



15 March 2019

Attention: Ms Violet Molete

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Dear Ms Molete

WRITTEN REPRESENTATIONS BY SARU ON DRAFT SPORTS BROADCASTING SERVICES AMENDMENT REGULATIONS, 2018

1. Executive summary

- 1.1 On 14 December 2018, ICASA published the Draft Sports Broadcasting Services Amendment Regulations, 2018 and invited interested parties to submit written representations thereon. SARU appreciates the opportunity to make submissions.
- 1.2 The Draft Regulations propose to, *inter alia*, regulate the acquisition of broadcasting rights in relation to national sporting events. While the provisions of the Draft Regulations are unclear, it seems that ICASA intends to prohibit the exclusive acquisition of the broadcasting rights of listed national sporting events. SARU, in its capacity as the custodian of rugby in South Africa, is responsible for, and oversees, all aspects of the game, including the broadcasting rights of rugby games. If promulgated as proposed, the Draft Regulations are likely to have far-reaching adverse consequences on SARU's ability to fulfil its legislative mandate as the custodian of the sport of rugby in South Africa.
- 1.1 As a result of the anticipated adverse consequences of the Draft Regulations, SARU is concerned about protecting its constitutional rights and commercial interests.
- 1.2 In sum, SARU's comments on the Draft Regulations are as follows:

- 1.2.1 the rationale motivating the amendments proposed by the Draft Regulations is not articulated clearly. The regime created by the 2010 Regulations satisfies all stakeholders as it allows greater public access to national sporting events while safeguarding the commercial viability of sports federations such as SARU;
- 1.2.2 clause 5 is *ultra vires* the ECA. In terms of section 60(1) of the ECA, ICASA has the power to identify national sporting events in the public interest. SARU submits that section 60(1) of the ECA does not authorise the imposition of legal requirements that the listed national sporting events 1) must be broadcast on full live coverage by free-to-air broadcasters, 2) that certain events may only be acquired on a non-exclusive basis by subscription broadcasters, or 3) that minority and developmental sporting events must be broadcast. SARU submits that the Draft Regulations extend beyond what ICASA is empowered to do in terms of section 60(1) of the ECA and are, as such, *ultra vires* ICASA's powers and therefore unlawful and unconstitutional;
- 1.2.3 the intended meaning and effect of clause 5.2 of the Draft Regulations are unclear, for example, what is meant by "*non-exclusive basis under sub-licensing conditions*"? It is further not made express that the determination of the sporting events falling within the list is subject to, or based upon the criteria in regulation 4 (in terms of regulation 4, not all the games that form part of the listed event will be of public interest), with the result that all listed sporting events will fall within Category B regardless of whether they are in the public interest. It is also unclear how some of the events listed will fall within the definition of "*National Sporting Events*" contemplated in the Draft Regulations, which definition appears to narrow the events that would qualify as national sporting events to events that include the *South African National Senior Team*;
- 1.2.4 the proposed amendment in clause 5.2 constitutes an unjustifiable intrusion on the constitutional right to property. The proposed amendments contemplated in clause 5.2 of the Draft Regulations will have a significant adverse impact on SARU's income as SARU will be impaired in its ability to offer its broadcasting rights to broadcasters on an exclusive basis (while complying with section 60 of the ECA). 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;

1.2.5 the Draft Regulations amount to administrative action for purposes of PAJA and, if ultimately promulgated, clause 5.2 could be challenged under, *inter alia*, the following grounds of review: i) the action was taken because relevant considerations were not considered; ii) the means adopted by ICASA are not proportional to the intended outcome, namely, to achieve a balance between audience and revenue; and iii) the decision is so unreasonable that no reasonable person could have exercised the power or performed the function;

1.2.6 the Draft Regulations are fraught with uncertainty and inconsistencies. They will result in regulatory and commercial uncertainty and instability with regard to the negotiation and acquisition of sports broadcasting and related rights, such as sponsorship and advertising, as well as the day to day tasks undertaken by SARU to administer, develop and promote the game of rugby in South Africa; and

1.2.7 a number of the clauses in the Draft Regulations, including clause 5.2, are unclear due to errors and/or are internally inconsistent. This makes it difficult for interested parties to comment on the Draft Regulations in a meaningful and informed manner. As such, if published in their current form, the Draft Regulations and the process culminating in the publication thereof might be held to be procedurally unfair.

2. Introduction

2.1 On 14 December 2018, the Independent Communications Authority of South Africa ("**ICASA**") published the Draft Sports Broadcasting Services Amendment Regulations, 2018¹ ("**the Draft Regulations**") inviting interested parties to make written representations by 4 February 2019. The date for submitting written representations was subsequently extended to 15 March 2019.

¹ Published under Government Notice 1388 in *Government Gazette* 42115 of 14 December 2018.

- 2.2 The South African Rugby Union ("**SARU**") thanks ICASA for affording it the opportunity to make these submissions. SARU also wants ICASA to note that it intends to participate in any subsequent oral hearings that may be held by ICASA in relation to the Draft Regulations.
- 2.3 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. Amongst other things, SARU is responsible for the development and management of all national teams, brand building and intellectual property rights protection, licensing and merchandising, broadcasting rights, sponsor procurement and servicing, the hosting and management of tournaments and tours, and the marketing of the game of rugby.
- 2.4 SARU has an interest in the Draft Regulations as they affect the manner in which SARU is able to leverage its broadcasting rights, which in turn impacts on SARU's ability to properly perform its functions.
- 2.5 We note that, in these written representations and unless the context otherwise indicates, the use of "clause" refers to the clause numbers in the Draft Regulations, "regulation" refers to the regulation numbers of the 2010 Regulations and "section" refers to the sections of the Independent Communications Authority of South Africa Act, 2000 ("**the ICASA Act**"), the Electronic Communications Act, 2005 ("**the ECA**") or other relevant legislation.

3. **Overview of the applicable legal framework**

- 3.1 Section 192 of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**") provides that national legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.
- 3.2 ICASA is that independent authority. ICASA is established in terms of section 3 of the ICASA Act. The functions of ICASA are set out in section 4 of the ICASA Act. Amongst other functions, ICASA must:
- 3.2.1 exercise the powers and perform the duties conferred and imposed upon it by the ICASA Act, the underlying statutes and any other applicable law;
and

- 3.2.2 make regulations on any matter consistent with the objects of the ICASA Act and the underlying statutes or that are incidental to or necessary for the performance of the functions of ICASA.
- 3.3 An important piece of legislation included in the underlying statutes of the ICASA Act is the ECA, the primary object of which is to provide for the regulation of electronic communications in South Africa in the public interest,² and for that purpose to–
- 3.3.1 encourage investment, including strategic infrastructure investment, and innovation in the communications sector (section 2(d));
- 3.3.2 promote the interests of consumers with regard to the price, quality and the variety of electronic communications services (section 2(n));
- 3.3.3 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
- 3.3.4 promote stability in the information, communications and technology sector (section 2(z)).
- 3.4 Section 60 of the ECA provides for restrictions on subscription broadcasting services. It provides that:
- "Subscription broadcasting services may not acquire exclusive rights that prevent or hinder the free-to-air broadcasting of national sporting events, as identified in the public interest from time to time, by [ICASA], after consultation with the Minister [of Communications] and the Minister of Sport and in accordance with the regulations prescribed by [ICASA]."*
- 3.5 Section 60(2) provides that in the event of a dispute arising concerning section 60(1), any party may notify ICASA and the dispute must be resolved on an expedited basis by ICASA in accordance with the prescribed regulations.

² Section 2 of the ECA.

3.6 Pursuant to sections 60(1) and 60(2) (read with section 4 of the ECA), ICASA published the Sport Broadcasting Services Regulations, 2010³ ("the 2010 Regulations"). Regulation 5(1) of the 2010 Regulations stipulates as follows:

"Subject to the criteria provided in regulation 4(1)(a)-(c) the following are listed national sporting events:

- (a) Summer Olympic Games;*
- (b) Paralympics*
- (c) Commonwealth Games*
- (d) All Africa Games*
- (e) FIFA World Cup*
- (f) Africa Cup of Nations*
- (g) IRB Rugby World Cup*
- (h) ICC Cricket World Cup*
- (i) ICC T20 Cricket World Championships*
- (j) Comrades Marathon*
- (k) Two Oceans Marathon*
- (l) Super 14 Rugby*
- (m) COSAFA Cup*
- (n) CAF Champions League*
- (o) CAF Confederations Cup*
- (p) Telkom Charity Cup (Soccer)*
- (q) MTN Supa 8 Cup (Soccer)*
- (r) Telkom Knockout (Soccer)*
- (s) Nedbank Cup (Soccer)*
- (t) Currie Cup (Rugby)*
- (u) MTN 40 (Cricket)*
- (v) International Boxing Federations."⁴*

3.7 Clause 5 of the Draft Regulations seeks to amend Regulation 5 of the 2010 Regulations as a whole.

3.8 SARU's primary focus is on the amendment proposed by clause 5.2, which provides as follows:

5.2 Group B: National Sporting Events offered to a subscription broadcasting licensee on a non-exclusive basis under sub-licensing conditions;

5.2.1 The following sporting events fall within this group:

- a) Super 14 Rugby;*
- b) All Africa Games;*
- c) COSAFA Cup;*
- d) CAF Champions League;*
- e) CAF Confederations Cup;*

³ Published under Government Notice R275 in *Government Gazette* 33079 of 7 April 2010.

⁴ Regulation 5(2) stipulates that the 2010 Regulations will continue to apply to the Group A events irrespective of any changes in the name of the competition or the sponsorship of the event.

- f) *Charity Cup (Soccer);*
- g) *Supa 8 Cup (Soccer);*
- h) *Knockout (Soccer);*
- i) *Soccer Champions Cup;*
- j) *Currie Cup (Rugby);*
- k) *Two Oceans Marathon;*
- l) *Comrades Marathon;*
- m) *Domestic Boxing Tournaments;*
- n) *Premier Soccer League;*
- o) *Domestic Cricket Championships; and*
- p) *Premier Hockey League.*

5.2.2 These Amendment Regulations will continue to apply to the listed national sporting events in Group A and B irrespective of any changes in the name of the competition or the sponsorship of the listed event."

3.9 The publication of the Draft Regulations constitutes administrative action for purposes of the Promotion of Administrative Justice Act, 2000 ("**PAJA**"), read together with section 33 of the Constitution.⁵ As such, ICASA in publishing the Draft Regulations is required to act in a manner that is lawful, reasonable and procedurally fair.

3.10 Moreover, ICASA as an organ of state exercising public power in publishing the Draft Regulations is subject to the principle of legality and the rule of law enshrined in section 1(c) of the Constitution (which provides that the rule of law is one of the central components of the South African legal system). The principle of legality provides that public power may only be exercised in accordance with the law.⁶ Public or governmental action must be authorised by law and must not go beyond the functionary's powers and it must be rational.

4. **Structure of the submission**

4.1 For ease of reference, the remainder of these submissions is structured as follows:

4.1.1 *first*, SARU makes a few preliminary comments on the Draft Regulations;

⁵ *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA) at para 10; *Security Industry Alliance v Private Security Industry Regulatory Authority* 2015 (1) SA 169 (SCA) at paras 15-16; *Medirite (Pty) Ltd v South African Pharmacy Council* [2015] ZASCA 27 at para 9. But see *Mostert NO v Registrar of Pension Funds* 2018 (2) SA 53 (SCA) at paras 8-10.

⁶ *Fedsure Life Assurance Limited and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) ("**Fedsure**").

4.1.2 *second*, SARU sets out its principal submissions on the Draft Regulations and submits that the Draft Regulations in their current form are unlawful and unconstitutional for reasons that are discussed fully below; and

4.1.3 *third*, SARU raises issues with specific clauses of the Draft Regulations.

5. **Preliminary comments**

5.1 The Draft Regulations seek to amend the 2010 Regulations. The rationale for the decision to make the Draft Regulations is not articulated clearly. The object of the 2010 Regulations is to:

"(a) Regulate the broadcasting of national sporting events in the Republic;

(b) Determine the criteria to be used in the listing of national sporting events;

(c) Identify and list national sporting events; and

(d) Provide a dispute resolution mechanism."

5.2 The Draft Regulations intend adding the following object to the stated list: "*[r]each a wider audience and to strike a balance between audience and revenue*". SARU submits that while ICASA should be cognisant of this balance and should caution against undermining it, the role of striking a balance should be the prerogative of the sports bodies, not ICASA.

5.3 Moreover, the regime created by the 2010 Regulations which sets the criteria for the determination of, and identifies a list of, national sporting events, allows for broader public access to the listed sporting events whilst respecting the rights of broadcasters and broadcasting rights holders such as SARU. As such, the current regime (under the 2010 Regulations) achieves the balance sought to be achieved by the Draft Regulations.

5.4 The Draft Regulations, if published in their current form, will undermine the balance and the purposes of the ICASA Act and the ECA and will cause or create problems for SARU and similar sporting bodies by affecting their ability to commercially leverage their broadcasting rights and thereby ensuring that they are in a position to discharge their obligations. If promulgated in their current form, the Draft Regulations are likely to be unlawful and susceptible to judicial challenge either in terms of PAJA or under the principle of legality.

6. SARU's submissions on the Draft Regulations

6.1 SARU's principal submissions on the Draft Regulations are as follows:

6.1.1 *first*, the proposed amendment in clause 5 is *ultra vires* the ECA;

6.1.2 *second*, the proposed amendment in clause 5.2 is unlawful, unreasonable and unconstitutional. Should the Draft Regulations be promulgated as proposed, SARU submits that this is likely to severely impair rugby in South Africa and undermine the philosophy and spirit behind Section 60 of the ECA;

6.1.3 *third*, the Draft Regulations are inconsistent, unclear and ambiguous, which makes it impossible for interested parties to comment meaningfully and in an informed manner. This undermines the requirement of procedural fairness, which requires at a minimum that consultation with interested parties be genuine and meaningful.

6.2 These submissions are expanded upon below.

6.3 **Clause 5 of the Draft Regulations is *ultra vires***

6.3.1 Section 60(1) of the ECA:

6.3.1.1 prohibits subscription broadcasters from acquiring exclusive rights if that would prevent or hinder free-to-air broadcasting of national sporting events; and

6.3.1.2 empowers ICASA to identify national sporting events which are in the public interest, subject to certain consultation requirements.

6.3.2 Section 60(1) does not prevent the acquisition by broadcasters of exclusive broadcasting rights per se. Instead, it prohibits the acquisition by broadcasters of exclusive rights if that would operate to prevent or hinder free-to-air broadcasting of national sporting events. The prohibition only kicks in if these jurisdictional facts exist. Otherwise subscription broadcasters can acquire exclusive broadcasting rights under the common law and subject to any limitations in any other legislation that may exist.

6.3.3 The power to list sporting events in section 60(1) of the ECA does not authorise the imposition of a legal requirement that the listed national sporting events 1) must be broadcast on full live coverage by free-to-air broadcasters, 2) that certain events may only be acquired on a non-exclusive basis by subscription broadcasters, or 3) that minority and developmental sporting events must be broadcasted. If the legislature had this intention, it would have made these aspects clear in describing the ambit of the power contained in section 60(1) of the ECA, which it did not do.

6.3.4 Having regard to the above, SARU submits that the Draft Regulations go further than what ICASA is empowered to do in section 60(1) of the ECA and are, as such, ultra *vires* ICASA's powers and therefore unlawful and unconstitutional.

6.4 **Clause 5.2 of the Draft Regulations is vague**

6.4.1 First, the intended meaning and effect of clause 5.2 of the Draft Regulations is unclear. Clause 5.2 provides as follows:

"Group B: National Sporting Events offered to a subscription broadcasting licensee on a non-exclusive basis under sub-licensing conditions".

6.4.2 What follows thereafter is a list of sporting events meant to fall within this group ("**the Group B events**").

6.4.3 Clause 5.2 is vague for the following reasons:

6.4.3.1 unlike in clause 5.1.1, it is not made express that the determination of the sporting events falling within the list is subject to, or based upon the criteria in regulation 4 (in terms of regulation 4, not all the games that form part of the listed event will be of public interest).

6.4.3.2 regulation 4 (taking into account the proposed amendment contemplated in clause 4 the Draft Regulations) provides as follows:

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

- (a) *a confederation sporting event involving a national team or a national sporting representative;*
- (b) *a semi-final and final of a national knockout competition; or*
- (c) *an opening game, semi-final and final of a confederation sporting event" (our emphasis);*

6.4.3.3 it is unclear how the Super 14, or the Currie Cup, for example, will fall within the proposed definition of "*National Sporting Events*" contemplated in the Draft Regulations. This definition appears to narrow the events that would qualify as national sporting events to events that include the South African National Senior Team. Neither the Super 14, nor the Currie Cup, involves the *South African National Senior Team*;

6.4.3.4 without the application of the criteria set out in regulation 4, all listed sporting events will fall within Category B regardless of whether they are in the public interest;

6.4.3.5 it is unclear what is meant by "*non-exclusive basis under sub-licensing conditions*" as stipulated in clause 5.2. Does it require the acquisition of broadcasting rights by subscription broadcasters to be on a non-exclusive basis, i.e. that free-to-air and other subscription broadcasters should also be able to acquire the broadcasting rights from the same rights holder, or is the intention for subscription broadcasters to acquire the rights, and then to sub-licence the rights to other broadcasters on a non-exclusive basis?

6.4.3.6 more significantly, clause 5.2 seems to be descriptive only and does not stipulate the consequence that must follow if a sporting event falls within the listed sporting events. In other words, it does not state expressly what the obligations or rights are in that event of a free-to-air broadcaster or subscription broadcaster.

6.5 **Clause 5.2 is an unconstitutional limitation on SARU's right to property and amounts to unlawful administrative action**

6.5.1 As will be explained in detail below, the proposed amendment contemplated in clause 5.2 of the Draft Regulations will have a significantly adverse

impact on SARU's revenue as SARU will be impaired in its ability to offer its broadcasting rights in respect of the Currie Cup to subscription broadcasters on an exclusive basis, especially in circumstances where the subscription broadcasters may sub-licence their rights to free-to-air broadcasters and comply with the object of section 60(1) of the ECA. This will, in turn, affect SARU's operations and functions as a sporting body and severely impact on SARU's legal obligation to actively participate in and support programmes and services of Sport and Recreation South Africa. SARU is enjoined to do so in terms of section 6(2) of the National Sport and Recreation Act, 1998 ("the Sport and Recreation Act").⁹

6.5.2 **Clause 5.2 infringes unconstitutionally on SARU's right to property**

6.5.2.1 SARU submits that clause 5.2 of the Draft Regulations unjustifiably limits its right to property and is therefore unconstitutional.

6.5.2.2 Section 25 of the Constitution protects the right to property in the following terms:

"(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application:-

*(a) for a public purpose or in the public interest;
and*

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including:-

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

⁹ Section 6(2) of the Sport and Recreation Act provides that: "*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.*" Sport and Recreation South Africa is defined in the Sport and Recreation Act as the National Department of Sport and Recreation.

- (c) *the market value of the property;*
- (d) *the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and*
- (e) *the purpose of the expropriation."*

6.5.2.3 Section 25 distinguishes between two different infringements of the constitutional right to property, namely, deprivations and expropriations. A deprivation of property must be in terms of law of general application and non-arbitrary. Our Constitutional Court has held that a deprivation of property is arbitrary if there is no "*sufficient reason*" for the deprivation or it is procedurally unfair.⁷ 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*".⁸ The test for "*sufficient reason*" lies somewhere between the low-level scrutiny of mere rationality and the relatively high-level requirement of reasonableness or proportionality.⁹

6.5.2.4 Clause 5.2 of the Draft Regulations interferes and limits an essential incidence of SARU's broadcasting right, namely, the ability to leverage of that right at the most commercially favourable price. If SARU is not permitted to sell its broadcasting rights on an exclusive basis (while complying with section 60 of the ECA), 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

⁷ *First National Bank of SA Limited t/a Wesbank v Commissioner, South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) ("**FNB**")

⁸ *FNB* at para 98.

⁹ This test was summarised in *Mkontwana v Nelson Mandela Metropolitan Municipality and Another* 2005 (1) SA 530 (CC) ("**Mkontwana**") at para 44 as follows:

"There are three interrelated steps to this enquiry. We must determine in turn:

- (a) *the nature of the property concerned and the extent of the deprivation;*
- (b) *the nature of the means-ends relationship that is required in the light of the nature and extent of the deprivation; and*
- (c) *whether the relationship between means and ends accords with what is appropriate in the circumstances and whether it constitutes sufficient reason for the section 25(1) deprivation."*

property, will be eroded. In so far as exclusivity is concerned, the Draft Regulations contradict ICASA's own prior pronouncements including in the Discussion Paper in the Inquiry into Sports Broadcasting Rights¹⁰ ("**the Discussion Paper**"). In the Discussion Paper, ICASA recognises that the sale of broadcasting rights to an event on an exclusive basis is an accepted commercial practice¹¹. Furthermore, ICASA stipulated that for sports bodies seeking to increase their income, the sale of the 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 rights¹². Elsewhere in the Discussion Paper, ICASA stipulates as follows:

"An important consideration with regards to the regulation of broadcasting rights, is the reliance by sports administrators on the income from selling such rights. The money generated from selling sports rights is often seen as critical to the survival of sports."¹³

6.5.2.5

The underlying purpose of the Draft Regulations is for the broadcast of sporting events in issue to reach a wider audience and to strike a balance between audience and revenue. SARU submits that this is not a sufficient reason particularly when regard is had to the potential impact on SARU's property right as set out in paragraph 6.5.4 below. As such, SARU submits that the Draft Regulations amount to an arbitrary deprivation of its rights to property as there is no rational link between the means employed to achieve the purpose of a wider audience (i.e. forcing the acquisition of SARU's broadcasting rights on a non-exclusive basis, having a dire impact on SARU's objectives and functions) and the end sought to be achieved. In fact, given the poorly worded clauses in the Draft Regulations it is unclear whether

¹⁰ Published on 8 August 2008.

¹¹ Paragraph 12.4, page 28 of the Discussion Paper.

¹² Paragraph 12.4, page 28 of the Discussion Paper.

¹³ Paragraph 2, page 7 of Discussion Paper.

clause 5.2 will ensure that the broadcasting of listed events reaches a wider audience.¹⁴

6.5.3 **Clause 5.2 is unlawful and unreasonable**

6.5.3.1 SARU submits further that clause 5.2 infringes on its constitutional right to lawful, reasonable and procedurally fair administrative action (section 33 of the Constitution, given effect to by PAJA).

6.5.3.2 Section 33(1) of the Constitution provides that:

*"(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
(3) National legislation must be enacted to give effect to these rights, and must—
(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
(c) promote an efficient administration."*

6.5.3.3 The proposed amendment, as envisaged in the Draft Regulations, is an action by an organ of state (ICASA), exercising a public power in terms of legislation (the ECA and the ICASA Act) which adversely affects SARU's rights. It has a direct, external legal effect and it is not specifically excluded from PAJA's definition of "*administrative action*".¹⁵

6.5.3.4 Accordingly, the Draft Regulations amount to administrative action for purposes of PAJA and, for the reasons already canvassed above,

¹⁴ For example, there is no obligation on free-to-air broadcasters to acquire the broadcasting rights of the Group B events. SARU submits that there is a significant risk of the free-to-air broadcasters not acquiring any of the broadcasting rights of the Group B events or selecting only the broadcasting rights which suit their commercial interests and budgetary and capacity constraints. Furthermore, subscription broadcasters may not place little or no value on such broadcasting rights if non-exclusivity is a condition. In such a scenario, exposure and revenue to SARU will be compromised.

¹⁵ Various cases of the Supreme Court of Appeal have held that delegated or subordinate legislation (and other forms of rule-making) are to be treated as administrative action and should be subject to administrative-law review. See *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA) at para 10; *Security Industry Alliance v Private Security Industry Regulatory Authority* 2015 (1) SA 169 (SCA) at paras 15-16; *Medirite (Pty) Ltd v South African Pharmacy Council* [2015] ZASCA 27 at para 9. But see *Mostert NO v Registrar of Pension Funds* 2018 (2) SA 53 (SCA) at paras 8-10.

clause 5.2 if ultimately promulgated could be challenged under the following grounds of review:

- 6.5.3.4.1 the action was procedurally unfair,¹⁶ as the Draft Regulations do not in substance afford adequate notice to interested and affected parties, nor a reasonable opportunity, to make representations as well as publishing a clear statement of the proposed decision. Furthermore, SARU is unable to comment meaningfully because the true intention of the clause is unclear given the vagueness thereof;
- 6.5.3.4.2 the action was taken because relevant considerations were not considered. ICASA did not take into account the significant adverse effect that clause 5.2 will have on, amongst others, SARU and that obtaining broadcasting rights on an exclusive basis but sub-licensing to free-to-air broadcasters meets the requirements of section 60(1);¹⁷
- 6.5.3.4.3 the means adopted by ICASA are not proportional to the intended outcome, namely, to achieve a balance between audience and revenue. First, the data underpinning this stated outcome is not made available. Secondly, this intended outcome of achieving a balance between audience and revenue is not fully developed and so SARU, amongst other interested parties, is unable to meaningfully engage with this intended outcome. ICASA could have achieved the same end by less restrictive means, namely, permitting exclusive licensing subject to sub-licensing to free-to-air broadcasters who want to sub-licence. Such an arrangement would be consistent with section 60(1) of the ECA;

¹⁶ Section 6(2)(c) of PAJA.

¹⁷ Section 6(2)(e)(iii) of PAJA.

- 6.5.3.4.4 the decision is so unreasonable that no reasonable person could have exercised the power or performed the function.¹⁸ We expand on this ground of review below; and
- 6.5.3.4.5 the action is otherwise unconstitutional or unlawful.¹⁹ For all the reasons discussed.
- 6.5.3.5 Clause 5.2 of the Draft Regulations is unreasonable for the following reasons:
- 6.5.3.5.1 clause 5.2 will have a significantly adverse effect on SARU's revenue/income, which in turn will have an impact on:
- 6.5.3.5.1.1 SARU's operations and functions as a sporting body;
- 6.5.3.5.1.2 SARU's legal obligation to actively participate in and support programmes and services of Sport and Recreation South Africa in terms of section 6(2) of the Sport and Recreation Act; and
- 6.5.3.5.1.3 SARU's ability to make substantial investments in junior, women's and community rugby, grassroots and elite player development programmes, training, education, initiatives for the development of infrastructure as well as transforming and uplifting rugby.

6.5.4 **The adverse impact of clause 5.2 on SARU's business operations and functions**

- 6.5.4.1 As stated above, the Draft Regulations, and in particular the proposed clause 5.2, will have a deleterious effect on SARU's operations, functions and obligations by substantially reducing SARU's revenues as more fully set out below. In this section, we set out in a fair measure of detail the reasons why an attempt on the part of ICASA to regulate the sale of sports broadcasting rights in South Africa by means of the Draft Regulations will result in grievous financial

¹⁸ Section 6(2)(h) of PAJA.

¹⁹ Section 6(2)(i) of PAJA.

consequences for sports federations such as SARU. Those consequences will have a significant impact on SARU's ability to deliver on its main objective to promote, develop and support all levels of rugby in South Africa and field internationally competitive provincial and national teams to the detriment of all South Africans.

6.5.4.2 We preface the above by first canvassing SARU's sources of revenue and explaining the prominence of the licensing of broadcasting rights in that regard.

6.5.4.3 **Sources of SARU's revenue**

6.5.4.3.1 SARU relies significantly on its private revenue generating initiatives.

6.5.4.3.2 Securing funding through these initiatives enables SARU to achieve a number of outcomes, importantly, making substantial investments in junior, women's and community rugby, grassroots and elite player development programmes, training, education, initiatives for the development of infrastructure as well as transforming and uplifting rugby. SARU invests a significant sum in these initiatives, in the region of R84 million per year.

6.5.4.3.3 Furthermore, the funding assists SARU in its responsibility to deliver globally competitive Springbok and Springbok Sevens teams. The international success of these teams since 1995 has acted as a powerful nation-building tool, which will be compromised should there be a negative impact on the sport's ability to self-fund.

6.5.4.3.4 Of the revenue which SARU generated in the 2018 financial year, the sale of rugby's broadcasting rights represents approximately 57% of SARU's revenue and sponsorships represent 27%. The remaining 16% of SARU's revenue is generated through test and event participation, grants, merchandising and licensing royalties. It should be borne in mind that the level of sponsorship enjoyed by SARU is largely

a function of the level of exposure it is able to achieve, thanks to the extensive distribution of content both locally and internationally as a result of the exclusive sale of its broadcasting rights.

6.5.4.3.5

The revenue derived from the exclusive sale of its rights has enabled SARU to deliver on its mandate and obligations to its various stakeholders, including its partners in the Super Rugby Championships which include South Africa, New Zealand, Argentina and Australia, jointly known as "**SANZAAR**". This has further incentivised the necessary investments in broadcasting equipment and quality which has enabled SARU to meet the high production standards set by international markets. For the above reasons, SARU is best placed to balance its obligations, its funding requirements and the need to generate revenue from all its activities. This includes it being able to determine how best to package and sell its rights to broadcast.

6.5.4.4

The sale of broadcasting rights

6.5.4.4.1

Sporting bodies (such as SARU) generally own the broadcasting rights to the sports events played in their country²⁰ and SARU submits that these bodies, as the rights sellers, are best placed to decide how, and to whom, to sell these rights. The sale of the rights requires sporting bodies to find a balance between the need for income and the desire to maximise the exposure of their sports to the general public. SARU (like other sporting bodies) takes into account a number of factors when considering how and to whom to sell its rights, including, but not limited to, the following:

6.5.4.4.1.1

the capacity of both local and international broadcasters to distribute all the rugby events played;

²⁰ For example, SARU controls the broadcasting rights to the June Springbok Tests.

- 6.5.4.4.1.2 the audience share or reach of a broadcaster;
- 6.5.4.4.1.3 a broadcaster's production budget to make the necessary investments, and production expertise and experience, in order to ensure that the content they produce satisfies the national and international markets' standards;
- 6.5.4.4.1.4 the ability of the broadcaster to pay for the broadcasting rights; and
- 6.5.4.4.1.5 the ability of the broadcaster to market the rugby events and to advance the South African rugby brand.
- 6.5.4.4.2 There are a number of reasons why sports bodies like SARU sell their rights to distribute events on an exclusive basis. The granting of exclusivity to the purchaser of the rights is a global practice, recognised by regulators and competition authorities, that delivers, *inter alia*, the following benefits:
 - 6.5.4.4.2.1 it maximises the revenue of sporting bodies. In this regard we note that an exclusive premium is generally worth between 40-100% of the total value of the rights;
 - 6.5.4.4.2.2 it promotes investment in the quality of production of the sport, which increases the attractiveness of the sport to consumers and in turn to sponsors, thereby increasing the value of sponsorship revenue. Since sponsorship is the second largest revenue contributor, this is a significant consideration; and
 - 6.5.4.4.2.3 it enables broadcasters to differentiate their product offering, innovatively package the content and promote and market the content. This investment benefits viewers.
- 6.5.4.4.3 Sports bodies, like SARU, have an interest in ensuring that the process involved in selling their rights is as competitive as possible to enable them to maximise their revenue.

- 6.5.4.4.4 It is, however, important to note that there are currently a significant number of rugby events that are available on free-to-air television in South Africa, including a large number of the Rugby World Cup matches. In terms of Regulation 6(1) of the 2010 Regulations, subscription broadcasters who have acquired broadcasting rights to listed events must inform free-to-air broadcasting service licensees within 5 days of acquiring the rights, of the opportunity to tender for such rights. Broadcasters holding the rights to distribute the events therefore sub-licence the rights to free-to-air broadcasters which extends the audience reach to free-to-air television consumers and meets the requirements of section 60(1) of the ECA.
- 6.5.4.4.5 SARU has derived the following benefits from its ability to sell the rights to broadcast and distribute its content on an exclusive basis:
- 6.5.4.4.5.1 extensive distribution of rugby matches per season (+/- 1 500 hours excluding match build-ups and reviews) including World Rugby Sevens Series matches. This is facilitated by the creation of a channel that is primarily dedicated to rugby;
 - 6.5.4.4.5.2 production of high quality rugby content which meets international standards. This content, which is also distributed by international broadcasters, is a very significant contributor of revenue to SARU;
 - 6.5.4.4.5.3 high levels of exposure and brand recognition for South African rugby, thereby attracting sponsors and significant additional revenue;
 - 6.5.4.4.5.4 generation of revenue which has enabled the professionalization of the sport, the ability of franchises and SARU to remunerate players, coaches and referees competitively and thus SARU's ability to attract and retain talent. This has enabled South Africa to maintain top

rankings, currently fifth as at March 2019, in the World Rugby Rankings;

6.5.4.4.5.5 investment in ensuring sustainable domestic rugby competitions through the 14 provincial unions;

6.5.4.4.5.6 promotion of the sport of rugby and investment in rolling out grassroots training and development of the sport in local communities, schools and clubs;

6.5.4.4.5.7 in sum, SARU has been able to invest significant amounts in achieving its objectives.

6.5.5 **The consequences if clause 5.2 is implemented in its current form**

6.5.5.1 The Draft Regulations are fraught with uncertainty and inconsistencies. They will result in regulatory and commercial uncertainty and instability with regard to the negotiation and acquisition of sports broadcasting and related rights, such as sponsorship and advertising, as well as the day to day tasks undertaken by SARU to administer, develop and promote the game of rugby in South Africa.

6.5.5.2 SARU's broadcasting rights are its major asset. Live and exclusive broadcasting rights, in particular, are by far the most valuable. If SARU were forced, as a result of regulation to forego the additional price which it would have been able to charge for exclusivity, SARU's revenue from the sale of the broadcasting rights to the affected sports events would be cut by up to 40-100%.

6.5.5.3 South African rugby is amongst the best in the world and has been in one of the top five positions for the past five years. The Springboks were the Rugby World Cup bronze medal winners in 2015 and the Sevens Springboks Team was the Sevens World Series Championship winners in 2017 and 2018. It was also Rugby World Cup Sevens bronze medallists in 2018. This could not have been achieved without the revenue which SARU derives from the sale of its broadcasting rights. If SARU's revenue were to fall as a result of regulation or regulatory uncertainty, that would have a devastating

impact on SARU, and an extremely damaging domino effect on the entire rugby funding structure, with distressing consequences for rugby in South Africa, including the following:

- 6.5.5.4 the vast majority of the 14 provincial unions (which rely heavily on the funding which they receive from SARU) would face bankruptcy and closure. The provincial unions are further in back-to-back agreements in respect of which it cannot simply withdraw as it will. It would impact on their ability to be competitive on the international stage which is a requirement of broadcasters, fans and sponsors;
- 6.5.5.5 SARU would be unable to invest in the development and promotion of rugby, from grassroots level upwards as it is currently able to do. SARU currently invests in rugby at all levels, including junior, women's and community rugby, grassroots and elite player development programmes. These include training and education, and initiatives for the development of infrastructure and human resources potential in order to grow, transform and uplift rugby to establish it in areas where it has not been played. It also includes a range of activities annually at all levels, such as youth weeks, talent identification programmes, elite squads, holistic development of players, excellence programmes, school and club tournaments, club assistance programmes, women's rugby, and coaching and referee development;
- 6.5.5.6 SARU will be unable to pay competitive salaries and will lose its top-performing players, coaches and referees to financially lucrative overseas markets, which, in turn, would affect the quality of rugby, and that of its players, administrators and referees, both in South Africa, and internationally;²¹ and
- 6.5.5.7 the reduction in revenue would lead to a deterioration in the quality of South African rugby which, in turn, would have a severe adverse

²¹ We note here that between 250 and 300 South African players are contracted overseas on an annual basis by clubs in Europe and Japan (principally) and are regarded as a good investment by those clubs. High profile coaches like Erasmus, Meyer, Van Graan, Coetzee, Ludeke, Theron, Gold and Ackermann (among others) have accepted offers overseas. The inability to pay competitive South African salaries will accelerate those departures.

impact on the value which broadcasters would see in rugby broadcasting rights. This would result in a further decline in the price which broadcasters would be willing to pay for those rights and the amount broadcasters would be willing to invest in their attempt to create viewer awareness and interest in their rugby broadcasting programmes.²² Such investments are critical for the exposure of the game, and SARU's ability to attract sponsorships.

6.5.5.8 It is clear therefore that if SARU cannot sell its broadcasting rights on an exclusive basis to broadcasters, it will have a significant adverse impact on SARU's obligations, operations and functions, and the game of rugby will look vastly different as a result.

6.6 **The consultation process regarding the Draft Regulations is procedurally unfair**

6.6.1 In publishing the Draft Regulations, ICASA is required to act in a procedurally fair manner. This would require, at a minimum, that interested parties be given adequate notice of the nature and purpose of the proposed administrative action, a reasonable opportunity to make representations and a clear statement of the proposed decision (our emphasis).²³ It is only when these minimum requirements are met that the consultation process will be genuine and meaningful.

6.6.2 SARU submits that the clauses listed below, together with clause 5.2, are unclear due to errors and/or are internally inconsistent. This makes it difficult for interested parties to comment on the Draft Regulations in a meaningful and informed manner. As such, if published in their current form, the Draft Regulations and the process culminating in the publication thereof might be held to be procedurally unfair.

6.6.3 **Clause 5.1 of the Draft Regulations**

6.6.3.1 The meaning of clauses 5.1.1 and 5.1.2 is unclear. The clauses are vague and inconsistent when read together.

²² Broadcasters are willing to invest far more money and resources in promoting the broadcast of an event which they will be broadcasting exclusively

²³ Section 3(2)(b)(i)-(iii).

- 6.6.3.2 The heading of clause 5.1 indicates that what follows in the clause are "Compulsory Listed National Sporting Events for a Free-to-air licensee with full live coverage" (our emphasis). Read together with the wording of clause 5.1.1, which states that the events listed in that clause (referred to as "**the Group A events**") "must be broadcast on full live coverage on Free-to-air" (our emphasis), it appears to be mandatory for free-to-air broadcasters to broadcast the Group A events on full live coverage, and, seemingly, for the rights holders (like SARU) to sell their broadcasting rights to free-to-air broadcasters to enable them to do so.
- 6.6.3.3 Clause 5.1.2, on the other hand, appears to claw back on this "*obligation*" on the seller of the broadcasting rights as well as the free-to-air broadcaster, and provides that if the free-to-air broadcaster cannot acquire the rights to broadcast the Group A events, it must inform subscription broadcasters and *allow* them to *bid* for the rights (on a non-exclusive basis).
- 6.6.3.4 Clauses 5.1.1 and 5.1.2 are thus inconsistent insofar as the former suggests that the Group A events must be broadcast on full live coverage by free-to-air broadcasters (i.e. there being no choice afforded to either the rights holder or to the broadcaster) whereas the latter clause suggests that the free-to-air broadcasters have some form of option or choice.
- 6.6.3.5 What is more confusing is the impact of clause 5.1.2 given that even if the free-to-air broadcaster is afforded an option or choice, it is by no means clear what is meant by "*cannot acquire the rights*". It seems to suggest that there may be instances where free-to-air broadcasters will not be able to, or be afforded (for whatever reason) the opportunity to acquire the rights to the Group A events on full live coverage (in contrast to the use of the word "*must*" in clause 5.1.1).²⁴

²⁴ For example, does "*cannot acquire*" mean: i) it must be impossible for free-to-air broadcasters to acquire the rights because the rights have been acquired by someone else; ii) that free-to-air broadcasters "*cannot acquire*" the rights because it cannot afford to buy the rights from SARU, for instance; or iii) that the free-to-air broadcaster does not have the resource capacity to broadcast and therefore "*cannot acquire*" the rights because it cannot broadcast the content?

6.6.3.6 Yet a further oddity arising from clause 5.1.1 is whether it is intended to exclude subscription broadcasters from broadcasting on full live coverage altogether where a free-to-air broadcaster has acquired the right and will be broadcasting on full-live coverage. It is not immediately apparent whether a subscription broadcaster will be permitted to acquire the rights to simultaneously broadcast on full live coverage in circumstances where a free-to-air broadcaster has acquired those rights. Nothing in clause 5.1.1 prohibits subscription broadcasters from also broadcasting on full live coverage, although clause 5.1.2 seems to suggest that only if a free-to-air broadcaster "*cannot acquire*" the rights to broadcast on full live coverage, should the free-to-air broadcaster inform the subscription broadcaster to allow the latter an opportunity to bid for the rights (i.e the broadcaster only gets an opportunity to acquire the rights if the free-to-air broadcaster could not do so).

6.6.3.7 A further challenge in interpreting clauses 5.1.1 and 5.1.2 arises from the fact that, when regard is had to the definitions of "*free-to-air*", "*broadcasting*" and "*broadcasting service*", it appears to contemplate both free-to-air *television* and *radio* broadcasters. This makes it unclear as to whether, if only one such free-to-air broadcaster is able to acquire the rights, that excludes the others or subscription broadcasters from also acquiring the rights. Concomitantly, it is unclear whether the application of clause 5.1.2 is only triggered if no (television or radio) free-to-air broadcaster is able to acquire the rights.

6.6.3.8 Given the fact that there are a number of free-to-air broadcasters (both television and radio) it is equally unclear whether clause 5.1.1 required a holder of broadcasting rights to sell its rights to all free-to-air broadcasters, or whether the rights holder can choose to which free-to-air broadcaster it wishes to sell.

6.6.3.9 Finally, it is wholly unclear what is meant by "*allowing*" subscription broadcasters an opportunity to bid for the rights on a non-exclusive basis. It is unclear whether only subscription broadcasters will be bidding for the rights, or whether the free-to-air broadcasters will also

bid with the subscription broadcasters. It would be anomalous that the free-to-air broadcasters should inform subscription broadcasters of their opportunity to bid for the rights of a third party. And it could not have been intended that subscription broadcasters must bid for the rights from the free-to-air broadcasters, as they, supposedly, could not have acquired the rights and would have nothing to sell. Again, the correct position is unclear. In any event, it is unclear why subscription broadcasters are restricted to bidding for the rights on a non-exclusive basis if a free-to-air broadcaster could not acquire the rights.

6.6.4 **Clause 5.3**

6.6.4.1 Clause 5.3 introduces "**Group C: Minority and Developmental Sporting Events** to be broadcast by subscription and free-to-air broadcasters".

6.6.4.2 In terms of the Draft Regulations, "*Developmental Sports*" are defined as "*sports aimed at promoting social change and enlarging the population's choices and increasing opportunities to all members of the society*" and "*Minority Sports*" are defined as "*any sport that does not have majority of the population's following or a sport having a less distinctive presence within a larger society*".

6.6.4.3 Clause 5.3.1 makes it mandatory for free-to-air and subscription broadcasters to broadcast at least two events of the listed sporting codes per annum. The inclusion of the Minority and Developmental Sporting Events is peculiar. It is unclear (i) whether the list is subject to the criteria set out in regulation 4 and (ii) how broadcasters are meant to fulfil this obligation.

6.6.4.4 What is clear is that clause 5 does more than simply identify a list of national sporting events as authorised by section 60(1) of the ECA.

6.7 **Clause 6.1**

6.7.1.1 Clause 6.1 provides that:

"A broadcasting service licensee who has acquired rights or failed to acquire rights in terms of regulation 5.2 must inform other broadcasting service licensees within five (5) days of acquiring such rights or failure to do so, for the opportunity by other broadcasters to tender for same if the rights are not acquired."

6.7.1.2 It is not clear whether it is intended that the other broadcasters must be allowed to sub-licence from the broadcaster who acquired the rights, or that the other broadcasters be allowed an opportunity to also acquire the rights to broadcast from the rights holder.

6.7.2 **Clause 1 of the Draft Regulations (Definitions)**

6.7.2.1 According to clause 1, the definitions of "*National Sporting Representative*" and "*Sports of National Interest*" must be *inserted* after the definitions of "*National Sporting Representative*" and "*Sports of National Interest*", respectively. The phraseology is odd. In preceding proposed definitions, the wording usually indicated that the new definition is to be inserted after the preceding definition. Instead in this clause, it suggests that the insertion is to follow an already existing definition of the very same term. There are currently no definitions for "*National Sporting Representative*" and "*Sports of National Interest*". These are new definitions and the clause should state that they are to be inserted after the definition immediately preceding its insertion.

6.7.2.2 The same issue arises in respect of the insertion of the definition of "*National Sporting Events*". This is incorrect for two reasons: *first*, the 2010 Regulations contain a definition for "*national sporting event*", not "*national sporting events*"; and *second*, even if the intention was to refer to "*national sporting event*" in the 2010 Regulations, it would have the result of two definitions for the same phrase being included in the final Regulations. Additionally, the more appropriate terminology should be "substitution", not "insertion".

6.7.2.3 The purpose of including the definition of "*Sports of National Interest*" is also not clear, as it is not used in the Draft Regulations or the 2010 Regulations. Furthermore, it appears to be inconsistent with the proposed definition of "*National Sporting Events*", which is defined as

"the broadcasting of sporting events that are deemed to be of national interest and include the South African National Senior Team" (our emphasis). "Sports of National Interest" is defined as "an event that does not necessarily involve a Senior National Team but appeal to the majority of South African populace" (our emphasis). It is unclear how a national sporting event is deemed to be of national interest and includes the South African National Team, but a sport of national interest does not have to involve a Senior National Team. In any event, section 60 of the ECA refers to "national sporting events", not to "sports of national interest".

6.7.2.4 It is also unclear when a team will qualify as a "National Senior Team", which is defined as "the highest-ranking team in a specific sporting age group". The use of "specific sporting age group" in the definition could have the odd consequence of including the highest ranking team in the u/10 or u/13 age group for rugby, hockey or soccer, for example. Furthermore, it is unclear whether the intention is to substitute the definition of "National team" in the 2010 Regulations with the definition of "National Senior Team", or whether the intention is to retain the definition of "National team".

6.7.2.5 The purpose of including the definition of "Sports of National Interest" is not clear, as it is not used in the Draft Regulations or the 2010 Regulations.

6.7.2.6 Finally, the definition of "National Senior Team" is not used in the Draft Regulations or the 2010 Regulations, except for the new proposed definition of "National Sporting Event", which appears to narrow the scope of such events to only where the South African National Senior Team is involved, and the definition of "Sports of National Interest" which refers to "Senior National Team" instead of "National Senior Team".

7. Conclusion

7.1 The 2010 Regulations, after weighing all of the public interest considerations, permit a broadcaster to acquire exclusive rights to broadcast listed sporting events which have been prescribed in the public interest and allowing the

broadcast to be done live, delayed live or delayed. In this way, the 2010 Regulations enable a sports body to maximise the value from its sports broadcasting rights, whilst enabling fans to view the event on television at an appropriate time, soon after the event, taking into account all of the relevant factors, including the free-to-air television broadcasters' capacity constraints and scheduling requirements. There is no demonstrable rational basis to change the current, working regime and ICASA has not shed any light in this regard.

- 7.2 Although SARU favours self-regulation, the 2010 Regulations present a middle ground in the public interest. SARU submits that the proposed changes to the definitions, and the changes contemplated in clauses 5 and 6 are neither necessary nor desirable, and they would have the effect of taking a functional system and rendering it dysfunctional, chaotic and costly to sporting bodies such as SARU.
- 7.3 More specifically, SARU submits that if the Draft Regulations are published in the current form, they will be unlawful and unconstitutional.
8. Please do not hesitate to let us know if you have any queries in relation these comments. We hold ourselves available to meet to discuss any aspect of our comments at a mutually convenient date and time.

Yours sincerely



Jurie Roux
Chief Executive Officer