



THE NAB'S SUBMISSIONS TO THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA ON THE REVIEW OF OWNERSHIP AND CONTROL OF BROADCASTING SERVICES AND EXISTING COMMERCIAL SOUND BROADCASTING LICENCES POSITION PAPER

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1. INTRODUCTION

1.1. The National Association of Broadcasters ("the NAB") is the leading representative of South Africa's broadcasting industry. It aims to further the interests of the broadcasting industry in South Africa by contributing to its development. NAB members include:

1.1.1. the three television and the seventeen radio stations of the public broadcaster, the South African Broadcasting Corporation ("the SABC");

1.1.2. all licensed commercial broadcasters in both radio and television;

1.1.3. both the common carrier and the selective and preferential carrier licensed signal distributors; and

1.1.4. over forty community television and radio broadcasters.

1.2. ICASA published its Discussion Paper on the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences in Notice 1825 published in Government Gazette 23873 dated 30 September 2002 ("the Discussion Paper"). Interested parties made written and oral representations on the Discussion Paper to ICASA.

1.3. Subsequent to ICASA having duly considered both the written and oral representations by interested parties, ICASA issued The Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences Position Paper ("the Position Paper") on 13 January 2004.

1.4. The Position Paper is divided into four parts, namely:

1.4.1. Part A - the introduction;

1.4.2. Part B – a summary of the submissions on the Discussion Paper;

1.4.3. Part C - ICASA's findings and policy decisions; and

1.4.4. Part D - ICASA's proposed amendments to some of the provisions of the Independent Broadcasting Authority Act, 1993 ("the IBA Act").

1.5. ICASA has invited submissions on the Position Paper but with regard to only Part D thereof. Therefore, the NAB will focus on the proposed amendments to sections 48, 49, 50 and Schedule 2 of the IBA Act. However, the NAB is of the view that there are certain other key policy issues that it respectfully submits requires further consideration by ICASA namely:

1.5.1. increasing the coverage areas of the Greenfields licences; and

1.5.2. the definition of historically disadvantaged groups.

We shall deal with each in turn.

2. **THE PROPOSED AMENDMENTS TO THE IBA ACT**

The NAB wishes to place on record its belief that it would not be in the public interest for Option One to be adopted, that is, for ICASA to be able to make regulations on key ownership and control policy issues without proper Parliamentary guidance. Thus the NAB supports Option Two, that is, amendments to be made to sections 48-50 of and to Schedule 2 to the IBA Act. The NAB sets out below its comments on the proposed amendments to sections 48, 49 and 50 of and to Schedule 2 to the IBA Act and it deals with each section in turn:

2.1. **Section 48: Limitations on foreign control of commercial broadcasting services**

While the NAB commends ICASA for increasing the threshold for foreign interest in commercial broadcasting services, it has a number of concerns around ICASA's proposed amendments to section 48. In this regard:

2.1.1. The NAB respectfully reiterates its concerns about treating investors in the broadcasting industry from other countries in Africa in exactly the same manner as they would treat non-African foreign investors. The NAB respectfully suggests that in the interests of encouraging other African countries for reciprocal arrangements, it will be important for South Africa to take the lead in this regard and it respectfully suggests that ICASA re-look at the issue of African ownership interests, perhaps consulting with the Department of Trade and Industry in doing so.

2.1.2. Given the NAB's real concerns around the definition of "security" as set out in paragraph 2.4.1.5 below, the NAB suggests that paragraph 48(1)(b) read as follows:

"have issued share capital in a South African unlisted public or private company holding a commercial broadcasting licence equal to or exceeding twenty five percent of the issued share capital."

2.1.3. The NAB wishes to bring to ICASA's attention that there are three problems with section 48A(1), namely:

2.1.3.1. that it is contradictory when read together with section 48(1)(b);

2.1.3.2. it refers to "securities", the definition of which is problematic as is set out more fully in 2.4.1.5; and

- 2.1.3.3. as there is no sub-paragraph (b) being proposed, we suggest that the number (a) be deleted.

Consequently, the NAB submits that the proposed section 48A(1) needs to read as follows:

“Two or more foreign persons shall not, whether directly or indirectly, have issued share capital in a South African unlisted or private company holding a commercial broadcasting licence equal to or exceeding thirty five percent of the issued share capital.”

- 2.1.4. Similarly, the NAB suggests that proposed section 48A(2) be amended to read as follows:

“A foreign person shall not, whether 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”.

- 2.1.5. While the NAB supports the inclusion of proposed sections 48(4)(a) and (b) which provide for exemptions on "good cause" shown, The NAB respectfully submits that the section should further give guidance to the industry and to ICASA by setting out the factors that ICASA will take into account when deciding on an application for exemption. The NAB's submission is informed by the fact that despite sections 49(6) and 50(3) of the IBA Act being "good cause" shown exemption provisions, ICASA has never exercised its discretion to grant such exemptions. Consequently, the NAB is of the view that the grounds should be set out in proposed section 48(4)(a) and should include:

- 2.1.5.1. the promotion and facilitation of Black Economic Empowerment;

- 2.1.5.2. the promotion of foreign direct investment and job creation;

2.1.5.3. undertakings by the foreign shareholder to sell shares back to South Africans within a specified period; and

2.1.5.4. undertakings to transfer expertise to South Africans.

2.2. **Section 49: Limitations on control of commercial broadcasting services**

The NAB welcomes ICASA's proposals on the new limitations on control of commercial broadcasting services. However, there are a number of issues that the NAB wishes to bring to ICASA's attention in respect of the proposed amendments to section 49 of the IBA Act. In this regard:

2.2.1. In respect of the proposed section 49(2)(a), the NAB respectfully suggests that the wording of this section is confusing. The NAB suggests that it be amended to read as follows:

“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 limit; and/or”.

2.2.2. In respect of the proposed section 49(2)(b), the NAB respectfully submits that where a licensee exceeds the limit only as a result of the revocation or suspension of one or more licences, then such a licensee should automatically be exempt from section 49(1) limitations without the need to apply to ICASA for such an exemption as this situation will have been entirely out of such licensee's control.

2.2.3. In respect of the proposed section 49(3), the NAB respectfully submits that the following needs clarification:

- 2.2.3.1. whether the reference to "licence areas" is a reference to the licence areas as provided for in the licences or to the coverage areas that result from the technical specifications as set out in Annexure B to the licences. In this regard, the NAB notes that should the test relate to licensed coverage areas, this could conceivably result in a situation where a person is barred from controlling stations whose *de facto* coverage areas do not in fact overlap substantially;
- 2.2.3.2. how "substantial-overlap" is determined. For instance, where reference is to two radio stations one with a larger licence area than the other, in determining whether or not the two substantially overlap, is the determination made from the perspective of the station with the larger licence area or the one with the smaller licence area? The NAB respectfully submits that the determination of whether or not there is a substantial overlap between radio stations should be made from the perspective of the radio station with the smaller licence area and that a substantial overlap is an overlap of more than 50% (fifty percent) of the licence area and of the smaller licence area.
- 2.2.4. Further, the NAB respectfully submits that section 49(6) of the IBA Act ought to be amended to set out the grounds upon which the exemption may be granted by ICASA. This is in order to promote certainty for the industry and for ICASA. The NAB supports the following examples of good cause in this context:
 - 2.2.4.1. to promote and facilitate Black Economic Empowerment;
 - 2.2.4.2. to ensure the survival of commercial broadcasters, particularly of the so-called "Greenfields" licences; and

2.2.4.3. that differences in formats should be considered in respect of granting exemptions, particularly in respect of the restrictions on overlapping coverage areas.

2.3. **Section 50: Limitations on cross-media control of commercial broadcasting services**

2.3.1. While the NAB supports the ethos behind the proposed amendments to section 50 of the IBA Act, it would like to propose far simpler wording that it respectfully believes would lead to greater clarity for the communications industry. In this regard:

2.3.1.1. The NAB suggests that section 50(2)(b) ought to read as follows:
"No person who is in a position to control a newspaper may be in a position to control a commercial sound or television broadcasting licence where the newspaper has an average weekly ABC circulation of 25% of the total average weekly ABC circulation in that broadcast licence area".

2.3.1.2. Should the above wording be adopted by ICASA, this would obviate the need for definitions of overlapping coverage areas and therefore the following existing and/or proposed subsections of section 50 could be deleted: s50(2)(bA); s50(2)(bB); s50(2)(bC) (proposed) and s50(2)(c) and s50(2)(d) (existing).

2.3.1.3. Although there was a lack of consensus among the members on the issue, it was suggested that ICASA ought to clarify whether or not the term "newspaper" includes community newspapers and that the term "newspaper" be defined in the IBA Act.

2.3.2. Further, the NAB respectfully submits that the section should provide for exemptions on "good cause" shown, and that the section should further give

guidance to the industry and to ICASA by setting out the factors that ICASA will take into account when deciding on an application for exemption. The NAB's submission is informed by the fact that despite sections 49(6) and 50(3) of the IBA Act being "good cause" shown exemption provisions, ICASA has never exercised its discretion to grant such exemptions. Consequently, the NAB is of the view that the grounds should be set out as follows:

2.3.2.1. to promote and facilitate Black Economic Empowerment; and

2.3.2.2. to ensure the survival of failing newspaper and/or broadcasting licensees. This is important to promote the overall reason for such restrictions, namely ensuring access to a diversity of views. Access to various views albeit from a similar ownership source, the NAB respectfully submits, is better than not having access to any views at all.

2.4. Paragraphs 3 and 3(a) of Schedule 2 of the IBA Act

2.4.1. The NAB respectfully submits that the proposed paragraph 3 of Schedule 2 is problematic for the following reasons:

2.4.1.1. the reference to "being in a position to exercise control" is not necessary and should be deleted;

2.4.1.2. the first line of the paragraph creates a rebuttable presumption to that extent that it states "in the absence of proof to the contrary" whereas the last sentence creates an irrebuttable presumption as it states, "irrespective of whether such holding or holdings confers *de facto* control". The paragraph therefore contradicts itself;

- 2.4.1.3. the section refers to equity shareholding exceeding twenty five percent but does not clarify what the twenty five percent refers to. It is not clear whether or not the twenty five percent refers to the total equity of the company or the company's nett assets;
- 2.4.1.4. the section also refers to securities exceeding twenty five percent of a company's nett assets without saying how the nett assets figure is calculated;
- 2.4.1.5. the definition of security contained in the proposed paragraph 3(a) to Schedule 2 to the IBA Act creates confusion as opposed to creating certainty for the industry. In this respect, it is not clear:
- (a) what stock refers to;
 - (b) whether or not debentures constitute a share in the capital of the company;
 - (c) what rights or interests in a company mean. For example, would a bank that in the course of its normal business lends money to a company have an interest in the company? Would such a creditor be covered by the provision?; and
 - (d) how one would determine the monetary amount of all the securities. There appears to be extensive duplication;

Consequently the NAB suggests that paragraph 3(a) be deleted in its entirety.

- 2.4.2. The NAB respectfully submits that paragraph 3 of Schedule 2 be amended and worded in a manner that creates certainty for the industry. Consequently, the NAB respectfully proposes that paragraph 3 of Schedule 2 should provide as follows:

A person shall be regarded as being in control of a company if he or she owns, whether 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.

- 2.4.3. The NAB respectfully submits that the wording that it proposes will create certainty in the broadcasting industry for the following reasons:

- 2.4.3.1. in terms of the NAB's proposed wording, paragraph 3 of schedule 2 constitutes an irrebuttable presumption of control which would create certainty in the industry; and
- 2.4.3.2. "issued share capital" is a term that is clearly understood and it is also a term that is used in the Companies Act, 1973.

3. INCREASING COVERAGE AREAS OF THE GREENFIELDS LICENCES

- 3.1. This is dealt with at paragraph 11 of the Position paper. The NAB respectfully submits that the paragraph is problematic for the following reasons, namely:

- 3.1.1. it is not clear which Greenfields licences are being referred to. The NAB respectfully submits that ICASA clarify that only the original regional Greenfields licences granted in 1997 may take advantage of this and not the secondary town licences of the next round of Greenfields licences in the primary markets;
- 3.1.2. it provides that "Greenfields stations may apply for similar or the same coverage areas as the privatised six former SABC stations". It is not clear whether this means that a Greenfield station whose licence area is Johannesburg can

increase its coverage area by applying for the same licence area as one of the former privatised SABC stations which has a coverage area in Cape Town or whether a Greenfield station can make an application in respect of only a former SABC radio station with which its coverage overlaps; and

3.1.3. it states that ICASA has "decided that Greenfields stations who have indicated their wish to increase their coverage" should be afforded the opportunity to apply for the coverage increase. The question that arises is, does it mean that only those Greenfields that have "indicated" their wish to increase their coverage prior to the Position Paper's publication can apply? Should that be the case, another question arises as to what is meant by "indicated", ought they have applied through section 52 of the IBA Act or orally made their intention to increase their coverage known to ICASA?

3.2. The NAB respectfully submits that paragraph 11 is ambiguous and needs to be clarified.

4. **THE DEFINITION OF HISTORICALLY DISADVANTAGED GROUPS**

4.1. The NAB submits that the concepts of "empowerment" and "historically disadvantaged groups" are particularly important and the NAB submits that it is important that the concepts be accurately defined. Consequently, the NAB respectfully submits that the inclusion of discrimination on the basis of "sexual orientation" or "religion" in the definition of "historically disadvantaged groups" make the concept too broad as, arguably, White Jewish men, for example, would fall within the definition of historically disadvantaged groups.

4.2. The NAB respectfully submits that the definition of historically "disadvantaged groups" be amended to provide that:

""historically disadvantaged groups" refer to blacks, women and people with disabilities, and that blacks should be defined to include : "Africans, Indians and Coloureds."

- 4.3. The NAB respectfully submits that this issue will require on going evaluation in line with developments such as the ICT Charter and the Broad-Based Black Economic Empowerment Act. The NAB cautions ICASA against having definitions that are out of step with those used in the rest of the economy.

5. **CONCLUSION**

- 5.1. The NAB respectfully submits that it is imperative that the ownership amendments referred to in Part D of the Position Paper be enacted before any new invitations to apply for commercial broadcasting licences are issued, in order to ensure fairness in the broadcasting industry by allowing existing players to be able to compete for such licences.
- 5.2. The NAB thanks ICASA for this opportunity to make written submissions on the Position Paper and looks forward to the outcome of this process and to making further contributions in other ICASA related processes.