



15 March 2019

THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA (ICASA)
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CENTURION

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Dear Sir/Madam

**SOUTH AFRICAN CRICKETERS' ASSOCIATION SUBMISSIONS ON THE DRAFT SPORTS
BROADCASTING SERVICES REGULATIONS, 2018**

This letter contains the submissions to ICASA of the South African Cricketers' Association (SACA) which is the collective representative of all South Africa's professional cricketers.

Introduction

1. On 14 December 2018 the Independent Communications Authority of South Africa ("ICASA") provided notice of its intention to amend the Sports Broadcasting Services Regulations, 2010 ("the Existing Regulations") and invited interested parties to make written representations on the draft Sports Broadcasting Services Amendment Regulations, 2018 ("the Draft Regulations").
2. SACA is a trade union duly registered as such with the Registrar of Labour Relations in terms of Section 97(1) of the Labour Relations Act no. 66 of 1995, with its principal place of business at Great Westerford, 240 Main Road, Rondebosch, Cape Town.

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SACA Board: Gerald Dros Lebohang Mehlomakulu Omphile Ramela Anthony Irish



3. SACA represents all 317 professional cricketers in South Africa, including Proteas Men, Proteas Women, Franchise Cricketers and Senior Provincial Cricketers. The following senior players are members of the SACA Executive Committee and are active in the leadership and decision-making of the organisation: Omphile Ramela (President), Stephen Cook, Farhaan Behardien, Khaya Zondo, Aidan Markram (Proteas men) and Mignon du Preez (Proteas women). Tony Irish serves as SACA's chief executive and is also a member of the SACA Executive Committee.
4. SACA has a four year Collective Agreement with Cricket South Africa ("CSA") in terms of which a share of CSA revenue is apportioned to the funding of player contracts and the remuneration of all professional cricketers in South Africa. The total player cost for the four year period 2018 to 2022 equates to approximately R850 million. This cost covers player contract retainers, match fees, series win bonuses, player employment benefits (including medical aid and retirement), commercial rights as well as International Cricket Council (ICC) event distributions for use of player rights necessary for participation in events such as the Cricket World Cup and the World T20.
5. If CSA revenues are materially reduced, this will have a direct impact on player contracts, in particular the remuneration of the 317 professional cricketers represented by SACA, who are dependent on CSA for their jobs and careers.
6. Given that the proposed Draft Regulations are likely to significantly reduce CSA Revenues for the reasons stated in the CSA submissions attached hereto marked "A", SACA and the individual professional cricketers it represents are interested parties as regards the Draft Regulations.

SACA Submissions

7. SACA supports the CSA submissions set out in Annexure A attached hereto entirely, for the reasons stated in those submissions.
8. Furthermore, SACA makes the following additional representations set out below:



- 8.1 The global cricketing landscape, and in particular the opportunities for professional cricketers, has changed significantly over the last decade. The growth of the T20 domestic leagues around the world (such as the Indian Premier League, Australian Big Bash, the Caribbean Premier League and the Pakistan Super League, amongst others) has seen the emergence and growth of an alternative market for professional cricketers outside of South Africa. This alternative market usually pays more on a time/wage ratio and on a US dollar basis, than that which can be earned in South Africa playing international and domestic cricket. Accordingly, CSA must be in a position to pay players on an optimal basis in order to retain those players as opposed to them being lured to the alternative T20 leagues market.
- 8.2 In addition, South Africa is faced with the loss of “Kolpak” players to the United Kingdom. These include former Proteas players such as Kyle Abott, Rilee Rossouw, Duanne Olivier and Morne Morkel, for example. A Kolpak player is not eligible to play for the Proteas due to the registration system of the England and Wales Cricket Board. Counties in the United Kingdom are able to remunerate players at a higher level than in South Africa due to the value of the British pound. A reduction in revenues will also lead to an increase in the number of players taking up Kolpak status and being lost to international cricket.
- 8.3 The retention of players to play for South Africa and domestic franchises in South Africa is a critical factor in ensuring the strength and performance of the Proteas teams (men and women). Without the strength and depth of players playing within the South African system, the Proteas will be significantly weakened. An imperative for a strong Proteas team is a strong player pipeline that exists at the domestic professional level and below – all the way to amateur and grassroots levels.
- 8.4 A critical component of retention is maintaining optimal levels of player remuneration at all levels of professional cricket.
- 8.5 If CSA’s revenues are reduced, this will give rise to a greater exodus of players to T20 Leagues and Kolpak contracts outside South Africa, which will in turn substantially weaken the Proteas teams.



- 8.6 The Proteas (mens) team is the primary generator of revenue for cricket in South Africa. The strength of the Proteas team drives commercial value, in particular broadcast revenue, sponsorship, ICC Events participation and ticketing revenue. A weakened pool of players will lead to a significant fan and stakeholder reduction in interest. Research shows that fans are less likely to watch a severely depleted national team.
- 8.7 The cycle will become self-perpetuating. A reduction in broadcast revenues, as a consequence of the Draft Regulations, will see a reduction in revenues available to players. This will lead to a weakened player pool which in turn will lead to weakened Proteas teams. As a consequence, CSA will see a reduction in commercial revenues from broadcasting, sponsorship and ticketing. This will in turn lead to a further reduction in revenue available to players.
- 8.8 This cycle will also reduce the resources that SA is able to invest in amateur and grassroots cricket which is likely to lead to lower participation levels, especially in disadvantaged areas where there is a bigger call for CSA to fund the playing of cricket. This is likely to affect transformation imperatives in professional cricket.
- 8.9 CSA is already facing a perilous financial situation. When presenting to the Parliamentary Sports Portfolio Committee four months ago, it forecast a significant financial deficit running into hundreds of millions of rand over the course of its current four year cycle, ending in April 2022. This excludes losses sustained in the inaugural Mzansi Super League, held in November/December 2018. The impact of further losses arising from the Draft Regulations (as a result of reduced broadcasting and sponsorship revenues) will be crippling for cricket in South Africa. The system will not be able to sustain those losses, leading to dire consequences for the game in South Africa.
- 8.10 In conclusion, in our view, the proposed Draft Regulations will lead to significantly reduced revenues for CSA and this will in turn have a catastrophic effect on the game in South Africa.



In reviewing the above submissions, we trust that consideration will be given not only to the financial impact on the game as a whole, but also the human impact on the careers of players and on employment of many other people engaged in the game of cricket at all levels in South Africa.

Thank you for the opportunity to participate in this process and we request that our submissions be given your careful consideration.

Yours faithfully,

Tony Irish

Chief Executive

SA Cricketers' Association

SA Cricketers' Association Management (Pty) Ltd

CSA SUBMISSIONS TO ICASA

A. INTRODUCTION

1. On 14 December 2018 the Independent Communications Authority of South Africa ("ICASA") provided notice of its intention to amend the Sports Broadcasting Services Regulations, 2010 ("the Existing Regulations") and invited interested parties to make written representations on the draft Sports Broadcasting Services Amendment Regulations, 2018 ("the Draft Regulations").
2. The below representations are submitted by Cricket South Africa ("CSA").
3. CSA is responsible for the administration, management, promotion and advancement of cricket in South Africa, both amateur and professional. Its responsibilities and objectives include the following:
 - 3.1 the development of the game at all levels, including at a grassroots level;
 - 3.2 the support and funding of amateur cricket;
 - 3.3 ensuring professionalism in the game;
 - 3.5 the retention of local talent;
 - 3.5 ensuring the viability and sustainability of cricket in South Africa; and
 - 3.6 increasing levels of awareness and exposure to cricket.
4. To achieve its stated objectives, CSA is reliant on various revenue streams to meet this objective. As the most significant revenue stream is the sale of broadcast rights, CSA is of the view that it would be remiss not to make submissions with respect to the new draft Regulations.
5. As detailed herein, CSA objects to the Draft Regulations as they currently stand, for the following five reasons:
 - 5.1 the Draft Regulations as proposed by ICASA are ultra vires and go beyond the authority provided to ICASA in terms of the empowering provisions of Section 60(1) and (2) of the Electronic Communications Act, 2005;
 - 5.2 ICASA has not followed due and proper process in seeking to implement the Draft Regulations;
 - 5.3 the new wording forming part of the Draft Regulations creates undesirable anomalies and is unclear, confusing and ambiguous;

- 5.4 the effect of the Draft Regulations, as we interpret them, will have a detrimental commercial and sporting impact on CSA and cricket in South Africa; and
- 5.5 the Draft Regulations are likely to be deemed to amount to inappropriate government interference in the administration of cricket in South Africa by the International Cricket Council ("ICC"), which may result in the suspension or expulsion of CSA by the ICC.

B. ULTRA VIRES

The Empowering Provisions

- 6 The Existing and Draft Regulations are made by ICASA in terms of S60(1) of the Electronic Communications Act, 2005 ("the EC Act"). S60(1) of the EC Act provide as follows:

"60(1). Subscription broadcasting services may not acquire exclusive rights that prevent or hinder the free-to-air broadcasting of national sporting events, as identified in the public interest from time to time, by the Authority, after consultation with the Minister and the Minister of Sport and in accordance with the regulations prescribed by the Authority."

- 7 ICASA is empowered to identify "national sporting events" that are in the public interest by way of regulations that it prescribes after consultation with the Minister of Communications and the Minister of Sport.
- 8 Section 60(1) contemplates one prohibition only: subscription broadcasting services may not acquire exclusive rights that prevent or hinder the free to air broadcasting of listed national sporting events. In other words: (a) ICASA must identify and list national sporting events in the public interest and (b) once such an event has been listed, subscription broadcasters may not acquire exclusive rights that prevent (i.e. stop) or hinder (i.e. be an obstacle) that event from being broadcast free-to-air.
- 9 Subscription broadcasters are free to acquire rights to, and broadcast, listed national sporting events, as long as they do not stop or prevent any of the free to air broadcasters from broadcasting listed events.

What is the Purpose of Section 60(1)?

- 10 The purpose of S60(1) is to ensure that the public is not prevented from watching national sporting events which are so significant to the nation's identity (i.e. they have a particular national resonance such that they are important from a nation-building point of view) that the nation should not be deprived of watching the event on TV because they cannot afford Pay TV.

- 11 Such 'listed events' are not uncommon in other countries. In the United Kingdom, the Broadcasting Act of 1996 empowers the Secretary of State to designate key sporting events and other events of national interest as 'listed events' (e.g. Wimbledon Tennis Finals).
- 12 In Europe, the 'listed events' regime in the Audiovisual Media Services Directive is to ensure that broadcasters do not exclusively broadcast events of major importance for society in such a way as to deprive a substantial proportion of the public of the possibility of following those events on free-to-air television.
- 13 So-called 'listed events' are generally major national events that have particular national relevance and a cohesive cultural function.

What is Not the Purpose of Section 60(1)?

- 14 The purpose of identifying or listing the national sporting events under S60(1) is:
 - 14.1 Not to promote free-to-air access to sporting events which are simply popular or interesting;
 - 14.2 Not to give free-to-air broadcasters a commercial advantage;
 - 14.3 Not a means of financial support for the public broadcaster;
 - 14.4 Not to address competition concerns; and
 - 14.5 Completely different to, and separate from, the SABC's public service broadcasting mandate under Section 10(1)(i) of the Broadcasting Act, 1999 to include developmental and minority sports programming.

ICASA's function

- 15 In exercising its function within the parameters of S60(1), ICASA must clearly set out rational and defensible grounds for determining what is a "national sporting event" and it must make such identification "in the public interest".
- 16 What ICASA cannot do is:
 - 16.1 list a sporting code, federations or unidentified competitions. It must list specific national sporting events. Therefore, listing "International Boxing Federations", "International Association of Athletics Federation" and "National Netball" in Group A goes beyond the scope of its authority, as does listing "Super 14 Rugby", "Premier Soccer League", "Domestic Boxing Tournaments" and "Domestic Cricket Championships" in Group B;
 - 16.2 compel sports federations to make their rights available for broadcast either in general or on a particular platform. Sports federations are not licensed or

regulated by ICASA and fall outside of ICASA's jurisdiction. Moreover, their right to freedom of association (in respect of their commercial partners) is protected under Section 18 of the South African Constitution;

- 16.3 require sports federations to alienate their rights at all or in a particular fashion (their broadcasting rights are their constitutionally protected property under Section 25 of the South African Constitution). Even if they could be expropriated, Section 25(3) of the South African Constitution would require fair compensation for such expropriation;
 - 16.4 regulate who can bid for particular rights (the only prohibition is that subscription broadcasters may not prevent or hinder the free to air broadcasting of listed events);
 - 16.5 prevent subscription broadcasters from broadcasting, or acquiring the rights to, any events (again, the only prohibition is that subscription broadcasters may not prevent or hinder the free to air broadcasting of listed events);
 - 16.6 compel commercial free to air broadcasters to broadcast listed events either at all or in a particular way (S60(1) sets out prohibitions on subscription broadcasters, not obligations on free to air broadcasters. The section also does not distinguish between the SABC and other free to air broadcasting services);
 - 16.7 compel events to be broadcast free to air live and in full (S60(1) provides that the public should not be prevented or hindered from viewing listed national sporting events free to air – but not necessarily live as it happens). The EC Act's objectives can be met in a balanced way through delayed/delayed live free to air broadcasts, thus allowing viewers to view the national sporting event without necessarily undermining the value of the federation's rights and still giving the free to air broadcaster the flexibility to schedule events amongst other programming;
 - 16.8 compel subscription broadcasters to broadcast, or to not broadcast, listed events; or
 - 16.9 regulate minority/developmental sports broadcasting (these are conceptually and legally completely different to national sporting events and fall outside the scope of S60(1) - the SABC is mandated to "include national sports programming as well as developmental and minority sports" in terms of S10(1) of the Broadcasting Act).
- 17 To act in a manner contrary to paragraph 16 above would be ultra vires.
- 18 Moreover, given that ICASA has been established by Parliament in terms of legislation, and is enforced by government, it is likely that such action would be deemed to be inappropriate government interference in the administration of the sport of cricket in South Africa, which is forbidden under the regulations of the ICC. This may result in

Cricket South Africa being suspended or expelled by the ICC. The ICC expelled Nepal and USA from its membership in 2016 and 2017 respectfully due to government interference in the administration of the sport. Other international sports federations have adopted similar regulations. For example, in 2011 the International Rugby Board (now World Rugby) suspended its funding of Fiji Rugby Union (and subsequently blocked live coverage of the Dubai Sevens to Fiji) due to government interference in the distribution of rugby broadcast rights in Fiji.

Balancing the public interests

- 19 ICASA is required to act in the public interest when identifying national sporting events that are subject to protection under S60(1). It must consider carefully what is in the public interest when exercising its authority under S60(1). If it does not do so, the exercise of its powers can be taken under review.
- 20 As noted above, SABC, as the public free to air broadcaster, must “include national sports programming” in terms of its broadcasting obligations. But sport is only one of many public interest obligations borne by the SABC. The SABC must “include significant amounts of educational programming, both curriculum-based and informal educative topics from a wide range of social, political and economic issues, including, but not limited to, human rights, health, early childhood development, agriculture, culture, religion, justice and commerce and contributing to a shared South African consciousness and identity” (S10(1)(e) of the Broadcasting Act).
- 21 The programming broadcast by the SABC must “be varied and comprehensive, providing a balance of information, education and entertainment meeting the broadcasting needs of the entire South African population in terms of age, race, gender, religion, interests and backgrounds (S3(5)(a) of the Broadcasting Act).
- 22 Accordingly, the SABC must balance its sports coverage against a multitude of other public interest obligations.
- 23 However, the SABC is commercially insolvent and describes itself as having an “unfunded public mandate”. It has neither the scheduling capacity nor the financial means to broadcast all of the events in the Draft Regulations live in full (it is unable to, and does not, broadcast the Summer Olympic Games, Paralympic Games or Commonwealth Games). SABC does not have a dedicated sports channel, nor does the other terrestrial broadcaster in South Africa, e.tv.
- 24 The SABC has said that it would require additional funds to deliver on a number of events of national interest (SABC presentation to the Portfolio committee on Communications on 21 August 2010, slide 10). For the financial year 2019/2020 alone, the SABC has a funding gap of nearly R500 million (R491,282 excluding VAT), taking into account the over R1.2 billion (R1,228,206,000) it required to broadcast sport of national interest (SABC presentation to the Portfolio committee on Communications on 21 August 2010, slide 10).

- 25 The SABC has said that the lack of funding for sports broadcasting on the SABC will have the implications, amongst others, that sports events that have historically been broadcast will not be broadcast (SABC presentation to the Portfolio committee on Communications on 21 August 2010, slide 11).
- 26 It is not in the public interest for certain national sporting events not to be broadcast due to capacity, funding and far-reaching regulatory restraints.
- 27 The revenues which sports federations acquire through the sale of their broadcasting rights is critical to their survival, usually making up the vast majority of their income. If the list of national sporting events is too wide, this will have a significant impact on the financial viability of every major sport in South Africa. It will detrimentally affect the ability of those major sport to fund its national teams and its grassroots development. Its teams will suffer, as will the product it offers to fans. Fans will lose interest in supporting those teams and the very survival of federations and their sports will be threatened. As far as CSA is concerned, the effect on its own income will be significant, as is further set out in Section E of these submissions. This is not "in the public interest".
- 28 In addition, this will have a knock-on effect on South Africa's ability to host major international sports events. Taxpayers have funded the construction and maintenance of facilities to support the hosting of major international sports events. However, world governing bodies require South Africa to disclose its regulatory regime in bidding documents for major events as part of the tender and assessment process. International federations will not grant South Africa the right to host major international sports events if these events are too strictly regulated. This is also not in the public interest.
- 29 It is in the public interest, however, for the Draft Regulations to be suitably balanced so that only events which are truly national sporting events are listed. Although flawed in some respects (see paragraphs 56 to 59 below), the Existing Regulations are generally regarded as being balanced and in the public interest. However, the same cannot be said of the new Draft Regulations.

C PROCESS

- 30 The Existing Regulations were approved and implemented by the Authority after a comprehensive consultation process, including a Discussion Document, Preliminary Findings Document and draft Regulation for consultation (see Findings and Reasons Document on the Sports Broadcasting Service Regulations, 2010, Government Gazette 33108 dated 12 April 2010, Page 41).
- 31 If ICASA wishes to make policy changes to the Existing Regulations, in particular fundamental changes, it must first publish a document explaining its reasons for the proposed changes and the deficiencies it seeks to address, and conduct meaningful consultations with stakeholders on its proposed regulatory position. Only then may ICASA propose far-reaching changes to the Existing Regulations. If it fails to do so, it

risks (a) imposing a regulatory framework which irretrievably damages sport in South Africa and (b) an antagonistic and contested implementation process, ultimately giving rise to time-consuming, costly and unnecessary litigation.

- 32 ICASA has indicated that it *may* hold public hearings *if deemed necessary*. Given the far-reaching nature of the Draft Regulations, proper consultation with respect to the Draft Regulations should be held with stakeholders and public hearings conducted.

D LEGAL ANOMALIES AND DEFICIENCIES

Issues of Substance

Criteria

- 33 Regulation 4 of the Existing Regulations sets out the criteria which the Authority (ICASA) has used in listing national sporting events. It provides that:

“(1) The Authority has used the following criteria in determining national sporting events that are of public interest:

- (a) A confederation sporting event involving a national team or an individual;*
- (b) A semi final and final of a national knockout competition; or*
- (c) An opening game, semi-final and final of a confederation sporting event.*

(2) A new sporting event that falls within the criteria mentioned in regulation 4(1)(a) – (c) above shall be considered for listing during the review period in terms of regulation 7.”

- 34 Regulation 5 lists the national sporting events. The list in Regulation 5 is subject to the criteria in Regulation 4(1)(a) – (c). The criteria therefore have the effect of narrowing the list. For example, the FIFA World Cup is listed in Regulation 5(1)(e). Owing to the fact that it is a ‘confederation sporting event’ as defined in Regulation 1, the FIFA World Cup matches that are listed in terms of Regulation 5(1)(e) are only (i) those matches involving the South African national team (Regulation 4(1)(a)); and the opening game, semi-final and final of the FIFA World Cup (Regulation 4(1)(c)). No other FIFA World Cup matches are therefore listed and any other such matches fall outside the scope of the Existing Regulations.
- 35 The Draft Regulations now contain three distinct categories, namely Groups A, B and C. However, only Group A is now subject to the criteria in Regulation 4. This is because the opening sentence in Regulation 5.1.1 (Group A) begins with the phrase “subject to the criteria...”, but the relevant Group B and Group C listings do not contain any such reference.

- 36 Moreover, Regulation 5.1.1 now makes the Group A list subject only to the criteria provided in Regulation 4(1)(a) i.e. the reference to the other criteria in Regulations 4(1)(b) and (c) no longer appear and cease to be relevant.
- 37 We suspect that the proposed omissions described in paragraphs 33 and 34 above are errors (at least in relation to Group B).
- 38 Since the Group B and Group C listed events are not proposed to be made subject to the criteria in Regulation 4, the Group B events are proposed to be listed in their entirety, without any qualification or limitation. This means that, for example, the entire Super 14 Rugby (should read Super 15 Rugby), All Africa Games and CAF Champions League are proposed to be listed.
- 39 In addition, since Regulation 5.1.1 (Group A) is proposed to be made subject only to the criteria in Regulation 4.1(a), there is nothing to invoke the application of the criteria listed in Regulation 4.1(b) and (c). Accordingly, they become superfluous. As a result, the FIFA World Cup and the Rugby World Cup would be listed only insofar as they involve the South African national team. However, the Summer Olympic Games, which fall outside the definition of a “confederation sporting event” would not be subject to any qualification or limitation, as there are no criteria to which it would be subject. The entire Summer Olympic Games is therefore proposed to be listed, without limitation, and would be required to be broadcast free-to-air live and in full. We doubt this is the intended consequence and is probably an error.

Nature of the listed events

- 40 ICASA has moved away from listing events which are national in character e.g. IAAF events, Domestic Boxing Tournaments, Premier Hockey League, Domestic Cricket Championships and Premier Soccer League.
- 41 Apart from over-reaching their authority, this is a departure from, and inconsistent with, the purpose and intent of S60(1) of the EC Act.
- 42 With respect to “Domestic Cricket Championships” specifically, it is not clear what this means. Please provide clarity as to what this is intended to entail?

New objective of the Draft Regulations

- 43 One of the new proposed objectives of the Draft Regulations, as set out in the proposed Regulation 2 (e), is to “*reach a wider audience and to strike a balance between audience and revenue*”. However, it is not clear what this means entirely and how one would measure this, particular the latter aspect.

Group A Listed events must be broadcast live, in full on free-to-air

- 44 Currently listed events may be broadcast live, delayed live or delayed by a free-to-air broadcasting service licensee¹. ICASA apparently “considered the fact that free-to-air broadcasters are unlikely to have the capacity to broadcast listed events live”, which was “compounded in the Local Content requirements imposed on free-to-air broadcasting licensee”².
- 45 Group A events must now be broadcast live and in full on free-to-air broadcasting services³. This is regardless of ICASA’s previous recognition that “there is no legislative basis empowering it to participate in the scheduling of fixtures...”⁴. As previously noted, a free-to-air broadcaster such as SABC does not have the financial resources or the capacity to fulfil these obligations currently, thus making a mockery of the revised list.
- 46 However, Draft Regulation 5.1.2 causes further confusion by suggesting that “[i]f a Free-to-air licensee cannot acquire the above sporting rights, the Free-to-air licensee must inform subscription service broadcasters, to allow and opportunity for the latter to bid for the rights on a non-exclusive basis”, thereby implying that a free-to-air broadcaster possibly may not in fact acquire the broadcasting rights, in which case it would not be in a position to fulfil its obligation to broadcast the event at all as required by Draft Regulation 5.1.1.
- 47 A further anomaly arising from Draft Regulation 5.1.1 is that the broadcast rights to international events such as ICC Cricket World Cup, FIFA World Cup, Rugby World Cup etc, are held by the international federations concerned (or their duly authorised licensees). These federations (or their licensees) are not bound by the Existing or Draft Regulations. They are therefore not bound to make available the broadcast rights to free-to-air broadcasters unless they are satisfied with the commercial terms of such arrangements. As a consequence, it is highly likely that the only way free-to-air broadcasters will be able to fulfil their obligations to broadcast the required listed events in Group A would be to sub-license those rights from subscription broadcasters (assuming a subscription broadcaster would be prepared to acquire the rights on a non-exclusive basis in the first place). Either way, based on the proposed Draft Regulation 5.1.1, they would be required to broadcast those entire events live in full.

Lack of clarity with respect to Group B events

- 48 Draft Regulation 5.2 refers to Group B events. These are “National Sporting Events offered to a subscription broadcasting licensee on a non-exclusive basis under sub-licensing conditions”.
- 49 The meaning and purpose of this regulation is not clear.

¹ Reg 6(2) of the Existing Regulations

² Page 42 of the 2010 Reasons Document.

³ Draft Regulation 5.1.1.

⁴ Page 44 of the 2010 Reasons Document.

- 50 It could mean that free-to-air broadcasters must offer to sub-license the broadcast rights to Group B events to subscription broadcasters on a non-exclusive basis.
- 51 This in turn assumes that a free-to-air broadcaster has in fact acquired the rights to broadcast these events from the rights holders. However, Draft Regulation 6.1 appears to suggest that it may fail to do so, in which case the main purport of Draft Regulation 5.2 does not apply (it would not in fact be in a position to offer to sub-license the broadcast rights to Group B events to subscription broadcasters on a non-exclusive basis).
- 52 Alternatively, it could mean that subscription broadcasters can buy the rights non-exclusively, but must sub-license them to free-to-air broadcasters.
- 53 Either way, subscription broadcasters will not be able to acquire exclusive broadcast rights to Group B events.

Live or delayed live or delayed?

- 54 Regulation 6.2 (which states that a “listed national sporting event may be broadcast live, delayed live or delayed by a free-to-air broadcasting service licensee”) is directly at odds with Draft Regulation 5.1.1, which specifies clearly that the listed events in Group A must be broadcast live, thereby creating yet another anomaly.

Minority and Developmental Sporting Codes

- 55 Group C does not contain any national sporting events, only supposed minority and developmental sporting codes. It therefore goes beyond the remit of S60(1), which is the empowering provision in terms of which ICASA is granted its regulatory authority in this context. Ironically, ICASA has itself recognized that “a clear distinction exists between the coverage and following of sports events listed in Group A and B with those sporting codes that the Authority has identified in Group C”.⁵

Issues of Form

Lack of consistent use of defined terms

- 56 A further major concern with the drafting is the lack of consistent use of defined terms. For instance, there are two definitions for “national sporting event(s)”, one referring to the listed events in Regulation 5 and another referring to the “broadcasting of sporting events that are deemed to be of national interest and include the South African National Senior Team”. This is naturally confusing given that it forms the substance of the Draft Regulations.

⁵ Page 15 of the Gazette.

- 57 To make matters more confusing, sometimes the term is used in upper case and sometimes in lower case in the Draft Regulations. This means that there is uncertainty as to whether the defined term is being used in the Draft Regulations.
- 58 On a multitude of occasions, terms are used in lower case (undefined form) in the Regulations but in upper case in the definitions section e.g. 'confederation sporting event' in Regulation 4(1)(a), 4(1)(c) and in the definition of "National Sporting Representative"; and 'subscription service broadcasters' in Regulation 5.1.2 and 'subscription broadcasting licensee' in Regulation 5.2. The term 'broadcasting service licensee' is used in Regulation 6.3, 8(1), 8(3)(A) and 10 but a different term 'Subscription broadcasting service licensee' is used in the definition. The term "Free-to-air" is used throughout the Draft Regulations however the definition provided in the definitions section is "free-to-air broadcasting service licensee" (all lower case). Interchangeable use of terminology and case throughout the Draft Regulations causes utter confusion in the drafting.

Drafting errors and idiosyncrasies

- 59 The following additional drafting errors need to be corrected:
- 59.1 Ideally, defined terms in Regulation 1 should start with a capital letter (upper case) and be identified as such in the main body of the Draft Regulations e.g. "Delayed"; "Delayed Live"; "Dispute"; "List", "Live" etc. In this way, when reviewing the Draft Regulations one can easily determine when a defined term (and its afforded meaning) is being used;
- 59.2 Definition of "Confederation sporting event" – insert the article 'a' before 'national federation';
- 59.3 Definition of "Developmental Sports" – this proposed definition is problematic if one considers that (a) the objective of every sport is one of physical health and wellbeing which itself brings social benefit and (b) every sport wishes to enlarge the population's choices and increase opportunity through participation in that sport;
- 59.4 Definition of "dispute" – the term 'broadcasting service licensees' is used; however, this term is not defined;
- 59.5 The term 'broadcast' and 'broadcasting' is not defined throughout the Draft Regulations. Given the different types of broadcast, and the complex definitions of the terms used in media rights agreements both in South Africa and abroad, this term should be defined;
- 59.6 "IRE" and "International Rugby Board" do no longer exist and the federation is now referred to as "World Rugby";

- 59.7 The definition of "Minority Sports" is unhelpful and vague. Based on this definition, and the ordinary definition of majority (more than 51%), cricket and rugby would be "Minority Sports";
- 59.8 Definition of "National Senior Team" – the national senior team should bear no reference to age. It is the highest representative team in the nation representing a sporting code;
- 59.9 Inserting two definitions for 'national sporting event(s)' is confusing;
- 59.10 Definition of "National team" – is the reference to 'senior South African team' intended to refer to "National Senior Team" as defined, or some other form of team? This is confusing;
- 59.11 Definition of "Sports of National Interest" – reference is made to "Senior National Team" but we assume this should be to "National Senior Team" otherwise it just creates further confusion;
- 59.12 Regulation 3(1) – the term "Free-to-air" is not defined, only the term "Free-to-air broadcasting service licensee". The correct term should be used to avoid confusion. The same abbreviated (and undefined) term "Free-to-air" is used in Regulations 5.1, 5.1.1, 5.1.2, 5.3, 5.3.2 and 9.1;
- 59.13 Regulation 4(1)(a) – is the reference to "national team" intended to refer to the defined term "National Senior Team"? And is the reference to "national sporting representative" intended to refer to "National Sporting Representative" as defined? As it stands, it is currently unclear;
- 59.14 Regulation 5.1.1 – as noted, "International Boxing Federations", "National Netball" and "IAAF" are not events;
- 59.15 Regulation 5.2 – the term 'subscription broadcasting licensee' is not defined;
- 59.16 Regulation 5.2.1 – as noted, Super 14 Rugby does not exist;
- 59.17 Regulation 5.2.1 – as mentioned, it is not clear what is meant by "Domestic Cricket Championships";
- 59.18 Regulation 5.3 – reference is made to "subscription" (broadcasters) and "Free-to-air broadcasters" but these terms are not defined; the same is the case in Regulation 5.3.2;
- 59.19 Regulation 6.1 – the term "broadcasting service licensee" is used twice in this provision but the term is not defined, thus causing confusion;
- 59.20 Regulation 6.1 – should the cross reference here be to Regulation 5.1 as well as 5.2? If not, why is no time period specified in Regulation 5.1.2?

- 59.21 Regulation 6.2 – the term “free-to-air broadcasting service licensee” should be upper case if the defined term is being used;
- 59.22 Regulation 7.1 – it is not clear whether provisions (a) to (e) are cumulative or not. In other words, do all these conditions need to be met for the removal to be effective?
- 59.23 Regulation 8(1), (2) and (3) – the term “Alternative Dispute Resolution” is used as a defined term but the term is not defined in Regulation 1;
- 59.24 Regulation 8(3A) – when is a dispute deemed to be unresolved?
- 59.25 Regulation 9(2) – it is not clear what the words “involved in” mean. This is all the more confusing when one considers that the term “broadcast” or “broadcasting” is not defined in the Regulations.

E COMMERCIAL CONSIDERATIONS FOR CSA AND SPORT GENERALLY

Funding streams for cricket in South Africa

- 60 Sport does not receive significant amounts of government funding in South Africa. Accordingly, this necessitates sporting bodies such as CSA to secure its income largely from the private sector, therein making CSA an organisation which is largely funded by way of the commercialisation of its sports offerings.
- 61 The biggest source of revenue CSA receives is from broadcasting rights. The second biggest is from sponsorship, which in turn relies very heavily on the successful exploitation of CSA’s broadcasting rights.

The importance of exclusivity in broadcasting rights

- 62 During the initial inquiry held by ICASA into sports broadcasting rights in 2002/2003, Gerry Boon, the Head of Deloitte & Touche Sport in the United Kingdom at the time, submitted representations in writing on the economics of the broadcasting of sports events. He stated the following about the value of exclusivity:

“The exclusivity premium is the proportion of income that exclusivity can generate over and above what would have been paid for non-exclusive rights. The actual proportion itself is difficult to quantify, but is, in my opinion, significant...I would estimate that, in my view, the acquisition of exclusive rights is worth somewhere between 40% and 100% of the total value of the rights themselves.”

- 63 The importance of exclusivity has been acknowledged by the European Commission, who stated that:

"[e]xclusive sports rights are a commercial commodity that play an important role in developing both the TV market and the sports themselves. They are inherent to the economy of the broadcasting system".⁶

64 ICASA's policy position with respect to exclusivity in 2003 was that the EC Act:

"...does not prohibit subscription broadcasting services from acquiring exclusive rights for sports events. Neither does section 30(7) prohibit subscription broadcasting services from broadcasting national sporting events. It only denies subscription broadcasting services the right to exclusively broadcast 'national sporting events', as determined by the Authority. The Authority has, therefore, decided that a prohibition be placed on subscription broadcasters on the exclusive acquisition of listed events. This means that subscription broadcasting services can acquire the rights for the broadcasting of listed events, but they are required to sub-license such rights to free-to-air broadcasters. Free-to-air broadcasters are, on the other hand, required to negotiate the acquisition of such rights and broadcast the events live or delayed live or delayed."⁷

65 ICASA also stated in the same position paper quoted above that *"the sale of exclusive rights to broadcast sports events is an accepted commercial practice. For sports organisers, the sale of exclusive rights is a way of ensuring the maximum short-term profitability of the event being organised as the price paid for exclusivity by one broadcaster is generally higher than the sum of the amounts, which would be paid by several broadcasters for non-exclusive rights".⁸*

66 In the Existing Regulations, there is currently no prohibition on the broadcast of listed events on subscription broadcasting services, provided that they do not prevent or hinder the free-to-air broadcast of listed events.

67 In terms of the new Draft Regulations, Group A events will now have to broadcast live and in full on free-to-air broadcasting services and Group B events may be sub-licensed to subscription broadcasters on a non-exclusive basis. Going forward, therefore, it appears that no Group A or Group B events will be able to be broadcast exclusively on subscription broadcasting services, regardless of whether or not they prevent or hinder the free-to-air broadcasting of those events.

68 These include ICC Cricket World Cup and "Domestic Cricket Championships", although as previously noted it is not clear what the latter encompasses.

69 Contrary to the previously stated position, the Draft Regulations no longer recognize the value or legitimacy of the exclusivity for broadcasters or sports rights holders. This is evident from the following aspects of the Draft Regulations:

⁶ European Commission Press Release No. IP/97/85 of 5 February 1997, concerning its communication *"Television Without Frontiers and Major (Sports) Events"*.

⁷ Sports Broadcasting Rights Position Paper, ICASA, 25 July 2003 (2003 Position Paper), page 33

⁸ As above, page 30.

- 69.1 the obligation on the part of free-to-air broadcasters to broadcast Group A events live and in full and for subscription broadcasters to be permitted an opportunity to bid for Group A rights which were not acquired by free-to-air broadcasters on a non-exclusive basis;
- 69.2 the provision that Group B events be offered to a subscription broadcast licensee on a non-exclusive basis under sub-licensing conditions; and
- 69.3 the extension of the list.
- 70 The erosion of exclusivity in the exploitation of CSA's broadcasting rights will have a significant impact on its revenues, and consequently its ability to administer the sport effectively in South Africa, as further explained below.
- 71 As a sports federation, CSA is enjoined by section 6(2) of the National Sports and Recreation Act No.110 of 1998 ("the National Sports and Recreation Act") to play a meaningful role in the development of sport in South Africa. Section 6(2) of the National Sports and Recreation Act reads as follows: "National federations must actively participate in and support programmes and services of Sport and Recreation South Africa and the Sports Confederation in so far as high performance sport is concerned".
- 72 To achieve the objectives discussed in paragraph 61 above and to discharge our duty per section 6(2) of the National Sports and Recreation Act, CSA requires significant revenues. In this regard, CSA's main source of income which enables us to achieve these objectives is the licensing of broadcasting rights to various broadcasters. A close second to that is sponsorship revenues, which is reliant to a very large degree on broadcasting.
- 73 The extent of our reliance on broadcasting income is significant. In 2016 broadcasting revenues accounted for 50% of CSA's revenues (with broadcasting and sponsorship revenues together accounting for 70% of CSA's revenues). In 2017, broadcasting revenues accounted for 31% of CSA's revenues (with broadcasting and sponsorship revenues together accounting for 59% of CSA's revenues). In 2018, broadcasting revenues accounted for 69% of CSA's revenues (with broadcasting and sponsorship revenues accounting for 83% of CSA's revenues⁹).
- 74 When considering the CSA's sources of income, it is important for the Commission to also note the following:
- 74.1 the agreements that CSA concludes with broadcasting partners are typically for 3-5 year terms. The security and certainty associated with achieving a significant guaranteed income for the duration of these arrangements is of

⁹ State funding only represents 0.30% of CSA's total funding. Income received from other sources would be wholly insufficient to sustain CSA.

vital importance to CSA because it enables it to conduct advance financial planning which is fundamental to the CSA's ability to meet its objectives set out in paragraph 3;

- 74.2 unlike the income earned from the licensing of broadcasting rights, advertising and sponsorship income can be erratic and often last minute and it accordingly offers far less security. We note that these sources of income are also far more vulnerable to the ebb and flow of our economy; and
 - 74.3 the CSA's ability to negotiate favourable terms with advertising merchants is greatly enhanced by the presence of a reputable, capable and reliable broadcasting partner.
- 75 Internationally and locally, it is widely accepted that the sale of broadcasting rights on an exclusive basis is a necessary feature of the broadcasting market. As previously noted, in the South African context this has already been confirmed by ICASA. The rationale underlying the need to be able to license broadcasting rights on an exclusive basis includes the following:
- 75.1 exclusivity is a mechanism used by broadcasters to differentiate themselves from competing services, especially in the Pay TV context. It is highly likely that consumers will be less inclined to pay subscription fees to a Pay TV operator such as MultiChoice where the same content is also available from another Pay TV operator or from a free-to-air operator such as the SABC. The ability to differentiate themselves from the services of rival broadcasters through the acquisition of broadcasting rights on an exclusive basis also allows broadcasters to grow the size of their viewership and consequently their revenues, whether earned through the sale of advertising space (in the case of free-to-air and Pay TV broadcasters) or through subscription fees in the case of Pay TV broadcasters;
 - 75.2 the sale of broadcasting rights on an exclusive basis also has a positive impact on consumer welfare. For example, procuring the broadcasting rights on an exclusive basis induces other investment initiatives related to the content in question by the broadcaster concerned such as content promotion, channel development and improvements to the production quality. In this way, consumers benefit from more choice and an improved broadcasting experience;
 - 75.3 thanks to the benefits associated with exclusivity, broadcasters have repeatedly demonstrated a willingness to pay a premium to secure broadcasting rights on an exclusive basis. This in turn creates an opportunity for CSA as the owners of the broadcasting rights to increase the value of its broadcasting rights and therefore maximise its income. With this increased income, CSA is then in a position to better execute our mandate to develop cricket in South Africa.

- 76 Broadcasters are incentivized or motivated to perform the following to the rights purchased when it is concluded on an exclusive basis:
- 76.1 Extensively promote the content including programming and match schedules;
 - 76.2 Enhancing production, quality and presentation of the content purchased;
 - 76.3 Produce additional content to support the match-day content e.g. magazine programming, behind-the-scenes interviews etc; and
 - 76.4 Invest more money into developing the sport so as to ensure that the sport and the teams remain competitive, thereby producing better quality sports content for viewers¹⁰.
- 77 Licensing broadcasting rights on an exclusive basis (only domestic cricket content) is mutually beneficial to us and to our Pay TV broadcaster MultiChoice. From the perspective of MultiChoice, exclusivity is an opportunity to offer a unique service to DStv consumers. From CSA's perspective, it is an opportunity to extract the maximum value from our broadcasting rights to ensure that we are in a position to meet our obligations as the custodians of cricket in South Africa. For example, this income allows us to make the content associated with in-bound internationals available to free-to-air broadcasters, and thereby meaningfully contribute towards the development of amateur cricket, grass roots programs, programs designed to address past inequalities and programs designed to invest in international competitiveness.
- 78 As an aside, it should be noted that no terrestrial broadcaster in South Africa has dedicated channel space to broadcast domestic cricket other than T20 cricket, as 50-over and four-day cricket matches take up too much broadcasting time. Multi-channel capacity is therefore a very important consideration for us in the choice of a broadcasting partner.
- 79 The removal of the discretion to license broadcasting rights on an exclusive basis would have highly adverse consequences for the CSA's sustainability. As discussed in preceding paragraphs, CSA depends very heavily on the premium that broadcasters are prepared to pay for the acquisition of broadcasting rights on an exclusive basis. This, in turn, is based on the appetite of subscribers to pay for exclusive content. It would be illogical for people to pay to view that which they can view for free.
- 80 Sponsorship and advertising is in turn heavily dependent on the broadcasting deals, Sponsors and advertisers look for the best possible exposure for their brands. Any regulation of broadcasting rights will have a knock-on effect of also adversely affecting the value of other sponsorships.

¹⁰ A good example of this is the money invested by Multichoice into the SuperSport Rugby Challenge and the Superhero Sunday Double Header.

- 81 Absent exclusivity, there would also be a corresponding reduced incentive to invest in other beneficial initiatives related to the broadcasting rights including marketing, the procurement of production studios and the training of relevant personnel.
- 82 As has been disclosed publicly, CSA is forecasting substantial losses in the current cycle. This is due largely to a difficult local sponsorship and broadcast market and a tough economy generally. In addition, there is current uncertainty in the media rights sector due to fast-growing changes in technology relating to the production and distribution of content. Reducing the exclusivity of its broadcast rights, in particular with respect to the domestic cricket rights granted exclusively to its subscription broadcast partner, will only serve to increase the losses materially, given that its subscription broadcaster is likely to pay far less for the rights. This is unsustainable and would place the very existence of CSA at risk.
- 83 Assuming that CSA survives, it will have much less money to administer and promote the sport, manage the teams, organise and stage domestic events, host international events, develop and maintain provincial structures and facilities, maintain its development programmes and deliver on its grassroots programmes. Salaries of players will drop (increasing the desire to play abroad), stadia and facilities will deteriorate, spectator attendances will decrease and interest in the sport will wane, in turn resulting in reduced sponsorship revenues. The public, who ICASA apparently want to assist by virtue of the Draft Regulations, will not benefit.
- 84 ICASA has itself recognized in the Discussion Document it issued, saying:
- “The Authority has an obligation to ensure that its decisions do not compromise the need for different sports codes to use sport rights to increase their revenue streams.”¹¹
- 85 Presumably this commitment is even more critical when such decisions will result in a significant decrease in revenue streams.

The importance of ‘live’ broadcasting

- 86 It is well known and widely accepted that live rights are the most valuable in sport.
- 87 The fact that live rights are included in Draft Regulation 5.1.1 further undermines the value that will be afforded to the broadcasting rights of those events listed in Group A by a subscription broadcaster on the open market, given that the broadcasting of these events will no longer be exclusive.

¹¹ Page 10 of the Discussions Document on the Sports Broadcasting Rights Regulations, 21 November 2008.

F. CONCLUSION

- 88 The commercial rights of sports bodies vest in those bodies themselves. They are assets of the federations. Sports federations in South Africa are under pressure to maximise the exploitation of their commercial rights. This is primarily due to lack of government funding, increasing operational costs and the need to fund the grassroots development of sport, which has traditionally been under-funded. This pressure comes at a time when the country as a whole faces economic challenges.
- 89 As previously noted, for many sports federations such as CSA the most value commercial rights are those related to broadcasting.
- 90 Sports federations must inevitably consider a multitude of factors when assessing the sale of their broadcast rights. These include the duration of the sale; the territory or territories; the payment mechanism; the broadcast medium (e.g. terrestrial, satellite, cable, ADSL etc); the nature of the broadcast (e.g. live, delayed live, delayed, highlights, clips etc); exclusive or non-exclusive rights, the issue of sub-licensing; the exposure of the event; the value of broadcast sponsorship to the broadcaster; the quality of the production, the promotion of the event by the broadcaster, the financial sustainability of the broadcaster; the likelihood of attracting sponsorship etc. These variables may carry different weight depending on the time and the nature of the sport concerned.
- 91 Sports federations are uniquely and best placed to decide how and to whom to sell their broadcasting rights and to balance the generation of both revenue and exposure (not the government or the regulator). Sports federations are highly attuned both to the broadcast market and the nature of their sport.
- 92 CSA has worked hard to achieve this balance by selling its broadcast rights to domestic cricket exclusively to Multichoice, selling its broadcast rights to the Mzansi Super League exclusively to SABC and by ensuring that all international bilateral cricket taking place in South Africa is available both on subscription television and free-to-air. The new Draft Regulations, however, have the effect of regulating sports federations, both prescribing and curtailing the manner in which CSA and other sports federations can commercialize their rights.
- 93 As set out in our submissions to ICASA dated 4 December 2017 and our submissions to the Competition Commission on 23 November 2018, we are of the view that the issue is not addressing the issue of exclusivity or greater regulation with respect to broadcast rights; it is creating a more enabling environment for broadcasters in general which encourages greater participation in the broadcast rights market and fosters growth.
- 94 The current Draft Regulations are very likely to dissuade new subscription broadcasters in particular from entering the market, thereby prejudicing the above outcome.

- 95 We caution that in the pursuit of a more competitive broadcasting market, ICASA should balance all competing interests and be weary of imposing unwarranted regulatory interventions which are not supported by market conditions and are likely to significantly undermine the CSA's ability to deliver on its objectives.
- 96 The Draft Regulations, in their current form, do not represent such a balance. As indicated above, the Draft Regulations:
- 96.1 are ultra vires and go beyond the authority provided to ICASA in terms of the empowering provisions of Section 60(1) and (2) of the Electronic Communications Act, 2005;
 - 96.2 do not conform to due and proper process in terms of implementation;
 - 96.3 the new wording forming part of the Draft Regulations creates undesirable anomalies and is unclear, confusing and ambiguous;
 - 96.4 as we interpret them, are likely to have a highly detrimental commercial and sporting impact on CSA and cricket in South Africa; and
 - 96.5 the Draft Regulations are likely to be deemed to amount to inappropriate government interference in the administration of cricket in South Africa by the ICC, which may result in the suspension or expulsion of CSA by the ICC.
- 97 CSA reserves the right to make further oral representations in due course in the event that stakeholders are provided with the opportunity to do so.
- 98 Thank you for the opportunity to participate in this process and we trust that CSA's views will be afforded due and proper consideration.