



Attention: Ms Violet Molete

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Dear Ms Molete

**SUBMISSIONS BY SANZAAR REGARDING THE DRAFT FINDINGS DOCUMENT
FOLLOWING THE INQUIRY INTO SUBSCRIPTION TELEVISION
BROADCASTING SERVICES.**

Introduction

1. ICASA will be familiar with SANZAAR from its previous submission in March 2019 in relation to the Draft Sports Broadcasting Services Regulations. We have recently also been advised of the Draft Findings from the *Inquiry into Subscription Television Broadcasting Services* ("**Draft Findings**") and, as an interested and very concerned party, SANZAAR makes the following submissions in response to the Draft Findings.

Background to SANZAAR

2. In 1996, the South African Rugby Football Union ("**SARFU**" as it was then known) or the South African Rugby Union ("**SARU**" as it is now known), the New Zealand Rugby Union ("**NZRU**") and the Australian Rugby Union Limited ("**ARU**" as it was then known) or Rugby Australia Limited ("**RA**" as it is now known), came together as an unincorporated joint venture, known as SANZAR, to create and run two international professional rugby competitions. Those competitions were known at that time as Super 12 (a competition involving state or provincial teams) and the Tri-Nations Championship (a competition involving senior national teams from those countries). Those competitions have changed over time and today are known as "**Super Rugby**" and "**The Rugby Championship**", respectively.
3. The right to enter grounds around the world for the purpose of creating and transmitting audio visual signals of matches in those competitions was first granted to News Corporation Limited and its various licensees in 1996. Since that time, various Pay TV operators have acquired the rights to those competitions.
4. At each subsequent juncture of the rights sales process from 1996, the South African Free to Air (FTA) Broadcasters have been offered rights in Africa, however they have declined to take up the offer in each and every instance.
5. In 2016, the Unión Argentina de Rugby ("**UAR**") was added as a fourth member of the SANZAR joint venture, which is now known as "**SANZAAR**". Each member of the SANZAR joint venture, being a "**Union**" and collectively the "**Unions**".

6. The Unions' business model for these two competitions (i.e. Super Rugby and The Rugby Championship) is built around entering into agreements ("**Rights Agreements**") for the sale of the ground access rights in each of the core territories (being, New Zealand, Australia, Africa and Argentina) together with the sale of media rights throughout the rest of the world ("**ROW**"). In this document the ground access rights in the core territories and the media rights for the ROW are called the "**Rights**". Rights that are sold in ROW territories are valuable, but the vast bulk of the Unions' revenue from the matches that are owned by the SANZAAR joint venture relate to the Rights in each of those core territories. Each Union in the SANZAAR joint venture sells the Rights to the matches played in its home country.
7. The financial viability and sustainability of each Union and SANZAAR depends on maximising the value of the Rights for Super Rugby and The Rugby Championship. Most of the value in the Rights derives from media organisations being able to acquire the Rights as "the [exclusive] home of Rugby". Accordingly, the various factors identified in the Draft Findings as needing amendment in order to promote competition, would, if adopted, have a potentially "game-changing" effect on southern hemisphere rugby, and potentially rugby on a global scale.

Background and Overview

8. In this part, we propose to:
 - a) give a high-level overview of the international governance of rugby as it relates to the issues created by this inquiry; and

- b) highlight general and substantive process issues with what ICASA is purporting to place on international sporting bodies, such as [SANZAAR joint venture].
9. Each national rugby union is a member of World Rugby ("**WR**" and formerly known as the International Rugby Board) which is the body that is officially sanctioned to promote, foster and develop rugby at all levels within its territory. In the case of South Africa, the national rugby union is SARU.
10. Each Union is a not-for-profit entity.
11. Each Union owns its own national domestic competitions, hosts test matches involving its national teams and, in the case of South Africa, Australia and New Zealand, every 4 years hosts a British & Irish Lions Series. Each Union sells the Rights to these domestic matches (in most cases) jointly as part of the SANZAAR offering, but essentially the current revenue share model sees each Union keep the Rights revenue to those matches and utilize this revenue and the shared revenue (Super Rugby and The Rugby Championship) to promote rugby within its region.
12. More than 50% of each Union's revenue is derived from the Rights sales process. Those funds are then used in part to support the provincial and regional unions and Super Rugby Clubs/Franchises. Generally, at least 20% of all revenue derived by each Union is used to promote amateur rugby, mass participation and development.
13. In relation to the process adopted by ICASA to date, the Unions are concerned not only about the lack of engagement with the actual owners of the rights whose businesses will be directly affected by these Draft Findings (if enacted) but

also the lack of understanding about how these Draft Findings will impact on the business of sport both within South Africa and beyond.

14. In addition to a lack of consultation with international sporting bodies to determine what they consider to be 'premium' or not within their rights offering, further questions remain as to whether ICASA has any jurisdiction to regulate those bodies and the way they conduct their businesses and on the validity and enforceability of such proposals.
15. By defining the various "markets" narrowly and categorising certain sports as 'premium', the Unions question the validity of ICASA'S economic analysis and understanding of what is really happening when it comes to the sale of Rights. Over-the-top (OTT) platforms are a competitive force in every market in which the Unions sell their rights and that includes South Africa. By proposing to regulate the manner in which such rights can be marketed and sold ICASA is attempting to impose regulations on Rights and their owners, all of which will have significant negative impacts on the rights of international sports bodies and the value of those rights.

Rights Sales Process

16. As mentioned in our previous submission, the SANZAAR joint venture is an unincorporated joint venture that exists to:
 - a) determine the structure of Super Rugby and The Rugby Championship and ensure that they are the best competitions in the world;
 - b) perform and comply with the obligations on the Unions under each Rights Agreement;
 - c) conduct the sales process for the Rights; and

- d) manage and administer the international competitions.
17. SANZAR Pty Limited co-ordinates the Rights sales process for the Unions. Under the joint venture arrangements, unanimous agreement of all four members of the joint venture is required in respect of each stage of the Rights sales process.
 18. The Unions, as owners of the Rights, are best placed to determine how, to whom and for how long the Rights are sold. In particular, the Unions are best placed to strike the correct balance between optimising the value of the Rights and exposure.
 19. In selling the Rights, the Unions seek to realise the fullest possible value while ensuring that production obligations to produce live world class signals for communication around the world can be guaranteed.
 20. If the value of the Rights in each territory is not acceptable to all four Unions then no agreement is able to be concluded and the future of SANZAAR is put at risk.
 21. If the Rights value were to substantially reduce in one territory and all of that reduction in revenue was to be attributed to the territory in which the value is diminished (e.g. South Africa), the SANZAAR joint venture would not be able to continue in its current form because the relevant Union (i.e. SARU in the example) would in all likelihood not be financially viable to continue in the SANZAAR joint venture. This in turn would put the whole SANZAAR joint venture in jeopardy.

22. For SARU to remain a viable entity and continue its participation in international and domestic competitions, the total quantum of rights fees from Rights Agreements cannot be reduced significantly, which would occur if ICASA's proposals are enacted.
23. We note that the determination of how rights (including the Rights) are sold is a complex exercise, becoming increasingly so given the dynamic changes within the market. Sports bodies have additional options for selling rights compared with a few years ago (e.g. online or over the top (OTT)).
24. In contrast, ICASA has formulated remedies based on a view that online and over the top (OTT) streaming services are an 'out-of-market' development (i.e. not relevant to pay television broadcasting), thus adopting an outdated view of the industry which does not recognise or cater for actual market dynamics and technological developments. Remedies which begin from such an incorrect premise are likely to remove commercial flexibility and cause many unintended consequences for sports bodies and consumers.
25. As a general point, SANZAAR respectfully submits that, ICASA, in considering regulations that potentially have very dramatic impacts on many parties inside and outside South Africa, should be mindful to avoid the imposition of regulations that will undermine the fabric of sport in South Africa and potentially in other countries. SANZAAR urges ICASA not to remove the incentives for media organisations to bid for, and consequently invest in, the acquisition of rights and associated activities as this will have catastrophic consequences not only for Rugby but also for many organisations from international sports federations,

competition organisers, national sporting bodies and all the way down to the community participants.

Draft Findings

26. The key proposals that are contained in the Draft Findings that will, if enacted, have the most damaging impact on SANZAAR and the Unions are the proposed measures that will preclude exclusive rights being able to be sold by rights holders such as the Unions, namely proposals to:
- a) require rights to be split or unbundled across more than one distributor; and
 - b) require a licensee with market power to sublicense its rights on terms to be determined by ICASA.
27. The proposal to limit the duration of exclusive contracts (if there is such a contract in light of the above proposals) to three years will also have an impact on value, albeit perhaps not to the extent of the above proposals. It will also impact the sustainability of the SANZAAR joint venture given the term of the joint venture is linked to the term of the Rights Agreements.

Splitting of Rights and Unbundling Rights

28. Over the last 25 years of professional rugby, each of the Unions has radically changed their respective business models to match the growth of the sport and the demands put on it by professional rugby. These demands now include (in no particular order):
- a) managing and developing numerous national teams;
 - b) marketing and promoting many major events on an annual basis;
 - c) procuring and servicing sponsors;

- d) building brands and protecting intellectual property;
- e) paying and retaining players, coaches, management, team support staff;
- f) managing licencing programmes;
- g) managing domestic competitions;
- h) funding for grassroots development of the base of the game of rugby; and
- i) funding to enable SARU and other SANZAAR union members to grow and promote the game of rugby and make it accessible to all persons within their respective markets.

29. In order to meet these demands, the Unions have to package the sale of the Rights in a manner that enables them to achieve the widest coverage of the sport and to derive the highest possible revenue.
30. Rights holders have consistently over the last 25 years told SANZAAR that exclusivity is fundamental to the valuation of rights and enabling sports bodies to maximise the value from these rights. If the Unions are obliged to split the Rights in Africa (say by competition) and attribute a value to each package, we know that the revenue generated from the sale of the total rights for Africa will be materially impacted through the dilution of exclusivity and reduced willingness by Pay TV operators to pay. Pay TV operators will also lose customers to other rights holders and may also lose customers generally because the customers cannot get all rugby from one supplier or may not wish to pay multiple rights holders to watch the same content. In addition, the dilution of exclusivity would have a negative impact on consumers of content because they will be forced to obtain content from multiple sources (which could include multiple subscriptions) and thus make the sport of Rugby harder to access.

31. Currently, the Unions do not set the price on their Rights. This is left to be determined by the market in each territory, being what bidders are prepared to pay. The proposal to require rights holders to split rights into multiple packages and sell them to more than one media organisation is likely to have the following multiple consequences:
- a) media organisations who rely on subscribers will place a lower value on the offering as their customers will be able to choose one or more providers or none. It will have a direct impact on the media organisation's bottom line and lead to less money being available for the relevant portion of the Rights;
 - b) there will be a risk that only some of the Rights packages will be sold: the requirement to split and unbundle rights may have the unintended consequence of media organisations 'cherry-picking' which parts of rugby content they are interested in, leaving large parts undistributed and thus also impacting the value of the Rights in totality. This is also undesirable from a fan perspective, as only the most popular content (as perceived by the media organisation) will be available for viewing whilst other content will not be accessible;
 - c) media organisations will be less inclined to invest in innovation (technological and fan engagement) as their margins for doing so are eroded and no media organisations can guarantee a return to its investors;
 - d) the promotion of SANZAAR competitions will suffer if media organisations hold back on making broadcast and promotion-related investments, hoping to free-ride on the investments made by their rivals; and

- e) unbundling and rights splitting will increase transactions costs as the Unions will have to enter into and manage multiple agreements and contractual arrangements.

Wholesale-Must-Offer Obligation

- 32. Mandatory requirements on the rights holder to sublicense its rights to SANZAAR content on terms to be determined by ICASA will have a very significant negative impact on the value of the Rights fees for Africa, which in turn would have a direct consequence for other Union regions and SANZAAR. The effect would be exactly the same as foreshadowed in SANZAAR's submissions on the new draft list of content that may have to be made available simulcast on Free-to-air in March 2019.
- 33. Without repeating those submissions, the net impact of this proposal, if implemented, would be a serious, if not disastrous, consequence for SARU and hence all SANZAAR members and would in all likelihood result in SANZAAR having to abandon Super Rugby and possibly The Rugby Championship. As a result, SANZAAR would cease to exist in its current form.
- 34. This is not an exaggeration. It is the reality that would flow from the extent of the reduction in Rights value arising from the proposed changes in the Draft Findings.

Ability to Produce Rugby Games to International Broadcast Standards

- 35. The Rights to the competitions owned and managed by the Unions and, in turn, sold to media organisations across the core territories require each rights holder in each core territory to be (or engage another entity to be) the host broadcaster

and produce a signal for these games which is suitable for international distribution.

36. Since its inception, the Unions have relied on the incumbent media organisation to invest in the infrastructure and capability to deliver a world class product suitable for international distribution.
37. In the case of South Africa, SANZAAR has serious concerns around any other media organisation including SABC's capability and capacity to produce such games and to the required standards, as currently all matches that are provided to SABC in South Africa have always been produced by the incumbent media organisation. SANZAAR understands that there is currently no financial ability for SABC or any other media organisation to set up and produce the matches to the required standards and, if that is the case, that will be the end of Super Rugby and The Rugby Championship.

Shortening the Duration of Exclusive Contracts

38. As set out above, the SANZAAR joint venture arrangement was originally established in 1996 primarily to agree on the international competitions and to sell media rights at the time the sport of rugby first turned professional and began to formally pay players. These rights have been negotiated and sold, apart from the initial rights agreements, in five-year tranches to maximise value by providing the rights holder with longevity and a platform which would encourage capital and other investment into the broadcast commercial relationship.
39. The proposed shortening of the rights period will have material adverse consequences, including the following:

- a) it will jeopardise the rights value by disincentivising the media organisation to invest in long term growth for the product, because the focus will turn to short term outcomes like not losing money and ignoring the wider role the media organisation plays in this day and age including in developing the sport at all levels;
 - b) it will significantly reduce the ability of the SANZAAR joint venture to invest in the growth of the sport and to address the demands put on it by professional rugby (including those demands referred to in paragraph 28 above) as the term of the joint venture is the same as the term of the Rights Agreements;
and
 - c) it will mean that Rights Agreements will likely need to be negotiated during periods in which the Rugby World Cup and the British & Irish Lions Series are being played, in turn causing significant administrative pressure and burden upon participants in the Rights process.
40. There are significant commitments that media organisations have to adhere to in terms of investment in quality production and marketing. As such, there is a need for a reasonable time period to allow media organisations to recoup the associated costs and earn a reasonable return. If the proposal to shorten the rights period is implemented, there will be a material negative impact on the investment by the media organisation in the product, and this would consequently adversely impact the experience for consumers.
41. Further, agreements for the sale of rights (including the Rights Agreements) are complex and involve significant transaction costs in terms of time, money and effort. Allowing a reasonable period between transactions enables both sports bodies and media organisations to minimise these costs.

Conclusion

42. The Unions, as owners of the Rights, are best placed to determine how best to package and sell the Rights at any given point in time to strike the right balance between optimising the value of the rights and creating exposure for the sport. Like any business, the Unions respond to changes in market conditions, where it is commercially viable to do so.
43. The sale of the Rights is the Unions' largest source of revenue and the value they realise from the sale of those rights plays a massive role in the development of rugby in each of their countries.
44. In light of the above, in contemplating the imposition of remedies, ICASA must take into account the impact of the proposed regulations. The proposed regulations are likely to remove the ability of the Unions to maximise the value of the commercial properties they own, which will likely have a negative impact on Rugby in the Southern Hemisphere, leading to many unintended consequences downstream not only in South Africa but across the Southern Hemisphere which include:
 - a) a very significant reduction in Rights revenue available to SANZAAR members (and SARU in particular);
 - b) the end of Super Rugby comprising South African teams;
 - c) a significant risk that the Springboks will not be in The Rugby Championship;
 - d) South Africa being avoided as a territory in which to host, play and, as a result, broadcast Rugby matches into by WR and the other SANZAAR members. It is acknowledged that matches may well still be broadcast into South Africa, but they are unlikely to play matches in that territory;

- e) a significant negative impact on resourcing for the community rugby game in SANZAAR member territories;
- f) the end of the SANZAAR joint venture; and
- g) threatened viability of some or all SANZAAR member unions.

45. SANZAAR is available to answer questions on these submissions.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Andy Marinos', with a stylized flourish at the end.

Andy Marinos
CEO of SANZAR Pty Limited in its capacity as service provider to the Unions