



**NAB SUBMISSION TO ICASA ON THE DRAFT REGULATIONS AND CODE OF
ADVERTISING PRACTICE SETTING OUT THE STANDARDS, PRACTICE AND
PROHIBITIONS IN ADVERTISING, SPONSORSHIPS AND FORMS OF
COMMERCIAL PROMOTION BY RADIO AND TELEVISION BROADCASTING
SERVICE LICENCEES**

28 APRIL 2009

1. INTRODUCTION

2. On 13 February 2009, the Authority published in notice number 172 of 2009, government gazette number 31903 (the notice), a notice of its intention to make regulations and Code of Advertising Practice setting out the standards, practice and prohibitions in advertising, sponsorships and other forms of commercial prohibition by radio and television broadcasting service licencees (the draft regulations).
3. The draft regulations are made in terms of section 4 read with section 55(1)(2)(3) and section 95 of the Electronic Communications Act 36 of 2005 (the EC Act). The draft regulations are open for public comment, and the closing date for the submission of written representations is 28 April 2009.
4. Subsequently, the Authority published in government gazette 32014, an explanatory memorandum outlining the Authority's rationale or thinking on the issues raised in the draft regulations. This came as a result of the concerns that arose in a workshop the Authority held on 30 March 2009. In the workshop, stakeholders expressed their dismay in the way in which the draft regulations have deviated from the 1999 ICASA Advertising, Infomercials and Programme Sponsorships Regulations (the 1999 Regulations), and requested the Authority to provide the reasoning behind the deviation.
5. The National Association of Broadcasters (the NAB) welcomes the explanatory memorandum, and thanks the Authority for the opportunity to make its written submission on the draft regulations. The NAB would like to be given the opportunity to make further representations and participate in oral hearings called by the Authority in respect of the draft regulations.
6. The NAB is the leading representative of South Africa's broadcasting industry. It aims to further the interests of the broadcasting industry in South Africa by contributing to its development. The NAB members include:
 - 6.1. the three television channels and eighteen radio stations of the public broadcaster, the South African Broadcasting Corporation (the SABC);
 - 6.2. all the licensed commercial broadcasters in both radio and television;

- 6.3. both the common carrier and the selective and preferential carrier licensed signal distributors; and
- 6.4. Over thirty community radio services and a single community television service.

7. NAB POSITION

7.1. The notice stipulates that the draft regulations are promulgated in terms of section 4 read with section 55(1)(2)(3) and section 95 of the Electronic Communications Act 34 of 2005 (the EC Act). In this section the NAB will scrutinise the cited sections of the EC Act.

7.2. Section 95 of the EC Act

7.3. In 1999, the Authority published in government gazette 19922 the 1999 regulations, in terms of section 78(1) of the Independent Broadcasting Authority Act 153 of 1993, (the IBA Act). It is these Regulations that the Authority is seeking to amend.

7.4. Section 95 of the EC Act stipulates as follows:

“Within twenty-four months of the coming into force of this Act, the Authority may, if the Authority considers it necessary, repeal or amend the regulations made under-

(a) Section 119A of the Postal Office Act 1958

(b) The Telecommunications Act

(c) The Broadcasting Act

(d) The IBA Act

(e) The Radio Act 1952

(f) The Sentech Act

Which were in force immediately prior to the commencement of this Act”.

7.5. Following from the provisions of section 95 of the EC Act, the Authority is supposed to repeal or amend existing regulations within twenty four months of the coming into effect to the EC Act.

- 7.6. The EC Act came into force in April 2006, and the twenty four months during which the Authority is authorized to repeal or amend existing regulations lapsed in April 2008. The Authority ought to have undertaken to review or amend existing regulations prior to April 2008. Consequently, the opportunity to review or amend existing regulations in terms of section 95 of the EC Act has prescribed.
- 7.7. Section 95 of the EC Act gives the Authority the discretion to amend or repeal existing regulations if the Authority considers it necessary to do so. In this regard, the Authority ought to apply its mind and establish a need to amend regulations. In our view, the 1999 regulations are workable, and require little, if no amending at all.
- 7.8. The NAB perceives the current process as problematic, *ultra vires* the Authority's mandate, as the Authority has no powers to review or amend the ASA Code.
- 7.9. The title of the draft regulations deviates substantially from the title of the 1999 regulations. In addition, as opposed to the 1999 regulations, the scope of the draft regulations has been increased, to cover "*other forms of commercial promotion by radio and television broadcasting licencees*"
- 7.10. The inclusion of "other forms of commercial promotions by radio and television broadcasting licencees", in the title of the draft regulations is problematic, as it is open-ended, and unduly widens the Authority's powers to areas outside the Authority's mandate and hence *ultra vires* the provisions of section 95.
- 7.11. Consequently, the NAB is of the view that the current process does not conform to the provisions of section 95 of the EC Act in its entirety, and is therefore invalid as:
- 7.11.1. The opportunity to repeal and amend the 1999 regulations in terms of section 95 of the EC Act has prescribed, as the opportunity to do so prescribed in April 2008.

7.11.2. The introduction of a code by the Authority is *ultra vires* the provisions of section 95 of the EC Act;

8. Section 55 of the EC Act

8.1. Section 55 of the EC Act stipulates as follows:

- (1) *“All broadcasting service licencees must adhere to the Code of Advertising Practice...as from time to time determined and administered by the Advertising Standards Authority of South Africa (ASASA) [our emphasis].*
- (2) *The Complaints and Compliance Committee must adjudicate complaints concerning alleged breaches of the Code by broadcasting service licencees who are not members of the ASASA [our emphasis], in accordance with section 17C of the ICASA Act.*
- (3) *Where a broadcasting licencee, irrespective of whether or not he or she is a member of the said ASASA, is found to have breached the Code, such broadcasting licencee must be dealt with in accordance with the applicable provisions of the ICASA Act.*

9. Section 55(1)

9.1. The EC Act recognises the existence of the Advertising Standards Authority of South Africa (ASA). ASA is a self-regulatory, independent body set up and funded by the marketing communication industry. The ASA aims at ensuring that its self-regulatory systems work in the public interest¹. The independent nature of ASA denotes that the ASA should operate free from interference of any body, including government and other independent bodies such as ICASA.

9.2. The ASA has jurisdiction over advertising practices. The ASA administers a code of conduct for Advertising (the ASA code), and regulates the advertising industry. In addition, ASA has disciplinary mechanisms in place set out by the ASA code. All of the NAB members are members of ASA, hence they fall under the jurisdiction of ASA. Inevitably section 55(1) requires all broadcasting

¹ The Advertising Standards Authority Code of Advertising Practice 2008, at page xvii

licensees to adhere to the ASA code regardless of their membership and affiliation, as a result, hence everyone falls under the jurisdiction of the ASA Code.

9.3. Furthermore, the provisions of section 55 of the EC Act do not envisage the existence of any other code apart from the ASA code, nor does it, in its provisions, direct the Authority to formulate regulations or code in respect of advertising practices. Instead, the EC Act enjoins all broadcasting licencees to adhere to the ASA code.

9.4. Consequently, by attempting to promulgate a code for advertising practices, the Authority is encroaching on the jurisdiction of the ASA, and is as a result acting *ultra vires* its powers.

9.5. Broadcasting service licencees have internal practices aimed at ensuring that advertisements with content inappropriate to children or not aimed at children is scheduled responsibly on times when children are not viewing. In addition these practices entail censoring procedures that must be followed on advertisements. Consequently, broadcasting service licencees cannot unilaterally change advertising content as they hold no rights to that content. If an advertisement is found to be problematic, and in violation of the ASA code, it is referred back to the advertising agency and/or the ASA for changes, to align it to the acceptable standards set by the ASA code.

10. Section 55 (2) (3)

10.1. The NAB welcomes the provisions of section 55(2) and (3), to the extent that they conform to the object of the EC Act. However, the NAB is of the view that these provisions are problematic, and if applied in their literal form have a potential to yield undesired results, as they are open to misinterpretation.

10.2. As already stated, the ASA has its own disciplinary mechanisms in place which have proved to be effective over the years. As a result by empowering the Complaints and Compliance Committee (CCC) to adjudicate on complaints concerning the breach of the ASA Code, the CCC will be encroaching on the jurisdiction of ASA. In our view the provisions of section 55(2)(3) create double

jeopardy to broadcasting licencees, as broadcasting licencees will be tried and penalised twice for the same infringement.

11. Section 4 of the EC Act

- 11.1. Having looked into the provisions of section 55, the question to be asked is whether ICASA has the power to make regulations on advertising practices in terms of section 4 of the EC Act.
- 11.2. Section 4 of the EC Act empowers the Authority to make regulations with regard to any matter which in terms of the EC Act or related legislation must or may be prescribed governed or determined by regulation.
- 11.3. In our opinion ICASA's attempt to promulgate a code in respect of advertising practices is not within the scope set by section 4 of the EC Act. The ASA already has a code in place which regulates advertising practices and is recognised by the EC Act.
- 11.4. ICASA has no jurisdiction to regulate on issues pertaining to advertising practices, as by so doing, the Authority would be acting *ultra-vires* its powers. Similarly, the Authority's jurisdiction does not extend to marketers and advertising agencies that hold the creative rights and copyright to advertising content. The draft Code seeks to transfer those rights to broadcasting services and hold broadcasting services responsible for advertising content. Not only is this outside of the jurisdiction of the Authority but also impedes the rights of marketers and agencies. Copyright and ownership of advertisements is the property of marketers and agencies involved, and broadcasters cannot be held accountable or be required to effectively censor advertising.
- 11.5. Section 4 of the EC Act gives the Authority the discretion on whether to formulate regulations or not. This is evident from the use of the word *may* in the section. In our view, the 1999 Regulations are sufficient in their current form, and do not need to be augmented by a code, which the Authority is seeking to introduce in this process.

11.6. The NAB is therefore of the view that the Authority has no legal grounds for the proposed amendment, as outlined in the notice, and proposes that this process be struck off.

11.7. In the event that the Authority seeks to continue with the amendment process irrespective of the arguments raised, the NAB will outline its comments on the draft regulations in the following sections of its written submission.

12. COMMENT ON THE PROVISIONS OF THE DRAFT REGULATIONS

12.1. ANNEXURE A

12.2. Definitions

12.3. *Product placement*: the NAB would like the Authority to provide a distinguishing factor between product placement and advertisement.

12.4. Application

12.4.1. The NAB is concerned about the provisions of regulation 3 of the draft regulations, which outline the application of the draft regulations. In terms of regulation 3, the draft regulations apply to all broadcasting service licencees who provide a television and sound broadcasting service. In this regard, the scope of the draft regulations has been increased to apply with uniformity to all broadcasting licencees.

12.4.2. The NAB notes the rationale provided by the Authority in providing conditional application of the 1999 regulations to sound broadcasting licencees,² however the NAB maintains that the need to treat television and radio broadcasting services still exists, as the disparities still exist. Furthermore, the Authority recently licenced three individual commercial sound broadcasting services in secondary markets, and has subsequently issued an invitation to apply for individual commercial sound broadcasting service in primary markets (the ITA). The NAB is therefore of the view that the circumstances that compelled the 1999 Regulations to apply conditionally to sound broadcasting service licencees still exist, as the

² ICASA's explanatory memorandum on the review of the 1999 regulations relating to the definition of advertising and the regulation of infomercials and programme sponsorships in respect of broadcasting activities, at page 2

newly licenced sound broadcasting licencees need to be afforded the same opportunity of adjusting in the market.

12.4.3. The NAB submits that, the draft regulations and code impose more onerous obligations on sound broadcasting licencees, and introduce an administrative nightmare both for the Authority and sound broadcasting licencees. The NAB therefore submits that the provisions of regulation 2 of the 1999 regulations be applicable to the draft regulations and code³ in its entirety.

12.5. Advertising

12.5.1. The Authority makes reference to spot commercials in regulation 4(1), however this term has not been defined. The NAB request the Authority to provide a definition of this term.

12.6. Multi-channel subscription broadcasting services

12.6.1. The Authority states in the explanatory memorandum that “...*regulating advertising on multi-channel subscription broadcasting services could mean stipulating advertising limits for individual channels on the bouquet. This would defeat the intention of section 60(4) of the EC Act since it would mean more advertising minutes per hour for subscription broadcasting services, when the individual channels are viewed collectively...*”

12.6.2. The NAB is of the view that section 60(4) of the EC Act does not seek to unreasonably limit advertising on multichannel broadcasting services, but rather provide sufficient limitation. As a result, there is no need for the Authority to seek to limit advertising on each specific channel in a subscription bouquet. This would allow the subscription broadcasting licencee flexibility in allocating advertising to each channel within the bouquet while aiming to remain within the limits set by section 60(4) of the EC Act.

12.7. Draft regulation 5 (1)

³ Page 54 of the 1999 Regulations

12.7.1. The provisions of draft regulation 5 never existed in the 1999 regulations, as they formed part of the licence conditions of licencees, and were only applicable to television broadcasting service licencees, and this the Authority confirms in the explanatory memorandum⁴. Furthermore, draft regulation 5(1) has turned out to be more onerous on broadcasting licencees than previously, as it applies to all broadcasting licencees. The NAB is opposed to the rationale provided, as it opens up doors for uncertainty and confusion. It is convenient to have a single point of reference rather than multiple points of reference which run the risk of conflicting.

12.7.2. The NAB reiterates the submission it made earlier that the Authority should differentiate between television and sound broadcasting licencees when imposing obligations. Bearing in mind that the newly licenced sound broadcasting licencees need to benefit from the conditional application of the regulations.

12.8. Draft regulation 5(2), 5(3), 5(4) and 5(5)

12.8.1. Taking into account the submission made under draft regulation 5(1) above, the NAB views the provisions of draft regulations 5(3), 5(4) and 5(5) as repetitious, and should as a result be deleted from the draft regulations, as draft regulation 5(1) and 5(2) adequately captures the issues.

12.9. Draft regulation 5(6), 5(9) and 5(10)

12.9.1. These regulations aim to prescribe to broadcasting service licencees the number of advertising interruptions per scheduled programme, depending on the length and nature of the programme.

12.9.2. The NAB submits that these regulations are too prescriptive as they interfere with the programming and scheduling practices of broadcasting services. It is the NAB's view that these regulations will amount to interference in the commercial activities and independence of broadcasting

⁴ Page 3 para 4.1 of the explanatory memorandum *"the inclusion of such in the regulations would mean that they are not only standardized across similar licencees but also accessible to interested parties"*

services. They will, furthermore, not allow broadcasting services any flexibility in scheduling, neither will they allow broadcasting services to make any changes should viewers or listeners show low tolerance for the Authority's prescribed scheduling of advertising.

12.9.3. The NAB submits that the that draft regulation 5(2) read in conjunction with draft regulation 6(1)(b) provides broadcasting services with set limits on the amount of advertising that is allowed, as well clear requirements as to when such advertising should be scheduled.

12.9.4. The NAB therefore urges the Authority to remove draft regulations 5(6), 5(8) and 5(10) as they are too prescriptive and allow no flexibility in scheduling. The NAB views draft regulations 5(2) and 6(1)(b) as sufficient to meet the Authority's requirements.

12.10. Identification of advertisements

12.10.1. The provision of draft regulation 6(1)(a) is viewed as being problematic. The provisions of this draft regulation seem to limit interruptions by advertising blocks to sports programmes or the coverage of events.

12.10.2. This therefore seems to imply that other programmes may not be interrupted by advertising at all, and this is viewed as being prescriptive. Furthermore, this seems to contradict the provisions of regulation 6(1)(b) which allows for advertising interruptions during natural breaks in all programming.

12.10.3. The NAB suggests that the Authority clarifies this contradiction and remove the prescriptive stipulations of draft regulation 6(1) (a).

12.11. Programme sponsorship

12.11.1. Draft regulation 9(1) of the draft regulations requires broadcasters to furnish the Authority with copies of sponsorship contracts concluded by broadcasters. The NAB is of the view that this provision should be removed from the draft regulations, as it amounts to undue interference in the

commercial activities of licencees, and is in contravention with the objects of the EC Act⁵.

13. ANNEXURE B

13.1. In terms of section 3 of the Notice, the Authority intends submitting annexure B of the draft regulations to ASA for inclusion in the ASA code of Advertising. Annexure B is intended to form a supplementary code, which ASA will administer on behalf of ICASA. As stated in the preceding section of this submission, promulgating two codes side by side will be prejudicial and create confusion on the industry as a whole. Furthermore, the Authority has no jurisdiction over advertising practices, and will therefore be acting *ultra vires* its powers by so doing.

13.2. It would seem that a great number of the provisions of annexure B are a duplicate of the existing provisions of the ASA code, while other provisions in the annexure, are pending amendments to be made by the ASA on its codes. This however does not give the Authority the power to enforce its own code.

13.3. In terms of the ASA code, stakeholders and interested parties are welcome to suggest or recommend amendments to the ASA Code. The incorporation of these amendments into the ASA code is within the exclusive jurisdiction of the ASA, and is done in accordance with the provisions of the ASA code.

13.4. The NAB recommends that in view of the fact that the Authority sees a need to regulate advertising content; the Authority should use these avenues available to suggest amendments to the ASA Code. We also suggest that the Authority work closely with the ASA in ensuring that the interests of the broadcasting industry are catered for.

13.5. The NAB submits that this will also assist in creating a synergy and reaching a common understanding of the application of section 55(2) and (3) of the EC Act.

14. CONCLUSION

⁵ Section 2(y) of the EC Act.

14.1. In conclusion, the NAB would like to bring the following points to the attention of ICASA:

14.1.1. The current process does not conform to the provision of section 95 of the ECA as it the legislated period within which existing regulations may be amended has lapsed. Furthermore, the introduction of a code is *ultra vires*.

14.1.2. The Authority does not have jurisdiction to regulate over advertising practices, therefore lacks the power to promulgate a code for advertising. As such the power conferred by section 4 of the EC Act on the Authority to make regulations where it deems necessary does not extend to advertising practices. As such, the Authority should utilize the already available avenues set by the ASA code to protect the interest of the broadcasting industry.

14.1.3. The ASA has the sole jurisdiction to regulate over advertising practices, and administer a code for advertising practices. Similarly, the ASA solely has the role of adjudicating complaints alleged breaches of the ASA code.

14.1.4. The NAB thanks the Authority for making its written submission, and believes the submissions made will add value to this process.