



NAB

National Association of Broadcasters

**NAB SUBMISSION ON THE DTI'S
LIQUOR POLICY REVIEW:
A discussion document for public consultation
18 June 2015**

1. Introduction

- 1.1. The National Association of Broadcasters understands and supports government's overarching objective to combat alcohol abuse and its devastating effects. We have been engaging with the Department of Health on this critical issue and welcome the publication of the National Liquor Policy ("the Draft Policy") by the Department of Trade and Industry ("the DTI").
- 1.2. The Draft Policy sets out proposals for the amendment of the Liquor Act, 59 of 2003 ("the Act") which proposals have been informed by various challenges identified by the DTI. We recognise that the Draft Policy seeks to address these challenges.
- 1.3. The National Association of Broadcasters ("NAB") is the leading representative of South Africa's Broadcasting industry. The NAB aims to further the interests of the broadcasting industry in South Africa by contributing to its development. The NAB membership includes all three tiers of broadcasting as well as signal distributors and associate members, these include:
 - 1.3.1. Three television public broadcasting services, and eighteen sound public broadcasting services of the South African Broadcasting Corporation of South Africa ("the SABC");
 - 1.3.2. The commercial television broadcasters (e.tv, DStv, M-Net and ODM) and sound broadcasting licensees (that include media groups Primedia, Tsiya, Kagiso, MSG Africa and AME);
 - 1.3.3. Both the licensed common carrier and the selective and preferential carrier broadcasting signal distributors;
 - 1.3.4. Over thirty community sound broadcasting licensees and community television broadcasting service, Trinity Broadcasting Network (TBN).
- 1.4. The NAB is particularly concerned with proposals which seek to empower the Minister to determine restrictions on the advertising and marketing of liquor products. We note the recommendation made in the Draft Policy that Section 9

(advertising restrictions) of the Act be amended to empower the Minister of Trade and Industry to determine the restrictions and parameters for advertising and marketing of liquor products in line with the Control of Marketing of Alcohol Beverages Bill (“the Bill”).

1.5. Our comments will be confined to those aspects of the policy which affect the broadcasting industry. The NAB participates in this process to be constructive and offer insight into the legal and regulatory framework applicable to the broadcasting industry. In particular, to bring to the Department’s attention Constitutional provisions which require the independent regulation of broadcasting.

1.6. Given the impact of the proposals contained in the Draft Policy, we would urge the Department to convene public hearings on this matter. If the Department elects to do so, the NAB would like an opportunity to make an oral representation.

2. Independent Regulation of Broadcasting guaranteed in the Constitution

2.1. 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.”

2.2. 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

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

¹ Section 2(a)

- 2.4. As the Department is aware, the Constitution is the supreme law of the Republic and any law or regulation which is inconsistent with the Constitution is invalid. We raise this issue of constitutionality, not to suggest that the Department may not proceed with initiatives to regulate advertising and marketing in general, but to point out that the regulation of broadcasting can only be implemented by ICASA.
- 2.5. Any legislative amendment empowering the Minister of Trade and Industry to regulate broadcasting by determining restrictions and parameters for advertising and marketing of liquor products by broadcasters, would be inconsistent with the provisions of section 192 of the Constitution:
- 2.5.1. By encroaching on the constitutionally-mandated role of ICASA to regulate broadcasting in the public interest; and
- 2.5.2. The Department of Trade and Industry would fail to meet the constitutional requirement that an authority regulating broadcasting must be “*independent*”.

3. ICASA empowered to regulate advertising

- 3.1. Section 55 of the ECA expressly addresses “*Control over advertisements*” and ICASA’s primary role in this regard:

“(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. Any proposed amendments to the Act which purport to give the Minister powers to regulate broadcasting would be in conflict with section 192 of the Constitution and accordingly unlawful.
- 3.3. In essence, the Department may address restrictions on the advertising and marketing of liquor products (as proposed) on any platform, except for broadcasting, because the Constitution protects the independent regulation of broadcasting, any restrictions on advertising and marketing of liquor products by broadcasters would have to be implemented by ICASA.
- 3.4. There are a number of existing regulatory and self-regulatory mechanisms available, entrusted with the Complaints and Compliance Committee (“the CCC”) of ICASA and the Advertising Standards Authority of South Africa (“the ASA”). We would encourage the Department to collaborate with ICASA and the ASA to consider strengthening the existing codes administered by these bodies, in order to achieve the Department’s aims with regards to alcohol advertising.

4. Procedural Matters

Control of Marketing of Alcoholic Beverages Bill

- 4.1. The Draft Policy seeks public comment on a proposal to amend the Act to permit the Minister of Trade and Industry to determine advertising and marketing restrictions “in line with the Control of Marketing of Alcoholic Beverages Bill” (“the Bill”).
- 4.2. The Bill referred to has not been made public and the contents of the Bill are unknown. Accordingly, the precise nature of the amendments being proposed in the Draft Policy cannot be determined.

- 4.3. The NAB is aware that the DOH was instructed to conduct a Regulatory Impact Assessment (“RIA”) on a previous version of the Bill. Engagements between the NAB and the DOH revealed that the RIA has been concluded, but has not yet been presented to Cabinet for approval, and is therefore not in the public domain. We welcome the conducting of a RIA by the DOH and believe that a proper impact assessment is essential to effective policy making. This was confirmed in the Presidential Guidelines for the Implementation of Regulatory Impact Analysis/Assessment Process in South Africa (“the RIA Guidelines”)² which observed among others that:

“RIAs are an extension of a broader commitment to the quality of government through evidence based policy making. The advantage of instituting RIA is that RIA adds structure, predictability, and methodological clarity to assessment while also ensuring that the right information is available to decision making...”³

- 4.4. What is not clear is whether the DTI has had sight of the findings of the RIA, whether these were considered in the current process or whether the RIA has had any impact on the version of the Bill previously presented to Cabinet. In light of these uncertainties, the NAB believes that the publication of the Draft Policy is premature, as it is informed by a DOH legislative process which is incomplete.
- 4.5. Meaningful consultation would require that affected parties have sight of the Bill and only once the Bill has been published by the DOH, will interested parties be in a position to understand the nature of the proposals in the Draft Policy. To this end, the NAB proposes that the Draft Policy be withdrawn until such time that the DOH has finalised and published the Bill.

Inter-departmental engagement

- 4.6. The DTI relies on the work of the inter-ministerial committee (“the MIC”) established in 2010 to look into the abuse of alcohol in the country.⁴ It is not clear to what extent the new Department of Communications (“DOC”) as established in 2014 and its new

² Published in 2012

³ At page 2 of the RIA Guidelines.

⁴ At page 10 of the Draft Policy.

Minister have been involved in this process. As already indicated, the Draft Policy will have an impact on the sustainability of the regulated broadcasting sector (both radio and television) and we propose that the Minister of Communications be consulted.

5. Conclusion

- 5.1. While the NAB supports national initiatives to curb the abuse of alcohol, any policy or legislative intervention must be consistent with the Constitution. We reiterate our recommendation that the DTI engages ICASA or the ASA to ensure the proposed initiatives are implemented in a lawful manner.