



**NAB WRITTEN SUBMISSION ON ICASA'S DISCUSSION DOCUMENT:
OWNERSHIP BY HISTORICALLY DISADVANTAGED GROUPS AND THE
APPLICATION OF THE ICT SECTOR CODE IN THE ICT SECTOR**

30 JUNE 2017

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1. Introduction

1.1. The National Association of Broadcasters (the NAB) is a leading representative of South Africa's broadcasting industry, established in 1993. The NAB aims to further the interests of the broadcasting industry in South Africa, by contributing to its development. The NAB members include:

- 1.1.1. the three television services and 19 radio services of the SABC;
- 1.1.2. licensed commercial radio broadcasters (including media groups and independents: Primedia, Kagiso Media, Tsiya Group, AME, MSG Afrika, Classic FM, Kaya FM, YFM, Smile FM and Vuma FM);
- 1.1.3. licensed commercial television broadcasters (e.tv, Multichoice, M-Net, StarSat-ODM);
- 1.1.4. a host of community radio broadcasters and community television broadcaster, Faith Terrestrial;
- 1.1.5. both the licensed broadcast signal distributor and the selective and preferential common carrier broadcast signal distributors, Sentech and Orbicom;
- 1.1.6. a range of associate members, including training institutions.

2. Background

2.1. On 31 March 2017, the Independent Communications Authority of South Africa (ICASA) published in government gazette number 40759, a Discussion Document on its inquiry into Equity Ownership by Historically Disadvantaged Groups and Application of the ICT Sector Code in the ICT Sector (the Discussion Document). The NAB welcomes the opportunity to make its written submission to the Discussion Document. The NAB supports discussions on this subject matter, as the passing of the B-BBEE ICT Sector Code has introduced a policy shift in relation to empowerment in the ICT sector, and a need for policy alignment. Prior to the publication on the B-BBEE ICT Sector Code, empowerment issues in the ICT sector, including broadcasting, were regulated in terms of the Independent Communications Authority of South Africa Act (ICASA Act), the Electronic Communications Act (the ECA) as the various ICASA Regulations.

2.2. It is worth pointing out that, the NAB participated in the process of nominating representatives to serve on the B-BBEE ICT Sector Council led by the Minister of Telecommunications and Postal Services, in conjunction with the Minister of Trade and Industry, and has representatives serving on the B-BBEE ICT Sector Council.

The NAB further participated in the public consultation process on the B-BBEE ICT Sector Codes in 2016. We further engaged the Minister of Communications regarding the implications of the changes brought about by the B-BBEE legislation on the broadcasting sector. The NAB's submission will therefore address policy and regulatory issues emanating from the Discussion Document and our submissions are outlined below.

3. Legislative context

3.1. B-BBEE Act 2003 as amended

3.1.1. The B-BBEE Act introduces a comprehensive, and specialist legislative landscape on the promotion of B-BBEE. In terms of section 3(2) of the B-BBEE Act, the B-BBEE Act is the primary legislation for broad-based economic empowerment issues, and takes precedence over any Act that conflicts with its provisions. To this end the section provides *"in the event of any conflict between this Act and any other law in force immediately prior to the date of commencement of the Broad-Based Black Economic Empowerment Amendment Act, 2013, this Act prevails if the conflict specifically relates to a matter dealt with in this Act"*.

3.1.2. The B-BBEE Act defines "black people" as a generic term which means *Africans, Coloureds and Indians-*

- (a) *who are citizens of the Republic of South Africa by birth or descent; or*
- (b) *who became citizens of the Republic of South Africa by naturalisation-*
 - (i) *before 27 April 1994; or*
 - (ii) *on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date.*

3.1.3. The B-BBEE Act does not use the terms Historically Disadvantaged Groups (HDG) and does not define the term.

3.2. Electronic Communications Act 2005 as amended

3.2.1. The Department of Communications (the DoC) in 2013 introduced amendments to the ECA. The objects of the Bill were *"to align the Act with broad-based black economic empowerment legislation."*¹ By virtue of the amendments to the ECA, the Authority's mandate has shifted from the empowerment of persons from HDGs primarily through equity ownership to B-

¹ Objects of the Electronic Communications Bill 17-2013.

BBEE in terms of the B-BBEE Act. Notable changes introduced by amendments to the ECA include among others:

- 3.2.1.1. the incorporation of a definition of “broad-based black economic empowerment” in section 1²;
 - 3.2.1.2. the amendment of the definition of ICT Charter to delete “Black Economic Empowerment Charter for the ICT sector in section 1”;
 - 3.2.1.3. The deletion of historically disadvantaged persons in the objects of the ECA in section 2(h)³;
 - 3.2.1.4. The deletion of “empowerment of previously disadvantaged persons” in section 5(9)(b) ⁴.
- 3.3. The Authority may now make regulations to set a limit on, or restrict, the ownership or control of an individual licence in order to promote the ownership and control of electronic communications services by HDGs and to promote B-BBEE (as defined in the B-BBEE Act).⁵
- 3.4. In granting a licence under the ECA, the Authority must now promote B-BBEE in accordance with the requirements of the ICT Charter.⁶
- 3.5. Despite these notable amendments, there remains some sections that have not been aligned accordingly, which in the view of the NAB may have been an oversight by the drafters of legislation.
- 3.5.1. Section 9(2) (b) of the ECA, still makes reference to HDGs, a term that the B-BBEE Act has departed from. It provides as follows:

“(b) include the percentage of equity ownership to be held by persons from historically disadvantaged groups (“HDGs”), which must not be

² ‘**broad-based black economic empowerment**’ has the meaning assigned to it in the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);

³ promote **[the]** broad-based black economic empowerment **[of historically disadvantaged persons, including Black people]**, with particular attention to the needs of women, opportunities for youth and challenges for **[people]** persons with disabilities;”.

⁴ promote **[the empowerment of historically disadvantaged persons]** broad-based black economic empowerment including the empowerment of women and the youth and **[people]** persons with disabilities, in accordance with the requirements of the ICT charter.”.

⁵ Section 13(3)(a) of the ECA as amended with effect from 21 May 2014

⁶ Section 5(9)(b) of the ECA as amended with effect from 21 May 2014

less than 30% or such other conditions or higher percentage as may be prescribed by ICASA.”

3.5.2. The ECA does not define HDGs and does not prescribe an obligation on the Authority to define the term by way of regulations.

3.6. ICASA Act 2000 as amended

Section 4(3)(k) of the ICASA Act empowers the Authority to make regulations on empowerment requirements in line with the B-BBEE legislation. It is notable that the scope of the B-BBEE Act is on “black people” and not on HDGs. The NAB’s interpretation of this section is therefore that the legislature envisaged that the Authority will prescribe empowerment regulations in line with the prescripts of the B-BBEE Act⁷. Therefore, any regulations⁸ passed that are aligned to HDGs will need to be repealed/amended in order for them to be aligned with the B-BBEE Act.

3.7. B-BBEE ICT Sector Code 2016

3.7.1. The B-BBEE ICT Sector code was gazetted on 7 November 2016, in government gazette number 40407. The B-BBEE ICT Code, as the B-BBEE Act applies to black people. The Codes are not binding on the sector, but can be applied voluntarily.

3.7.2. According to the Code, in interpreting the provisions of the code, any reasonable interpretation consistent with the objects of the B-BBEE Act must take precedence⁹.

3.7.3. In light of the amendments to the ECA and the extensive B-BBEE legislative framework, the NAB does not believe the Authority should impose separate and additional empowerment obligations on licensees as this could cause confusion and potentially create conflicting requirements in licensing and other regulatory processes.

3.7.4. This position informs our response to two of the critical questions raised by the Authority in the Discussion Document:

⁷ In terms of black people and not HDGs.

⁸ Regulations on Standard Terms and Conditions and Regulations on Processes and Procedures.

⁹ Clause 2.2 of the B-BBEE ICT Sector Code.

3.8. Should the requirement for 30% ownership by Historically Disadvantaged Groups be imposed on all licensees and should this level be increased?

3.8.1. For the reasons stated above, the NAB does not support the imposition of increased or extended HDG ownership obligations by the Authority.

3.8.2. There are already extensive obligations in B-BBEE Legislation. Compliance with the ICT Sector Code sets an overall compliance target of economic interests and voting rights by black people at 30%.

3.8.3. The Authority should therefore rather consider requiring compliance with the B-BBEE Legislation. For instance, the Authority could require all existing and new applicants to comply with the ICT Sector Code as an alternative to the minimum 30% HDG ownership. The ICT Sector code is much more comprehensive and deals not only with ownership but a whole range of elements that aims to achieve transformation holistically. The 30% HDG ownership criteria appears to be too narrowly focused on ownership and control.

3.9. *How should the Authority apply and monitor compliance by the licensees with the ICT Sector Codes*

The NAB believes this issue is easily addressed. The Authority can require licensees to submit copies of their B-BBEE certificates on an annual basis.

4. Recommendations and conclusion

4.1. The NAB welcomes the opportunity to make its written submissions.

4.2. The B-BBEE ICT Sector Council has been conducting national roadshows to educate stakeholders on the B-BBEE ICT Sector Code, and address compliance issues from stakeholders. The Authority is also encouraged to engage the B-BBEE Sector Council in order to find common ground, and possibly enter into Memoranda of Understanding (MOU) that will address issues of overlap;

4.3. In terms of section 4(2)(o) of the ICASA Act, the Authority is empowered to make proposals for legislative amendments to the Policy Maker. The NAB therefore encourages the Authority to consult with the DTPS, the DTI and the DoC for

purposes of legislative alignment and make proposals for the amendment of the ECA.