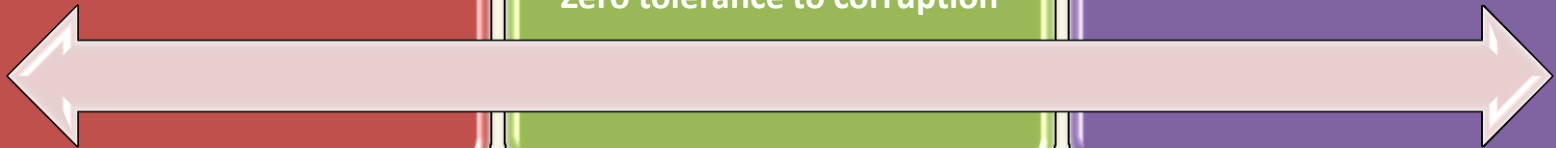
Accountability for all decisions
and actions taken by us

Zero tolerance to corruption



Vision

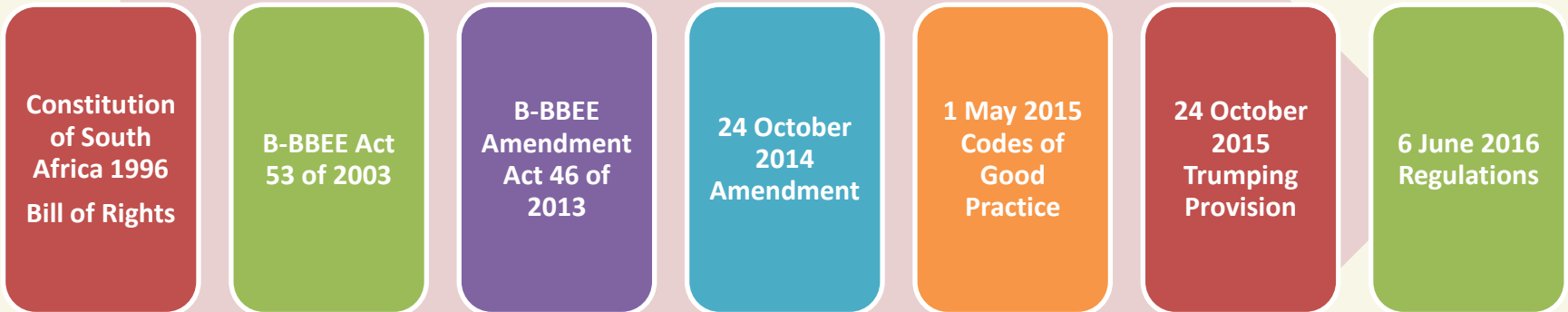
An inclusive economy that is
globally competitive



Why are we here?

Fronting Practices
Misalignment
Inconsistent interpretation

B-BBEE
Commission
s13B



Redress = Equity – Equality – Inclusive Economy

What is B-BBEE?

B-BBEE

Increasing number of black people that own, manage, control

Facilitating management and ownership by communities, workers, cooperatives & others

Human resource and skills development

Achieving equitable representation in all occupational workforce levels and categories

Preferential procurement from black owned or managed

Investment in enterprises that are black owned or managed

Integrated Strategies

What are the B-BBEE Elements?



Ownership

(Priority)

25 points

Exercisable voting rights, economic interest and net value



Management Control

19 points

Merged with Employment Equity

Economically Active Population (EAP)



Skills Development

(Priority)

20 points

Changed from 3% to 6%

Employees and Non-Employees



Supplier & Enterprise Development

(Priority)

40 points

Beneficiaries QSEs and EMEs 51% black owned



Socio-economic Development

5 points

1% Net Profit After Tax (NPAT)

75% beneficiaries black people

← Eight Recognition Levels →

How are the recognition levels allocated?

B-BBEE Status	Qualification	B-BBEE Recognition
Level One Contributor	≥100 points on the Generic Scorecard	135%
Level Two Contributor	≥95 but <100 points on the Generic Scorecard	125%
Level Three Contributor	≥90 but < 95 points on the Generic Scorecard	110%
Level Four Contributor	≥80 but < 90 points on the Generic Scorecard	100%
Level Five Contributor	≥75 but < 80 points on the Generic Scorecard	80%
Level Six Contributor	≥70 but < 75 points on the Generic Scorecard	60%
Level Seven Contributor	≥55 but < 70 points on the Generic Scorecard	50%
Level Eight Contributor	≥40 but < 50 points on the Generic Scorecard	10%
Non-compliant Contributor	<40 points on the Generic Scorecard	0%

How are Measured Entities classified?

Exempted Micro Enterprise (EME)

- R0 to R10 million
- No verification required
- Sworn Affidavit or CIPC Certificate – it is illegal to misrepresent status
- Enhanced recognition for black owned EMEs

Qualifying Small Enterprise (QSE)

- Above R10 million but less than R50 million
- Comply with QSE Score Card
- Enhanced recognition for black owned QSEs - only required to use a sworn affidavit
- Priority Elements: Comply with Ownership, and either ESD or Skills Development

Large Enterprise

- Above R50 million
- Comply with the score card fully
- Priority Elements: 40% sub-minimum in all required – otherwise drop one level
- It is illegal to break down the entity into smaller entities to fall below the threshold

Classification based on annual turnover, gross receipts or allocated budget

What are the powers of the Minister?

Sector Codes & Regulations

- S9 empowers the Minister to issue guidelines and approve/repeal sector codes
- S10 clarifies status of generic and sector codes - alignment with B-BBEE Act critical
- Entity in sector with sector codes must be verified on that code
- Sector Council must submit report to Minister – within 30 days to B-BBEE Commission
- S14 empowers Minister to issue regulations, guidelines and practice notes

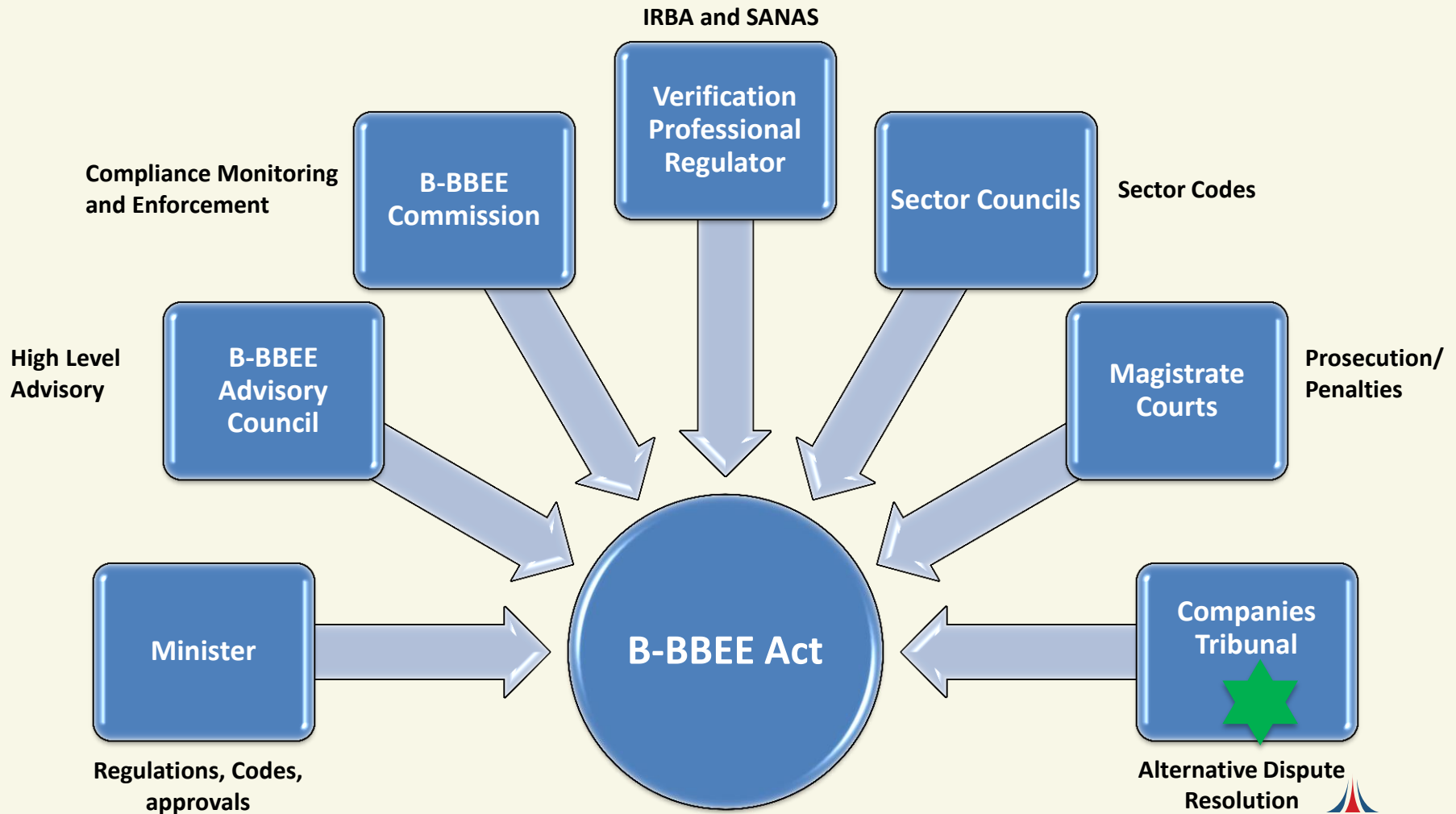
Permission to Exceed

- S9(6) allows an organ of state or public entity to exceed qualification criteria for procurement and other economic activities with Minister's permission
- Minister's decision must be made within 3 months of receipt of application
- Decision of Minister must be published in the Government Gazette

Exemption or Deviation

- S10(2) empowers Minister to grant deviations or exemptions from the generic or sector codes to organ of state or public entity
- Reasons or motivation must be on peculiar objectively verifiable facts or circumstances applicable to the organ of state or public entity
- Minister has 90 days to make a decision – Decision published Government Gazette

How is the Institutional Framework?



What is our mandate?

Functions (s13F)

Monitor, supervise and promote adherence – in the interest of the public

Strengthen collaboration between private and public sectors – safeguard the objectives

Receive complaints or initiate - investigations

Promote advocacy, access to opportunities and educational programmes

Maintain register of major B-BBEE transactions (meeting threshold)

Receive and analyse prescribed reports (listed entities, SETA, Public Entities, Organs of State)

Promote good corporate governance and accountability

Increase knowledge and public awareness (guiding, declaratory order, researching)

What is fronting Practice?

Fronting Practice

**Transaction/Arrangement/
Conduct/Act**

**Directly/Indirectly
Frustrates/Undermine**

Achievement of objectives/Implementation of any provision

Includes inhibiting or discouraging participation in core activities, economic benefits not flowing to black people in the ratio applicable, bringing the black person on board for purpose of achieving high level status, concluding agreement with enterprise with limitation of identity of suppliers, etc, improbable business operation given available resources, terms not negotiated at arms length or fair

What are the penalties?



Cancellation of contracts or awards (s13A)



Exclusion from doing business with government for up to 10 years (s13P)



Fine of up to 10% of entity turnover and/or as may be determined by court for natural persons (S130(3))



Imprisonment of natural persons for up to 10 years (s130(a)) for involvement and up to 12 months for other offences (S130(b))



Inclusion in Tender Defaulters' Register of National Treasury (13P(1))

What are the processes and timelines?



Complaint

B-BBEE7 Form

Up to 12 months to investigate

Alternative Dispute Resolution

Findings and Recommendations



Advisory Opinion

Explanatory Note on Procedure issued

Non-binding and based on set of facts

Within 30 days



Registration of Major B-BBEE transactions

Based on Threshold

Certificate of Registration within 10 days

Feedback on merit with 90 days



Compliance Reports

JSE Listed, SETA, Organs of State, public entity

Sector Council

Consider report within 90 days



Written Clarification

General interpretation or application of B-BBEE

Issued within 5 days



What Programmes Do We Have?

Administration





Operational Implementation
as at 30 September 2016

Background

- ❑ B-BBEE Commission operations commenced effectively on *01 April 2016* within **the dti** and has *14 staff members*, and **the dti** is still in the process of securing office space for its operation.
- ❑ On 06 June 2016 the B-BBEE Regulations were issued in terms of s14(1) of the B-BBEE Act by the Minister, following a 30-day public commentary period.
- ❑ B-BBEE Commission is implementing both its compliance and enforcement strategies simultaneously, i.e. both education and awareness, and investigations.
- ❑ B-BBEE Commission operates within the allocated *budget* of **the dti** – as guided by **the dti** policies – but exercises independent decision making within its mandate

Operational Implementation

- ❑ In line with s13F of the B-BBEE Act, the following initiatives have been implemented as at 30 September 2016:
 - **134** *complaints* received in terms of s13F(1)(c), with **112 (84%)** specifically pertaining to fronting. Pre-screening done on complaints.
 - **112** fronting complaints related to conduct of the *measured entity* while **twelve (12)** of the complaints related to conduct of *verification professionals*. Note that in **112** fronting cases, illegal conduct by verification professionals is alleged, investigated parallel to fronting.
 - Transport (**23%**), Mining (**15%**), and Construction (**9%**) – sectors with highest number in complaints
 - **22** letters issued to Verification Professionals and Accounting Officers regarding alleged unacceptable practices

Operational Implementation

- ❑ Six (6) letters issued to *professional bodies* to which verification professionals are affiliated/regulators
- ❑ Five (5) *Black Industrialist Scheme* applications from **the dti** to review for possible fronting – ownership structures and operational involvement had fronting indicators
- ❑ Two (2) ‘possible’ *major B-BBEE transaction* in terms of S13F(1)(f) under consideration
- ❑ In terms of s13F(3) of the following were issued to direct the effective implementation of the B-BBEE Act:
 - Practice Guide on *Third Party Procurement*;
 - Practice Guide on *Certificates for Exempted Micro Enterprises*;
 - Practice Note on the *Procedure for Requesting Advisory Opinions*;
 - Fourteen (14) *Advisory Opinions* and 136 *Written Clarifications*

Operational Implementation

- ❑ **Eight (8) Compliance Reports** received in terms of s13G of the B-BBEE Act and are being assessed.
- ❑ Letters issued to all *National Directors-General* and *heads of public entities* for effective implementation of s10 and other provisions
- ❑ **Three (3) Instructions** issued regarding practices or conduct that appear to undermine B-BBEE in terms of s13f(1):
 - Cancellation of the *Fronting Seminar* **Axidex and Innoven** consulting companies – public apology issued and refunds given to delegates
 - Cancellation of *information session* by **Net Value Holdings** – notice sent to delegates and public statement issued
 - Public Retraction of *misleading statement* by **Association of B-BBEE Professionals (ABP)**

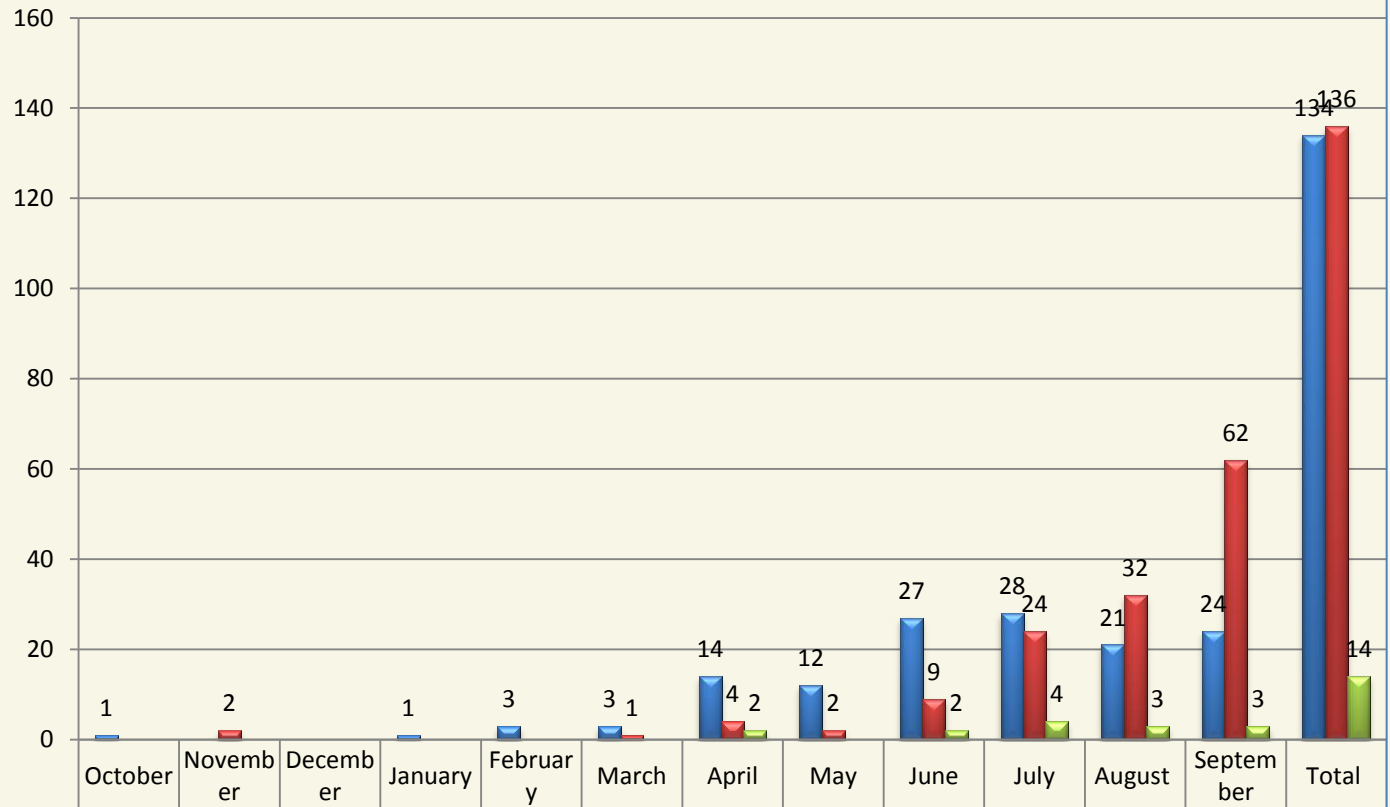
Operational Implementation

- ❑ **Seven (7)** *information sessions* in terms of Section 13F(1)(e) of the B-BBEE Act were held in Gauteng, the Western Cape, North West and Kwazulu-Natal provinces
- ❑ **Four (4)** presentations to Department of Communications Transformation Media Colloquium, ENS Africa Seminar, Association of Certified Fraud Examiners, EconoBEE and AQRate
- ❑ **120 meetings** held with clients/stakeholders on B-BBEE. This includes *advisory* meetings on proposed transaction, *complaints* meetings. **16** Walk-in meetings held
- ❑ Information session with *Gambling CEO's Forum* (9 provinces including National Gambling Board) regarding B-BBEE requirements in licensing processes.
- ❑ **Two (2)** presentations for the *Presidential B-BBEE Advisory Council* on activities of the B-BBEE Commission

Operational Implementation

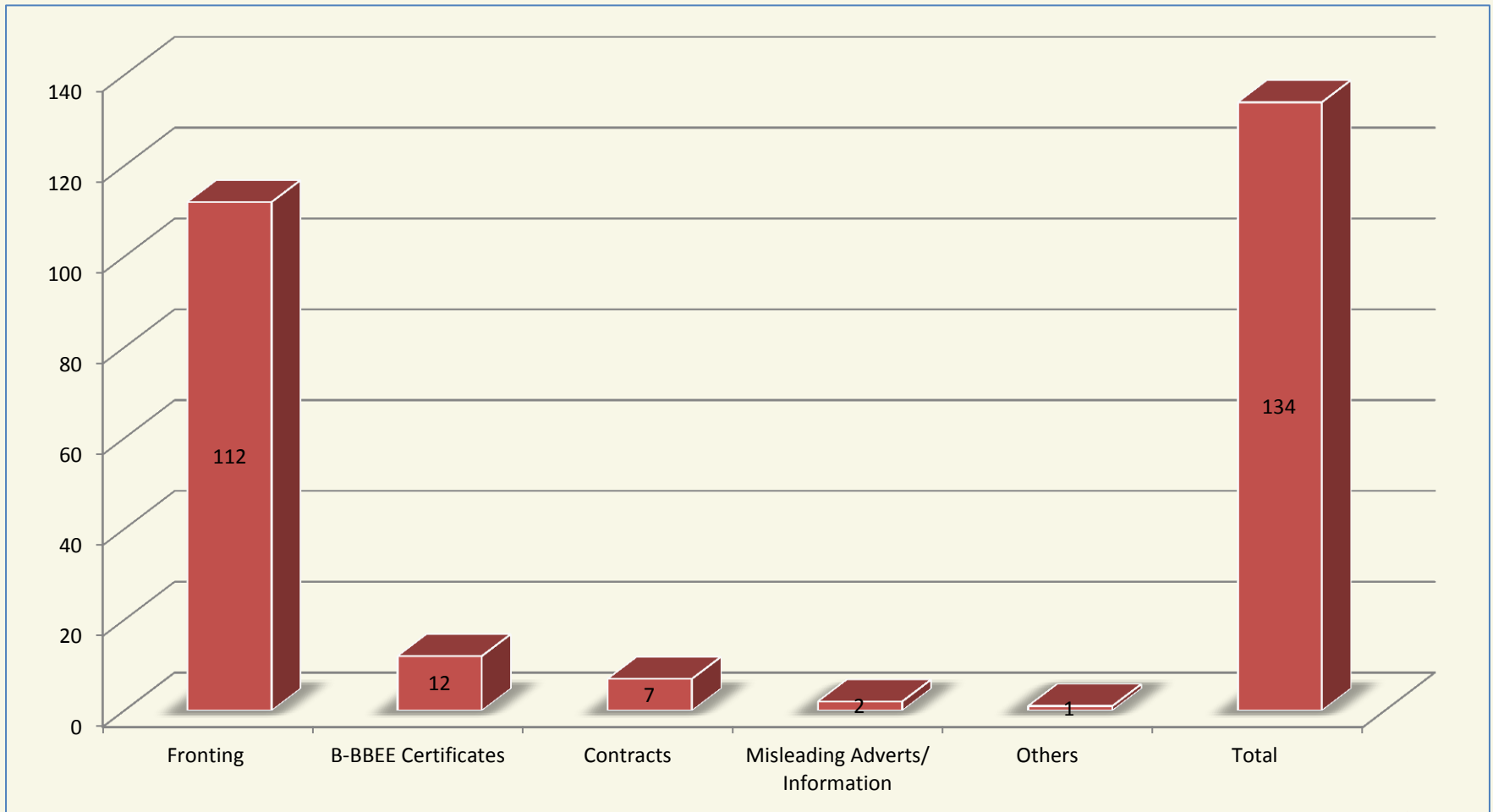
- ❑ **Four (4)** written submissions/positions made in respect of the following: -
 - ❑ *Draft Preferential Procurement Policy Framework Act (PPPFA) Regulations* – National Treasury;
 - ❑ *Concept of the Proposed Implementing Agent* - B-BBEE Advisory Council;
 - ❑ *Short Term Funding for Higher Education* - Ministerial Task Team led by Sizwe Nxasana; and
 - ❑ *Once Empowered, Always Empowered* – Minister of Trade and Industry
- ❑ Communication and information dissemination through the *media* – SABC TV and Raio, ANN7, PowerFM, eNCA, KayaFM and various print and electronic media

Complaints and Advice



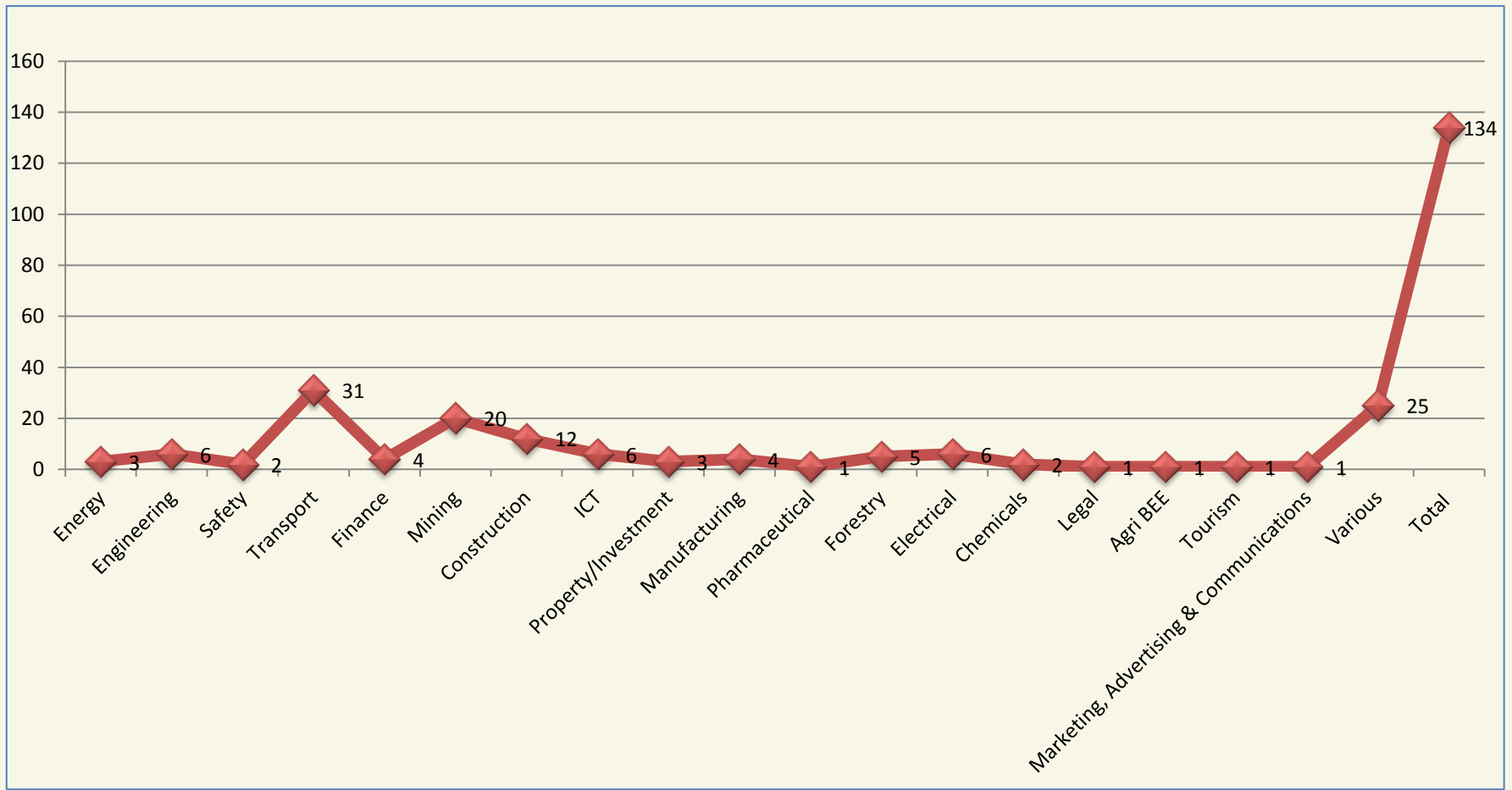
Source: B-BBEE Commission - Unaudited

Type of Complaints



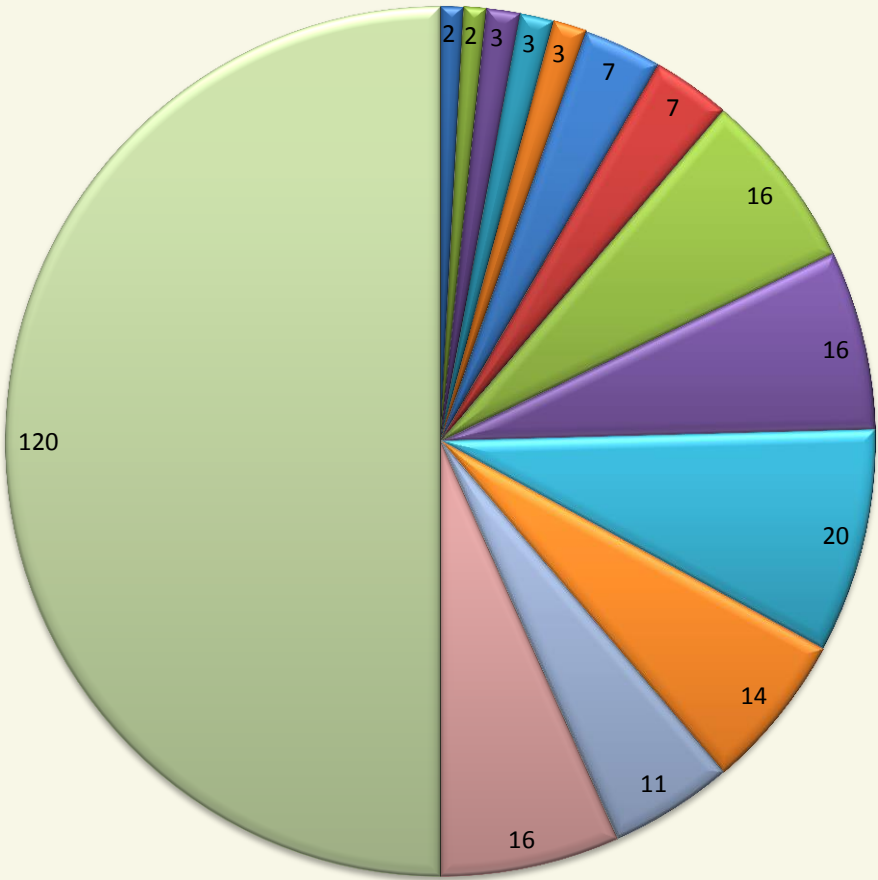
Source: B-BBEE Commission - Unaudited

Complaints by Sector/Industry



Source: B-BBEE Commission - Unaudited

Meetings/Walk-ins held



- September
- October
- November
- December
- January
- February
- March
- April
- May
- June
- July
- August
- September
- Walk-ins
- Total

Source: B-BBEE Commission - Unaudited

Emerging Issues & Observations



Once Empowered, Always Empowered

- ❑ B-BBEE Commission position is as follows:
 - **Objects** to this principle on the basis that it undermines the objectives of B-BBEE Act
 - Transitional period already accommodated with **Continuing Consequence Principle** in terms of Code Series 100, with the following requirements for the continued recognition of ownership points:
 - the black participants must have held the shares for **a minimum period of three** years;
 - **net value** based on time based graduation factor as per Annexure 100E must have been created in the hands of black people;
 - **transformation** must have taken place within the measured entity using the B-BBEE recognition level from the period of entry of black participants to the exiting period; and
 - the continued recognition cannot contribute **more than 40%** of the score on the ownership scorecard.
 - For continued recognition, the initial B-BBEE transaction must have been **legitimate** with no fronting elements
 - Period allowed in framework for another deal to be done is **more than sufficient**

Development of Sector Codes

- ❑ Minister authorised by s9 to approve and gazette sector codes
- Sector codes should recognise the **dynamics and unique** features of the sector
- Sector codes should **drive transformation**, not to be an avenue for circumvention or to drop the standards
- Sector codes must be **aligned** to the B-BBEE Act, and not create a new dispensation or fragmentation, or an exemption
- It is **illegal** to use generic codes if entity operates in a sector with an approved sector code – also illegal to issue two certificates using both codes
- Sector codes must not allow for points to be awarded for **normal course activities** of entities – contrary to objectives
- ❑ Need to expedite finalisation of sector codes that are pending to **create certainty and consistency**
- ❑ B-BBEE Commission will **raise objection** with Minister on inconsistent sector codes

Funding of B-BBEE transactions

- ❑ Black people continue to face challenges in accessing finance for B-BBEE transactions :-
 - Entities finance deals and repayment expected from **dividends**
 - **Lock in period** for economic value and dilution or sale of shareholding
 - Shareholders' contracts place **onerous conditions** linked to funding
 - No recognition of value of B-BBEE partners in B-BBEE initiatives – **'free shares' concept**
 - **Factual control** in transactions remain with white shareholders in shareholders contracts, undermining black ownership
- ❑ **Public and private** sector funding interventions required to advance and sustain B-BBEE ownership
- ❑ Funding challenge is linked to **market access** and **entry barriers** that must be addressed

Implementation by Government

- ❑ Lack of adherence to sections 9 & 10 of the B-BBEE Act – including request for deviation, exemptions or permission to exceed
- ❑ Lack of **monitoring** of contracts, awards, licences, etc. for compliance with B-BBEE commitments made
- ❑ Little/No **due diligence** performed within organisations – leading to fraudulent claims and misrepresentation
- ❑ Slow progress in setting **transparent high level requirements** for B-BBEE – non compliant entities still awarded government work
- ❑ Need to speed up **alignment of internal procurement** with B-BBEE requirements
- ❑ Letters sent to organs of state and public entities – slow **response received**
- ❑ B-BBEE must be a **priority** for all government entities and departments

Abuse in B-BBEE Arrangements

- *Modified Flow Through Principle* – remote empowerment allowed by association
- *Employees Share Ownership Schemes* and similar collective schemes – beneficiaries vis-a-vis owners
- Definition of ‘*black person*’ – foreign nationals recognised as black people incorrectly
- Creation of *opportunistic intermediaries*, joint ventures, partnerships
- Willing ‘frontees’ – passive shareholding with financial benefit
- *Owner driver schemes* – retrenchment in disguise and unconscionable
- Corporate governance and *minority shareholders’ rights* not respected
- *Lock-in provisions* and creative use of trusts in collective ownership schemes – entities appointing trustees and controlling trusts

Verifiers/Consultants/Advisors

- ❑ **Model/Schemes/Programs** developed – sold to entities with no assessment of implications – off the shelf products with no impact
- ❑ **Complex Structures** – intended to dilute or strip B-BBEE partners of value and rights
- ❑ **Incorrect advice** to entities/**incorrect process** in issuing certificates
- ❑ **No rotation** of verifiers/consultants/advisors – perpetuating incorrect approaches/laxity in verification
- ❑ No **proper regulation** of these intermediaries and assurers – integrity of process compromised
- ❑ **Interest of B-BBEE partner/beneficiaries/shareholders** not safeguarded by advisors/consultants
- ❑ Misleading **advertising or offering of services** – short cut/cutting corners – no attention to detail
- ❑ Lack of **competition** due to coordination and possible collusion/unethical behaviour

Contact Details

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A group of people, including several women in bright jackets (green, red, pink) and men in suits, are gathered on a wide stone staircase. A large white banner with a repeating logo is visible in the background. The scene is set outdoors in front of a modern building with large columns and glass windows. The text "Thank You" is overlaid in white at the bottom center.

Thank You