



**THE NATIONAL ASSOCIATION OF BROADCASTERS WRITTEN SUBMISSION ON THE SOUTH  
AFRICAN HUMAN RIGHTS COMMISSION'S INVESTIGATION INTO ALLEGATIONS OF RACIAL  
DISCRIMINATION OR DISCRIMINATION IN ADVERTISING  
SUBMITTED: 31 JANUARY 2022**

## INTRODUCTION

1. On or about 18 October 2021, the South African Human Rights Commission (**HRC**) published its Terms of Reference (**TOR**) for Investigation into Allegations of Racial Discrimination or Discrimination in Advertising (the **Investigation**) calling for written submissions by 31 January 2022.
2. The National Association of Broadcasters (**NAB**) is a leading representative of South Africa's broadcasting industry, representing the interests of all three tiers of broadcasters (public, community and commercial). Our members include the SABC, all the licensed commercial television broadcasters; e.tv, Multichoice, M-Net, and StarSat-ODM, independent commercial radio broadcasters such as Kaya FM, YFM, Smile FM, Rise FM, YOU FM, Hot 102.7FM, and radio services of media groups Primedia, Kagiso Media, MRC Management Services, AME, MSG Afrika and a number of community radio broadcasters and community television broadcaster, Faith Terrestrial. The NAB membership also extends to signal distributors as well as a range of industry associates.
3. As the voice of South Africa's broadcasting industry, the NAB's aim is to foster and promote the development of a sustainable and robust broadcasting system that upholds the principles of South Africa's constitutional democracy. It also seeks to enable and maintain an environment in which broadcasters are able to thrive – by serving audiences and contributing to diversity in the country. For our members, the carriage of advertisements is central to their ability to serve the public as advertising revenue is a significant income generator for all tiers of broadcasters.
4. The NAB members support the Investigation by the HRC into allegations of racial discrimination or discrimination in advertising. The values of the Constitution of South Africa (**Constitution**) and the Bill of Rights (**BoR**) are extremely important to the NAB members and our members fully support an advertising sector that does not discriminate based on race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
5. The NAB will confine its comments to those aspects of the HRC's Investigation which relate to the broadcasting industry. The NAB participates in this process with the aim of providing constructive input for the HRC and to offer insight to the HRC into the legal and regulatory framework applicable to the broadcasting industry.

## THE REGULATORY ENVIRONMENT

6. We would like to emphasise at the outset that the members of the NAB are licensed broadcasters and not advertising companies. Our members do not create or produce adverts, other than for their own self-promotion. As will be dealt with in more detail below, the members of the NAB are a carrier platform for advertisements and are not originators/producers of the advertisements that they broadcast. Furthermore, there is a robust regulatory system in place to ensure broadcasters comply with all codes and regulations in respect of the advertising they carry.
7. Whilst this Investigation is informed by a few advertisements which have been indicative of racism and have evoked much criticism of the advertising industry and their clients, the NAB has not observed a “trend” of such adverts across the broadcasting sector. Nonetheless, we are happy to engage on this important topic and provide whatever insight we can on the relationship between broadcasting and advertising.
8. The NAB also notes that concerns regarding the advertising industry were raised in Parliament by the Portfolio Committee on Communications as far back as 2001,<sup>1</sup> when it convened public hearings into the pace of transformation in the advertising and marketing value chain.<sup>2</sup>
9. Following the Parliamentary process, the Government Communications and Information System (**GCIS**) facilitated a consultative process to develop a blueprint to transform the advertising industry and the Marketing, Advertising and Communication Sector Code (**MAC Sector Code**) was published. In addition, the Association for Communication and Advertising (**ACA**) indicated that in changing the industry for the better, membership of the ACA would be limited to advertising agencies who adopted and signed the MAC Sector Charter.<sup>3</sup>
10. The MAC Sector Code applies to companies that derive more than 50% of their turnover from the sector and an advertising company is listed as a company whose core business is the conceptualisation, creation and production of advertising to foster a relationship between a product and the consumer.

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<sup>1</sup> For the sake of completeness, it must be noted that prior to this, in 1998, a white paper on broadcast policy was published, which emphasized the importance of self-regulation in the broadcast sector.

<sup>2</sup> The NAB was part of the public hearing process.

<sup>3</sup> For your ease of reference, the most recent MAC charter is available here: <http://www.thedtic.gov.za/wp-content/uploads/BEE-39887.pdf>

11. The MAC Sector Code states further in section 4, that *“we will establish the advertising industry as unique to South Africa; for all the people of South Africa; by all the people of South Africa... promote the constitutional right of equality and the exercise of true democracy; eliminate unfair discrimination...”* The value statement of the MAC Sector Code addresses issues of inclusivity and diversity, respect and human dignity as well as responsible creativity.
12. Whilst the MAC Sector Code provides a framework for the advertising sector, the broadcasting sector has been heavily regulated since the dawn of democracy with the enactment of the Independent Broadcasting Authority Act of 1993 and the requirements of section 55 of the Electronic Communications Act 36 of 2005 (**ECA**)<sup>4</sup> that deal specifically with control over advertisements, as well as the regulations and license conditions enforced by the Independent Communications Authority of South Africa (**ICASA**). ICASA requires its licensed broadcasters to adhere to specific regulations and guidelines on advertising and sponsorships (which are currently under review by ICASA). In addition, in the Draft White Paper on Audio and Audio-visual Content Services Policy Framework published in October 2020 recommended that content in the broader audio and audiovisual sector be regulated cumulatively by ICASA, the Film and Publication Board (**FPB**), the Advertising Regulatory Board (**ARB**) and the Broadcasting Complaints Commission of South Africa (**BCCSA**) or a similar co-regulatory body.
13. In this respect, 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.”*
14. To give effect to this provision, Parliament enacted the Independent Communications Authority of South Africa Act 13 of 2000 (**ICASA Act**). One of the objects of the ICASA Act 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”.*<sup>5</sup>
15. ICASA is the only constitutionally-mandated, independent body empowered to regulate broadcasting in South Africa. ICASA aims to regulate broadcasting in the public interest

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<sup>4</sup> Dealt with in further detail below.

<sup>5</sup> Section 2(a) of the ICASA Act.

and is also empowered to regulate advertising. The Complaints and Compliance Committee (**CCC**) of ICASA is a regulatory mechanism designed to deal with compliance issues.

16. Section 55 of the ECA (as amended) expressly addresses “Control over advertisements” and sets out 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.”*

17. The Advertising Standards Authority of South Africa (**ASA**) was established in 1968 and was funded by the marketing and communications industries. The ASA administered the Code of Advertising Practice for many years, establishing a system of self-regulation, providing protection for both consumers and of the industry. The ASA was dissolved in 2018 and replaced by the ARB. The ARB is the self-regulatory body established by the advertising industry to administer the Code of Advertising Practice.
18. Broadcasters are required to adhere to the relevant Code of Advertising Practice, which is reviewed regularly (most recently in 2021). The code applies to commercial, non-commercial and political advertising, as well as controversial subjects and advocacy advertising.<sup>6</sup> Broadcasters also comply with rulings from the ARB in respect of adverts that have been found to violate the Code and should no longer be flighted.

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<sup>6</sup> Section 1, clause 2 of the Code.

19. The aim of the code is to ensure that all advertisements should be legal, decent, honest and truthful. All advertisements must be prepared with a sense of responsibility to the consumer and must conform to the principles of fair competition in business. Adverts may not bring advertising into disrepute or reduce confidence in advertising as a service to industry and to the public.<sup>7</sup>
20. The ARB and ICASA signed a Memorandum of Understanding in 2021.<sup>8</sup> It is important to note that ICASA regulates the **scheduling** of adverts, infomercials and programming sponsorships and **not the content** of the adverts flighted by broadcaster.<sup>9</sup>
21. Broadcasters also adhere to a Code of Conduct as administered by ICASA and NAB members adhere to the BCCSA's Codes of Conduct for Broadcasters. The BCCSA is recognised by ICASA to administer two Codes of Conduct (the **Codes**), Free-to-air services and Subscription services. The BCCSA engages from time to time with the ARB on any concerns regarding self-promotional adverts provided by NAB member broadcasters.
22. In this respect, clause 4(1) of the Broadcasters Code of Conduct requires that license holders must not broadcast material that "*sanctions, promotes or glamorises violence or unlawful conduct based on race, national or ethnic origin, colour, religion, gender, sexual orientation, age, or mental or physical disability*". In addition, clause 6(1) of the Broadcasters Code of Conduct ensures that broadcasters "*must not broadcast material which is harmful or disturbing to children*".
23. The NAB understands that the ARB will be providing the HRC with a detailed submission and the GCIS, ACA and ICASA are also important stakeholders who could assist the HRC in this inquiry.

## THE ADVERTISING PROCESS

24. Broadcasters are part of a larger value chain where adverts flighted are produced by third parties aimed at promoting a product or a service, and the broadcaster is merely the carrier of the advert.
25. The only time broadcasters create adverts is to self-promote their own content, for instance, by promoting forthcoming shows in an earlier segment or advertising on social

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<sup>7</sup> Section 1, clause 1 of the Code.

<sup>8</sup> For ease of reference, the MoU can be accessed here: <https://www.icasa.org.za/legislation-and-regulations/icasa-and-the-advertising-regulatory-board-arb-mou>.

<sup>9</sup> Excluding the content of self-promotional adverts flighted by broadcasters.

media. This self-promotion is to mitigate churn by keeping audiences engaged for longer. The broadcaster focuses on both retention and growth. Attracting new audiences is critical and therefore partnerships with products/brands are important. Broadcasters generally follow internal guidelines on such partnerships as well.

26. Self-promotion adverts are either produced in-house, by the broadcaster itself, or commissioned to an independent production company. In both scenarios there are clear editorial guidelines and compliance with applicable regulations.
27. From a self-promotion perspective, broadcasters use internal checks and balances to ensure that any self-promotion adverts flighted do not contravene any legislation or regulations. In this respect, broadcasters rely on their marketing, legal and compliance teams to ensure that the advertisement complies with the values of the Constitution and the requirements set out in legislation, regulation and the relevant broadcaster's ICASA license.
28. In the event that a promotional advert raises concerns, a member of the public can lay a complaint with the ARB. That being said, the BCCSA has also in the past considered whether a self-promotion advert is problematic. In this respect, the BCCSA has ruled against broadcasters on a number of occasions. By way of example, broadcasters have been sanctioned by the BCCSA for a self-promotional advert that resulted in an infringement of the privacy and dignity of the complainant.
29. As the HRC will note, the system of self-regulation of broadcasters by the ARB (as well as the BCCSA's limited role in respect of determining the appropriateness of self-promotional content) is effective and efficient.

## **COMPLIANCE WITH THE CONSTITUTION**

30. Broadcasters are bound by the provisions of the Constitution, both directly and indirectly through the relevant legislation in the sector, which aim at ensuring that content promotes diversity and social cohesion. The Constitutional standards, both in terms of the content flighted on their platforms and the retrospective complaints process, have resulted in a culture that allows for freedom of expression which does not stifle creativity, and permits members of the public to complain through appropriate channels and allow complaints to be resolved in an effective manner.
31. The NAB notes that the traditional value chain in the media space has evolved over the years with other emerging platforms, such as online platforms, drawing increasing

amounts of advertising revenue. While broadcasters are bound by legislation and their ICASA licenses, new online platforms which provide similar content to broadcasters are not regulated and do not require a license to operate.

32. Remedial measures that ensure compliance with the provisions of the Constitution have been put in place for broadcasters by ICASA, the BCCSA and the ARB to impose appropriate sanctions and remedial action for any breaches by broadcasters.
33. ICASA also monitors the compliance of broadcasters with the ICASA Act, the ECA, terms and conditions of their licence, and any relevant legislation and regulations. ICASA publishes compliance reports indicating each licensee's compliance with its licence, and whether the broadcaster was found in breach of any provisions by the ARB or the BCCSA.<sup>10</sup>
34. Given the evolving nature of the media and competition between regulated and unregulated platforms, the NAB has observed an increase in advertising spend being diverted to huge global tech and social media platforms. This is an area that could potentially be investigated further by the HRC, in particular the impact of this trend on the sustainability of local media and a diverse media landscape.

## **CONCLUSION**

35. In conclusion, the NAB members remain committed to the principles of responsible advertising in line with the principles of the Constitution. Broadcasters are regulated by ICASA and have been found to be a generally compliant sector. Broadcasters also adhere to additional self-regulatory systems to ensure trust and credibility. Any advertising related matters are addressed by ICASA and/or the ARB and the BCCSA.
36. We thank the HRC for the opportunity to provide this written submission and we request an opportunity to make oral representations, should a hearing be held.

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<sup>10</sup> For ease of reference, the relevant compliance reports can be accessed here: [Compliance Reports — Independent Communications Authority of South Africa \(icasa.org.za\)](https://www.icasa.org.za/compliance-reports).