



**THE NATIONAL ASSOCIATION OF BROADCASTER'S  
WRITTEN SUBMISSION ON THE INDEPENDENT COMMUNICATIONS AUTHORITY OF  
SOUTH AFRICA'S DISCUSSION DOCUMENT ON OWNERSHIP AND CONTROL**

**19 FEBRUARY 2010**

## **1. Introduction**

- 1.1 The National Association of Broadcasters (the NAB) is the leading representative of South Africa's Broadcasting Industry. The NAB aims to further the interests of the broadcasting industry in South Africa by contributing to its development. The NAB membership includes:
  - 1.1.1 Three television public broadcasting services, and eighteen sound public broadcasting services, of the South African Broadcasting Corporation of South Africa (the SABC);
  - 1.1.2 All the commercial television and sound broadcasting licensees;
  - 1.1.3 Both the major licenced signal distributors (electronic communications network service operators), namely Sentech and Orbicom;
  - 1.1.4 Over thirty community sound broadcasting licensees, and one community television broadcasting licensee, namely, Trinity Broadcasting Network (TBN).
- 1.2 On 17 November 2009, the Independent Communications Authority of South Africa (ICASA), published in Notice 1532, Government Gazette 32719, a notice of its intention to publish its Ownership and Control Discussion Document (the discussion document). Interested parties were invited to submit their written representations on the discussion document by 19 February 2009.
- 1.3 In terms of the preamble of the Notice, the discussion document is in two sections, namely, section A, covering a discussion document on ownership and control issues on individual broadcasting services, published in terms of section 2, 4, 13(4, 5) and 65(7) of the Electronic Communications Act 36 of 2005 (the EC Act), and section 4(3)(k) of the ICASA Act 13 of 2000 (the ICASA Act). Section B of the discussion document covering ownership and control issues relevant to individual electronic communications services (ECS) and electronic communications network services (ECNS), published in terms of sections 2,4,13(3)(5) of the EC Act, and section 4(3)(k) of the ICASA Act.
- 1.4 The NAB welcomes the opportunity to submit its written representation. The NAB hereby requests the opportunity to participate in oral representations at a hearing to be conducted by the Authority in respect of the discussion document.

- 1.5 As a general comment, the NAB would like to point out that internationally, ownership and control, as regulatory instruments are there essentially to deal with questions of who has the right to be a broadcaster and how many different broadcasters there should be. The first question is about setting the rules of ownership such as being a legal person, the fitness and propriety of the applicant/licencee, the nationality of the applicant/licencee and whether the applicant/licencee is a political or religious organization. A key rule is nationality as most countries want to secure domestic frequencies for domestic operators.
- 1.6 The second question deals with plurality, which concerns the number and diversity of voices that should be heard on the airwaves. The purpose of plurality, in democratic countries, is to ensure that there is an adequate range of sources of news, information and opinion necessary for the operation of democracy. Plurality can be measured in different ways, such as, availability measures or control measures. The NAB submits that in approaching any inquiry into ownership and control, the Authority should keep in mind the objectives these regulatory instruments are directed at achieving.
- 1.7 The NAB will in this submission first raise the policy and legislative background pertaining to limitations on ownership and control issues, then raise some concerns or process issues on the procedure the Authority adopted in publishing the discussion document. Lastly the NAB will address the questions raised in the discussion document in the order that they were raised by the Authority.

## **2 Background**

### **3 Broadcasting Services**

- 3.1 On 30 September 2002, the Authority published in government gazette 23873, its discussion paper on the review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences (the 2002 discussion paper). The 2002 discussion paper was published in terms of section 28 of the Independent Broadcasting Act 153 of 1993 ( the IBA Act) (repealed by the EC Act), which empowered the Authority to conduct enquiries from time to time, into any matter relevant to:
- 3.1.1 The achievement of the objects and application of the principles enunciated in section 2 of the IBA Act; and

- 3.1.2 The exercise and performance of its powers, functions and duties in terms of the IBA Act.
- 3.2 The 2002 discussion paper sought to initiate a process for the review of the statutory limitations on ownership and control of broadcasting services that were imposed by section 48<sup>1</sup>, 49<sup>2</sup> and 50<sup>3</sup> of the IBA Act.
- 3.3 Furthermore, section 49(7) of the IBA Act empowered the Authority to:
- “whenever deemed necessary in view of developments in the broadcasting technology or for the purposes of advancing the objects and principles enunciated in section 2 of the Act, after due inquiry in terms of section 28, make recommendations to the Minister regarding the amendment of any of the preceding subsections, which recommendations shall be tabled in the National Assembly by the Minister within 14 days after receipt thereof, if the National Assembly is then in session, or, if the National Assembly is not then in session, within 14 days after the commencement of its next ensuing session”.*<sup>4</sup>
- 3.4 The NAB submitted its written representations to the 2002 discussion document, wherein the NAB made detailed recommendations on the various ownership and control issues for the consideration by the Authority.<sup>5</sup>
- 3.5 The process of the 2002 Discussion document culminated in the publication of the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences Position Paper, dated 13 January 2004 (the position paper). In its findings, the Authority reiterated the position adopted in the 1998 White Paper on Broadcasting Policy which stated “that the level of ownership of private radio and television stations permitted for a foreigner is currently 20%. The government is of the view that this ceiling should be raised in order to facilitate an increase in

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<sup>1</sup> Section 48 of the IBA Act imposed limitations on foreign control of commercial broadcasting services.

<sup>2</sup> Section 49 of the IBA Act imposed limitations on control of commercial broadcasting services.

<sup>3</sup> Section 50 of the IBA Act imposed limitations on cross media control of commercial broadcasting services.

<sup>4</sup> Section 50(4) and (5) of the IBA Act has the same provisions as section 49(7) of the IBA Act.

<sup>5</sup> NAB Submission to the Independent Communications Authority of South Africa on the Discussion Paper on the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licencees at pages 8 to 19

investment.” In view of this, the Authority made recommendations for the amendment of section 48,49 and 50 of the IBA Act, and two options were proposed:

3.5.1 Firstly the Authority proposed the deletion of sections 48, 49, and 50 of the IBA Act, replacing them with provisions that would enable the Authority to prescribe regulations on limitations of ownership and control issues.<sup>6</sup>

3.5.2 Secondly, the Authority proposed the retention of ownership and control limitations in the statute, but suggested amendments to sections 48, 49 and 50 of the IBA Act.<sup>7</sup> This proposal corresponded with the proposal put forth by the NAB in its written representations to the discussion document.

3.6 The Authority submitted its proposed amendments to the IBA Act to the Minister to be tabled in Parliament (see Annexure A).<sup>8</sup>

3.7 In paragraph 2 of the discussion paper, the Authority provides the outlined background. However, what remains unclear is the status of the ownership and control recommendations that were submitted to the Minister of Communications, as per the 2004 position paper. In the current discussion paper, the Authority does not indicate if these recommendations are still in effect and therefore this discussion paper only addresses issues not raised in the previous inquiry, or if this discussion paper intends to cover the same terrain as that covered by the recommendations submitted to the Minister for tabling before the National Assembly. If it is the latter, then properly speaking the recommendations made to the Minister should have been reproduced in this discussion paper as a starting point for debate on whether they require updating or not, before being submitted to the Minister for tabling in the National Assembly.

3.8 In our view the 2004 Ownership and Control recommendations submitted to the Minister remain in effect despite the repeal of the IBA Act. The Minister must in fact table them in the National Assembly in accordance with the ECA Act, failing which the Minister runs the risk of being in continued breach of section 65(8) and section 66(8) of the EC Act. In this regard the Authority is referred to section 92(7) of the EC Act which provides that:

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<sup>6</sup> The Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences Position Paper, dated 13 January 2004 at page 44

<sup>7</sup> Ibid at page 44

<sup>8</sup> Independent Communications Authority of South Africa Discussion Document on Ownership and Control, November 2009, at page7.

*“Any current applications, process, recommendations and regulations pending before the Authority or the Minister upon the coming into force of this Act must be considered to have been submitted in accordance with the provisions of this Act and must be considered in terms of the relevant sections of this Act.”*

- 3.9 Further confusion is created when the Authority cites section 13(4) (5) of the EC Act as the enabling section for the publication of the discussion paper.<sup>9</sup> Having regard to the argument raised above, the NAB is of the view that the process of drafting regulations in terms of section 13 (4) (5) of the EC Act is premature, as currently there is a policy uncertainty regarding the provisions governing limitations on ownership and control for broadcasting services.
- 3.10 The NAB notes that under the “Timeframe” heading in the discussion paper, the Authority will develop and submit recommendations to the Minister in accordance with section 65(7) which is limited to recommendations on control of commercial broadcasting services. As such, the implication of this is that the draft regulations cannot be considered in terms of section 13(4) for individual broadcasting licensees. However, the questions raised in the discussion paper deal with broader matters including questions pertaining to the drafting of regulations on ownership and control.
- 3.11 This leads to some uncertainty as to the scope of the recommendations that ICASA will submit to the Minister. The NAB requires that the Authority must provide some clarity on the status of the recommendations made to the Minister. The NAB’s understanding is that for all intents and purposes, the recommendations made in 2004 are still valid, and need to be dealt with as stipulated in legislation. Should the Authority recognise these recommendations as valid, the NAB requests that prior to the recommendations being re-submitted to the Minister the recommendations be published as draft recommendations for public comment.
- 3.12 To the extent that the questions raised in the discussion paper cover the same terrain as the 2004 Ownership and Control recommendations, the NAB will respond with a view to affirming or updating elements of those recommendations, as detailed recommendations were raised in the NAB written representation, which still pertain today.

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<sup>9</sup> Ibid at page 5

- 3.13 Further, by responding to the questions raised in the discussion paper, the Authority must not regard this as the NAB's support for the drafting of regulations in this regard. The NAB's stand point is, the regulations are unnecessary, and the policy recommendation process to the Minister needs to be pursued and completed.
- 3.14 Further, when perusing the provisions of section 13(3) of the EC Act, it is clear that the requirement to publish regulations is not peremptory but rather discretionary on the Authority. This flow from the fact that the provision requires that "*the Authority may by regulation set a limit on, or restrict, the ownership or control of an individual licence ...*" [our emphasis].
- 3.15 In any event, subordinate or delegated legislation cannot be in contrast with primary legislation. It is for this reason that the NAB recommends that the Authority should pursue and complete the policy recommendations to the Minister.
- 3.16 The views raised above are the NAB position. However, should the Authority decide to proceed with the drafting of the regulations, the NAB will then provide its input to the questions raised in the discussion document. While the NAB may not respond to all the questions raised in the discussion document, this should not be construed as the NAB's concession. The NAB would like to be given the opportunity to respond to these questions should the Authority decide to proceed with the drafting of the regulations. Individual NAB members reserve the right to make additional representations to suit their individual needs.

#### **4 ANSWERS TO THE QUESTIONS POSED**

##### **5 Question i : Market Share**

- 5.1 The Authority posed a question on whether the ownership and control restrictions in South Africa should be guided by market share, as a measure to ensure who should contribute the most to meet the goals of legislation, e.g. the BBBEE Act?
- 5.2 The NAB is not aware of any current examples of regulations being based on market share to seek to diversify ownership similar to the goals of the BBBEE Act. Most countries implement policies to foster or encourage broadcasting for or by indigenous groups, e.g. Australia and Canada, but not by placing higher restrictions on other broadcasters with higher market share.
- 5.3 Accordingly, the NAB holds the view that the use of market share as a regulatory tool in the context proposed by the Authority does not hold with international best practice,

nor would its proposed use as a measure in this instance be naturally aligned with the goal which is being sought to be achieved.

- 5.4 When coming to competition issues, the NAB notes that both the Authority and the Competition Commission exercise concurrent jurisdiction in competition matters in the communications sector, hence the Authority has jurisdiction to regulate on competition issues.
- 5.5 BBBEE is regulated under the BBBEE Act, and the Act has its own codes of best practice. The Authority should therefore not duplicate already existing workable systems. The Authority has other measures or tools at its disposal to regulate the diversity of views or content.

## **6 Question ii: Foreign Ownership Limits**

- 6.1 The discussion document raises questions on the easing of the current restrictions on foreign ownership and possible exemptions. These issues were addressed in considerable detail in the 2004 Ownership and Control Position Paper and Recommendations.
- 6.2 In its submission to the Authority in response to the 2002 discussion paper, the NAB outlined problems that come with the ownership and control limitations on foreign ownership, which warrant the review of the current position.<sup>10</sup>
- 6.3 It is worth noting that there is a broad consensus among the NAB membership that foreign ownership limitations should be relaxed, in order to encourage foreign investment in the broadcasting sector. While the NAB members reserve the right to exercise their discretion in recommending a percentage increase, the NAB would like to update the 2004 Ownership and Control recommendations, as they are in line with the proposals made by the NAB in its response to the 2002 discussion paper, by proposing revised wording for section 64 of the EC Act, as follows:

"(1)(a) A foreign person may not, whether directly or indirectly, exercise control over a commercial broadcasting licensee.

(b) The ability to vote more than twenty-five (25) percent of the votes in a commercial broadcasting licensee will be considered to constitute control.

(2) Not more than twenty-five (25) percent of the directors of a commercial broadcasting licensee may be foreign persons.

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<sup>10</sup> Page 9 to 10 of the NAB submission.

6.4 The NAB is of the view that it is also necessary to define the term “foreign person” in the EC Act, and propose the following definition:

“(a) a natural person who is not a South African citizen; or

(b) a company, wherever incorporated, where the natural persons who control the company, whether directly or indirectly, are not South African citizens.”

## **7. Question iii: Control**

7.1 The NAB is of the view that the EC Act appears to have neglected to provide a definition for the term “control”, which term is used in many places in the EC Act. The NAB proposes that the Authority consider recommending the amendment of the EC Act to include a definition of control. In doing so, the Authority may want to consider the approach adopted in sections 2 and 3 of the new Companies Act, 2008 (which is still to come into operation).

7.2 In addition, the NAB made its proposals on the definition of control, in its response to the 2002 discussion paper<sup>11</sup>. The NAB proposes that the Authority should consider making recommendations for the amendment of the EC Act to include a definition of control. The Authority must have regard to the NAB’s proposals in the response to the 2002 discussion paper, and be guided in crafting a definition of ‘control’ by the definition thereof set out in section 12(2) of the Competition Act, 1998 (Act no. 80 of 1998). The NAB’s proposed definition was as follows:

*“Notwithstanding the provisions of any law or of the common law, a person shall be deemed to be in control of a company if such person has equity shareholding in such company exceeding 25%.”*

## **8. Question iv: BBBEE Compliance**

8.1 The question as phrased does not make sense as it is not clear from the context what exemptions for compliance with BBBEE are being referred to here. Are these exemptions from limitations on foreign ownership, from limitations on horizontal control of commercial broadcasting services or limitations on cross-media control of commercial broadcasting services? The question could even be read to mean exemption from compliance with BBBEE.

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<sup>11</sup> Pages 33 to 35 of the NAB 2002 submission.

8.2 The lack of clarity makes it difficult for the NAB to answer this question other than to state that exemptions from ownership and control limitations could be considered in return for BBBEE compliance as already stated in the 2004 Ownership and Control recommendations. However, in the alternate construction that could be given to the question, namely exemption from compliance with BBBEE, the NAB is of the view that there should be no exemption for individual broadcasting licensees from the requirements of BBBEE.

## **9. Question v: Promoting Diversity Of Views And Opinions**

9.1 Section 13(4) states that “the Authority may, subject to Chapter 9, by regulation, set a limit on, or restrict, the ownership or control of an individual licence for broadcasting services in order to promote a diversity of views and opinions [own emphasis].” The use of the word “may” indicates that the Legislature intended that the Authority must apply its mind and discretion to determine if it is in fact necessary to make regulations on this matter.

9.2 The NAB is of the view that it is not necessary to make regulations in terms of section 13(4) as the Authority already promotes a diversity of views and opinions in the licensing process and thereby ensures that broadcasting services collectively promote a diversity of views and opinions in South Africa. In particular section 5(9) requires that

*“The Authority must, in granting a licence –*

*(a) Ensure that electronic communications network services, broadcasting services and electronic communications services, viewed collectively, are provided by persons or groups of persons from a diverse range of communities in the Republic; and*

*(b) Promote the empowerment of historically disadvantaged persons including women and the youth and people with disabilities in accordance with the requirements of the ICT Charter.”*

9.3 Furthermore, there are other provisions in the EC Act which support the promotion of a diversity of views and opinions. We refer, for example, to Chapter 9 of the EC Act where limitations on control and cross-media control of commercial broadcasting services are set out.

9.4 As stated above, the Authority should use other measures or tools at its disposal, such as licence conditions and /or content regulations to regulate the diversity of views.

**10. Question vi: Vertical Integration**

The NAB is of the view that it is not necessary to address vertical integration. In any event, the EC Act does not provide the Authority with jurisdiction to do so.

**11. Question vii: Ownership and Control Restrictions on New Services**

11.1 The NAB is of the view that it would be inappropriate to use ownership and control as a regulatory instrument to set restrictions on new services. Firstly, under the technology-neutral licensing framework of the EC Act there are only individual and class broadcasting services offered within the ambit of three types of broadcasting set out in Chapter 9, namely Public, Commercial and Community Broadcasting. Consequently there is no need to subject new services to different rules of ownership and control.

11.2 The NAB is of the view that the appropriate regulatory tool to encourage diversity and views on new services is through licensing and local content regulation.

**12. Question viii: Historically Disadvantaged Groups**

The Authority asked the question of whether increases in ownership by historically disadvantaged groups lead to a proportional increase in diverse opinions and views. The NAB cannot answer that question as it is not aware of any evidence or research that supports or disproves this view. Save to say the EC Act requires that when applying for an individual licence, the equity ownership to be held by persons from historically disadvantaged groups must not be less than 30% of the ownership.<sup>12</sup>

**13. Question ix: Ownership and Control of Class Broadcast Services**

13.1 The Authority states that the EC Act is silent on ownership and control of Class Broadcasting Services. The NAB is of the view that this is not a correct statement. The EC Act is silent in terms of section 13(4) which requires that if the Authority decides to make regulations limiting or restricting ownership and control, such regulations will only apply to individual broadcasting licensees. However, sections 64, 65 and 66 of the EC Act apply to all commercial broadcasting services whether individual or class licensees.

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<sup>12</sup> Section 9(2)(b) of the EC Act.

13.2 However, including non-commercial class broadcasting services in the limitations would not hold water, as the legislated ownership structure of class broadcasting services is limited to members of the community served by the class broadcasting service.

**14. Question x: Ownership and Control Restrictions on Listing**

The NAB is of the view that the Authority should not be attempting to set restrictions for listing as it could have negative impacts on the commercial viability of licensees. There is also no scientific evidence suggesting that ownership and control restrictions on listing will have any effect on diversity of views and opinions offered on the broadcasting service.

**15. Question xi: Advancing BBBEE in the Sector**

15.1 The Authority should consider formally adopting the Department of Trade and Industry (the DTI) Codes of Good Practice, as they set out a clear and verifiable methodology for measuring BBBEE. However, it should be kept in mind that the legislation in the sector approaches the measurement of empowerment using different criteria as the concept of historically disadvantaged individuals (HDI) in the sector includes white women and white people with disabilities.

15.2 The DTI ICT Charter even though not yet finalised was drafted with the aim of providing stability and uniformity within the ICT sector.

**16. Question xii: Shareholding Data on Regional Representation, Gender Balance and Disabled People**

The NAB is of the view that such information should be requested during the licensing process.

**17. Question xiii: Values or Percentages Allocated to Youth, Gender and Regional Representation**

17.1 The NAB has indicated in a response to a previous question that there is no scientific evidence that demonstrates a relationship between percentages of shareholding and diversity in views on the broadcasting service.

17.2 The Authority must further be cognizant of already existing instruments which deal with representation, such as the BBBEE Codes.

## **18. Question xiv: Miscellaneous BBBEE Questions**

- 18.1 The Authority raises the question of whether the concepts of BBBEE and historically disadvantaged individuals are reconcilable. The Authority must note that these concepts are imperatives, and ought to be complied with, even though they are different concepts. If the Authority wishes to move to an understanding of empowerment that excludes white women and white people with disabilities it will have to recommend the amendment of the EC Act to align it with the BBBEE Act.
- 18.2 However, the NAB would recommend that the Authority should align its definition of BBBEE with the DTI Codes.
- 18.3 The Authority notes that 'equity' is not defined in the EC Act and proposes that the definition of equity in Code 100 issued by the BBBEE Act be adopted. The NAB is in agreement with the adoption of this definition of equity.
- 18.4 The Authority sought guidance on how existing licensees should comply with the suggested limitation of equity ownership. The NAB is of the view that this BBBEE equity ownership limitation is already set out as a condition in the licences of individual broadcasting licensees. Failure to comply would therefore be a breach of licence conditions; therefore no additional mechanism is required.

## **19. Conclusion**

- 19.1 In conclusion, the NAB wishes to bring the following pertinent issues to the Authority's attention:
- 19.1.1 The NAB is content that the 2004 recommendations to the Minister are still valid, and need to be submitted to the Minister for submission before Parliament;
- 19.1.2 The Authority should republish the recommendations for public comment in order to ascertain their validity;
- 21.1.3 The NAB believes that the process of drafting regulations in terms of section 13 for broadcasting services licencees is premature.
- 19.2 The NAB thanks the Authority for the opportunity to make its written submission, and believes the submissions made will add value to this process.

## ANNEXURE A: EXTRACT FROM ICASA’S POSITION PAPER ON THE REVIEW OF OWNERSHIP AND CONTROL OF BROADCASTING SERVICES AND EXISTING COMMERCIAL SOUND BROADCASTING LICENCES – 13 JANUARY 2004

**General comment:** There proposals were made in terms of the IBA Act. It is incumbent on the Authority to make the recommendations to the Minister based on the EC Act. The proposals are outlined in their state as outlined in the 2004 position paper.

### **PART D: PROPOSALS TO AMEND THE PROVISIONS OF THE INDEPENDENT BROADCASTING AUTHORITY ACT (No. 153 of 1993)<sup>13</sup>**

The Independent Communications Authority of South Africa (“the Authority”), in terms of section 13(1)(k) read with sections 49(7) and 50(4) and (5) of the Independent Broadcasting Authority Act (Act No.153 of 1993) (“the IBA Act”) hereby recommends to the Minister of Communications that sections 48, 49, 50, 52 and paragraphs 1 and 3 of Schedule 2 to the IBA Act should be amended.

#### **Section 48: Limitations on Foreign Control of Commercial Broadcasting Services**

1. The Authority recommends that section 48(1)(b) of the IBA Act should be amended as follows:
  - (1) One foreign person shall not, whether directly or indirectly -
  - (b) have **[financial interest or interest in either]** issued share capital in a South African unlisted public or private company holding a [private] commercial broadcasting [licensee] licence equal to or exceeding [twenty] twenty-five percent of the issued share capital.
2. The Authority recommends that section 48(1)A is inserted as follows:
  - (A) Two or more foreign persons shall not, directly or indirectly, have issued share capital in a South African unlisted public or private company holding a

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<sup>13</sup> **GENERAL EXPLANATORY NOTE.** [ words.\_\_\_\_ Underlined words indicate insertions

] Words in bold type in square brackets indicate deletions of existing

commercial broadcasting licence equal to or exceeding thirty-five percent of the issued share capital.

3. The Authority recommends that section 48(1)B, should be inserted as follows:
  - (B) One foreign person shall not, directly or indirectly, have issued share capital in a South African listed public company holding a commercial broadcasting licence equal to or exceeding thirty-five percent of the issued share capital.
  
4. The Authority recommends the deletion of subsection (2) of section 48 and its replacement with the following:
  - (2) Foreign persons who are directors of a commercial broadcasting licensee shall not equal or exceed twenty-five percent of the total number of directors on the board.
  
5. The Authority recommends that subsection (4) of section 48 should be inserted as follows:
  - (4) On application by any person the Authority may, on good cause shown and without departing from the objects and principles as enunciated in section 2, exempt such person from adhering to any one of the limitations contemplated in the preceding subsections on grounds that include the following:
    - (a) the promotion and facilitation of Black Economic Empowerment;
    - (b) the promotion of foreign direct investment and job creation;
    - (c) undertakings by the foreign shareholder to sell shares back to South African citizens within a specified period; and
    - (d) undertakings to transfer expertise to South African citizens.
  
6. The Authority recommends that subsection (5) of section 48 should be inserted as follows:
  - (5) An exemption in terms of subsection (4) may be made subject to terms and conditions as the Authority deems appropriate and equitable in the circumstances.

#### **Section 49: Limitations on Control of Commercial Broadcasting Services**

7. The Authority recommends that subsections (1), (2), (3), (4) and (5) of section 49 should be deleted and substituted with the following:

- (1) No person shall, directly or indirectly, exercise control over more than one commercial television broadcasting licence;
- (2) No person shall, directly or indirectly, exercise control over more than thirty five percent of the total number of licensed commercial sound broadcasting services provided that:
  - (a) when the calculation of the number of licensed commercial sound broadcasting services that a person may be in control of does not result in an integer and that when that number is rounded to the closest integer, that integer results in a percentage that is higher than the thirty-five percent limitation set out in subsection (2); and/or
  - (b) when a person exceeds the thirty-five percentage limitation set out in subsection (2) only because one or more other licensees have had their licences suspended or revoked by the Authority, or one or more licensees have ceased broadcasting (temporarily or permanently), in which case the Authority shall consider an application by the relevant person for exemption from the limitations in terms of subsection (6)(a).
- (3) Notwithstanding the provisions of subsection (2), no person shall, directly or indirectly, exercise control over more than two commercial sound broadcasting licences which have the same licence areas or substantially overlapping licence areas.

8. The Authority recommends the amendment of subsection (6)(a) as follows:

- (6)(a) On application by any person the Authority may, on good cause shown and without departing from the objects and principles enunciated in section 2, exempt such person from adhering to any one of the limitation contemplated in the preceding subsections on grounds that include the following:
  - (i) the promotion and facilitation of Black Economic Empowerment; and
  - (ii) ensuring the survival of a commercial broadcasting service.

#### **Section 50: Limitations on Cross-Media Control of Commercial Broadcasting Services**

9. The Authority recommends that section 50(2)(a) should be amended as follows:

- (2)(a) No person who controls a newspaper or newspapers **[may acquire or retain]** shall exercise, direct or indirect, **[a financial]** control **[in]** of both a **[radio]** commercial sound broadcasting licence and **[TV]** a commercial television broadcasting licence”.

10. The Authority recommends that section 50(2)(b) should be amended as follows:
- (2)(b) No person who is in a position to control a newspaper shall exercise, direct or indirect, **[may be in a position to]** control of a **[radio]** sound or a television broadcasting licence **[in an area]** where the newspaper or all the newspapers that it controls has **[an average]** a total weekly ABC circulation of **[25%]** twenty-five percent of the total weekly ABC **[newspaper readership]** circulation in [the area if the] that broadcast licence area. **[of the radio licence overlaps substantially with the said circulation area of the newspaper]**
11. The Authority recommends that subsections 50(2)(c) and (2)(d) should be deleted.
12. The Authority recommends that subsection 50(2)(e) should be amended as follows:
- (2)(e) The shareholding and financial structures of commercial broadcasting licensees [will] shall form part of [the] their annual reports submitted to the **[a]**Authority.
13. The Authority recommends that subsection (3) of section 50 should be deleted and substituted with the following:
- (3) On application by any person the Authority may, on good cause shown and without departing from the objects and principles as enunciated in section 2, exempt such person from adhering to the limitations contemplated in the preceding subsections on grounds that include the following:
- (a) the promotion and facilitation of Black Economic Empowerment; and
- (b) ensuring the survival of a commercial broadcasting service.
14. The Authority recommends that subsection (3)A should be inserted in section 50 as follows
- (3)A An exemption in terms of subsection (3) may be made subject to terms and conditions as the Authority deems appropriate and equitable in the circumstances.

## **Section 52: Amendment of broadcasting licences**

15. The Authority recommends the amendment of section 52 by the insertion of section 52A as follows:

- (A) The Authority may prescribe regulations on the procedure to be followed by a licensee who is required to seek approval for the change in control of such licensee in circumstances where such approval does not involve the amendment or a transfer of a licence.

### **Schedule 2 to the IBA Act**

16. The Authority recommends that the term `private' should be replaced by the term `commercial' wherever it appears in paragraph 1 of Schedule 2, including the heading of the schedule
17. The Authority recommends that paragraph 3 of Schedule 2 should be deleted and substituted with the following:
3. A person shall be regarded as being in control of a company if he or she holds, directly or indirectly, issued share capital equal to or exceeding twenty-five percent of the issued share capital in the company, irrespective of whether or not such issued share capital confers de facto control.
18. The Authority recommends that the definition of 'financial interest' in section 1 of the IBA Act should be deleted.