



4 October 2019

Attention: Ms Violet Molete

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Dear Ms Molete

South African Rugby Union's ("SARU") response to ICASA's Draft Findings in relation to the Subscription Television Broadcasting Services Market

1. Preliminary comments

- 1.1 SARU thanks ICASA for this opportunity to respond to the Draft Findings Document published on 12 April 2019. Should ICASA conduct further public hearings, SARU would appreciate the opportunity to make further representations.
- 1.2 As ICASA is aware, SARU, in its capacity as the custodian of rugby in South Africa, is responsible for, and oversees, all aspects of the game of rugby. Amongst other things, SARU is responsible for the development and management of all national teams, brand building, intellectual property rights protection, licensing and merchandising, licensing of broadcasting rights, sponsor procurement and servicing, the hosting and management of tournaments and tours, and the marketing of the game of rugby. Furthermore, SARU has 14 provincial unions/structures for which it is responsible, namely the Blue Bulls, Boland Cavaliers, Border Bulldogs, Falcons, Free State Cheetahs, Golden Lions, Griffons, Griquas, Leopards, Pumas, The Sharks, Western Province, Eastern Province Kings and the Eagles. The provincial unions can be described as a microcosm of SARU and are responsible for all aspects of the game in their respective provinces, including the development of club rugby, amateur, professional and semi-

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professional teams and the implementation of various development initiatives. While some provincial unions earn additional income from the sale of stadium tickets and sponsorship revenue most are almost entirely dependent (the grant received from SARU can constitute as much as 90% of a provincial union's income) on the grant and other support received from SARU.

1.3 In terms of the National Sport and Recreation Act 110 of 1998 ("**the Sports and Recreation Act**"), sports federations are under a legal obligation to support South African high-performance sports, which includes rugby. The Sports and Recreation Act also requires sports federations to be creative in their fundraising initiatives, be financially self-reliant and to set aside funds to implement development programmes such as the initiatives discussed in paragraph 1.2 above.

1.4 Section 6(2) of the Sports and Recreation Act states 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".

1.5 Section 10(1)(b) of the Sports and Recreation Act states as follows:

"Sports and Recreation South Africa must, in accordance with its funding policy encourage creativity and self-reliance on the part of the national federations regarding funding".

1.6 To meet the legal obligations set out in the Sports and Recreation Act and its obligations towards the 14 provincial unions/structures, SARU requires significant funding. As discussed in prior SARU submissions to ICASA, including its submission dated 4 December 2017 ("**the Initial Submission**"), SARU meets its unfunded yet extensive statutory public mandate through private fund-raising initiatives including the licencing of broadcasting rights. It is common knowledge that the income received from the National Department of Sports and Recreation only meets 0.3% of SARU's requirements¹.

1.7 In stark contrast, SARU's counterparts in other jurisdictions are largely funded by their respective governments while also having less onerous public mandates. In

¹ MyPlayers (Pty) Ltd submission to ICASA in response to the *Draft Sports Broadcasting Services Amendment Regulations* of 2018 at paragraph 23.

the Initial Submission, SARU observed that approximately 53% of its revenue is derived from the licencing of broadcasting rights while sponsorships represent approximately 28% of the revenue mix². Particular note should be taken of the fact that SARU's ability to exploit complementary sources of funding such as sponsorships is inextricably linked to the appropriate licencing of broadcasting rights as sponsors require significant exposure for their brands³.

1.8 Without the additional income generated from the exclusive licensing of broadcasting rights and related sponsorships, SARU would not be financially self-reliant and would not be able to support a host of laudable initiatives, including its various grassroots or development programmes. This would be contrary to the provisions and legal requirements of the Sports and Recreation Act.

1.9 In light of the above considerations, SARU has a material interest in and is concerned with the Draft Findings Document. In particular, SARU is concerned by the licence terms and conditions which ICASA proposes to impose on any licensee found to have significant market power ("**SMP**"). The licence terms and conditions proposed by ICASA make provision for, inter alia, the following:

1.9.1 reducing the duration of contracts and prohibiting the automatic renewal of contracts: In this regard, we note that ICASA holds the view that competition becomes ineffective when a licensee with SMP enters into exclusive contracts with a duration of 5 or more years. ICASA proposes to limit the duration of exclusive contracts entered into by a licensee with SMP to 3 years;

1.9.2 rights splitting: This involves splitting content rights into packages and selling them to more than one distributor. ICASA has stated that the current practice of allowing a "winner-takes all" outcomes only serves to limit entry into the relevant market;

² We note that, for most sports federations, the licencing of broadcasting rights is a significant generator of revenue. For example, the licensing of broadcasting rights represented 40% of the total revenues of the New Zealand Rugby Union. We also refer to MyPlayers (Pty) Ltd submission to ICASA in response to the *Draft Sports Broadcasting Services Amendment Regulations* of 2018 at paragraph 63.

³ MyPlayers (Pty) Ltd submission to ICASA in response to the *Draft Sports broadcasting Services Amendment Regulations* of 2018 at paragraph 18. It is noted that attendance at rugby matches have dwindled. This means that the industry has become more reliant on revenue from broadcasting as the income from ticket sales and stadium attendance has decreased. Please also note paragraph 26 of this submission.

- 1.9.3 unbundling: Similar to rights splitting, unbundling allows rights to be held by more than one distributor. The focus of unbundling is on the modes of distribution, that is, allowing rights to be held simultaneously by subscription, free-to-air or OTT service providers; and
- 1.9.4 wholesale must-offer: Wholesale must offer allows or obliges a licensee with SMP that wins rights to offer them to downstream distributors on terms and conditions imposed by ICASA.
- 1.10 SARU is very concerned about the conclusions arrived at in the Draft Findings Document and the associated licence terms and conditions that have been proposed, for inter alia, the following reasons;
- 1.10.1 ICASA does not enjoy jurisdiction over SARU. In terms of section 2 of the ECA, its primary object is to provide for the regulation of electronic communications. Furthermore, the functions of ICASA are set out in section 4 of the Independent Communications Authority of South Africa Act, 2000 ("**the ICASA Act**"). Amongst other functions, in terms of the ICASA Act, ICASA must: exercise the powers and perform the duties **conferred and imposed (our emphasis)** upon it by the ICASA Act, the underlying statutes and any other applicable law. Therefore, as a creature of statute, ICASA cannot act beyond its statutory mandate by taking regulatory steps that have an intrusive impact on entities who are outside of its jurisdiction. To do so would be ultra vires and such action would be open to judicial review;
- 1.10.2 the proposed licence terms and conditions were not, at least to the best of SARU's knowledge, preceded by a cost benefit analysis, or any other economic impact assessment;
- 1.10.3 ICASA's reliance on the Consumer Survey does not cure the shortcomings of the Draft Findings Document because, aside from the significant limitations of the survey itself (which we address later), the survey offers little support, if any, for ICASA's findings;
- 1.10.4 ICASA appears to have accepted the submissions of some stakeholders such as the Competition Commission South Africa and Cell C largely at face value without adequately interrogating or questioning the merits of the arguments with due regard to the unique context of the South African broadcasting and sports industries. As an example, ICASA asserts, without

recourse to any evidence, that contracts with a duration of 5 years or more result in ineffective competition. The lack of evidence to support its position, would perhaps also serve to explain why ICASA also fails to offer any explanation for how a reduction to a three - year term of the contracts would serve to ameliorate its concerns. The incoherence in the approach adopted by ICASA is also manifest in its failure to address the fact that if rights are split and/or unbundled in line with its proposal, little if any purpose would be served by the simultaneous reduction in the duration of the contracts given that most, if not all competing broadcasters will all have access to some content;

- 1.10.5 the proposed licence terms and conditions would largely undermine the very real competitive benefits associated with exclusivity, in particular the ability of broadcasters to differentiate their offering and in so doing attract consumers. The impact of this on the value of the rights would in turn cause irreparable financial harm to sports federations and ultimately sporting codes. This is discussed in greater detail in succeeding sections and in the attached Annexure B;
- 1.10.6 the proposed licence terms and conditions are contrary to the constitutional mandate of ICASA to regulate in the public interest. ICASA has a legal duty to ensure that it gives due regard to the interests of all parties likely to be affected by the outcome of the Inquiry. This necessarily includes sports federations such as SARU;
- 1.10.7 if implemented, the proposed licence terms and conditions would amount to an infringement on the constitutionally protected right to property which is enjoyed by sports federations;
- 1.10.8 ICASA has failed to offer a convincing definition of premium content which would justify the proposed regulatory interventions. Importantly, ICASA has failed to demonstrate that its definition of premium or essential content includes rugby; and;
- 1.10.9 at numerous stages of the inquiry and during other interactions with ICASA, SARU (*and for that matter many of the other stakeholders*) has gone to great lengths to demonstrate that it would suffer irreparable financial harm should the proposed licence terms and conditions be implemented as proposed. It

is therefore very disappointing to note that ICASA had scant regard in its Draft Findings to these concerns. In short, the Draft Findings Document does not address how ICASA proposes to balance the implementation of the proposed licence terms and conditions with the continued financial sustainability of the sports federations.

2. SARU concerns with the Draft Findings Document

2.1 General observations

2.1.1 At the outset, it is important for SARU to make some general observations regarding the shortcomings of the Draft Findings Document. First, as submitted above, it is noted that the Draft Findings Document is devoid of any in depth, coherent and independent economic analysis. For example, ICASA appears to regard certain categories of content, as essential, must-have content because certain broadcasters have marketed or advertised it as premium content in their promotional material to consumers. Surely this is an irresponsible and imprecise methodology for purposes of determining whether certain content is required by competing broadcasters to provide their services to consumers. It is submitted that for content to be regarded as must-have or indeed likened to an essential facility as understood in competition law parlance, it must be established with reference to evidence that it is not possible to attract sufficient consumers without the identified content. In the absence of such evidence, it difficult to conceive how a certain category of content can be regarded as essential to the point of warranting far-reaching regulatory intervention.

2.1.2 Second, SARU is concerned that the Draft Findings Document does not meaningfully engage with the concerns cited by the sports federations and simply summarises the issues raised. In so doing, ICASA ignores the likely impact of the proposed licence terms and conditions and also ignores the real and demonstrable pro-competitive justifications advanced in support of the current status quo by SARU and other stakeholders. ICASA has also failed to demonstrate that, on balance, the cited pro-competitive justifications (*discussed in greater detail in succeeding sections of this submission*) are outweighed by any of its perceived and as yet unsubstantiated competition concerns.

2.1.3 Third, SARU is concerned that ICASA is conducting an incoherent parallel process of enumerating perceived competition concerns, without seeking to distinguish fact from fiction, while simultaneously discussing proposed remedies. In other words, ICASA cannot sensibly propose solutions and what SARU's role, if any, should be in relation thereto, in circumstances where it has failed in the first place to properly interrogate the nature and extent, if any, of the competition concerns.

2.2 **Proposed licence terms and conditions not preceded by a cost benefit analysis or regulatory impact assessment**

2.2.1 To the best of SARU's knowledge, the proposed licence terms and conditions were not preceded by a Cost Benefit Analysis, Regulatory Impact Assessment or any other Socio-Economic Impact Assessment as recommended by the Department of Planning, Monitoring and Evaluation.⁴ These various forms of impact assessments will be referred to collectively herein as IAs. IAs are commonly used by regulatory bodies and policy makers to evaluate the likely impact of proposed regulatory interventions and to objectively test whether proposed interventions will actually deliver the perceived benefits. IAs are also recommended because they facilitate better policy decisions and ensure that regulatory interventions are not excessive or unduly restrictive. That is, the interventions must be kept to the absolute minimum required to cure a justified problem. The process of conducting an IA entails measuring the costs of the proposed regulatory intervention against the claimed benefits.⁵

2.2.2 The need for and importance of carefully conducted IAs was highlighted by the Competition Appeal Tribunal in the case of the UK Competition Commission's Grocery Market Inquiry. The lead economists in that inquiry, Gunnar Niels et al observed that conducting a Cost Benefit Analysis prior to regulatory intervention is "*generally good policy practice, and is increasingly relied upon by, and required from, policy-makers and regulatory authorities across the EU.*" Gunnar Niels also went on to note the increasing

⁴ Department of Planning, Monitoring and Evaluation of the Republic of South Africa. *National Policy Framework* 2011, p.10-11.

⁵ Gunnar Niels, Helen Jenkins, James Kavanagh, "*Economics for Competition Lawyers*" (2011) Oxford University Press, p.481

acceptance that IAs should be undertaken at the time of contemplating regulatory remedies.⁶ This is particularly so, we would suggest, in circumstances where the remedies proposed are far-reaching. In fact in South Africa, IAs are obligatory for policy makers such as cabinet ministers. We note in this regard that in February 2007, it was decided by cabinet that there was a need for a consistent assessment of the socio-economic impact of **policy initiatives**, legislation and regulations. This decision followed a study commissioned by the Presidency and National Treasury in response to concerns about the failure in some cases to understand the full costs of regulations and especially the impact on the economy. Arguably, the obligation to conduct an IA extends to a regulatory body such as ICASA⁷.

- 2.2.3 It follows from the above that ICASA should have conducted (its regulatory obligations aside) an IA on its proposed remedies prior to proposing them as part of its findings, as this would have facilitated more meaningful engagement with stakeholders. It is submitted that had ICASA conducted an IA, it would have become patently clear that the proposed regulatory interventions are grossly misguided and will come at a significant social and economic cost. These costs include, but are not limited to the following:⁸
- 2.2.3.1 the distortion of incentives which detracts from dynamic competition or innovation which would result in reduced service quality and restrictions on market functioning;
 - 2.2.3.2 consumer harm as a consequence of reduced security or quality of supply;
 - 2.2.3.3 consumer harm due to subscribers being forced to deal with more than one service provider as a consequence of rights-splitting;
 - 2.2.3.4 a negative impact on the continued financial viability of sports federations;

⁶ Gunnar Niels, Helen Jenkins, James Kavanagh, *"Economics for Competition Lawyers"* (2011) Oxford University Press p.489.

⁷The South African Presidency (2012)-Guidelines for the Implementation of the Regulatory Impact Analysis/Assessment (RIA) Process in South Africa.

⁸ Gunnar Niels, Helen Jenkins, James Kavanagh, *"Economics for Competition Lawyers"* (2011) Oxford University Press, p.487

- 2.2.3.5 the unavailability of certain matches on any broadcasting medium in the event that some bundles of rights are not acquired by any broadcaster due to forced unbundling of rights, for example, through rights-splitting;
- 2.2.3.6 significant compliance costs for affected stakeholders, including the sports federations. For example, it will be onerous for sports federations to conclude multiple contracts with multiple parties and to go to market more frequently than is objectively necessary as a consequence of the regulatory intervention.
- 2.2.4 Had ICASA conducted an IA, it would have been able to weigh up the costs discussed above, against the claimed benefits of the proposed licence terms and conditions. For example, in the Draft Findings Document, ICASA submits that the benefits associated with the proposed regulatory intervention include “*increased access and lower prices for television broadcasting and video-on-demand services.*”⁹ At this stage of the IA, ICASA would have had to consider whether this perceived benefit of increased access and lower prices for television broadcasting and video-on-demand services exceeds the anticipated costs (SARU argues that it does not). It would also have had to consider whether the regulatory interventions it is proposing have been effective in other markets, with sufficient regard to the unique factors of the South African market.
- 2.2.5 In the absence of an IA, ICASA has sought refuge in the findings of a consumer survey, which it allegedly commissioned (*see paragraph 2.6.1 of the Draft Findings Document*) with specific research objectives in mind, including but not limited to, assessing the key content sought from television viewing. We are told that the survey was conducted amongst 1002 participants, apparently comprising of free to air viewers, subscription television subscribers and over the top subscribers. Based on the findings of the Consumer Survey, ICASA has reached a number of material and far reaching conclusions, including but not limited to the following:

⁹ Government Gazette No. 4239. *Notice to Publish the Draft Findings Document on "Inquiry into Subscription Television Broadcasting Services"* at paragraph 8.3.18, p,81.

- 2.2.5.1 movies are the most watched content, followed by drama series, news and sports;
- 2.2.5.2 sport is strongest amongst upper income households;
- 2.2.5.3 movies, sport and drama series are mentioned most frequently when personal preference is addressed;
- 2.2.5.4 overall, movies, sport and drama series drive audience size; and
- 2.2.5.5 the lowest and highest income households have a desire for more sport.
- 2.2.6 SARU has reservations regarding the findings of the Consumer Survey and makes the following observations:
 - 2.2.6.1 ICASA has not disclosed what methodology it employed to ensure that the sample it selected is sufficiently representative. In particular SARU is unsighted as to what informed the composition of 1002 participants. Furthermore, there is insufficient information regarding how the sample population was selected to make sure that it is unbiased and truly representative. It is noted that the survey appears to fail to control for, inter alia the following:
 - 2.2.6.1.1 the fact that a significant number of consumers of sport consume it directly in stadiums and as a consequence their choice of service provider for audio-visual services may not necessarily be informed by whether the provider in question carries any sport on their platform;
 - 2.2.6.1.2 the fact that many consumers prefer to consume sport through public channels such as bars and restaurants, which may in turn influence their views as to whether access to sport through their provider of video entertainment services is critical to their purchasing decisions; and
 - 2.2.6.1.3 the fact that the survey was conducted in the English, which is almost certainly not the mother tongue of the majority of the participants. In the circumstances, stakeholders are not assured that the participants who are not native English speakers fully

understood the questions posed, or were able to adequately articulate their response.

2.2.6.2 Perhaps the most telling criticism when reviewing the Consumer Survey, is the fact that the findings do not in fact support the position adopted by ICASA in the Draft Findings Document and in particular the proposal to extend the proposed licence terms and conditions to rugby. What is clear, to the extent that the survey results can be relied upon at all, is that the viewing habits of participants are not driven by a desire for sports¹⁰ and in particular rugby. Regarding the feedback of Pulse Research as discussed in the presentations dated October and November 2018 respectively, (*we assume that this is the service provider who was appointed by ICASA to perform the survey*) the following is noted:

2.2.6.2.1 the 6 focus groups have noted that soccer is a popular content genre. None mentioned rugby as a desirable category of sport;¹¹

2.2.6.2.2 the lack of sports and in particular rugby is not listed as one of the reasons for the lack of participant or viewer satisfaction¹²;

2.2.6.2.3 movies are identified as the most watched content, **followed** by drama series, news and sport¹³. Although sport is mentioned, there is no **specific** reference to rugby;

2.2.6.2.4 while rugby is mentioned in the November 2018 presentation, it is not clear which rugby competitions were considered popular by participants. For example, it is not clear whether this refers to international matches, local matches or only those matches involving the Springbok team¹⁴; and

¹⁰At paragraph 5.8.2 of the Draft Findings Document, ICASA concedes that sports accounts for only 15% of all viewing. Par.5.12.10, ICASA concedes that only 20% of the participants to the Consumer Survey cited sport as a key driver.

¹¹ Pulse Research presentation, October 2018 at page 14 & 15. See also Pulse Research presentation, November 2018 p. 59 and 60.

¹² Pulse Research presentation, October 2018 p. 20.

¹³ Pulse Research Presentation, October 2018 at p.48.

¹⁴ Pulse Research Presentation, November 2018 p.60.

- 2.2.6.2.5 while the desire for increased local sports content is mentioned in the November 2018 presentation as a reason for viewer dissatisfaction, there is no **specific** reference to rugby¹⁵.
- 2.2.7 In the circumstances, SARU submits that given the shortcomings outlined above, the inescapable conclusion is that the findings of the Consumer Survey cannot reasonably be relied upon by ICASA, or affected stakeholders to draw any credible inferences about the preferences of consumers.
- 2.3 **No settled definition of premium content**
- 2.3.1 In the Discussion Document, ICASA has proposed the following definition of premium content:
- "valuable content that is acquired on an exclusive basis and made available on high end premium bouquets."*
- 2.3.2 It is significant that, during the course of this Inquiry, stakeholders such as Telkom, the South African Broadcasting Corporation SOC Limited ("**SABC**"), Cell C, National Broadcasters Association ("**NAB**"), Siyaya and Etv all offered their own varied definitions of what constitutes premium content. It is particularly noteworthy that no two stakeholders offered the same definition. Stakeholders such as Cell C and Telkom in fact went so far as to concede that there is no one way of defining premium content. A concession ICASA, at least in part, appears to agree with (*see paragraph 1.3.11 of the Draft Findings Document*), where ICASA notes that premium content is a fluid concept that is dependent on the circumstances prevailing at a particular point in time. Worryingly, having conceded that it is difficult to define premium content, ICASA nonetheless "opted" to identify what *it* considers to be premium content¹⁶.
- 2.3.3 The inability to define so-called premium content with any precision calls into question the merits of the proposed licence terms and conditions which are premised on certain categories of content being categorised as premium or must-have. In other words, the proposed intervention is unwarranted in circumstances where ICASA has failed to demonstrate that any category of

¹⁵ Pulse Research Presentation, November 2018 p.83-91.

¹⁶Par.1.3.12 of the Draft Findings Document.

content (especially rugby related content) is so essential to consumer choices that it is not possible to attract and retain audiences without access to that particular category of content.

2.3.4 It would be remiss of us not to observe that, if one, for a moment, accepted the results of the Consumer Survey, the feedback of the participants supports the view that there is no single category of content that can or should be regard as essential or "must-have" to competitor broadcasters. In fact, the results of the Consumer Survey suggest that consumers enjoy the entire universe of audio-visual content. The participants to the Consumer Survey have indicated that they consider the following genres (*arguably all possible genres and all possible content within each genre*) of content as valuable:

2.3.4.1 Movies;

2.3.4.2 Drama series including local drama series such as Generations;

2.3.4.3 Sitcoms;

2.3.4.4 News;

2.3.4.5 Sports;

2.3.4.6 Lifestyle;

2.3.4.7 Documentaries; and

2.3.4.8 Cartoons.

2.3.5 The feedback of the Consumer Survey also demonstrates that it is possible to attract and retain an audience without access to sports content, least of all rugby related content as consumers value a wide array of other content such as general entertainment.

2.3.6 The entry and subsequent success of Netflix further evidences the fact that sports content, least of all rugby, is not a requirement for customer acquisition and retention as much depends on the chosen commercial strategy of the service provider in question. In this regard we note that according to the remarks of senior executives of Netflix (such as Maria Ferras), in the foreseeable future, Netflix intends to increase the amount of localised, non-drama content produced for international audiences through

global partnerships and that any interest in sport does not extend beyond documentaries. The ineluctable conclusion one is driven to is that if sports was in fact indispensable to audience acquisition and retention, Netflix would have had to acquire sports content at the point of entry into the South African market. The focus by Netflix on general entertainment has proved to be a sound commercial strategy and is in line with ICASA's remarks to the effect that general entertainment drives the lion's share of network profitability.¹⁷ It would be remiss of us if we omitted to note that our observation in relation to Netflix is also consistent with local trends, for example, the research published by the Broadcast Research Council of South Africa demonstrated that the most watched shows on all the platforms of licensed broadcasters is of a general entertainment nature. This is also supported by the information submitted by the SABC during the course of this Inquiry. This information also reflects that the top 10 channels on the DStv platform are of a general entertainment nature¹⁸.

2.3.7

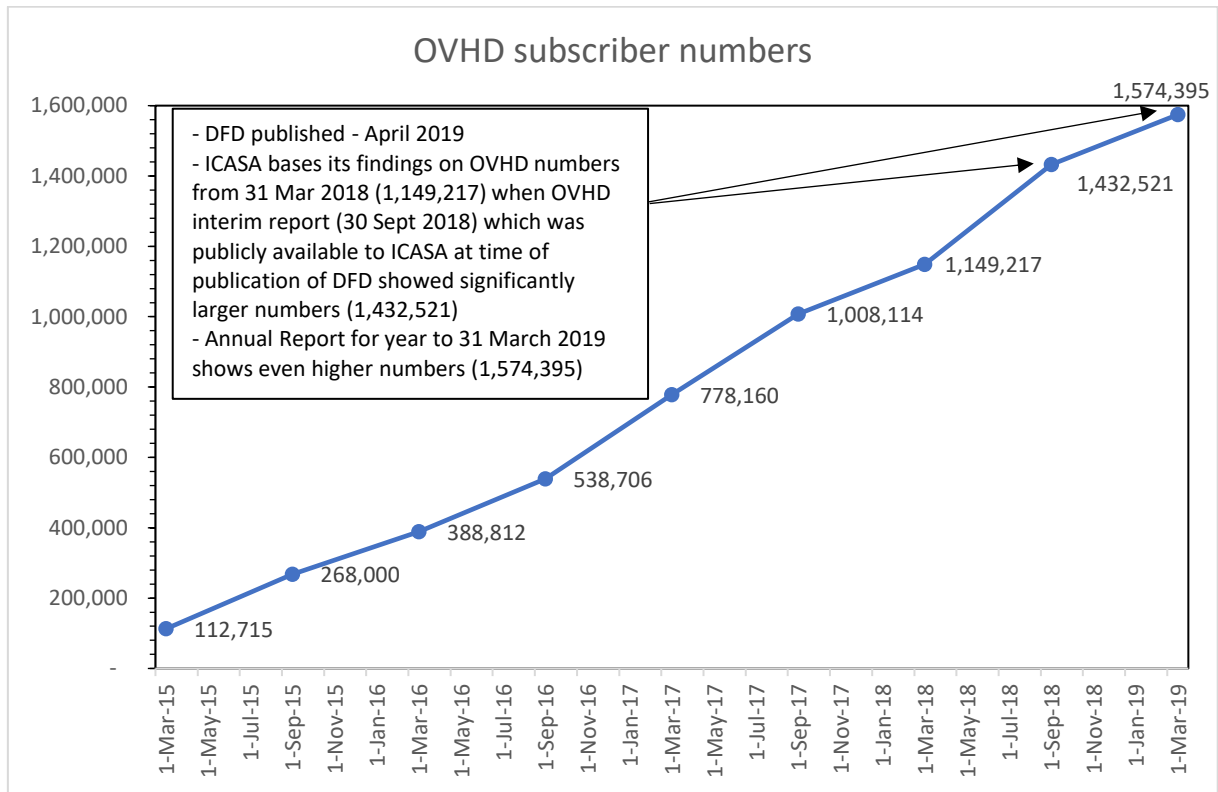
Vodacom has reported, in its annual results for the year ended 31 March 2019 that its Video Play service, which does not carry any sports content, has 869,000 consumers. In terms of publicly available information, local free-to-air broadcaster, e.tv does not carry any rugby related content on its OVHD platform¹⁹. Despite this, the OVHD service has enjoyed spectacular growth since its launch as reflected in Figure 1 below.

¹⁷ Government Gazette No. 4239. *Notice to Publish the Draft Findings Document on "Inquiry into Subscription Television Broadcasting Services"* par.5.8.2.

¹⁸ Supplementary Submission from SABC Top 20 Channels on Dstv" accessed on the ICASA website on 03 July 2019.

¹⁹ It is noted that in terms of the Consumer Survey, only 20% of the participants cited sports as a key driver. This low figure does not support the far-reaching regulatory interventions proposed by ICASA. We refer to paragraph 5.12.10 of the Draft Findings Document. This is also supported by the remarks by ICASA referred to in paragraph 2.2.2.3 of this submission.

Figure 1: OVHD growth since launch



2.3.8 Figure 1 demonstrates that in the period between March 2018 and March 2019, OVHD grew by 420,000 subscribers which equates to an average of 35,000 new subscribers per month. Notably, this significant growth has been achieved without having any rugby content. Indeed, the growth of OVHD has been on the back of general entertainment content such as the recent investments in a news channel, Afrikaans content and an eReality channel.²⁰

2.3.9 By way of a counterpoint, Siyaya Free to Air TV (Pty) Ltd ("**Siyaya**") is an example of the fact that the acquisition of sports related content is not a guarantee of success. In 2014, Siyaya is reported to have concluded a licensing agreement worth R1-billion with the South African Football Association ("**SAFA**") in relation to the broadcasting of Bafana Bafana matches, which ICASA has identified as premium content. Notwithstanding this, to date, Siyaya has not launched its pay-tv service. Similarly, although Kwesé Sports has amassed an impressive catalogue of sports content including NBA basketball and the EPL football, according to publicly available

²⁰http://www.emediaholdings.co.za/wp-content/uploads/2019/05/eMedia_Annual_Results_Booklet_2019_V2_13506_20190523_JM_15h45-signed.pdf, p.2

information, this service is currently under administration. This is yet further proof that carrying sports content does not equate to the success of a broadcaster.

2.3.10 Viewed cumulatively the available evidence suggests that there is no single category of content which is required to attract and retain audiences, least of all rugby. In the circumstance, the proposed licence terms and conditions are clearly disproportionate and unwarranted.

2.4 **Concerns regarding the proposal to limit the duration of exclusive contracts entered into by a licensee with SMP to 3 years**

2.4.1 In the Draft Findings Document, ICASA states that competition becomes ineffective when a licensee with SMP enters into exclusive contracts of 5 or more years duration. ICASA then proposes to limit the duration of exclusive contracts to 3 years, (*including those of rugby content which it has failed to show to be essential or must-have*). What ICASA fails to do is advance any economic analysis to substantiate its view, or for that matter demonstrate that reducing the contract periods from 5 years to 3 years will increase competition in any meaningful way. Critically in the case of SARU, it is hard to credit why the proposed reduction in the contract period would serve to increase the appetite of competing broadcasters to bid for the SARU rights, given, MultiChoice aside, the total lack of interest to date.

2.4.2 In proposing the 3-year limit, it is noted that ICASA (*aside from contradicting its own position*) appears to have failed to consider the fact that SARU and other major sports federations conduct competitive bidding processes for the acquisition of broadcasting rights in which all interested broadcasters are at liberty to participate in the rights-selling process. It should be noted in this regard that no other licenced pay-tv operator has ever attempted to acquire the SARU broadcasting rights.

2.4.3 As will be appreciated, SARU has an intimate knowledge of the needs of rugby and it is accordingly best placed to determine the most appropriate duration for its agreements with broadcasters. It would be remiss of us not to observe that SARU does not have any incentive to enter into agreements with excessively long terms as it values the flexibility to be able to periodically review and where possible maximise its position.

- 2.4.4 The above considerations aside, there are a number of commercially sound justifications for contractual terms which exceed 3 years, including the following:
- 2.4.4.1 longer contractual terms afford SARU the stability and financial certainty it requires to sustain itself. A period of 5 years is essential for planning, budgeting and implementing SARU's various activities including grassroots programs;
- 2.4.4.2 contracts of a longer duration provide greater incentives to broadcasters to invest in the marketing and promotion of the sport because it presents a more reasonable opportunity to recover their investment, or realise a return on the costs of acquiring the broadcasting rights. It therefore follows that the longer the contract is the greater the associated incentives are likely to be;
- 2.4.4.3 related to the paragraph immediately above, SARU requires that the relevant broadcast partner adequately promote the game as a condition in the licensing agreement. It would be significantly difficult to negotiate such an onerous contractual term or positive undertaking by the broadcast partner while simultaneously proposing shorter-term contracts. It is noted that promotional and/or marketing activities such as the SuperSport SuperHero Sunday initiative are often loss leaders although definitely worthwhile from a fan engagement perspective. In light of this, to set-off the losses, broadcasters must be appropriately incentivised through appropriate contractual terms that allow an adequate opportunity to recoup the losses or investments;
- 2.4.4.4 the possibility that the broadcasting rights may be awarded to another broadcaster within a relatively short period of time would significantly weaken a broadcasters' incentive to invest in any marketing and promotion. This is because other broadcasters will free-ride on the investments, marketing and promotion of the previous acquirer. This is particularly problematic if the duration of the contract relative to the requirements of that contract is too short to recoup all the necessary investments. It should also be appreciated that SARU benefits when the licensed broadcasting rights are well marketed, as this represents

an opportunity to attract sponsorship revenue which further increases the value of the rights;

2.4.4.5 in instances where the broadcasting partner is also involved in the production of the sports content, it may be necessary to invest in filming or production equipment, employment and training of relevant staff such as camera crew and expert commentators. Such investments would be specific to the broadcast rights in question. Accordingly, a broadcasting partner is very unlikely to make such investments in magazine shows such as Super Rugby, Phaka, First XV and Game Plan in the absence of a guarantee that there would be a reasonable opportunity to realise its return on investment. This is facilitated by longer term agreements. Furthermore, sports federations are not the only beneficiaries of such investments. Investments also create employment opportunities and also benefit the sports fans in the form of an enhanced viewing experience.

2.4.4.6 negotiations are usually protracted (may endure for 10 months), require significant management attention and have high transaction costs, including the costs of engaging a media rights specialist and attorneys. These costs make it undesirable for such negotiations to occur at regular intervals; and

2.4.4.7 lengthier contracts also permit of greater employment certainty for key, senior administration staff such as the position of Chief Executive Officer and Finance Director.

2.4.5 That there are commercially sound reasons for content agreements to be concluded in excess of 3 years is demonstrated by international trends in markets such as the United Kingdom, Australia, New Zealand and Japan. In this regard, we have attached Annexure A which demonstrates that broadcasting rights are typically licenced for approximately 5 years for sporting codes such as cricket, tennis, netball and rugby.

2.5 **SARU's submissions regarding rights splitting, unbundling and wholesale must offer**

2.5.1 Any regulatory intervention which requires the splitting of rights between two or more broadcasters or platforms, or forced sub-licensing has the effect of

diluting or diminishing exclusivity. This is undesirable for sports federations as it has a significant negative impact on the value of the broadcasting rights in question.

2.5.2 In the past, ICASA has acknowledged the importance of licencing broadcasting rights on an exclusive basis on the revenues of sports federations. For example, in the ICASA Discussion Paper in the Inquiry into Sports Broadcasting Rights, dated 8 August 2002 ("**the Discussion Paper**") ICASA recognised that the sale of broadcasting rights to an event on an exclusive basis is an accepted commercial practice. In the Discussion Paper, ICASA also recognised that for sports federations seeking to increase their income, the sale of the broadcasting rights to an event on an exclusive basis is the best way of maximising the profitability of that event, **since 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.** [Emphasis added].

2.5.3 The importance of the exclusivity premium on the revenues of sports federations has also been recognised by other stakeholders. Media Monitoring Africa has remarked (*in the context of the Draft Sports Broadcasting Amendment Regulations, 2018*) that a loss of exclusivity would create an unsustainable situation for broadcasters and sports federations because exclusive broadcasting rights would be taken off the table.²¹

2.5.4 There are a number of sound justifications why sports federations like SARU licence broadcasting rights on an exclusive basis. In the first instance, the licencing of broadcasting rights on an exclusive basis is a global practice, recognized by regulators and competition authorities (including ICASA), that delivers, inter alia, the following benefits:

2.5.4.1.1 it allows broadcasting services to distinguish themselves from competing services which provides a basis for acquiring and retaining subscribers. In the UK, in a case concerning the sale of

²¹Eybers 2019. New ICASA sports regulations are a threat to SABC's finances. <https://city-press.news24.com/News/new-icasa-sports-regulations-are-a-threat-to-sabcs-finances-20190105>. <Accessed on 28th/05/2019>.

the English Premier League rights, the Restrictive Practices Court stated that:

"Pay-TV companies can only attract subscribers, who have the option of free-to-air television, by significantly differentiating their services from those of rivals. The main method of doing this is to acquire exclusive rights to a defined category of material. Exclusive rights are the main competitive tool used by Pay-TV broadcasters and to some extent by all broadcasters. Pay TV broadcasters need them to persuade viewers to invest in a set top box and to pay a subscription".

2.5.4.1.2

ICASA has made similar concessions in the Subscription Broadcasting Services Position Paper (2005) ("**the Subscription Broadcasting Position Paper**"). At page 72 of the Subscription Broadcasting Position Paper, ICASA stated that the ability of subscription broadcasting services to acquire content on an exclusive basis is fundamental to the provision of these services. ICASA continued to state that for subscription broadcasting services, exclusivity is the primary basis on which these services will attract and retain subscribers and that some forms of exclusive arrangements in the broadcasting industry are, therefore, both efficient and desirable. We hasten to add that the above sentiments are also supported by the free to air broadcasters. For example, in the context of the Draft Sports Broadcasting Regulations 2018, the SABC submitted that exclusive sports rights represents a guarantee of value of the sports content, an opportunity to build up an audience, potential for sizeable advertising or sponsorship revenue and a degree of exclusive standing that distinguishes a broadcaster from other broadcasters;

2.5.4.1.3

given that broadcasters value exclusivity, sports federations raise revenue from this by generating competition for the rights amongst broadcasters which in turn drives up the value of the broadcasting rights. As detailed in the Initial Submission, an exclusivity premium is generally worth between 40% and 100% of the total value of the broadcasting rights. In summary,

licensing the broadcasting rights on an exclusive basis is an essential revenue maximising strategy for sports federations such as SARU. In maximising revenue, SARU and the provincial unions are able to increase investments into competitions, leagues and tournaments to the benefit of rugby development and ultimately to the fan base of rugby; and

2.5.4.1.4

non-exclusive broadcasting rights significantly diminish the incentives of broadcasters to invest in marketing and production efforts related to the sport in order to minimise the risks of opportunistic free-riding by rival broadcasters. Therefore, licencing broadcasting rights on an exclusive basis promotes investments in the quality of the broadcast production of the sport which meets international standards. This high-quality sports content, which is also distributed by international broadcasters, is a significant contributor of revenue to SARU. Furthermore, a higher quality production leads to increased interest or engagement from the fan base which also provides a better platform for securing sponsorship. Since sponsorship is the second largest revenue contributor, this is a significant consideration.

2.5.5

Other than diluting exclusivity and diminishing the value of the broadcasting rights, rights' splitting is also undesirable as it is likely to cause harm to sports fans due to how sports related content is typically consumed. Typically, sports fans want to watch all the matches in which their favourite teams participate. Furthermore, their interest is in the league or tournament as a whole, not just their favourite team. If rights are split and cannot be acquired by a single broadcaster, sports fans who want to watch all the matches in a series or league may be forced to deal with more than one broadcaster for example, DStv and StarTimes. This is likely to increase the costs for consumers and is not in the public interest which ICASA is enjoined to protect. This is an undesirable social cost which would be a direct consequence of the proposed regulatory intervention. While ICASA appears to appreciate this, there has not been any discussion or proposals regarding how this consumer harm would be mitigated.

- 2.5.6 Rights' splitting is also undesirable due to the risk of audience fragmentation which may occur if different games which are part of the same league or tournament are scheduled by different broadcasters. This will inevitably reduce the income that broadcasters will earn from advertisers and consequently reduces the amount that broadcasters are prepared to pay for rights.
- 2.5.7 Rights' splitting also places SARU at the risk of "cherry-picking" by broadcasters. Cherry-picking occurs when broadcasters elect to acquire only those broadcasting rights or matches which are likely to attract a mass audience as a consequence of the popularity of the teams involved. In such a scenario, SARU would be saddled with less popular broadcasting rights which no one would be willing to pay significant amounts for or may lie un-acquired. Should this occur, it will have a very negative impact on the less popular or smaller provincial unions who may not be able to secure other sources of income through other means. Therefore, licencing the broadcasting rights as an indivisible whole prevents cherry-picking and allows SARU to be equitable when allocating income earned from the licensing of broadcasting rights amongst the provincial unions thereby contributing to the sustainability of the entirety of rugby competitions and helping unions become more sustainable.
- 2.5.8 Similarly, the unbundling of broadcasting rights by distribution technology also dilutes exclusivity. It removes **match exclusivity** as the same match will be simulcast on various distribution technologies, for example on an over the top ("**OTT**") platform as well as on a traditional pay-tv satellite platform. This too diminishes the value of the broadcasting rights to broadcasters as the rights in question cannot be used by the broadcasters to differentiate their services. Furthermore, the unbundling of rights by distribution technology is undesirable as there is no assurance that, once unbundled, all of the broadcasting rights will be acquired across the different distribution platforms. On the other hand, licencing the broadcasting rights on an exclusive basis, across all distribution technologies to one broadcaster as an indivisible whole protects SARU from this risk of reduced options.
- 2.5.9 ICASA has claimed that the practice of "winner-takes-all" serves to limit entry into the relevant market, however, SARU has observed that that there has been entry into the audio-visual market across platforms by the likes of

Netflix, Amazon Prime Video, Vodacom Video Play and e.tv's OVHD. All these service providers have successfully entered the market notwithstanding the "winner-takes-all" practice.

2.5.10 The wholesale must offer ("**WMO**") regulatory intervention is also undesirable as it removes exclusivity of content amongst competing broadcasters. In other words, competitor broadcasters will not be able to market the broadcasting rights in question as a point of differentiation. As discussed in preceding paragraphs above, this has the consequence of diminishing the value of the broadcasting rights from the perspective of the broadcasters. The broadcasters who would have participated in the bidding process are likely to bid substantially less for the broadcasting rights which are the subject of a WMO obligation, to the significant detriment of SARU. Furthermore, the WMO may compromise the competitive bidding process as it undermines the incentives of beneficiaries of the WMO obligation to bid for the broadcasting rights themselves. In this regard, competitor broadcasters may not participate in the bidding process as there is the assurance that they will secure the broadcasting rights in any event from the regulated bidder and on regulated terms. A WMO obligation may also reduce the incentives of the regulated bidder to invest in the production and marketing of the broadcasting rights in question to avoid free-riding by competitors.

2.6 As alluded to in the introductory remarks of this submission, SARU is concerned that ICASA has not considered how the proposed license terms and conditions would be implemented in practice. We note that there is no justification for the proposal that the licence terms and conditions be implemented cumulatively. The adverse consequences of the individual proposed licence terms and conditions will be compounded if ICASA implements the proposed licence terms and conditions together as proposed. To illustrate: first, the rights are broken up into packages of matches which, as discussed above, diminishes the value of each package due to the elimination of series exclusivity, resulting in less revenue for SARU. The same diminished packages are further compromised due to the unbundling according to distribution platform. The regulated licensee is then forced to sub-license the already weakened package which would decimate the value of the package to nothing.

2.7 **Practical implications of the proposed licence terms and conditions**

- 2.7.1 In the Draft Findings Document, ICASA has not commented on or meaningfully addressed the harm that sports federations may suffer as a consequence of the dilution or loss of the discretion to licence broadcasting rights on an exclusive basis. This is despite numerous stakeholders having submitted that exclusivity is a common and invaluable feature of this market and that the loss of exclusivity would be hugely detrimental to sports federations. Instead, ICASA has trivialised SARU's submissions as mere "strong opposition" to ICASA's intentions without engaging with the merits of the issues raised.²² This is unfortunate and regrettable.
- 2.7.2 To assist ICASA to understand the irreparable financial and other harm that awaits SARU should the proposed licence terms and conditions be implemented, marked as Annexure B is an analysis of how SARU would be impacted by the loss of revenue due to the dilution or loss of exclusivity. This is demonstrated using 4 best-case scenarios. We refer to the analysis as "*best-case*" scenarios because they do not account for the knock-on effect on sponsorship revenue, which is closely linked to broadcasting revenue. Annexure B makes it clear that even a 40% (*being the minimum exclusivity premium*) reduction in income would place SARU in a perilous financial position with significant knock-on effects for its daily operations. SARU will incur significant financial losses which would cripple its operations in the short-term, medium-term and long-term. It will grind rugby in South Africa to a halt.
- 2.7.3 In the light of this diminished income, SARU would have to resort to various austerity measures which would have significant consequences for rugby in South Africa and in which the causalities would most likely be the following worthy and necessary initiatives which are largely "loss leaders" or cost centres:
- 2.7.3.1 grassroots rugby development;
- 2.7.3.2 rugby safety (BokSmart);
- 2.7.3.3 injured players' fund (CBPJ Fund);

²² Government Gazette No. 4239. *Notice to Publish the Draft Findings Document on "Inquiry into Subscription Television Broadcasting Services"* par.8.2.28-8.2.34.

- 2.7.3.4 elite player development;
- 2.7.3.5 Springbok analysis and technical department;
- 2.7.3.6 elite coaching development;
- 2.7.3.7 Craven Week and six other youth weeks;
- 2.7.3.8 SA Schools and Junior Springboks;
- 2.7.3.9 women's Springboks; -
- 2.7.3.10 women's Sevens Springboks;
- 2.7.3.11 financial support to provincial unions/structures. The impact of this is that the provincial unions/structures will no longer benefit from travel subsidies which largely enable their participation in a number of domestic amateur competitions;
- 2.7.3.12 salary freezes for SARU employees which has an impact on experienced employee retention. As it stands, SARU employees do not receive salary increments beyond inflation related increases. There is currently an indefinite moratorium on recruiting including for existing positions and for new roles which must necessarily be filled in pursuit of SARU's strategic goals;
- 2.7.3.13 various marketing initiatives at the expense of fan engagement.
- 2.7.4 The above initiatives are of utmost importance to the continued success of rugby in South Africa. Their demise would seek to undermine the following:
 - 2.7.4.1 the ongoing efforts to place SARU on a path of financial sustainability following a number of loss making years. In 2016 SARU suffered R14.6 million in losses and suffered further losses of R33.3 million in 2017;
 - 2.7.4.2 the financial health of the provincial unions many of which are in desperate need of increased income. For example, the Eastern Province Rugby (Pty) Ltd was sequestered in August 2016, Western

Province Rugby (Pty) Ltd was liquidated in December 2016; and Border Rugby union provisionally was sequestrated in April 2018²³;

- 2.7.4.3 succession planning in a manner that enables the Springboks senior team and the South African franchises to continue to be competitive against the top nations and the international franchises²⁴;
- 2.7.4.4 elite player retention. Without sufficient income, SARU would not be in a position to pay players competitive wages. It is likely that South Africa would see an even greater loss of talent to other jurisdictions such as the United Kingdom, France, Italy and Japan. In response to the Draft Sports Broadcasting Amendment Regulations, 2018 ("**the Draft Sports Amendment Regulations**") MyPlayers (Pty) Ltd submitted that more than 200 professional rugby players are playing for foreign clubs or teams due to SARU's existing inability to compete with the salary offers of other markets. This is significant as South Africa currently has approximately 980 professional rugby players. The proposed licence terms and conditions will further deteriorate this state of affairs;
- 2.7.4.5 professional coach and referee retention. For example, due to South Africa's inability to compete with nations such as New Zealand and Australia, elite former Springbok coaches such as Jake White, Heyneke Meyer and Allister Coetzee are currently coaching abroad;
- 2.7.4.6 transformation which includes achieving gender parity in rugby;
- 2.7.4.7 safety in rugby education;
- 2.7.4.8 employment and the employment conditions of professional rugby players. In this regard, it is noted that SARU has 73 direct employees

²³ MyPlayers (Pty) Ltd submission to ICASA in response to the *Draft Sports Broadcasting Services Amendment Regulations* of 2018 par. 25.

²⁴ MyPlayers (Pty) Ltd submission to ICASA in response to the *Draft Sports Broadcasting Services Amendment Regulations* of 2018 par.22, in which it is noted that our ability to compete as a rugby nation is determined by our ability to develop local content and retain it.

and has created employment opportunities for approximately 350 individuals, indirectly; and

2.7.4.9 the sense of social cohesion and national unity created by sports. In this regard, we note that in terms of the Socio Economic Impact Assessment System approved by cabinet in February 2015, regulatory intervention must also be measured against its potential impact on social cohesion.

2.7.5 We implore ICASA not to view the above adverse consequences in a superficial piece meal fashion that is evident from the Draft Findings Document. Such an approach detracts from the impact of what SARU refers to as the "*Death-Spiral*". The Death Spiral represents the cumulative effect of the negative consequences described above which are likely to arise due to the proposed licence terms and conditions. We emphasise that the now distinguished Springboks team is the end product of longstanding continuous investments by SARU into the development of rugby. We hasten to emphasise that without sufficient income and resources:

2.7.5.1 the performance and stature of the Springboks will diminish;

2.7.5.2 a poorly performing Springboks team will struggle to attract or retain a broadcasting partner. Broadcasters acquire content with the sole objective of attracting viewers. Viewers are unlikely to support a poorly performing team by watching the televised matches in which such a team participates. This is even more so where there is increased proliferation of content that is capable of attracting and acquiring subscribers and to which broadcasters can turn to as substitutes;

2.7.5.3 a poorly performing Springboks team will not be supported by fans through attendance at stadiums. As things stand, stadium attendance is under pressure in part due to the tough economic environment; and

2.7.5.4 with a diminished fan base and disinterest from the broadcasting community, SARU cannot attract sufficient levels of sponsorship or earn enough income through the sale of team regalia;

2.7.6 All the above would lead to an impoverished and uncompetitive local rugby community. These are ripe conditions for talented players to seek better

prospects in more attractive markets such as the United Kingdom. In the end, rugby as we currently know it in South Africa will cease to exist.

2.7.7 As ICASA is no doubt aware South Africa is a significant and influential stakeholder in the international rugby community. This is evidenced by our participation in one southern hemisphere competition and one northern hemisphere competition, the Super Rugby and Pro 14 competitions respectively. It is noted that continued competitiveness and strength as a rugby nation is a prerequisite for South Africa's ongoing participation in the above mentioned competitions. If South Africa is not able to maintain its track record of rugby excellence, we will lose our place as an influential stakeholder in the international rugby community.

2.8 **Proposed licence terms and conditions are contrary to the Constitution and the legislative mandate of ICASA**

2.8.1 In light of the foregoing, SARU submits that the proposed licence terms and conditions are contrary to the legal mandate of ICASA. In terms of section 192 of the Constitution of the Republic of South Africa, 1996 (“**the Constitution**”), ICASA is required to regulate the broadcasting sector in the public interest. This constitutional mandate is echoed by the Electronic Communications Act, 36 of 2005 (“**the 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–

2.8.1.1 encourage investment, including strategic infrastructure investment, and innovation in the communications sector (section 2(d));

2.8.1.2 promote the interests of consumers with regard to the price, quality and the variety of electronic communications services (section 2(n));

2.8.1.3 refrain from undue interference in the commercial activities of licensees while taking into account the electronic communication needs of the public (section 2(y)); and

2.8.1.4 promote stability in the information, communications and technology sector (section 2(z)).

2.8.2 While ICASA is under a constitutional obligation to regulate in the public interest, the public interest has not been defined in the Constitution or the

ECA. The interpretation of "in the public interest" therefore requires consideration. In *Argus Printing and Publishing Company Ltd v Darby's Artware (Pty) Ltd and Others*, the Court had to consider the meaning of "in the public interest". The Court began by asking who is to be included in "the public"? In answering this question, the Court had regard to an English case, which stipulated as follows: "It must be limited in every case by the context in which it is used. It does not generally mean the inhabitants of the world or even the inhabitants of this country". The Court further stated that the composition of "the public" must vary according to the particular scheme under consideration. One will have to determine in the light of the special facts and circumstances of each case who "the public" is, in doing so it would have regard to those individuals or classes of individuals who might be affected by the scheme.

2.8.3 It is clear from the above case law that in regulating the communications sector in the public interest, it is necessary for ICASA to identify who the public is and then proceed to strike a balance between any conflicting interests which may arise. In our view, for the present context, the public is wider than television households. The public must be defined to include the following communities:

2.8.3.1 the general sporting community which includes the sports federations, sports persons (professionals and amateurs), umpires, sports health practitioners such as physiotherapists and sports fans;

2.8.3.2 advertising merchants and sponsors;

2.8.3.3 the wider broadcasting community;

2.8.3.4 consumers of broadcasting services; and

2.8.3.5 the wider South African economy.

2.8.4 For reasons advanced above, when viewed cumulatively the proposed licence terms and conditions are antithetical to the collective interests of the communities discussed above. In particular, SARU is of the view that the proposed licence terms and conditions:

2.8.4.1 discourage investment into the relevant sectors due to the unwarranted regulatory intervention;

- 2.8.4.2 harm the interests of sports fans as the quality of sports content will be substantially diminished;
- 2.8.4.3 constitute undue interference in the commercial activities of broadcasting licensees and sports federations; and
- 2.8.4.4 undermine stability in the relevant sectors. All of the above are contrary to various provisions of the Constitution and the ECA.
- 2.8.5 Furthermore, SARU also submits that should the proposed licence terms and conditions be implemented as proposed, this would amount to an arbitrary and unwarranted limitation of section 25 of the Constitution which protects the right to property. Our Constitutional Court has held that a deprivation of property is arbitrary if there is no "sufficient reason" for the deprivation. The test for whether there is sufficient reason for a deprivation of property involves a balancing of the public interest in the deprivation against the private interest affected thereby. There must be "an appropriate balance between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve". The proposed licence terms and conditions would interfere with and limit SARU's ability to leverage its right to property at the most commercially favourable price. If SARU is not permitted to sell its broadcasting rights on an exclusive basis, SARU will essentially be forced to sell its rights at a significantly lower price because selling exclusively ensures a premium on the price at which the rights are sold. As such, SARU's value and enjoyment of its property will be eroded. As ICASA has not offered sufficient, evidence-based justification regarding the proposed regulatory intervention, SARU submits that if implemented, the proposed licence terms and conditions would amount to an arbitrary and unlawful deprivation of constitutionally protected intellectual property.

3. Conclusion

- 3.1 SARU, as the custodian of rugby in South Africa and as the owner of broadcasting rights is best placed to determine how best to sell its broadcasting rights in a manner that achieves the sustainability of rugby. If there is a need to revise licensing methods followed to date, this must be motivated by market dynamics and not unwarranted regulatory interventions which are not supported by the findings of a CBA or RIA.

- 3.2 If implemented, the proposed licence terms and conditions would have a devastating impact on SARU's revenues and would severely curtail its ability to meet its unfunded public mandate to develop rugby in South Africa. This would harm rugby and would not be in the public interest. In regulating the electronic communications sector of South Africa, it is crucial that, in seeking to advance the public interest, ICASA strike an appropriate balance between the competing interests of various stakeholders such as sports federations, sportsmen, broadcasters and sports fans.
- 3.3 In light of the insurmountable challenges faced by the Draft Findings Document, SARU strongly recommends that further consultations with affected stakeholders be conducted and that this is in the public interest as contemplated by the underlying statutes such as the ECA. In particular, we emphasise that it would be prudent for ICASA to first exhaust a process which seeks to properly investigate and/or diagnose the competition concerns in the pay-tv sector, if any. Once this process has been completed and **if** found to be necessary, a distinct process should be embarked upon, in which ICASA seeks to understand what remedial action is required and the extent thereof in order to address any competition concerns.
- 3.4 We trust that our responses will be of assistance. We hold ourselves available should ICASA wish to discuss any aspect this submission.

Yours sincerely


Jurie Roux
Chief Executive Officer

United Kingdom

Cricket		
Test match cricket and one-day international and twenty20 cricket (England and Wales)	2020 - 2024 Sky Sports and ECB	Live coverage of all England home Tests, ODIs and T20s, women's matches and county cricket. Sky Sports will provide comprehensive coverage and support across its TV, mobile, digital and social platforms.
	2020 - 2024 BBC and ECB	Live TV coverage of two England men's international T20 matches, one England women's T20 international, plus live TV coverage of 10 men's matches from the ECB's New T20 competition, and up to eight live matches from the women's T20 tournament including both Finals, and primetime TV highlights of England men's home international matches.
ICC Cricket events (Global)	2015 - 2023 Star Sports and ICC	Global broadcast rights for all ICC Events 2015-2023. This includes exclusive live and highlights rights across all platforms for ICC major events – the ICC Cricket World Cup and its qualifiers, the ICC Women's World Cup, the ICC World Twenty20 and its qualifiers, the ICC Champions Trophy and the ICC Under-19 Cricket World Cup.
ICC Cricket events (UK and Ireland)	2015 - 2023 Sky Sports and Star	Sky Sports has an exclusive arrangement with STAR for broadcast in UK and Ireland. ICC Cricket World Cup, ICC World Twenty20, ICC Champions Trophy, ICC Women's World Cup, ICC Women's World Twenty20, ICC U19 World Cup. Over 60 IPL matches (top four domestic Twenty20 cricket competitions from India, England, Australia and South Africa).
Test match cricket (England and Wales)	2014 - 2020 Sky Sports and ECB	TV, online and mobile rights, including live and exclusive coverage of home Test series in 2014-2017, one-day international and T20 series, plus domestic cricket.
Tennis		
Wimbledon (UK)	2021 - 2024 BBC and the All England Club	Extended contract for additional 4 years. Rights to Wimbledon on BBC TV, online and radio.
Wimbledon (UK)	2016 - 2020 Eurosport and the AELTC	Live simulcast coverage in the UK of the Wimbledon Gentlemen's and Ladies' Singles finals and daily 90 minute highlights shows for the duration of The Championships, Wimbledon (secondary broadcaster).
US Open (Europe except UK and Ireland)	2017 - 2022 Eurosport and United States Tennis Association	US Open Grand Slam tennis tournament (for all of Europe except UK and Ireland).
US Open (UK and Ireland)	2017 - 2022 Amazon and United States Tennis Association	Live and on demand viewing of the US Open.
Australian Open (Europe)	2017 - 2021 Eurosport and Tennis Australia	Broadcast and OTT rights in 50 European markets. Limited exclusivity applies until 2019. The deal includes exclusive live rights to two Australian Open warm-up ATP tournaments, the World Tennis Challenge along with rights to the Hopman Cup.
French Open	2019 - 2021 ITV and French Tennis Federation	Extended deal to show the French Open on free-to-air TV and online.
French Open	2015 - 2021 Eurosport and French Tennis Federation	Exclusive Pay TV rights across Europe and also all rights in 13 key markets, in particular in Italy and Spain.
Formula One		
All races (UK and Ireland)	2019 - 2024 Sky Sports and Formula One Group	Live broadcasts of all 21 grands prix. Free-to-air broadcast of the British Grand Prix, and highlights and qualifying will also be available for free. All other races will not be free-to-air.

Highlights (UK)	2016 - 2019 Channel 4 and Formula One Group	Highlights of all races.
Football		
Premier League (UK)	2019 - 2022 Sky Sports	128 live games (packages B, C, D and E) until 2022, plus live coverage of the Asia Trophy for 2019 and 2021. First pick of matches and the most coveted kick-off times.
Premier League (UK)	2019 - 2022 BT Sport	52 live games (packages A and G) until 2022
Premier League (UK)	2019 - 2022 Amazon Prime Video	20 live games per season (package F) until 2022
Premier League (Spain)	2019 - 2022 DAZN	Exclusive rights to all PL matches live and on-demand.
FIFA World Cup (UK)	2018 - 2022 BBC and ITV	TV, radio and online coverage of 2018 and 2022 World Cup finals. Free-to-air broadcasting in the UK.
Netball		
Home Test matches and internationals	2017 - 2020 Sky Sports and England Netball	Under the new deal, Sky Sports will show all home England international Test matches. Live coverage of the England Roses will begin in November. Superleague matches to be shown regularly throughout the season, alongside exclusive coverage of the semi-finals and Grand Final.

Australia

Tennis		
US Open	2017 - 2021 ESPN	Exclusive Australian broadcaster for all matches until the quarter-finals stage of the two-week hard court tournament. From 6th September ESPN will simulcast the rest with SBS.
US Open	2017 - 2021 SBS	SBS will simulcast with ESPN the quarter-finals night sessions, semi-finals and finals in both the men's and women's tournaments.
Australian Open	2019 - 2024 Nine Network	All audio-visual rights for broadcast, streaming, mobile, digital and social platforms.
Formula One		
Free-to-air	2015 - 2020 Network Ten	Network 10 simulcasting 10 events live plus highlight packages of all remaining race weekends.
Pay-TV	2015 - 2020 Fox Sports	All 20 events in the FIA Formula One World Championship Race Calendar Live and in High Definition – including every practice, qualifying and race live.
Rugby League		
Free-to-air	2018 - 2022 Nine Network	Three games per round. Thursday night (1 match), Friday night (1 match) and Sunday afternoon (1 match). 1 additional game per round on Saturday night for the last 5 rounds of the season simulcast with Fox League. Including contra. Finals series: Every game of the finals series including the Grand Final.
Pay-TV	2016 - 2022 Fox League	5 games per round, live and exclusive nationally, with the other 3 matches simulcast with Nine. Rights to the Saturday night match. Finals Series: Every game live nationally not the Grand Final, which airs replay coverage.
Aussie Rules (AFL)		
Free-to-air	2017 - 2022 Seven Network	3-4 matches per round live nationally. Friday night (1 match), Saturday night (1 match) and Sunday afternoon (3.20pm eastern time zone slot match). Further 11 games on public holidays / eve. Between 5-6 Thursday night games. Local teams replace broadcast into local markets every week of the season in SA, WA, QLD & NSW. 3 games each season in SA & WA featuring a local team broadcast on delayed basis.

		Finals Series: Every match live nationally including the Grand Final.
Pay-TV	2017 - 2022 News Limited (Foxtel and Fox Footy)	6 matches per round, live nationally. They also simulcast the remaining 3 matches from Seven Network therefore broadcasting 9 matches per round, live nationally. Right to sub-licence one game per round. Finals Series: Every match live nationally not the Grand Final.
Hand-held devices and online	2017 - 2022 Telstra	Live AFL App, afl.com.au, club digital network and IP TV. Broadcast every match on mobile devices.
Cricket		
Australia Test cricket (Free-to-air)	2018 - 2024 Seven Network and Cricket Australia	All men's Test matches and all Commonwealth Bank women's internationals as well as 43 KFC Big Bash League and 23 Rebel Women's BBL games each season
Australia Test cricket (Pay-TV)	2018 - 2024 Fox Sports and Cricket Australia	Exclusive rights to men's ODIs, men's T20 internationals, exclusive rights to BBL and WBBL other than those held by Seven. Rights to show matches that are broadcast by Seven. Rights to broadcast the Shield final and 13 One-Day Cup games as well as some international tour matches.

New Zealand

Rugby Union		
Rugby World Cup, Women's Rugby World Cup, the Rugby World Cup Sevens, and World Rugby U20 Championships	2018 - 2021 TVNZ and Spark	New Zealanders will be able to stream Rugby World Cup 2019 matches and related content live or on-demand using TVs, mobiles, tablets and laptops. The service will offer both free and paid content. Spark has entered into an agreement with TVNZ, which will see the Rugby World Cup Sevens 2018, the World Rugby Under 20 Championship 2018 and selected matches from the Rugby World Cup 2019 screen free-to-air on TVNZ. Free-to-air coverage of the Women's Rugby World Cup 2021 will be confirmed closer to the tournament date.
Rugby League		
NRL, State of Origin, NRL Nines	2018 - 2022 Sky TV	Exclusive rights to every NRL game, State of Origin series and NRL Nines tournament.
Cricket		
Australian cricket	2018 - 2020 Sky Sport. Extended to 2024/5. Sky allocates selected live coverage to Prime TV (free-to-air partner).	Exclusive rights to broadcast all Australian cricket in New Zealand. Beginning with the first Test against South Africa this week, SKY Sport will provide NZ cricket fans with complete live coverage, including men's and women's international games along with the KFC BBL and Rebel WBBL.
Netball		
Silver Ferns test matches	2017 - 2021 Sky Sport and NZ Netball League	Rights to broadcast Silver Ferns test matches, the new "New Zealand Elite Domestic League", Beko Netball League and other domestic events up to and including 2021, as well as the TV show, Netball Zone.

Japan

Soccer		
J.League	2017 - 2027 Perform Group and J.League	Perform will stream matches from the top three tiers of Japanese soccer through its online platform, DAZN.

Baseball		
Major League Baseball	2017 - 2020 Dentsu and Major League Baseball	Television networks that will air MLB games in Japan per rights granted through sub-licensing agreements with Dentsu include NHK (Japan Broadcasting Corporation), TBS (Tokyo Broadcasting System Television, Inc.), Fuji TV (Fuji Television Network, Inc.), J SPORTS (J SPORTS Corporation) TV Asahi (TV Asahi Corporation), TV TOKYO (TV TOKYO Corporation). All six networks have previously telecast MLB games in Japan.
Basketball		
B.League	2017 - 2020 SoftBank and B.League	Exclusive broadcast rights. Rights to stream all first and second division games, on computers, tablets and smartphones on a subscription basis.

Revenue and commercial operating impact of the proposed remedies (Backward looking impact)

	Group									
	Actual		Scenario 1 - 40% reduction		Scenario 2 - 50% reduction		Scenario 3- 60% reduction		Scenario 4 - 70% reduction	
	2018	2017	2018	2017	2018	2017	2018	2017	2018	2017
	R	R	R	R	R	R	R	R	R	R
Impact on Revenue (reduction in revenue generated)	1,263,620,767	1,153,679,814	977,777,678	885,775,958	906,316,906	818,799,994	834,856,134	751,824,029	763,395,362	684,848,065
Change in revenue due to non-exclusivity			-23%	-23%	-28%	-29%	-34%	-35%	-40%	-41%
Impact on operating profit (loss)	15,971,005	-40,069,389	-269,872,084	-307,973,245	-341,332,856	-374,949,210	-412,793,628	-441,925,174	-484,254,400	-508,901,138

	Union									
	Actual		Scenario 1 - 40% reduction		Scenario 2 - 50% reduction		Scenario 3- 60% reduction		Scenario 4 - 70% reduction	
	2018	2017	2018	2017	2018	2017	2018	2017	2018	2017
	R	R	R	R	R	R	R	R	R	R
Impact on Revenue (reduction in revenue generated)	1,235,974,878	1,131,350,337	950,131,789	863,446,481	878,671,017	796,470,517	807,210,245	729,494,552	735,749,473	662,518,588
Change in revenue due to non-exclusivity			-23%	-24%	-29%	-30%	-35%	-36%	-40%	-41%
Impact on operating profit (loss)	15,249,518	-28,564,039	-270,593,571	-296,467,895	-342,054,343	-363,443,860	-413,515,115	-430,419,824	-484,975,887	-497,395,788