

# Response to Comments on Broad-Based Black Economic Empowerment Amendment Bill, 2012

## PRESENTATION TO PORTFOLIO COMMITTEE ON TRADE & INDUSTRY APRIL 2013



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# PURPOSE

To provide the Portfolio Committee (PC) with responses on submissions made by stakeholders during the public hearings on the Broad-Based Black Economic Empowerment Amendment Bill



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# Introduction and Background

- In 2003 the B-BBEE Act was promulgated into law
- Following various meetings by the Black Economic Advisory Council whereby four sub-committees were established, each sub-committee received presentations from various institutions and commissioned several researches.
- The subcommittees then tabled reports with the Black Economic Advisory Council, recommending the following legislative adjustments:
  - The amendment of the legislative framework to address, *inter alia*, circumvention, regulatory mechanisms and compliance
  - The alignment of the primary legislation to other key pieces of legislation and policy instruments; and
  - Monitoring, evaluation and reporting

## BODIES CONSULTED

- ☐ Presidential B-BBEE Advisory Council,
- ☐ Department of Justice (Special Investigating Unit);
- ☐ The Employment Equity Commission,
- ☐ Labour Constituency of NEDLAC,
- ☐ Business Constituency (BUSA and Black Business Council) and
- ☐ the Select Committee on Trade and International Relations



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## PROCESS FOLLOWED AND TIME LINES

- ❑ The Cabinet approved the B-BBEE Amendment Bill on the 16 November 2011;
- ❑ Draft Amendment Bill published for public comment in December 2011
  - Majority of comments broadly supportive of Bill
  - Comments studied by DTI and changes made to Bill, including –
    - Changing the terminology in key definitions
    - Adopting a different approach to applying the codes of good practice to organs of state and public entities
    - Specifying the powers of the proposed B-BBEE Commission in greater detail
    - revising the provisions dealing with penalties and offences

## Processes and timelines, cont.

- ☐ The dti presented the Bill to the Cabinet Select Committee from May to August 2012;
- ☐ Cabinet approved the introduction of the Amendment Bill, to Parliament on the 8th August 2012; and
- ☐ The first Portfolio Committee session will take place on the 19th September 2012.

## PROCESS FOLLOWED AND TIME LINES

- ❑ Parliament commenced with public hearings in March to May 2013;
- ❑ Passing and adoption of the Bill by the National Assembly (NA) and National Council of Provinces (NCOP) June 2013;
- ❑ The President signs the Bill into Act by July 2013;

# Objects of the Bill

**Align the Act with other legislation impacting on B-BBEE and with the codes of good practice**

**Establish the B-BBEE Commission to monitor and evaluate B-BBEE**

**Deal with non-compliance and circumvention**

**Give effect to Government policy aimed at reducing inequality, defeating poverty and creating employment**



## Definition of 'BBEE Initiative' page 2, lines 8 – 10

Submissions from: ABSIP, ABASA, BLA, BBC, BBEC, BCA, BMF, FABCOS, SABTACO, SACCI, AMCHAM, ECNOBEE

Issue: inconsistency in use of terms such as 'initiative', 'transaction', 'scheme' and 'arrangement'. Calls for the insertion of a new definition - 'B-BBEE transaction' - to create consistency.

- 'B-BBEE initiative' is already broadly defined to include any transaction, scheme or practice; the proposed new definition is therefore unnecessary.
- 'B-BBEE initiative' is used throughout the Bill, save for where the context warrants the use of a different term.



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## **‘B-BBEE Verification Professional’ & ‘B-BBEE Verification Professional Regulator’**

**Page 2, lines 11 – 20**

AQRate; ABASA; ABSIP; ABVA; BLA; BBC; BBEC; BCA; BMF; CEE; CSCC; DCCI; ECNOBEE; FABCOS; MTN; Neotel; SABTACO; SAHTMEO; SANAS; SAWIC

**ISSUE: Confusion regarding SANAS’ role as Regulator, particularly considering that currently agencies and professionals are being accredited by both SANAS and IRBA**

- The proposed amendments were intended to serve as an interim measure, pending anticipated amendments to the Auditing Professions Act, in terms of which the role of B-BBEE Verification Professional Regulator would be transferred to IRBA.
- However, in light of the confusion created by the amendments, it is necessary to clarify the interim position.

## ‘B-BBEE Verification Professional’ & B-BBEE Verification Professional Regulator’, cont.

- It is proposed that the references to SANAS be removed from the definitions, which should instead read as follows:

**“B-BBEE Verification Professional’** means a person who performs any work in connection with rating the status of enterprises in terms of broad-based black economic empowerment compliance, on the authority of, or for a rating agency accredited by, a B-BBEE Verification Professional Regulator”



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## B-BBEE Verification Professional & B-BBEE Verification Professional Regulator, cont.

- “B-BBEE Verification Professional Regulator”** means a body appointed by the Minister for the accreditation of rating agencies or the authorisation of B-BBEE Verification Professionals.”
- In practice, it is anticipated that the Minister will appoint SANAS and IRBA as B-BBEE Verification Professional Regulators, with the effect that the accreditation system will remain as it currently is until such time as the necessary amendments are made to the Auditing Professions Act.
  - The Minister will issue a clarification note to the market regarding these transitional arrangements.

## Definition of 'black people' page 3, lines 4 - 12

ABSIP, ABASA, ABVA, BBC, BLA, BBEC, BCA, BMF, CEE, FABCOS, SABTACO, SAHTMEO, SAWIC, Telkom, TFSA

Most comments broadly supportive of proposed definition. Some comments suggesting that position of South African Chinese people should be clarified

-The comments regarding Chinese people relate to a High Court judgment in which the term 'black people' in the B-BBEE Act and the Employment Equity Act was held to encompass ethnic Chinese South Africans, who were classified as 'coloured' under Apartheid.

-For the sake of clarity, it is proposed that the phrase 'Chinese people' be inserted after 'Indians' in the definition.



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# Definition of 'broad-based black economic empowerment' Page 3,

lines 15 - 32

ABSIP, ABASA, Blind SA, BARSA, BBC, BBEC, BCA, BMF, CSIR, FABCOS, MTN, Peotana, SADECO, SABTACO, SACCI, SAMED, SAWIC, Telkom

**MAIN ISSUES RAISED:** certain terms should be further clarified; the exclusion of white people with disabilities is discriminatory; reference to 'local content procurement' in paragraph (e) (lines 28 – 30) shifts the emphasis away from preferential procurement from enterprises owned or managed by black people.

- The definition is sufficiently clear: further defining the terms in issue is therefore not necessary.
- Excluding white people with disabilities from the scope of B-BBEE is not unreasonable. It is noted in this regard that white people with disabilities, while specifically protected against unfair discrimination under the Employment Equity Act, have never been included in the ambit of B-BBEE. This is simply a reflection of the fact that such people are not historically disadvantaged for the purposes of the BEE.

## Definition of B-BBEE cont.

- It is clear from paragraph (e) that the promotion of local content procurement is to be in the context of preferential procurement from enterprises owned or managed by black people.
- It is however proposed that clause 5(b) (page 5, lines 10 – 11) – in terms of which the Minister was empowered to issue guidelines concerning the interpretation and definition of, and indicators to measure, local production and content – be removed from the Bill.
- While the DTI strongly believes that encouraging local procurement is an important aspect of transforming the economy, it is of the view that it would be more appropriate to leave it to the Preferential Procurement Policy Framework Act to flesh out the manner in which the concept is to be interpreted and applied.



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## Definitions of 'fronting practice' & 'knowing, knowingly or knows' page 3, line 39 – page 4, line 16

Comments from: ABSIP, ABASA, AMCHAM, AQRate, BASA, BARSA, BLA, BBC, BBEC, BCA, BMF, Clicks, CSCC, ECONOBEE, FABCOS, MTN, SABTACO, SAHTMEO, SAWIC, Telkom

**ISSUES:** Opinion divided on whether these definitions are too onerous or too lenient in their effect; recommended that certain terms should be further clarified.

- The effect of paragraph (b) of the definition of 'knowing, knowingly or knows' (page 4, lines 6 – 16) is that conduct need not necessarily be intentional in order to amount to 'fronting'. This is to guard against 'willful ignorance', and also recognises that intention is often difficult to establish.
- A number of submissions expressed the view that 'fronting' should be re-classified as 'fraud'.



## ‘Fronting practices’ and ‘knowing, knowingly or knows’, contd.

- However, the definition is intended to encompass cases of fronting in which fraud would be difficult to establish. Furthermore, the inclusion of the concept of ‘fronting’ in the B-BBEE Act would not prevent the prosecution of offenders for fraud under the common law.
- Not necessary to further define terms such as ‘reasonable’ and ‘at arms length’ (page 4, lines 4 -5, for example), as the concept of ‘fronting’ should remain flexible enough to deal with the variety of ways in which it can occur, and the terms are in any case sufficiently clear.



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# Objectives Page 4, lines 26 – 39

Comments by AQRate, BARSA, DCCI, SADECO, Telkom

**MAIN ISSUES:** References to land and infrastructure (line 29) and SMMEs (line 38) inappropriate; clarity requested / further detail required on manner in which objectives will be carried out.

-BEE is intended to be broad based: aiming to empower communities by enabling access to land and infrastructure; focusing on SMMEs, etc., are therefore appropriate objectives. It is pointed out, furthermore, that the provision in question is already in the Act and is not a proposed amendment.

-The Codes of Good Practice issued under section 9 of the Act further elaborate on the manner in which the Act's objectives will be carried out.



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## Interpretation of the Act Page 4, lines 41 - 43

ABSIP, ABASA, BLA, BBEC, BCA, BMF, CEE, ECONOBEE, FABCOS, MTN SABBACIO, SAWIC, Vodacom

**ISSUE:** The 'trumping provision' should be reinserted into the Bill.

- A provision was included in the draft amendment Bill to stipulate that, in the event of any conflict relating to B-BBEE arising between the provisions of the B-BBEE Act and any other law (other than the Constitution and Acts expressly amending the B-BBEE Act), the provisions of the B-BBEE Act would prevail.
- The rationale behind the clause was to ensure that Act was the primary piece of legislation governing BEE.
- The clause was removed following the publication of the draft Amendment Bill.



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# Codes of good practice Page 5, lines 2 – 18

ABVA, AQRate, BASA, BARSAs, CASA, CSCC, DCCI, ECONOBEE, MTN, SADECO, SAHTMEO, Telkom, TFSA, Vocacom

**MAIN ISSUE:** Permitting public entities and organs of state to specify qualification criteria in excess of those set out in the Codes could lead to uncertainty.

- It is reasonable to expect entities to familiarise themselves with the requirements of entities or organs of state with which they wish to contract.
- The Minister has a discretion, if requested to do so, to permit organs of state or public entities to specify qualification criteria in excess of the Codes. In practice he will not grant such permission unless there is a strategic rationale for doing so.

# Status of codes of good practice Page 5, lines 21 - 44

ABSIP, ABASA, ABVA, AQRate, BLA, BBEC, BCA, BMF, CASA, CEE, ECONOBEE, FABCOS, MTN, Neotel, Oceana, SACCI, SAMED, SABBACO, SAHTMEO, SAWIC, Telkom, TFSA

**MAIN ISSUE:** The position regarding enterprises which cut across various sectors should be clarified

- Under section 10(2) (line 36 – 39) an enterprise operating in a sector in respect of which the Minister has issued a sector code, may only be measured for B-BBEE compliance in accordance with that code.
- The purpose of this amendment was to clarify the existing position and to align the codes of good practice with the Act.
- An enterprise should be measured in accordance with the requirements of each sector in which it operates.

# Cancellation of contract or authorisation Page 6, lines 4-9

BASA, ECONOBEE, Oceana, Pholosang, SADECO, SACCI, Telkom

**MAIN ISSUE:** the rights of third parties may be effected where an organ of state or public entity cancels a contract pursuant to this provision

- At common law, a party which has been induced to enter into a contract by the other party's misrepresentation is generally entitled to cancel the contract. The provision therefore simply reinforces the common law position.
- Third parties affected by a contract cancelled under this provision may also have recourse against the guilty party under the common law.



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# Establishment & status of the B-BBEE Commission Page 6, lines 10 – 30

ABSIP, ABASA, AVBA, BASA, BLA, BBC, BBEC, BCA, BMF, BUSA, CCCI, Clicks, CEE, DCCI, ECONOBEE, FABCOS, Neotel, Oceana, Peotana SATABCO, SAWIC, Vodacom

Establishment of the Commission broadly supported, but trading entity model and lack of independence from the DTI questioned

- A 'trading entity' is a type of organisational form provided for in the Public Finance Management Act. It operates as a distinct entity within a government department, and is as such not entirely independent.
- The intention was to prevent a situation where the DTI is unable to exercise oversight or control over the Commission if it fails to properly carry out its mandate. Nevertheless, in practice the DTI's role will largely be limited to providing administrative and operational support.
- It is proposed that section 13B(4) (lines 26 – 28), which would have allowed the Minister to issue directives of a general nature to the Commission regarding the performance of its functions, be deleted.
- It is believed that the impartiality of the Commission is otherwise adequately safeguarded (eg lines 19 – 20)

# Appointment of Commissioner, Deputy Commissioner & staff of commission

Page 6, line 32 – page 7, line 17

ABASA, AMCHAM, BASA, BLA, BBC, BBEC, BCA, BMF, Clicks, FABCOS, Peotana, SBTACO, SAWIC, Telkom

Amendment broadly supported, but some concerns raised over the Commissioner's accountability to the Minister and the Commissioner and Deputy Commissioner's tenure

-The provisions strive to strike a balance between the need to ensure that the Commissioner is not subject to undue political interference and the need to hold the Commissioner accountable for his or her performance.



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# Finances of the commission Page 7, lines 19 - 25

AMCHAM, Clicks, MTN, Peotana, Telkom

Recommend that subsection (1)(b) – “money received from any other source” – be clarified.

- This is a ‘catch-all’ provision, to account for funds which may legitimately be received from a source other than Parliament. Similar provisions are commonly used in regulating the finances of commissions and other public entities (see section 90(1)(d) of the Consumer Protection Act, for example).
- It is noted that the DG is automatically the accounting officer of the Commission (although he may, under the Public Finance Management Act, delegate his powers in that regard to the Commissioner), by virtue of the fact that the Commission is to be established as a ‘trading entity’. It is therefore proposed that section 13E(2) – which appoints the Commissioner as accounting officer – be deleted.



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# Functions of Commission Page 7, line 27 – page 8, line 21

AASA, ABSIP, ABASA, BASA, BLA, BBC, BBEC, BCA, BMF, Clicks, CEE, ECONOBEE, FABCOS, MTN, Neotel, Oceana, SABTACO, SADECO, SAWIC, Telkom

**MAIN ISSUES:** recommended that provision be made for an annual report to track the Commission's progress; concerns raised around the manner in which the Commission will carry out its functions

- The purpose of this provision is simply to set out the functions of the Commission in broad terms.
- The Commission will be subject to reporting requirements under the PFMA.

# Reporting Page 8, line 23 – 35

ABSIP, ABASA, BASA, BLA, BBEC, BCA, BMF, CCCI, Clicks, DCCI, ECONOBEE, FABCOS, Pholosang, SABTACO, SADECO, SAHTMEO, SAWIC, Telkom, TFSA

**MAIN ISSUES:** recommendation that the reporting requirement be extended to other companies; concerns that the requirement will impose undue administrative burden on affected entities

-In its current form, the provision only affects government, public entities, JSE listed companies and SETAs. The manner in which JSE listed companies are required to report will be prescribed by regulation.

-Listed companies are already required to file sustainability reports; it is therefore not anticipated that the reporting requirement under this provision will impose any significant additional burden on such companies.



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# Investigations by the Commission and Summonses page 9, line 43 – page 10, line 9

BASA, Clicks, MTN, Oceana, SACCI, Telkom

**MAIN ISSUES:** concerns raised over the extent of the Commission's powers and uncertainty over the procedure to be followed in conducting its investigations.

- The Commission's powers are not particularly extensive in comparison to the powers given to similar bodies (the Companies and Intellectual Properties Commission, for example).
- The Commission is given the power to determine its own format and procedures for conducting investigations to allow it flexibility in handling a wide variety of complaints, but that does not mean that it can act with impunity. It would still be bound by basic principles of procedural fairness when conducting a formal hearing, for example.

## Confidential information, conflicting interests of employees & offences in connection with the Commission Page 10, line 48 – page 11, line 53.

BASA, MTN

**Main Issue: Concerns regarding the Commission's powers to disclose confidential information**

- Sections 13L and 13M are aimed at safeguarding confidential information and guarding against conflicts of interests within the Commission. 13L sets out the procedure for determining whether information should be protected under that provision in any given case.
- The Commission is only entitled to disclose confidential information in specified circumstances under section 13N(2), which will not apply to information which has been declared to be confidential under section 13L.



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## Other offences and penalties page 11, line 55 – page 12, line 33

ABSIP, ABASA, BASA, BLA, BBC, BBEC, BCA, BMF, BUSA, CCI, CEE, FABCOS, MTN , SABTACO, SACCI, SAHTMEO, SAWIC, Telkom

Concerns around creating criminal liability for negligent conduct and around the fines which may be imposed under the Act. Some stakeholders supported a set fine of 10% of annual turnover to serve as a deterrent, others felt that the penalties under the provision were potentially too onerous.

- The provision aims to allow a court room to determine an appropriate penalty according to the circumstances of each case.
- It is proposed that the minimum rather than maximum sentences be prescribed to deter fronting and strengthen compliance with the Act.



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