

NATIONAL SOCCER LEAGUE SUBMISSIONS

on

ICASA'S DRAFT FINDINGS DOCUMENT ON THE INQUIRY INTO SUBSCRIPTION

TELEVISION BROADCASTING SERVICES, 2019

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INTRODUCTION

- 1 On 12 April 2019, the Independent Communications Authority of South Africa (**ICASA**) published its Draft Findings Document (the **Draft Findings**) in relation to the Inquiry into Subscription Television Broadcasting Services (the **Inquiry**). ICASA has invited comment on the Draft Findings from interested parties, the deadline for which was extended to 4 October 2019.

- 2 The National Soccer League (**NSL**) has made various submissions to ICASA during the course of the Inquiry to date, including both written¹ and oral² submissions in response to the Discussion Document that preceded the publication of these Draft Findings. In the light of these previous submissions and considering the conclusions and recommendations set out in the Draft Findings, the NSL welcomes the opportunity to once again make submissions to ICASA.

- 3 As ICASA is aware, the NSL, which was established in 1985, is a Special Member of the South African Football Association (**SAFA**). Since 1996, the NSL, a private organisation trading as the Premier Soccer League (**PSL**), is the only body in charge of professional soccer in this country. As such, it is the owner of all broadcasting rights to the PSL matches and is an interested party for purposes of the Draft Findings. What follows is the PSL's response to ICASA's conclusions and recommendations as set out in the Draft Findings.

¹ Dated 4 December 2017 and 31 May 2018.

² On 11 May 2018.

4 The Draft Findings reflect to a large degree the thinking that was set out in ICASA's Discussion Document, particularly insofar as the proposed remedies are concerned. The PSL therefore considers it necessary to reiterate aspects of its previous submissions that emphasise the inappropriate nature of these remedies and the severe adverse impact that they would have on the PSL – which evidence appears to have been largely ignored by ICASA. While this document does not respond to each and every statement made or conclusion reached in the Draft Findings in relation to the PSL, this should not be taken to mean that the PSL agrees with or accepts every such statement or conclusion. The PSL stands by the content of its previous submissions to ICASA and, while it may become necessary to address each and every such statement made or conclusion reached by ICASA in due course, the purpose of this document is to set out the PSL's key concerns and comments arising from the Draft Findings.

5 If the remedies proposed in the Draft Findings are implemented, there will be dire consequences for the PSL and the development of soccer in the country:

5.1 Since the PSL is a private organisation, it receives no public funding. The PSL depends heavily on revenue from the sale of broadcasting rights and the sponsorships linked to that broadcasting in order to fund its activities.

5.2 If the proposed remedies are implemented, the PSL's principal revenue stream will come under threat. This will have knock-on effects on employment in the industry. It will make it more difficult to attract and keep top players in the country. And it will severely undermine the development of soccer in South Africa.

- 6 The PSL therefore makes these submissions in order to highlight to ICASA the policy and legal reasons why the remedies proposed in the Draft Findings are misguided and should not be implemented.
- 7 These submissions are structured into three main parts.
- 7.1 In the first part, we set out the primary policy rationale for ICASA not to interfere with the sale of broadcasting rights by the PSL in the manner proposed.
- 7.2 In the second part, we consider how the current process by which these rights are sold is in fact competitive and that there is accordingly no justifiable basis for intervention by ICASA.
- 7.3 In the last section, we deal with the PSL's concerns in relation to certain specific findings by ICASA and the proposed remedies insofar as they relate to the PSL, including in relation to ICASA's jurisdiction and the impact of these proposed remedies on the manner in which the PSL is able to utilise its content.
- 8 In summary, the PSL is concerned that ICASA has not conducted a proper assessment of the likely effect of the remedies that are proposed in the Draft Findings. The PSL has previously made submissions (and does again in this document) regarding the extent to which the proposed remedies will likely cause it harm, with significant knock-on effects for a wide range of stakeholders. ICASA has not taken these into account, nor has it demonstrated any benefits likely to arise from the proposed remedies which might offset this harm.

9 Furthermore, ICASA makes findings regarding, among other things, competition for the PSL's rights and their importance for competition among broadcasters that are not based on any evidence and in some cases are clearly contradictory. ICASA has not provided any basis for its intervention insofar as the PSL's content is concerned. Indeed, the proposed remedies – insofar as they affect the PSL – are beyond ICASA's jurisdiction and, having regard to the effect that the proposed remedies would have on the PSL, would also amount to an unlawful deprivation of the PSL's property.

PART I: THE POLICY RATIONALE FOR NOT INTERFERING WITH THE SALE OF BROADCASTING RIGHTS FOR PSL MATCHES

10 The PSL's primary concern with the proposed remedies set out in the Draft Findings, taken together, relates to the substantial adverse impact that these are likely to have on the PSL and its stakeholders, and in particular the consumers of its content.³

11 As has been set out in detail in the PSL's previous submissions to the Inquiry, the PSL is critical to the survival and continued development of soccer in South Africa. It also plays an essential role in supporting various stakeholders, including:

11.1 its 32 member clubs;

11.2 players (and the families that they support);

11.3 referees;

³ The likely impact of the specific proposed remedies insofar as they relate to the PSL are considered in Part III below.

- 11.4 South African soccer more broadly, including SAFA and the national teams;
- 11.5 fans;
- 11.6 other small vendors and entrepreneurs, whose businesses indirectly rely on the game of soccer in South Africa.
- 12 The roles and responsibilities of the PSL in relation to these stakeholders have been set out in some detail in its previous submissions.⁴
- 13 In the context of this Inquiry, where the focus has been on the nature of competition for the rights to broadcast content such as that offered by the PSL, there must be a particular consideration for the impact that the proposed regulatory intervention is likely to have on the PSL and the end-consumer of this content. Regulatory interventions directed at promoting competition are of no value if they ultimately undermine the value of the product on offer to the extent that the quality and availability of this product to the viewer is substantially worse than in the absence of the intervention. Not only would consumers be worse off, but the rights would be rendered valueless and it would not be attractive or sustainable for broadcasters to in fact broadcast this content. This is the risk associated with the remedies proposed by the Draft Findings.
- 14 This risk must be assessed through the lens of the financial impact that the proposed remedies will have on the PSL, as well as on investment in the sport of soccer, the value of the PSL to consumers, and broadcasters more generally. The PSL has previously emphasised the reliance that it places (financially) on the sale of broadcasting rights and

⁴ Dated 4 December 2017 (written) and 11 May 2018 (oral).

related sponsorships, which is crucial to the viability of its operations and the content that it is able to produce. Some of these points bear repeating here:

- 14.1 In the 2018 financial year, 64 percent of the PSL's revenue was generated from broadcast rights; 35 percent from sponsorships with the balance of 1 percent made up from supplier contributions and competition gate takings.
- 14.2 Sponsorship revenue is essentially driven by the PSL's ability to achieve a level of television exposure that will be attractive to its sponsors. However, an increase in exposure does not necessarily generate additional sponsorship revenue that can offset a reduction in revenue derived from the sale of broadcast rights on an exclusive basis. The value that sponsors attach to a product does not depend simply on the number of viewers that see the relevant content, but also on the specific profile of those views and the quality of the content they consume. Furthermore, value to sponsors will be reduced if certain rights packages: (a) are not acquired; or (b) are sold to broadcasters that do not competently broadcast the content. Any interference with the PSL's ability to balance its need for exposure, on the one hand, with its need for revenue, on the other, will threaten professional soccer in South Africa. The need for this balancing act by the PSL is critical for its commercial and financial viability and hence, in much the same way as other sports federations, the PSL is best-placed to make the determination of how to sell its rights.
- 14.3 The PSL relies on the revenue that it receives from the sale of broadcasting rights to provide financial support to its clubs. Without this support from the PSL, most clubs would not be able to participate in professional soccer at all. They would not be able to meet the financial burdens of running a professional club which include

the onerous and costly governance and compliance of the NSL and mandatory legal requirements. This includes the Safety at Sport and Recreational Events Act, 2010 (Act No 2 of 2010) (**SASREA**) which amongst others, provide for measures to safeguard the physical well-being and safety of persons and property at sports events held at stadiums as well as to provide for accountability of event role-players. The costs to clubs to implement the regulations and requirements of SASREA and successfully host a match amount to an estimated R300 000 to R400 000 per home match, depending on the categorisation of the event. This excludes other costs that clubs would incur during the course of the season, such as the players' salaries (which is the largest expense for any club). With clubs having 16 home league matches and additional cup competition home matches, hosting these matches is costly to clubs. Any reduction in broadcast rights revenue would threaten the financial sustainability and viability of clubs and the PSL, as well as the livelihood of players, coaches, technical officials, referees and administrative staff.

- 15 The PSL has until now been able to determine the manner in which it structures and offers these rights for sale to broadcasters. The tender process by which the PSL offers its rights for sale has previously been explained to the Inquiry, but is set out again in the section that follows.

- 16 This competitive tender process has allowed the PSL to realise a fair market value for its rights, which has in turn allowed it to: (i) fulfil its obligations towards and increase its support for the various stakeholders identified above; and (ii) increase the quality of the content that it offers as well as the breadth of coverage by broadcasters.

- 16.1 The increased broadcasting revenue achieved from the competitive tender process has led to immeasurable improvements and benefits for spectators, soccer players, clubs and the game as a whole. It has also seen significant investment in soccer such as youth academies and the introduction of new competitions including, importantly those aimed at youth development. It is these competitions and structures that ensure the pipeline of talent for soccer clubs and national teams.
- 16.2 The quality of coverage also improved, in particular in relation to:
- 16.2.1 broadcast graphics;
 - 16.2.2 number of cameras per match;
 - 16.2.3 better editing and presentation (for example, viewing angles and replays);
 - 16.2.4 better analysis before and during games; and
 - 16.2.5 new content.
- 16.3 In terms of breadth of coverage, SuperSport has in the recent past sub-licensed 140 matches per season to the SABC, which remain available for the SABC to acquire. These include 90 ABSA Premiership league matches and 29 cup tournament matches. Included in these fixtures are 45 "shared matches", which the PSL has identified as major fixtures and which must be shown by both SuperSport and the SABC. These matches include all fixtures between the PSL's most popular clubs: Kaizer Chiefs, Mamelodi Sundowns and Orlando Pirates. In addition, 15 National First Division league matches and 6 National First Division play-off matches are also made available to the SABC. This is considerably more than the amount of PSL

matches previously broadcast by the SABC prior to the PSL adopting a competitive tender process in 2007.

- 17 The particular manner in which the proposed remedies will distort the rights-sale process is explored in more detail in Part III below. What is clear, however, is that these proposed remedies, if implemented, will have a substantial adverse impact on the revenue that the PSL is able to derive from the sale of its broadcasting rights, as well as the sponsorship deals that it is able to secure, and therefore jeopardise the outcomes that the PSL has been able to achieve over the past 12 years.
- 18 This result will be clearly contrary to the objectives that ICASA is mandated to pursue, including to promote effective competition, investment and participation in the broadcasting sector in the public interest.⁵ The requirements set by the PSL for the broadcasting of its

⁵ The object of the Independent Communications Authority of South Africa Act No. 13 of 2000 (**ICASA Act**) includes the establishment of ICASA to regulate broadcasting in the public interest (section 2(a)) and to achieve the objects contemplated in the underlying statutes (section 2(c)). The underlying statutes include the Broadcasting Act No. 4 of 1999 (**Broadcasting Act**) and the Electronic Communications Act No. 36 of 2005 (**ECA**).

The primary object of the ECA is to provide for the regulation of electronic communications in South Africa in the public interest and for that purpose to, among other things:

- promote competition within the ICT sector (section 2(f));
- promote an environment of open, fair and non-discriminatory access to broadcasting services, electronic communication networks and to electronic communications services (section 2(g)); and
- promote the development of public, commercial and community broadcasting services which are responsive to the needs of the public (section 2(r)).

The object of the Broadcasting Act is to establish and develop a broadcasting policy in South Africa in the public interest and for that purpose to, among other things:

- encourage investment in the broadcasting sector; and
- ensure fair competition in the broadcasting sector.

content, while allowing broadcasters exclusivity for the contract period, encourage investment. The proposed remedies undermine this.

- 19 These impacts must also be assessed against the background of an existing process for the sale of the PSL's broadcasting rights that is already competitive and is not exclusionary. In fact, the PSL encourages all broadcasters to participate in its tender processes and anyone who has a genuine interest in the PSL rights is free to participate in the tender processes. As is considered in more detail in the section that follows, ICASA has not provided any compelling evidence and reasons for intervening in the existing process.

PART II – THE COMPETITIVENESS OF THE CURRENT PROCESS FOR THE SALE OF BROADCASTING RIGHTS BY THE PSL

- 20 The stated purpose of the Inquiry is to remedy market failure within the subscription broadcasting sector, in order to prevent anti-competitive outcomes and promote effective competition.⁶ ICASA has proposed various remedies in relation to the PSL, the effects of

⁶ Section 67(4) of the ECA provides that ICASA must, following an inquiry, prescribe regulations defining the relevant markets and market segments and impose appropriate and sufficient pro-competitive licence conditions on licensees *where there is ineffective competition*, and if any licensee has significant market power in such markets or market segments. The regulations must, among other things:

- determine whether there is effective competition in those relevant markets and market segments (section 67(4)(b)); and
- impose appropriate pro-competitive licence conditions on those licensees having significant market power to remedy the market failure (section 67(4)(d)).

ICASA has initiated the Inquiry in terms of section 4B of the ICASA Act, read with section 67(4) of the ECA, and with reference to its "*commitment and mandate to ensure that markets are effectively competitive*" (our emphasis). (Notice of Intention to Conduct an Inquiry into Subscription Television Broadcasting Services, 11 July 2016)

which are considered in more detail in the next part. However, as a prerequisite to any such remedies being proposed, ICASA must show, using objective evidence, that there is ineffective competition, which arises as a result of lack of access to the PSL broadcasting rights and which requires remedies aimed at addressing the identified market failure. This has not been done. It has not been demonstrated that access to PSL content is necessary for effective competition between broadcasters and, in any event, the process by which PSL rights are currently sold *is* in fact competitive.

21 Although this has been set out in previous submissions to ICASA, it is helpful to reiterate key features of the manner in which PSL rights are offered for sale to broadcasters.

21.1 Prior to 2007, the PSL was obliged to sell its content to the SABC – there was no competitive bidding process in place; the SABC had exclusive rights to all of the PSL’s content. Although the SABC sub-licensed some of these rights, its exclusive entitlement to the content from the PSL meant that the PSL had to accept a sub-optimal price for its content that did not reflect the commercial value of these rights.

21.2 In an attempt to remedy this situation, the PSL developed a tender process through which it invited various parties, including broadcasters, to bid for the rights. The SABC failed to bid and the rights were ultimately awarded to SuperSport.

21.3 The result of this tender was that more matches were shown on free-to-air television and pay television per season, at a higher quality, than ever before. Increased broadcasting led to a significant increase in sponsorships because of greater visibility for the sponsors. In addition to the commercial benefits, the increased broadcasting revenues led to immeasurable improvements and benefits for

spectators, soccer players, soccer clubs and the game as a whole as illustrated earlier. The quality of coverage also improved, as has been described above.

21.4 As this competitive tender process produced significantly better outcomes, the process was conducted again 5 years later (in 2012).

22 In 2017, the PSL temporarily extended for a period of two years the existing contract that had been awarded to SuperSport in 2012. This action was necessitated by certain financial difficulties that the PSL and its clubs were experiencing at the time, which required an immediate cash injection. With the adoption of the Club Licensing and Compliance Manual, in addition to the NSL Handbook by the NSL and its clubs, added financial burdens were placed upon the clubs to comply with its requirements. The clubs subsequently mandated the Executive of the NSL to urgently raise additional funds to ensure a smooth transition towards achieving the standards required relating to the implementation of the Club Licensing and Compliance Manual and the NSL Handbook. This was to ensure the financial viability of the clubs at a time when the clubs were taking financial strain. These financial difficulties could not previously have been foreseen. Having the flexibility to respond commercially to these difficulties, and temporarily adjust its rights sales process, enabled the PSL to ensure its sustainability and the continued viability of the league and its clubs.

23 This exceptional situation did not change the manner in which the PSL sells its rights because, following this single instance which arose midway through the contract at the time, the PSL conducted an open tender process in which it invited bids from all broadcasters. This tender process was conducted in 2017/18 for the rights commencing on the first day of the 2019/2020 season.

24 Since 2007, the PSL has been committed to the principle of offering its content for sale on a competitive basis, structured on terms and for a duration determined by the PSL according to its commercial needs and imperatives, through a process that allows the market to determine a fair value for the rights. Although the PSL is under no legal or regulatory obligation to do this (and would not need to justify its actions should it choose to structure the sales process differently), the PSL has elected to follow such a process as there is clear evidence that this achieves better outcomes for the PSL and its stakeholders (including soccer fans), including in relation to the quality of its content and the extent of its broadcast to viewers.

25 A key feature of the PSL's tender process has been that the PSL does not seek to limit or prescribe which packages of rights broadcasters are able to acquire (whether individually or in combination). Instead, the PSL offers multiple bundles that comprise various different rights, for which broadcasters are free to bid both on a stand-alone basis and in combination with one another. Competitive market forces determine which bundle(s) will achieve the optimal outcome for the PSL.

26 By way of illustration, in the 2007 tender process, bidders were invited to bid for broadcasting rights which were "bundled" into 20 different packages for broadcast on free-to-air television and subscription television respectively, as well as a separate bundle for radio broadcasting. Bidders were invited to bid for the broadcasting rights which were broadly categorized into Packages as follows:

26.1 A Composite Package comprising the rights to broadcast all the matches across all platforms;

- 26.2 Packages comprising a combination of games for live, near live and delayed live broadcast on Free to Air Terrestrial Television;
- 26.3 Packages comprising the right to broadcast a combination of games for live, near live and delayed live broadcast on Subscription/Pay Broadcasting;
- 26.4 Packages comprising the right to broadcast a combination of games for live, near live and delayed live broadcast on Pay Per View (including Cable);
- 26.5 Packages comprising the right to broadcast Magazine Programmes and News Archive Highlights for each of Free to Air Terrestrial Television, Subscription/Pay Broadcasting and Pay Per View (including Cable); and
- 26.6 Packages comprising the right to broadcast Clips for each of Free to Air Terrestrial Television, Subscription/Pay Broadcasting, Pay Per View (including Cable) and Radio.
- 27 The 2012 and 2017 invitations to tender comprised a total of 11 and 12 packages respectively (as opposed to the 20 previously offered) in the same broad categories set out above, save for the exclusion of packages for Pay Per View broadcast and packages for radio broadcast. Bidders were similarly invited to bid for all of the packages, or a combination of any of the packages. Successful bidders for any of the above rights were also entitled to broadcast the content on any platform of their choosing, including subscription/pay broadcasting, free-to-air broadcasting, mobile and over the internet.
- 28 Although SuperSport may have been the successful bidder in the tender processes conducted from 2007 to date, this does not mean that the processes have not been

competitive. As has previously been indicated to ICASA, a number of different parties have been interested in participating in the PSL rights-selling processes:

Tender	Expressions of interest
Rights commencing 2007	E.TV IMG: South Africa SAIL Group PTY Ltd SETANTA SuperSport International Telkom Media SABC MTN Vodacom
Rights commencing 2012	SABC SuperSport International On Digital Media – Top TV
Rights commencing 2019	SABC SuperSport International eMedia Investments & e-TV Telkom StarTimes Media Discover Digital Vodacom AHIMSA Media Mobile TV Sobek IT

29 ICASA itself recognises that there has been competition for the rights to broadcast the PSL since 2007.⁷ However, it criticises the extent to which this has driven up prices and the impact that this has had on potential new entrants. ICASA seems to adopt contradictory

⁷ Draft Findings, para 6.5.60.

positions on this issue: in some instances, ICASA appears to be claiming that there is no competition for rights; in others instances, ICASA accepts that there is competition for the rights. As has been pointed out above, the increase in price was in fact a correction, through competitive market forces, of the previously sub-commercial prices at which the SABC had been able to secure the rights for a prolonged period of time, to a level that more accurately reflects their commercial value – not to mention that this has allowed the PSL to develop its content, contribute towards the improvement of the quality and standard of soccer in South Africa, and also support the numerous stakeholders identified above.

30 Commensurate with the PSL's brand and coverage requirements, there are certain minimum requirements that bidders need to meet in order to be considered for the rights. For example, the 2007, 2012 and 2017 invitations to tender also set out their own technical production and broadcast quality standards and requirements as well as certain requirements related to the promotion and development of PSL brands and those of its sponsors that would have to be met by successful bidders. These criteria are imposed by the PSL as a necessary and legitimate incident of the quality content that it seeks to deliver to the market.

31 ICASA criticises these requirements as establishing an additional barrier to entry that favours the incumbent and makes it "*difficult for new entrants to break into the market, without deep pockets.*"⁸ The PSL sets these requirements legitimately in order to ensure that its product meets minimum quality standards that are in line with best practices internationally, while ensuring best coverage and reach. This is not aimed at restricting

⁸ Draft Findings, para 6.5.61.

competition for broadcasters, and there is no evidence that it has such an effect. Furthermore, it is unclear why the PSL should sponsor entry of broadcasters that are unable to meet these standard requirements at the expense of the PSL's product and content. These requirements are necessary for the PSL to compete effectively with, for example, other international soccer content that is broadcast to viewers. It is inappropriate for ICASA to adopt a position that seeks to regulate technical requirements in a manner that effectively diminishes the quality of the PSL's product. This would mean that viewers are worse off and would also reduce the commercial viability of the product for the PSL and broadcasters alike.

32 In addition to offering a price that is fair and reflects the commercial value of the content, the PSL must be able to rely on the prospective broadcaster's ability to in fact broadcast the content (and to a sufficient globally competitive quality) such that it is appropriately delivered to viewers. This is a key component not only to the PSL delivering on its mandate, but also to securing sponsorship revenue (which is clearly linked to exposure and quality of broadcast). The PSL does not stipulate that the bidder must own the means of production. This is not a requirement of the PSL, who is only interested in the quality of its product.

33 The PSL expects bidders to make offers that reflect the commercial value of its content and cannot be expected to accept sub-economic offers for content that generates immense commercial value for broadcasters. As such, efforts to directly or indirectly undermine the commercial value of the PSL's content by artificially reducing the value of the content and forcing the PSL to sell its rights to parties who do not meet objective and legitimate requirements, are inappropriate and unacceptable as they undermine the

viability of the PSL and prevent the PSL from realising the benefits of its private commercial property.

34 The PSL notes submissions by the Competition Commission that rights holders such as the PSL have a limited number of potential buyers and the conclusions that ICASA seeks to draw from this.⁹ However, competition for, and the purchase of, broadcasting rights is a complex and nuanced process. Conclusions regarding the degree of competition cannot be based solely on a simple count of the potential buyers perceived to be participating in the rights sale process at any given time or the identity of the successful bidder. The increased revenue that the PSL has been able to derive from successful acquirers of its rights over time in fact reflects that there has been strong (and increasing) competition for these rights.

35 In any event, it would not follow from the Competition Commission's observation that the manner in which the PSL offers its product to the market leads to, or is reflective of, ineffective competition. Similarly, it is not an appropriate response for ICASA to attempt to remedy a perceived lack of buyers by forcing the sale of content to parties who cannot (or are not willing) to pay a fair price for the rights, and who do not have the capabilities to deliver the content to viewers or to meet the required technical standards. This will simply erode the value of the PSL's rights, risking the PSL's financial viability and that of its clubs. ICASA has not demonstrated that its proposed remedies will actually deliver the outcomes it expects or, even if they do, that these outcomes would not be outweighed by irreparable harm caused to the PSL, its clubs, players and related stakeholders.

⁹ Draft Findings, para 5.16.4.

PART III: ICASA'S CONCLUSIONS AND THE PROPOSED REMEDIES

36 We set out below the PSL's specific concerns regarding certain conclusions reached by ICASA in the Draft Findings and the proposed remedies that are likely to have an impact on the PSL.

Market definition

37 The PSL is concerned that ICASA's subjective designation of what it considered to be "premium content", which appears to include the PSL's content, subjects the PSL and its rights to unnecessary regulation that will harm the PSL.

38 ICASA, in its Draft Findings, defines "*a wholesale market for the supply and acquisition of premium content for distribution in South Africa.*"¹⁰ However, ICASA notes that it "*agrees that premium content is a fluid concept that is dependent on the circumstances prevailing at a particular point in time in a market and is specific to a geographical area, given the culture and preferences of the population.*"¹¹

39 The position adopted by ICASA suggests that there may be consensus at a particular point in time and within a specific geographic area, but the view of what constitutes "premium content" changes over time. Based on the submissions to the Inquiry and its assessment conducted to date, it is not clear to the PSL that there has in fact been any consensus (at any point in time) regarding the notion of "premium content", regardless of the geographic

¹⁰ Draft Findings, paragraph 5.17.26.

¹¹ Drafting Findings, paragraph 5.17.8

area, culture and preferences of the South African population. There is therefore no evidence that a notion of "premium content" as defined by ICASA can in fact be identified or found to exist at all.

40 Nevertheless, having provided this definition, ICASA then goes on to state that "*for purposes of this enquiry the Authority considers the following to be premium content: ... (b) major live soccer matches including Bafana Bafana, FIFA World Cup, PSL, EPL, UEFA, La Liga, Bundesliga, Ligue 1 and Serie A live soccer.*"¹²

41 It is not clear on what basis ICASA has delineated the particular content that it lists as "premium content", including "PSL". One would expect this to be based on objective criteria and for some empirical basis to be provided to justify a particular sporting event's inclusion (with reference to these criteria). However, the factors influencing this finding by ICASA are opaque and no evidentiary basis for this categorisation is offered. As mentioned above, no consensus emerges from the various submissions received or research conducted by ICASA. The list appears simply to be based on the subjective view of the regulator as to the content that it has pre-determined ought to be regulated, without any demonstration that this content is essential for effective competition among broadcasters.

42 In the recent public hearings conducted by ICASA in relation to the Draft Sports Broadcasting Service Amendment Regulations, 2018, both e.tv and the SABC made it clear that they would make decisions on which content to broadcast based on the commercial value that they are likely to derive from the respective content. If sports content generates less revenue than other non-sports content, they trade-off between the

¹² Ibid.

two and broadcast non-sports content instead. This suggests that broadcasters consider non-sports content to be substitutable for sports content from a commercial perspective, at least for as long as the non-sports content generates greater commercial value for the broadcaster than sports content does. ICASA has not undertaken any real analysis of these issues and as such its positions on market definition, the effectiveness of competition, and the subsequent remedies it proposes stemming from the notion of premium content, are not substantiated.

43 Furthermore, it is not clear what is meant by reference to "PSL". As ICASA is aware, the PSL administers: (i) the premier professional league in the country, which is known as the ABSA Premiership; (ii) the National First Division, which is the second tier of professional soccer; and (iii) Cup Competitions known as the MTN8, the Nedbank Cup and the Telkom Knockout. It has also introduced the National Reserve League (the Diski Challenge) and related Diski Shield.

44 The Draft Findings do not make any distinction between these competitions. It is therefore unclear whether the rights to broadcast all or only certain of these competitions are regarded by ICASA as premium content (and therefore the subject of the proposed remedies discussed below).

Jurisdiction

45 Broadcasting rights to a sports event are typically owned by the entity which organises the event. So, for example, the PSL owns the broadcasting rights to professional soccer in this country.

- 46 ICASA is empowered under the ECA and Broadcasting Act to regulate entities that operate in terms of licences issued under those acts.¹³ However, ICASA has no jurisdiction over the sporting bodies that own the broadcasting rights to sporting events.
- 47 In this instance, the remedies proposed by the Draft Findings have a direct or indirect effect on the manner in which the PSL's broadcasting rights may be structured and sold, and therefore the extent to which it can commercialise these rights.
- 48 In this respect, ICASA appears to be attempting to exercise powers that are beyond its statutory authority and the proposed remedies are *ultra vires*.

No justification for intervention

- 49 ICASA has not established a valid basis on which to justify intervention in relation to the PSL's rights in the context of this Inquiry.

¹³ Under the ECA, ICASA may grant individual licences for broadcasting services (section 5(2)(b)), and may, as part of the terms and conditions for licences, include terms and conditions as contemplated in section 8(2) of the ECA. ICASA may prescribe additional licence terms and conditions that may be applied to a licence subject to the provisions of Chapter 10 of the ECA. (section 8(3)).

Section 67 (Chapter 10) of the ECA deals with competition matters. Section 67(4) provides that ICASA must, following an inquiry, prescribe regulations defining the relevant markets and market segments and impose appropriate and sufficient pro-competitive licence conditions on licensees where there is ineffective competition, and if any licensee has significant market power in such markets or market segments.

Notably, the scope of the ECA (and in particular section 67) does not extend to the regulation by ICASA of the manner in which sports organisers, who own content and are themselves not licensees under the Act, supply this content to broadcasters.

Similarly to the ECA, the scope of the Broadcasting Act does not extend to the regulation of the manner in which sports organisers, who own content and are themselves not licensees under the Act, supply this content to broadcasters.

50 ICASA is conducting this Inquiry in terms of section 67(4) of the ECA.¹⁴ Section 67(4) of the ECA provides that ICASA must, following an inquiry, prescribe regulations defining the relevant markets and market segments and impose appropriate and sufficient pro-competitive licence conditions on licensees *where there is ineffective competition*, and if any licensee has significant market power in such markets or market segments. The regulations must, among other things:

50.1 determine whether there is effective competition in those relevant markets and market segments (section 67(4)(b)); and

50.2 impose appropriate pro-competitive licence conditions on those licensees having significant market power to remedy the market failure (section 67(4)(d)).

51 It is therefore a jurisdictional prerequisite to any proposed remedy that ICASA identify ineffective competition in a properly defined market which requires regulatory intervention in order to address a clearly identified market failure. This has not been done in relation to the PSL's content.

52 As has been explained above, the current process by which the PSL's rights are offered and sold to broadcasters is competitive. Since 2007, the PSL has pursued an open tender process that has invited participation that is as broad and inclusive as possible. Through this, it has been able to realise the fair commercial value of its rights as determined by the market, free from distortion. Furthermore, as outlined in paragraph 22, when commercial exigencies arose that required particular flexibility in rights sales, the PSL was able to

¹⁴ Notice of Intention to Conduct an Inquiry into Subscription Television Broadcasting Services, 11 July 2016.

respond to ensure the sustainability of the PSL and its content to the benefit of all stakeholders. ICASA's proposed remedies would remove the ability to respond flexibly to commercial or market developments and to provide for unforeseen events of this kind.

- 53 The remedies proposed in the Draft Findings (discussed in more detail below insofar as they relate to the PSL) will have the perverse consequence of undermining these competitive market dynamics and will result in a reversion to a situation in which the PSL is unable to realise the fair commercial value of its rights, thereby jeopardising its operations and threatening the viability of the product on offer to broadcasters, and in turn, to consumers. They will reverse the benefits that have been achieved in improving professional soccer since 2007.

Implications of the proposed remedies for the PSL and competition

- 54 We consider below some of the likely implications of the proposed remedies insofar as they relate to the PSL.
- 55 Since many of the remedies are presented at a high level only and the details of their implementation are not apparent from the Draft Findings, the PSL's concerns regarding their likely effect as set out below should not be considered exhaustive. However, this section does set out a number of 'in principle' concerns that the PSL has with the proposed remedies and outlines many of the perverse and presumably unintended consequences that it considers will flow from these.

Reducing contract duration and prohibiting automatic renewals

55.1 ICASA correctly acknowledges that there are legitimate commercial and pro-competitive reasons for entering into what it refers to as "long-term contracts".¹⁵ However, it then considers foreclosure of inputs as a potential theory of harm that could arise from long-term contracts, with reference to statements by the European Commission that contracts longer than 5 years raise concerns "*as a general rule because any efficiencies arising from such a contract do not offset foreclosure effects beyond that duration.*"¹⁶

55.2 ICASA in this context "*finds that competition becomes ineffective when a licensee with significant market power enters into exclusive contracts with a duration of five or more years*" and therefore "*proposes to limit the duration of exclusive contracts entered into by a licensee with significant market power to three years.*"¹⁷

55.3 However, notwithstanding that ICASA pronounces this finding, it does not provide any economic analysis or objective evidence for its conclusion that "competition becomes ineffective" when a licensee with significant market power has exclusive contracts for 5 years (or more), nor does it provide any justification for limiting the duration of exclusive contracts to 3 years.¹⁸ There also does not appear to be any assessment (whether based on objective evidence or otherwise) of the relevant efficiencies that arise by virtue of the PSL offering its rights packages for a duration

¹⁵ Draft Findings, paragraph 8.3.4.

¹⁶ Draft Findings, paragraph 8.3.5.

¹⁷ Draft Findings, paragraph 1.6.1.1.

¹⁸ It is noted that the European Commission's position (cited by ICASA) is that exclusive contracts of more than 5 years raise concerns, not contracts that are of 5 years or more.

of 5 years or any assessment of whether those efficiencies outweigh the alleged anti-competitive effects.

55.4 This is problematic in circumstances where exclusive supply agreements are generally regarded as presumptively pro-competitive, and even the European Commission's guidance (cited by ICASA itself) assumes that contracts of 5 years or less as a general rule do not raise concerns.

55.5 It is inappropriate for ICASA to ignore efficiencies that result in investment, benefit consumers, rights owners and broadcasters and furthermore to propose remedies that would patently undermine these efficiencies. For example, limiting the duration to 3 years (as proposed by ICASA) would increase the costs associated with conducting a new tender process and disincentivise the investment that the PSL considers necessary to maintain the quality and extent of coverage over the contract period. This would have a material adverse impact on the PSL in relation to the revenue that it is able to derive from both its broadcasting rights and related sponsorships, as well as the investments that the PSL requires to maintain and enhance the quality of soccer.

55.6 In relation to automatic renewals, as is apparent from the description of the PSL's rights-sale process above, this is not something that the PSL requires or a practice in which it engages. As indicated, the PSL has only once since 2007 temporarily extended its rights without engaging in an open tender process (in 2017 for a period of 2 years, occasioned by financial difficulties) and this exceptional instance does not amount to a "disguised" automatic renewal as ICASA claims (without any apparent basis for such a claim). As has been mentioned above, the PSL has no obligation that would require it to "disguise" the extension of a contract that it has

awarded. If the PSL had wanted to automatically renew the contract, it would have simply done so for a period of 5 years. In any event, the reasons for this temporary extension have been set out above. As a general approach, the PSL does not grant automatic renewals of its contracts as such a model does not serve its commercial interests. The PSL instead elects to test the market regularly in order to achieve revenues that reflect the fair market value of its product and ensure that appropriate quality standards are met. It is therefore not clear why any prohibition on automatic renewals (as proposed by ICASA) is required in relation to the PSL.

Rights splitting and unbundling

55.7 ICASA proposes that content providers 'split' their rights into multiple packages and then sell these packages to more than one distributor (to avoid a "winner takes all" scenario).¹⁹ It also proposes 'unbundling' in the sense that, for each package of rights, multiple parties be permitted to distribute these across the various platforms.²⁰

55.8 As is apparent, the PSL has since 2007 offered its rights for sale in various packages in terms of which the rights are 'split' (in the sense contemplated by ICASA in its proposed remedy). The PSL therefore already *allows* for more than a single buyer of its rights, provided commercial offers are made, legitimate production requirements are met, and the PSL is not worse off as a result. However, ICASA's proposed remedy appears to contemplate *requiring* that these bundles be sold to more than one distributor. This requirement would go beyond the guidance of the

¹⁹ Draft Findings, paragraph 1.6.1.3.

²⁰ Draft Findings, paragraph 1.6.1.4.

European Commission cited by ICASA (which only *allows* for more than a single buyer).²¹

55.9 In relation to the rights unbundling, it is not clear to the PSL precisely what is contemplated by this or how it would be implemented. It is also not clear to the PSL how the rights splitting and unbundling remedies would interact with one another (in circumstances where ICASA has indicated that the proposed remedies should be implemented together, as a suite of remedies).²² The extent of harm likely to be caused by the proposed remedies is not appreciated by ICASA. The Draft Findings do not acknowledge the downside of ICASA's proposed remedies, nor do they weigh up the perceived benefits against the apparent negative effects of the proposed remedies.

55.10 The PSL has determined that its current model allows it to realise the fair commercial value of its rights by encouraging competition for these rights. ICASA's proposed rights splitting remedy would distort this.

55.10.1 First, it is not clear what would happen should there be only one willing buyer that is able to offer a fair price for the various rights and also meet the PSL's minimum requirements to broadcast its content. In these circumstances, certain rights packages will go unsold, which would severely compromise the PSL's ability to derive revenue from the content that it owns, which revenue it is currently able to generate in the absence of the interventions proposed by ICASA.

²¹ Draft Findings, paragraph 8.3.6.

²² Draft Findings, paragraph 8.3.2.

55.10.2 Second, rights splitting and unbundling would, depending on the form that it takes, substantially undermine the degree to which a broadcaster could secure exclusivity, especially given how broadcasting is evolving and becoming more integrated and converged. The importance of exclusivity for content providers such as the PSL in deriving revenue from these rights (and broadcasters in purchasing the rights), is discussed in more detail below.

55.10.3 Third, the PSL is concerned by the effect that rights splitting and unbundling in the sense contemplated by ICASA may have on the PSL. It may facilitate market allocation among bidders for the PSL's content, as there is a risk that it may incentivise broadcasters to agree or coordinate which rights packages they will each bid for. It may also reduce the number of potential bidders for each package, thus lessening competition even in the absence of any agreement or coordination between broadcasters. This would further undermine the existing competitive process and drive down the revenue that the PSL is able to derive from its content.

The importance of exclusivity

55.11 It is accepted internationally that the ability to sell sports rights on an exclusive basis attracts a substantially higher value. As soon as rights are offered on a non-exclusive basis only, their value to broadcasters immediately drops.

55.12 The importance of exclusivity to broadcasters is widely accepted, including by various competition authorities and regulators internationally. In a report prepared in August 2002, international expert Gerry Boon of Deloitte & Touche Sports

estimated that the value achieved in return for exclusivity could be anywhere between 40% and 100%. The PSL itself estimates that a prohibition on exclusivity would decrease the revenue that it is able to achieve from the sale of its broadcasting rights by approximately 80%.

55.13 The remedies proposed by ICASA in the Draft Findings, taken together, would substantially undermine the PSL's ability to offer rights on an exclusive basis (and for a period that makes the necessary investment in these rights worthwhile).

Evidence regarding likely adverse impact ignored

56 The PSL has in its previous submissions to ICASA emphasised the dire impact that its proposed intervention will have on the PSL and its stakeholders. These submissions appear to have been ignored, as the Draft Findings do not contain any meaningful engagement with the concerns raised.

57 As explained above, the income of South African sports bodies such as the PSL depends to a large extent on the sale of broadcasting rights. In the recent past, the sale of broadcasting rights has become by far the biggest source of revenue for sports bodies of major sports. Closely linked to this is the revenue achieved from sponsorships, which relies heavily upon the quality and extent of broadcasting. These two streams together comprise 99 per cent of the PSL's revenue.

58 The remedies proposed in the Draft Findings will severely undermine the extent to which the PSL is able to realise revenue from the sale of its broadcasting rights and related sponsorships (by up to 80%). This is a significant adverse impact that cannot be ignored.

It will have a material impact on not only those who rely directly on the support provided by the PSL itself (such as clubs and players), but also on the broader communities (including small businesses) who benefit from soccer in South Africa.

59 These effects have been set out in some detail in the PSL's previous submissions, but it is worth emphasising certain of these points here. In particular, the clubs rely substantially on grants from the PSL. Even with these grants, the majority of the clubs are not profitable and many struggle financially. The PSL itself does not receive any government support, hence the reliance on revenue that it is able to generate from its own content. A material reduction in this revenue would risk the viability of the clubs and the league itself, which will also have knock-on effects on the national teams. It would also materially affect what players are able to earn – which has a particularly important impact given that a player's career is limited, and they often support many others in their broader family networks.

60 In the event of this adverse impact on the PSL's revenue, the impact on clubs and players (as well as other stakeholders, such as referees and coaches) and the inability of the PSL to continue investing in its content would also have a consequential impact on the sponsorships that the PSL itself and the clubs are able to secure.

61 Taken together, it is clear that the proposed intervention by ICASA will have a significant adverse impact on the PSL, which effect is not offset by any of the perceived benefits that ICASA considers may arise from the interventions that it proposes. It will place at risk the financial viability of soccer in the country. The content that ICASA seeks to regulate will deteriorate and may cease to exist altogether. Yet ICASA does not appear to have engaged with these likely effects in any meaningful way. It has instead relied on general observations regarding presumed anti-competitive outcomes, which ICASA itself fails to

demonstrate objectively. We submit that these unproven general observations do not justify the interventions proposed.

Deprivation of property

62 The proposed remedies will constitute an unlawful deprivation of the property of the PSL, as a content owner.

63 As we have set out above, the PSL owns the right to broadcast the PSL games it organises. That broadcasting right is its property.

64 Section 25 of the Constitution protects everyone against arbitrary deprivations of property and expropriations of property that do not meet the requirements of s 25(2). Section 25 does not define property, other than to state that it is not limited to land.

65 In *First National Bank t/a Wesbank v Commissioner, South African Revenue Service*,²³ the Constitutional Court held that assigning a comprehensive definition to the term property was not appropriate.²⁴ The Court has therefore developed the contours of the property concept under s 25 as each case before it has required. For example, in *Law Society of South Africa and Others v Minister for Transport and Another*,²⁵ the Constitutional Court assumed, without deciding, that a claim for loss of earning capacity or support is property.

²³ 2002 (4) SA 768 (CC) ("*First National Bank*").

²⁴ 2002 4 SA 768 (CC) para 51.

²⁵ 2011 (1) SA 400 (CC) para 84.

It has also hinted that a trade-mark, despite being incorporeal, would constitute property.²⁶

In *National Credit Regulator v Opperman*, the Court held that the restitution of money paid, based on unjustified enrichment, was property under s 25(1).²⁷

66 In keeping with this broad approach to property rights, it is likely that the courts will recognise the right to broadcast sports events as intellectual property that falls within the protection of s 25 of the Constitution.²⁸

67 The section draws a distinction between ‘deprivation of property’ on the one hand, and ‘expropriation of property’ on the other. It protects holders of property against both types of interference.

68 In order for a deprivation of property to be constitutional, it must be in terms of a law of general application and must not be arbitrary.²⁹ The Constitutional Court has indicated that the phrase “arbitrary deprivation” imports a floating test that lies somewhere between the low-level requirement of mere rationality and the high-level requirement of reasonableness.³⁰ The test requires that there be a rational connection between the deprivation and the end sought to be achieved and, where the deprivation is severe, that

²⁶ *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

²⁷ 2013 (2) SA 1 (CC) para 63 (“*Opperman*”).

²⁸ Van der Walt & Shay “Constitutional Analysis of Intellectual Property” PER /PELJ 2014 Vol 17 No 1.

²⁹ s 25(1) of the Constitution.

³⁰ *First National Bank* para 100.

it be proportionate.³¹ A proportionality analysis assesses the purpose of the law in question, the nature of the property involved, the extent of the deprivation and whether there are less restrictive means available to achieve the purpose in question.³² The stronger the property interest and the more extensive the deprivation, the more compelling the State's purpose must be to justify the deprivation at issue.³³

69 As the owners of the rights to broadcast sporting events, sports' organisers are entitled to use, enjoy and exploit these rights.³⁴ However, as has been described above, the proposed remedies would severely restrict, directly and indirectly, the manner in which sports' organisers are able to sell their property in a variety of ways, including to prevent them from doing so on an exclusive basis. This will constitute an interference with the manner in which, and the terms on which, their rights may be exploited.

70 This deprivation is significant. As has been described above, the ability to sell sports rights on an exclusive basis attracts a significant premium. Removing this ability alone would decrease the revenue that the PSL is able to achieve from the sale of its broadcasting rights by approximately 80%. However, taken together, the proposed remedies would go further and severely limit the ability of content owners (including the PSL) to optimally commercialise their rights.

³¹ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 48.

³² *Ibid.*

³³ *Opperman* para 6.

³⁴ *First National Bank* para 57.

- 71 The proposed remedies therefore amount to a material restriction on sports organisers' rights and would significantly deprive them of one of the key incidents of their ownership.³⁵ In order for such a deprivation of property to be constitutionally valid, it must be both non-arbitrary and in terms of a law of general application.
- 72 The proposed remedies fail at the first test. They are not rational because there is no relationship between the means of prohibiting PSL rights from being sold in the manner proposed and attaining the aim of increased competition for those rights and other pro-competitive outcomes. In fact, as has been set out above, the means employed will defeat the aim.
- 73 The proposed remedies do not, therefore, satisfy the first requirement for a lawful deprivation of property. If they are promulgated by way of regulation (or otherwise), they will be liable to be reviewed and set aside as inconsistent with s 25(1) of the Constitution.

CONCLUSION

- 74 The proposed remedies set out in the Draft Findings should not be implemented.
- 75 The proposed remedies will have perverse outcomes for the PSL that run contrary to ICASA's mandate and the stated objectives of the Inquiry. They place at risk the viability and continued existence of the very content that is sought to be more effectively distributed to broadcasters.

³⁵ *First National Bank* para 57.

- 76 ICASA has not demonstrated a basis on which to justify its intervention in the PSL's rights-sale process, which remains competitive and is not exclusionary.
- 77 Furthermore, the proposed remedies are unlawful. They are beyond the powers of ICASA. They also constitute an arbitrary deprivation of property. If implemented, they would be liable to be set aside on these grounds.
- 78 The PSL therefore respectfully submits that the conclusions set out in the Draft Findings require substantial revision and the discussion on proposed remedies is significantly premature. There is currently no basis on which to justify their application to the PSL or its content.
- 79 Given the substantial inputs above and the concerns the PSL has previously raised (which remain largely ignored by ICASA), the PSL is concerned that ICASA has not properly understood the nature of the PSL's concerns and submissions. In addition, given the significant limitations of the conclusions in the Draft Findings and the proposed remedies (some of which are flagged above), the PSL considers it important that ICASA holds further public hearings and issue a further draft document. This will allow stakeholders (including the PSL) an opportunity to provide further input once ICASA has properly considered and engaged with the PSL's submissions.