



INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA
SOUTH AFRICAN RUGBY UNION
Inquiry into subscription television broadcasting services

The Team

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Placeholder - Video

About SA Rugby

- SA Rugby is the custodian of rugby in South Africa and is responsible for its general administration and the following traditional and new responsibilities:
 - The development and management of all national teams;
 - Brand building and intellectual property rights protection;
 - The licensing of broadcasting rights and the procurement of sponsors;
 - Financial and other support to 14 provincial unions;
 - The development of club rugby, amateur, semi-professional and professional teams;
 - The implementation of various development initiatives; and
 - Producing content (matches, competitions) to sell to consumers in a highly competitive market for attention and space.

This is what we're expected to do

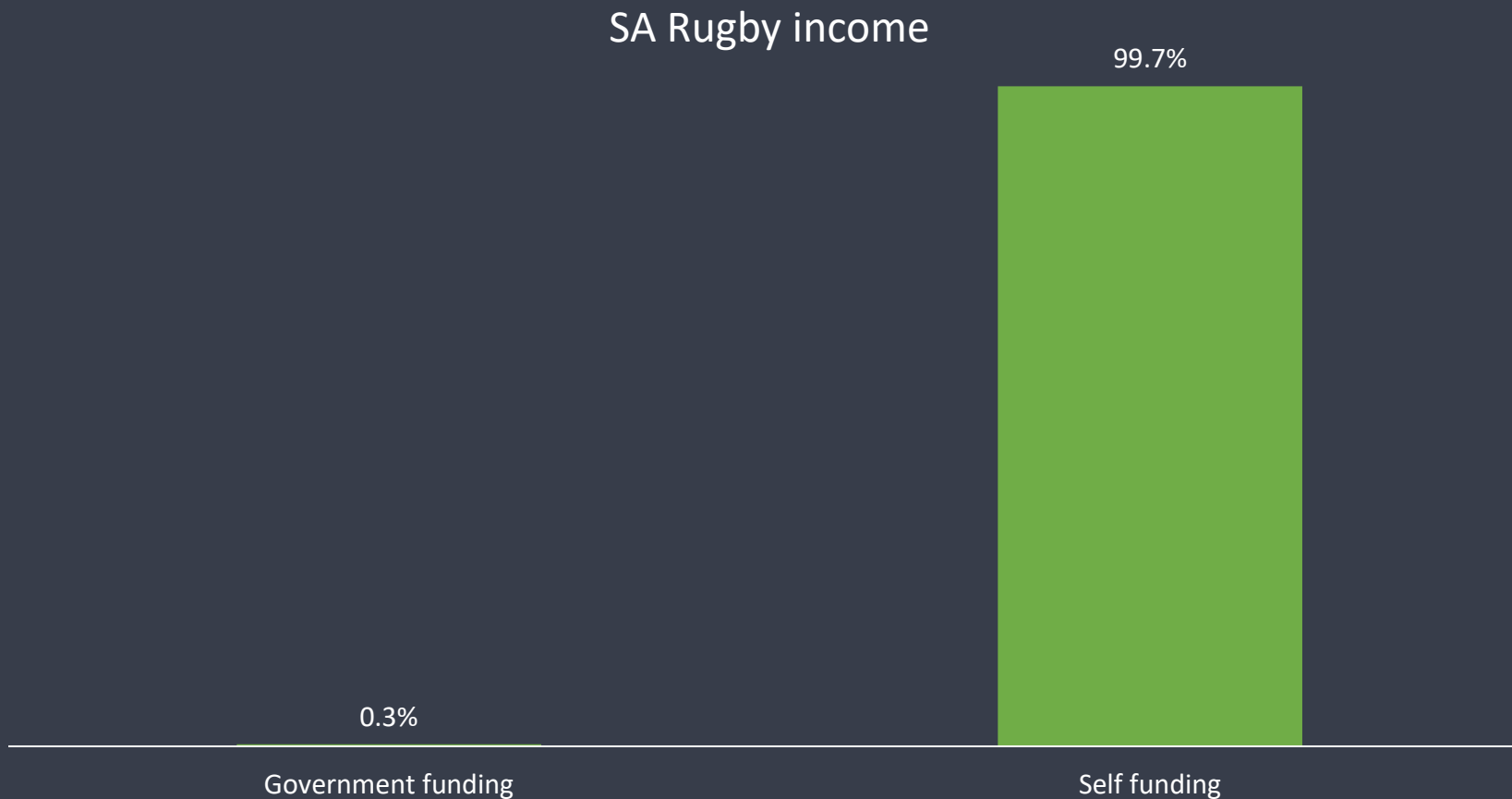
Section 6(2) of the Sports and Recreation Act states as follows:

"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".

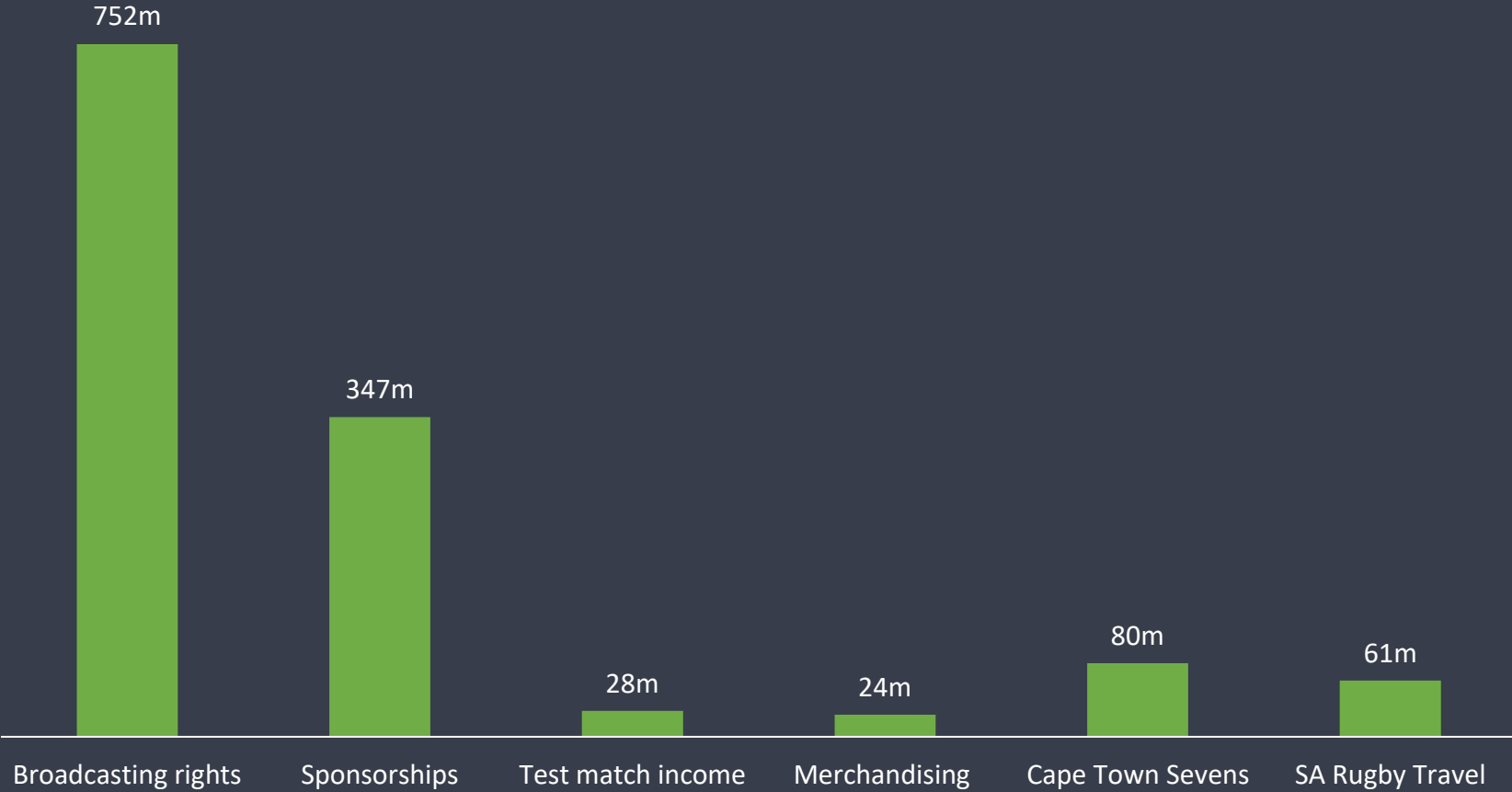
Section 10(1)(b) of the Sports and Recreation Act states as follows:

"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".

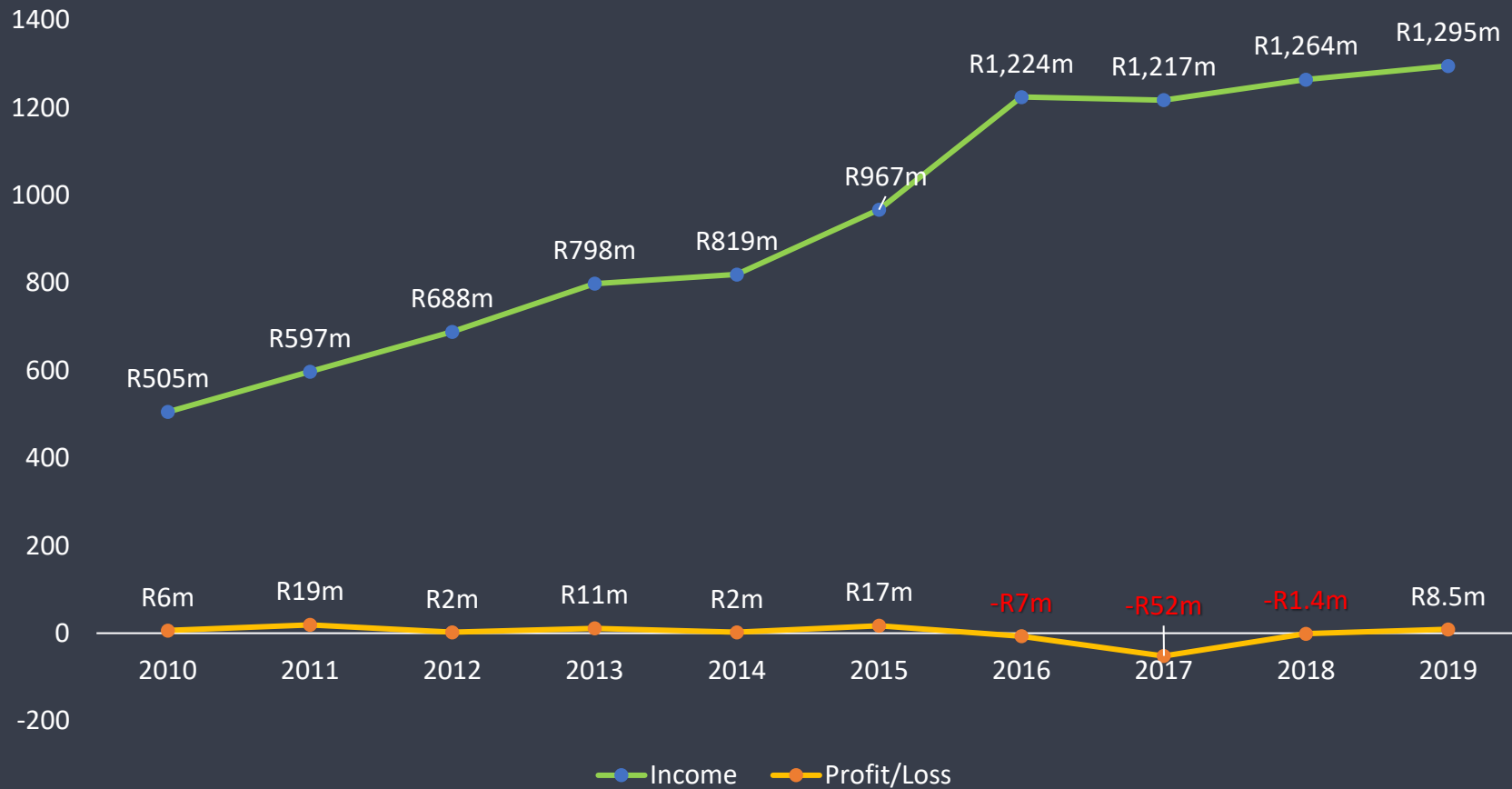
And this is how much we self-fund



And this is where it comes from



And this is our reality



SA Rugby is in financial difficulty

- SA Rugby has been in a financial slump for the past few years;
- We reported losses for the years 2016-2018:
 - a R7-million loss in 2016;
 - a R52-million loss in 2017;
 - a R1.4-million loss in 2018.
- In 2019, SA Rugby achieved a profit of R8.5-million;
- 2020 has been very challenging and SA Rugby's financial performance is still being assessed;
- Currently strict austerity measures are being applied, which includes aggressive cost-cutting.

The impact of COVID-19

- SA Rugby's business is currently in survival mode due to the cancellation of key revenue generating competitions such as:
 - Super rugby;
 - the Springboks' three in-bound tests;
 - the Rugby Championship featuring six tests against New Zealand, Argentina and Australia;
 - the suspension of the HSBC World Sevens Series
- As a response to Covid-19, SA Rugby has implemented an industry savings plan which included pay cuts for employees, players and team management.
- **If implemented, the proposed remedies will exacerbate the impact of Covid-19.**

Sounds dramatic, but...

- Rugby must operate on business principles in order to be sustainable;
- COVID-19 has made insolvency a real and present danger;
- Long-term broadcasting and sponsorship relationships, and a collective Industry Mitigation Plan that kicked off in May 2020 were the reasons for our continued survival;
- **Without broadcasting revenues** for reduced and even non-delivery of rights we would have been bankrupt by now;
- All the income we earn from professional rugby we re-invest in the game.

ICASA proposed remedies

- SA Rugby is concerned about the following proposed remedies to be imposed on a licensee(s) that enjoy significant market power:
 - Reducing the duration of contracts to a maximum of 3 years;
 - Requiring content providers to 'split' their rights into multiple packages (rights splitting) and then sell these packages to more than one distributor to avoid a "winner takes all" scenario;
 - Requiring content providers to unbundle their rights to enable multiple parties to distribute the content across various platforms for example OTT, satellite; and
 - Requiring a licensee(s) to offer any acquired rights to competitors (wholesale must-offer).
- SA Rugby is not aware of any jurisdiction that has implemented the above invasive remedies in relation to rugby;
- The proposed remedies amount to an unlawful interference with SA Rugby's discretion to package its broadcasting rights.

SA Rugby is opposed to the proposed remedies

- The proposed remedies are likely to:
 - Have an adverse impact on SA Rugby's ability to licence its broadcasting rights on an exclusive basis **(which is its main source of revenue)** and undermines other fundraising efforts such as sponsorships (sponsorships rely heavily upon the quality and extent of broadcasting);
 - Prevent SA Rugby from fully commercialising its broadcasting rights for the benefit of rugby;
 - Have adverse consequences for the grassroots development of rugby;
 - Undermine efforts to retain top players and coaches;
 - Undermine the global competitiveness of all South African squads;
 - Have an adverse impact on SA Rugby's employees, players, coaches, technical officials and other small businesses who depend on a viable local rugby industry; and
 - Result in an inferior end product to the detriment of consumers.

Unintended consequences

- No international competitions for professional franchises;
- No Springbok team and international participation;
- No domestic professional competitions;
- No amateur competitions;
- No growth of the game or development nor mass participation;
- We will close our doors and only local club rugby will be played for a while and it will die off as there will be no aspirational platform.

Threat posed by 3-year contractual limitation

- Flexibility to contract for a longer period than 3 years is essential because:
 - It offers stability which is necessary for planning, budgeting and implementing grassroots programs;
 - It provides greater incentives to broadcasters to market and promote the sport to “sweat” their asset;
 - It offers broadcasters protection against "free-riding";
 - It reduces the need for regular negotiations which are usually protracted and expensive and critically distracts management from engaging in far more important public interest objectives;
 - It enables third parties to make more significant investments in partnership with SARU to promote the sport beyond simple competitions and events.

Remedies diminish exclusivity

- Exclusivity enables broadcasting services to distinguish themselves from rivals which provides a basis for acquiring and retaining subscribers;
- Exclusivity is highly valued by broadcasters therefore allowing rights holders to maximise revenue;
- Non-exclusive rights diminish the incentives of broadcasters to invest in marketing and production due to the risks of "free-riding" by rivals;
- Better quality production leads to increased interest/engagement from fans generating greater appetite from sponsors.

Rights Splitting – unintended consequences:

- Audience fragmentation;
- Reduced broadcaster revenue which in turn reduces revenue to sports federations;
- Broadcaster cherry-picking thereby reducing visibility of sports federations who desperately require exposure;
- Multiple agreements would multiply costs;
- Consumer harm: if rights are split and cannot be acquired by a single broadcaster, sports fans who want to watch all the matches in a series may be forced to deal with more than one broadcaster which would increase consumer costs.

Unbundling – unintended consequences:

- Match exclusivity would fall away, given that the games are then shown on multiple platforms;
- No exclusivity would substantially reduce the rights value;
- More often than not "unbundled=unsold";
- Net result would be that the rights holder either loses or faces a devastating reduction in its principal source of revenue.

WMO – remedy is likely to:

- Remove the point of difference between broadcasters and in so doing undermine their competitive offering to the detriment of consumers;
- Remove the need to compete for content rights and in so doing substantially reduce the value of the associated rights to the detriment of the rights holders and consumers;
- Disincentivise broadcasters from investing in production enhancements to the detriment of consumers.

The cumulative impact

- Diminished exclusivity by way of:
 - rights splitting,
 - unbundling,
 - WMO;
 - reduced contract periods
- All serve to substantially reduce the value of content rights and the incentive to invest at all. The cumulative impact would be catastrophic.

Legal Concerns: Introduction

- ICASA exercises public powers when acting in terms of s67 of ECA. Therefore, it must comply with the following legal requirements:
 - act within its powers and ensure that licence conditions are authorized by section 67 of the ECA;
 - follow a rational process;
 - ensure that the licence conditions are substantively rational;
 - in compliance with s6(2) of PAJA, avoid defects/irregularities;
 - in compliance with the Constitution, ensure that proposed remedies are justifiable under section 36 of Constitution, including as to their proportionality.

Legal Concerns: Remedies are Ultra Vires

- In terms of underlying statutes, ICASA does not have powers to regulate the affairs of sports federations. Under the ECA and ICASA Act, ICASA is only authorised to regulate licensees;
- Although the proposed licence conditions purport to regulate the conduct of licensees, they in fact preclude certain conduct on the part of sports federations;
- Even if ICASA considers the proposed remedies to be desirable, it does not have powers under the ECA to regulate the conduct of sports federations as they are not licensees – the power to interfere with sports federations' freedom of contract in this way must be expressly conferred on ICASA by the legislature, which it is not the case;
- Therefore, the scope of the ECA **does not permit ICASA to limit the rights of sports federations which are not licensees under the ECA, in the manner that it purports to do.** If promulgated in their present form, the proposed licence conditions would be *ultra vires* the powers of ICASA.

Legal Concern: No RIA conducted

- On the question of evidence which would justify the proposed remedies, ICASA in keeping with international best practice, could and indeed should have conducted a Regulatory Impact Assessment (RIA) as recommended by the Department of Planning, Monitoring and Evaluation. Its failure to do so was irrational.
- By way of amplification in relation to the above, without a RIA or similar process ICASA has failed to:
 - properly investigate and inform itself of the potential adverse effects of the proposed remedies on sports federations and consumers;
 - establish whether the measures it wishes to adopt are likely to achieve their intended purpose and critically whether such measures are proportional;
- The facts and concerns expressed in the preceding slides show that a RIA would have demonstrated that given the unique conditions of the SA market, the proposed remedies will come at a significant social and economic cost and undermine the very purpose of the ECA.

Legal Concerns: Remedies are irrational

- To be rational, the proposed remedies must also be likely to achieve the purpose of section 67 and the ECA generally. For the reasons given, it does not achieve this purpose and critically, there is no rational connection between the stated purpose and the proposed remedies. We note in this regard the following:
 - the impact of the proposed remedies on SA Rugby will be dire;
 - if the likely dire consequences on SA Rugby eventuate, it will not be in a position to produce the alleged premium content to support the competitive markets that may be identified by ICASA;
 - the result will be a significant adverse impact on competition and the public interest, both of which are outcomes that negate the purposes of section 67 and the ECA more generally;
 - there is no clear evidence that the proposed remedies are necessary, especially in respect of rugby, in the unique conditions of SA to achieve effective competition in any markets that ICASA may identify;
- The proposed remedies are therefore irrational and not lawful.

Legal Concerns: Unlawful administrative action

- PAJA is applicable to this inquiry and any action taken by ICASA in terms of section 67(4) of the ECA;
- The proposed remedies do not comply with the following PAJA requirements:
 - they are not rationally connected to the purpose of section 67(4);
 - they are not rationally connected to the evidence before ICASA;
 - ICASA has not sufficiently taken into account relevant considerations including the likely adverse impact of the proposed remedies;
 - they are not authorized by the ECA, and are influenced by a material error of law; and
 - they are unreasonable

Legal Concerns: Remedies are unconstitutional-s22

- The proposed licence conditions impact upon and directly regulate the practice of SARU's chosen trade i.e trading in sports broadcasting rights.
- Section 22 of the Constitution permits the regulation of the practice of a trade by law, which would include the proposed remedies.
 - however, to be compliant with the Constitution and be lawful, such regulation must be rational.
- For the reasons advanced above, the proposed remedies are not rational in relation to SARU.

Legal Concerns: Remedies are unconstitutional-s25

- The proposed remedies constitute an unlawful deprivation of the property of SARU;
- Section 25 of the Constitution protects against arbitrary deprivations of property that do not meet the requirements of section 25(2);
 - for a deprivation of property to be constitutional, it must be in terms of a law of general application and must not be arbitrary;
 - there must be a rational connection between the deprivation and the end sought to be achieved and, where the deprivation is severe it must be proportionate;
 - the proposed remedies would result in interference with the rights of SARU to contract its sports broadcasting rights in a significant manner;
 - this is a severe deprivation as the licensing of broadcasting rights on an exclusive basis attracts a significant premium-without exclusivity, the value of the broadcasting rights would diminish by 80%-100%.

Legal Concern: Remedies undermine ICASA Mandate

Section 192 of the Constitution requires ICASA to regulate the broadcasting sector in the public interest.

The ECA requires ICASA to:

- encourage investment;
 - promote the interests of consumers;
 - refrain from undue interference in the commercial activities of licensees; and
 - promote stability in the ICT sector.
- For purposes of section of section 192 of the Constitution and the ECA: the public must be interpreted to include the sports federations, sports persons, umpires, sports health practitioners and the wider South African economy.

Conclusion

- The proposed remedies should be abandoned as they are:
 - unlawful and exceed the statutory powers of ICASA;
 - the product of an irrational process in the absence of a RIA or similar assessment;
 - substantively irrational;
 - not supported by evidence;
 - diminish exclusivity, which is an internationally accepted principle;
 - likely to have adverse consequences for the development of rugby;
 - are contrary to the Constitution and ECA and may undermine statutory obligations imposed upon sports federations.

