



**NAB WRITTEN SUBMISSION TO THE DTI ON THE DRAFT
LIQUOR AMENDMENT BILL 2016**

30 November 2016

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1. Introduction

- 1.1. The National Association of Broadcasters (the NAB) is the leading representative of South Africa's broadcasting industry, established in 1993. The NAB aims to further the interests of the broadcasting industry in South Africa, by contributing to its development. The current NAB members are:
 - 1.1.1. the three television services and 18 radio services of the SABC;
 - 1.1.2. licensed commercial radio broadcasters (including: Primedia, Kagiso Media, Tsiya Group, AME, MSG Afrika, TMG, Classic FM, Kaya FM, YFM, Smile FM and Vuma FM);
 - 1.1.3. licensed commercial television broadcasters (e.tv, Multichoice, M-Net, StarSat);
 - 1.1.4. a host of community radio broadcasters and community television broadcaster, Faith Terrestrial;
 - 1.1.5. both the licensed broadcast signal distributor and the selective and preferential broadcast signal distributors, Sentech and Orbicom;
 - 1.1.6. associate members, including training institutions.

2. Background

- 2.1. On 30 September 2016, the Minister of Trade and Industry (the Minister), published in government gazette number 40321, a Final National Liquor Policy (the Liquor Policy), outlining the policy recommendations intended to amend the Liquor Act 59 of 2003 (the Liquor Act). The Minister simultaneously published a draft Liquor Amendment Bill (the Bill) in government gazette number 40319 for public comment. The closing date for public comments was initially 30 October, and has been moved to 30 November 2016.
- 2.2. The NAB previously commented on the draft Liquor Policy when that was published in 2015. The NAB appreciates the mammoth task government is facing in alleviating the scourge of alcohol abuse in the country and we support government's overarching objective to combat alcohol abuse and its devastating effects. However, the NAB is concerned that key Constitutional issues around the regulation of broadcasting services, which we raised in our previous written submission on the Liquor Policy, do not appear to have been taken into account.

- 2.3. This is particularly concerning as any limitation on advertising may have an adverse impact on the sustainability of broadcasting serving. We respectfully submit that it is ICASA, as the body charged by the Constitution with independently regulating broadcasting services, which must apply any such advertising limitations and not the Minister of Trade and Industry.
- 2.4. This submission will summarise the Constitutional concerns and focus on provisions of the Bill that relate to advertising by broadcasters.

3. Constitutional Concerns

3.1. Independent Regulation of Broadcasting guaranteed in the Constitution

3.1.1. The NAB notes that the proposed Clause 9(3) (c) of the Bill empowers the Minister to prescribe time slots beyond which liquor advertisements may not be aired on television and radio. The Minister is further empowered to prescribe more restrictions on the envisaged limitations (Clause 9(5)). While the Bill is not express on the envisaged time limitations, the NAB notes that the Policy suggests the following: “...for example, all broadcast television channels should advertise at night from 22H00-06:00;....” This clause of the Bill empowers the Minister to “regulate” broadcasting services.

3.1.2. The DTI will note that the independent regulation of broadcasting services is Constitutionally protected by way of Section 192 of the Constitution. Section 192 of 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.”

3.1.3. To give effect to this provision, Parliament enacted the Independent Communications Authority of South Africa Act 13 of 2000 (the ICASA Act). One of the ICASA Act’s objects is:

*“to establish an independent authority which is to ... regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society, as required by section 192 of the Constitution”.*¹

3.1.4. ICASA is the only independent body empowered to regulate broadcasting.

3.1.5. The NAB therefore cautions that the provisions of clause 9(3)(c) seeking to empower the Minister to prescribe time limitations for the airing of liquor advertising on television and radio -- thereby prescribing a regulation for broadcasters - would be inconsistent with the provisions of section 192 of the Constitution

3.1.6. Notwithstanding the Constitutional point, the drafters of the Bill should have also taken into consideration the principles of good regulation on this issue of the independent regulator for broadcasting, in particular:

3.1.6.1. Consistency – new laws should always be consistent and take into account other existing legislative and regulatory frameworks to avoid duplication of effort and resulting inefficiencies. In this case an independent regulator for the broadcasting sector already exists with the power to make regulations on advertising; and

3.1.6.2. Proportionality – new laws should only intervene where necessary and all options for achieving policy objectives must be considered not just those which are prescriptive to reduce costs on industry and government. In this case the ECA already provides for a co-regulation approach to advertising regulation which is funded by industry reducing the cost of enforcement.

3.2. ICASA empowered to regulate advertising

3.2.1. Section 55 of the ECA expressly addresses “[c]ontrol over advertisements” and ICASA’s primary role in this regard:

¹ Section 2(a)

“(1) All broadcasting service licensees must adhere to the Code of Advertising Practice (in this section referred to as the Code) as from time to time determined and administered by the Advertising Standards Authority of South Africa and to any advertising regulations prescribed by the Authority in respect of scheduling of adverts, infomercials and programme sponsorships.

(2) The Complaints and Compliance Committee must adjudicate complaints concerning alleged breaches of the Code by broadcasting service licensees who are not members of the Advertising Standards Authority of South Africa, in accordance with section 17C of the ICASA Act, as well as complaints concerning alleged breaches of the advertising regulations.

(3) Where a broadcasting licensee, irrespective of whether or not he or she is a member of the said Advertising Standards Authority, is found to have breached the Code, such broadcasting licensee must be dealt with in accordance with applicable provisions of sections 17A to 17H of the ICASA Act.”

3.2.2. By virtue of section 55 of the ECA, in airing liquor advertisements, broadcasters are currently guided by a Code administered by the ASA. This Code already sets limitations on when liquor advertisements may be carried on broadcasting services. The ECA has created a co-regulatory system with the ASA which has made the Code binding on broadcasters. Thus, there is already in existence a mechanism for the imposition of watershed periods for alcohol which does not require a legislative intervention by the DTI

3.2.3. In essence, the DTI may impose restrictions on the advertising of liquor on other platforms, but may not do so for broadcasting services, as the Constitution protects the independent regulation of broadcasting by ICASA. Consequently, any restrictions on advertising of liquor products by broadcasters must be implemented by ICASA or the ASA or a body empowered by the ECA to oversee the compliance of the Advertising Code by broadcasters. We point out in this regard that the Bill

does not merely propose a restriction on liquor advertisements, including broadcasting services. It provides for (i) regulations to be prescribed by the Minister specifically in relation to advertisements broadcast on radio and television, (ii) oversight by the National Liquor Regulator and (iii) enforcement by inspectors under the Liquor Act. This falls squarely within the concept of broadcasting "regulation".

3.3. Establishment and Functions of the National Liquor Regulator

3.3.1. The Bill proposes the establishment of the National Liquor Regulator (the NLR). Clause 39A (7) of the Bill outlines the functions of the NLR, and one of the functions of the NLR is to enforce compliance with the Bill (clause 39A(7)(k)). Given that, by virtue of the provisions of section 192 of the Constitution, only ICASA has the power to regulate broadcasting, it follows that only ICASA may enforce compliance of broadcasting regulations. The NLR is not the regulator envisaged by the Constitution, nor is it independent, and therefore the NLR may not enforce compliance on broadcasting regulation matters.

3.4. Contraventions

3.4.1. In terms of Clause 9(6) of the Bill any person who contravenes clause 9 of the Bill commits an offence. In relation to broadcasting services, the Complaints and Compliance Committee (CCC) of ICASA is the body responsible for adjudicating matters of non-compliance (Section 55(3) of the ECA). Furthermore, section 17H of the ICASA Act sets out circumstances under which a broadcaster can be found guilty of an offence. Flowing from the Constitutional concerns raised earlier, we humbly submit that the Minister of Trade and Industry may not enforce compliance with of regulations on the broadcasting of liquor advertising, nor does he have the power to impose any criminal offences on broadcasters.

3.4.2. The NAB is therefore of the view that the provisions of clause 9(3) (c) be deleted in their entirety from the Bill, as there are existing mechanisms set in terms of section 55 of the ECA that regulate the broadcasting of advertisements by broadcasters.

4. Powers of the Minister to set watershed limitations and self -regulation

- 4.1. The provisions of clause 9 (4) provide the Minister with wide discretionary powers to "prescribe more restrictions on the provisions of subsection 3", after consultation with the Council, relevant government departments and municipalities. While the NAB is encouraged by the requirement for the Minister to undertake wide consultation in addressing issues of Liquor advertising, the NAB would like some clarity on whether or not the government departments envisaged in this clause will be the same representatives serving on the forum to be established in terms of clause 39A. We are of the view that the same inter-governmental representatives serving on the forum should be the ones consulted herein.
- 4.2. We further advise that one other group of stakeholders to be consulted should include self-regulatory bodies such as the Association of Responsible Alcohol Use (the ARA) and other recognized initiatives involved in curbing the abuse of liquor in South Africa, as they work closely with issues of limitation of the advertising of liquor.
- 4.3. We further advise that one other group of stakeholders to be consulted should include self-regulatory bodies such as the Advertising Standards Authority (ASA), the Association of Responsible Alcohol Use (the ARA) and other recognized initiatives involved in curbing the abuse of liquor in South Africa, as they work closely with issues of limitation of the advertising of liquor.
- 4.4. Of greater concern to the NAB is the extent of the discretion afforded to the Minister in clause 9 (4). It is not clear whether the section envisages more detail on the restrictions in clauses (a) to (c) of clause 9 (3), or purports to give the Minister wide powers to make regulations on any other matter relating to the prohibition of liquor advertisements on any platform.
- 4.5. To the extent that it is the former, this should be clarified, with due deference to ICASA's jurisdiction and the section 192 concerns raised above. The NAB has no objection to powers given to the Minister to prescribe regulations in respect of clauses (a) and (b) of clause 9 (3). However, as regards clause 9(3)(c), clause 9(4) is superfluous and inappropriate.

- 4.6. To the extent that it is the latter, the NAB opposes the proposal to give the Minister wide and unfettered powers to make regulations on any matter relating to the prohibition of liquor advertisements on any platform. To do so would simply have the effect of deferring the debate on liquor advertising to the regulation making process, which would not have the democratic benefits of the parliamentary process. It is not appropriate to hand over wide law-making powers to the Minister in this manner. To the extent that the Bill gives the Minister the power to make regulations, the Minister's powers must be clearly delineated, narrowly tailored and rationally connected to specific legitimate objectives.

5. General

The NAB notes the provisions of clause 9(3) which prohibits the advertising of liquor in “public platforms”. The NAB is concerned that the term “public platforms” has not been defined. In particular, with the rise in online services and advertising on these online publicly available platforms, the term “public platform” will have to be carefully considered. Whilst it is noted that the list of “public platforms” is not exhaustive, it is also concerning that certain platforms, such as, billboards, pamphlets, television and radio are the only mediums which are singled out and others are excluded. On the basis of constitutional arguments already stated, and in light of the proposals made that provision of Clause 9(3) (c) be deleted, it is our understanding that the non-exhaustive list of “public platforms” will not include television and radio.

6. Conclusion

- 6.1. The NAB welcomes the publication of the much-anticipated Bill;
- 6.2. The NAB believes that its inputs will add value to the deliberations of the DTI in finalizing the Bill, which will lead to the tabling of the Bill before Parliament;
- 6.3. In a nut shell, the NAB reiterates its position that any law seeking to encroach on the independent regulation of broadcasting services by ICASA is impermissible and unconstitutional - we therefore propose that clause 9(3) (c) be deleted from the Bill;

- 6.4. The NAB advocates for the recognition of the regulatory mechanisms set by the ECA as well as the ICASA Act, to ensure consistency with existing legislation which recognises the advertising industry self-regulatory body the ASA.
- 6.5. The NAB also submits that the powers proposed to be given to the Minister to make regulations in clause 9 (4) must be deleted, alternatively clearly delineated, narrowly tailored and rationally connected to specific legitimate objectives.