National Association of Broadcasters' submission
on the Department of Communications'
Draft Electronic Communications Amendment Bill

30 August 2012

1. INTRODUCTION

1.1 The National Association of Broadcasters ("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:

(a) Three television public broadcasting services, and eighteen sound public broadcasting services, of the South African Broadcasting Corporation of South Africa ("the SABC");
(b) All the commercial television and sound broadcasting licensees;
(c) Both the major licensed signal distributors (electronic communications network service operators), namely Sentech and Orbicom;
(d) Over thirty community sound broadcasting licensees, and one community television broadcasting licensee, namely, Trinity Broadcasting Network ("TBN").

1.2 On 18 July 2012, the Department of Communications ("DoC") published the draft Electronic Communications Amendment Bill, 2012 ("the draft Bill") in Notice 572 of 2012, in Government Gazette No. 35525. Interested persons were invited to make representations on the draft Bill within 30 days of publication of the notice.

1.3 The NAB welcomes the opportunity to submit its written representations. The NAB hereby requests the opportunity to make oral representations in the event that the DoC decides to hold hearings in respect of the draft Bill. The NAB will confine its comments on the Draft Bill primarily to amendments that directly impact on broadcasters.

1.4 The NAB wishes to make a general comment that in light of the intention to conduct a comprehensive review of the ICT and broadcasting policy landscape stated by the Minister of Communications, Dina Pule, in January 2012[1], any amendments to the Electronic Communications Act of 2005 ("the EC Act") should be confined to

[1] Minister of Communications First Media Briefing, 24 January 2012 (http://www.doc.gov.za/index.php?option=com_content&view=article&id=579:statement-by-the-honourable-minister-of-communications-ms-dina-mp-at-the-&catid=88:press-releases)

being technical amendments of a minor nature to avoid the risk of pre-empting the findings of that policy review. It is the view of the NAB that there are a number of draft amendments, in the current draft Bill, such as the proposed establishment of Spectrum Management Agency, which are of a substantive policy nature, and raise constitutional and legal aspects rather than simply being technical amendments.

1.5 The NAB submission has been set out in the following way:

(a) Technology Neutral Licensing Framework
(b) Independence of ICASA;
(c) Spectrum Management Agency
(d) Community Broadcasting;
(e) Advertising and Sponsorship;
(f) Universal Service and Universal Access;
(g) Procedural issues; and
(h) Specific drafting concerns.

2. TECHNOLOGY NEUTRAL LICENSING FRAMEWORK

2.1 The NAB is of the view that the wording of the proposed amendment to section 2(b) of the EC Act may result in the exclusion of broadcasting services from the object of a technology neutral licensing framework. We do not believe that this is the intention of the drafters.

2.2 The NAB is also concerned about the explanation provided for the amendment to s2(b) in the explanatory memorandum. Namely that the Independent Communication Authority of South Africa (ICASA) "…is of the view that the distinction between ECS and Broadcasting contradicts a technology neutral licensing framework. A narrowed meaning is required to allow technology specificity where applicable such as the frequency plan."[2] The concern is that amendments to s2(b) would alter the intention of the legislature on addressing the problems around the issue of convergence that this

[2] Gazette p55.

legislation was intended to remedy. As this is a core area of the EC Act, we will map out the impact of this intention throughout the Act below and its impact on licensing and then address the concern raised by ICASA.

2.3 The Preamble to the EC Act provides that the Act is to "promote convergence in the broadcasting, broadcasting signal distribution and telecommunications sectors and to provide the legal framework for convergence of these sectors; to make new provision for the regulation of electronic communications services, electronic communications network services and broadcasting services; to provide for the granting of new licences …". It is thus patently clear that the intention is to create a statute that will enable ICASA to regulate the communications sector moving into the future. Given convergence and rapidly changing technologies, it was fundamental that the statute be technology neutral.

2.4 The objects of the Act are set out in s2. It provides:

> "The primary object of this Act is to provide for the regulation of electronic communications in the Republic in the public interest and for that purpose to –
>
> (a) promote and facilitate the convergence of telecommunications, broadcasting, information technologies and other services contemplated in this Act;
>
> (b) promote and facilitate the development of interoperable and interconnected electronic networks, the provision of the services contemplated in the Act and to create a technologically neutral licensing framework;
>
> …(z)."

2.5 Chapter 3 deals with the licensing framework for the three types of services regulated by the EC Act. s5(1) and (2) provide:

> "(1) The Authority may, in accordance with this Chapter and the regulations prescribed hereunder, grant individual and class licenses.
>
> (2) The Authority may, upon application and due consideration in the prescribed manner, grant individual licenses for the following:

(a) subject to subsection (6), electronic communications network services;
(b) broadcasting services; and
(c) electronic communications services".

2.6 These three services are defined in s1 of the EC Act, as are the associated definitions of "electronic communications" and "electronic communications networks".

2.7 ICASA prescribes, in terms of s8, standard terms and conditions to be applied to individual licences and class licences. Subsection (1) provides that the "terms and conditions may vary according to the different types of individual licences and … class licenses". Subsection (2) sets out the issues which the Authority "may take into account" as they set such standard terms and conditions. These issues include the licence area, the duration of the licence, the protection of the interests of subscribers and end-users, etc. Nowhere in this section is ICASA empowered to take into account the platform over which a service, including a broadcasting service, is or may be provided.

2.8 Chapter 9 deals specifically with broadcasting services. To the extent that it deals with categories of broadcasting services, these are identified as public, community, commercial and subscription broadcasting. There is no mention of broadcasting platforms such as satellite, cable or terrestrial frequency.

2.9 The transitional provisions in s93(1) indicate that "Subject to subsection (4), the Authority must convert existing licences by granting one or more new licences that comply with this Act on no less favourable terms."

2.10 In line with the objects of the Act, nowhere in the EC Act is there any reference to technology platforms used or to be used by electronic communications services, electronic communications network services and broadcasting services. The Chapters which deal with licensing, and which are cited above, are all drafted in a manner which are technology neutral. The intention of the legislature was to ensure that a service (whether an electronic communications service, an electronic communications network

service or a broadcasting service) could be provided over any platform in a rapidly converging communications environment.

2.11 ICASA has successfully converted all existing service licenses into technology neutral licenses that do not bind the licensees to any particular technology platform. Broadcasting service, electronic communication service and electronic communication network service licensees, therefore, are all now in a position to offer their service on any technology platform (satellite, terrestrial frequency, cable/wired and any future platforms not envisaged now) under a single service license. The service offering is subject to acquiring the necessary frequency spectrum license, in cases where frequency spectrum is required for the service. It is generally accepted by all in the sector that this is what is meant by the object requiring "a technologically neutral licensing framework".

2.12 The statement attributed to ICASA in the explanatory memorandum that the distinction between ECS and Broadcasting contradicts a technology neutral licensing framework, therefore does not make sense as there has never been any attempt to conflate these two very distinct licensing categories in Chapter 3 of the EC Act. Nor could the object of requiring a technology neutral licensing framework be interpreted as being intended to achieve such a purpose as it must be read in conjunction with Chapter 3 which sets out the licensing categories. Furthermore, the categories of license and associated terms such as "electronic communications" and "electronic communication network" are all clearly defined in the EC Act, resulting in it being very clear that electronic communication services and broadcasting services are both forms of electronic communications and that they are dealt with differently - not because of the technology platforms, which in some cases might be exactly the same, but rather because of policy perceptions about the different type of content being offered.

2.13 Similarly, when dealing with radio frequency spectrum, the object concerning a technology neutral licensing framework has been read in conjunction with other specific sections of Chapter 5, which clearly imply that some level of specificity regarding technology is required, in order for ICASA to meet international obligations, and to ensure that the use of radio frequency spectrum is harmonized and undue interference is not caused to other users of the radio frequency spectrum.

2.14 It is the view of NAB that no amendment is required, as ICASA has already satisfactorily met the object contained in s2(b) of the EC Act when they prescribed the following regulations:

(a) Regulations regarding standard terms and conditions for individual licences under chapter 3, Government Gazette 33294, Notice 523, 14 June 2010;
(b) Regulations regarding standard terms and conditions for class licences under chapter 3, Government Gazette 33296, Notice 525, 15 June 2010;
(c) Licensing process and procedures regulations for individual licences, Government Gazette 33293, Notice 522, 14 June 2010;
(d) Licensing process and procedures regulations for class licences, Government Gazette 33297, Notice 526, 14 June 2010; and
(e) Radio Frequency Spectrum Regulations, Government Gazette 34172, Notice 184, 31 March 2011.

2.15 Alternatively, if the DoC is still of the view that the rationale prompting the proposed amendment is still sound, namely that alleged difficulty around assigning/licensing radio frequency spectrum stated in the Explanatory Memorandum attached to the draft Bill, it is suggested that this can be resolved simply by the following underlined amendment to s2(b) of the EC Act:

"(b) promote and facilitate the development of interoperable and interconnected electronic networks, the provision of the services contemplated in the Act, the licensing of radio frequency spectrum and to create a technologically neutral service licensing framework;

3. INDEPENDENCE OF ICASA

3.1 The Constitution and ICASA

3.1.1 Section 2 of the Constitution of South Africa provides that the Constitution is "the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled". Furthermore, section 192

of the Constitution mandates that, "national legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and diversity of views broadly representing the South African society". Consequently, the ICASA Act provides in s3(3) that ICASA "is independent, and subject only to the Constitution and the law, and must be impartial and must perform its functions without fear, favour or prejudice". However, the fact that s3(3) recognises the independence of ICASA is in our view, not sufficient on its own. All the provisions in the ICASA Act and related legislation such as the EC Act must contribute to and support and strengthen ICASA's independence.

3.1.2 The NAB believes that it is important to contextualize s192 of the Constitution. It appears in Chapter 9 which is headed "State Institutions Supporting Constitutional Democracy". Other "Chapter 9 institutions" include, the Public Protector, the South African Human Rights Commission and the Electoral Commission. In this regard, s181(2) provides that these institutions are "independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice". Subsection (3) provides: "Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions". Subsection (4) provides: "No person or organ of state may interfere with the functioning of these institutions".

3.1.3 Although sections 181, 193 and 194 of the Constitution do not refer to ICASA directly, the NAB believes that the characteristics of an independent authority outlined in these sections are applicable to ICASA. Given the importance of these sections in supporting constitutional democracy it is likely that courts will rely on these sections in any matter relating to the independence of the broadcasting authority as required by s192 of the Constitution.

3.1.4 Furthermore, the courts have had the opportunity to rule on the independence of Chapter 9 institutions. In the case of *De Lange v Smuts* 1998 (3) SA 785 (CC) the Constitutional Court held that factors that may be relevant to

independence and impartiality, depending on the nature of the institution concerned, include provisions governing appointment, security of tenure and removal, as well as those concerning institutional independence.

3.1.5 The DoC has made submissions previously on the issue of the Authority's independence to a parliamentary committee. It was put to the ad hoc Committee on the Review of Chapter 9 and Associated Institutions that the constitutional provision for the establishment of a regulatory body of this nature is inappropriate. In particular, the DoC presented a number of factors in support of this view, including:

(a) The Authority is not listed in s181 of the Constitution and, consequently, can be distinguished from the other institutions described in Chapter 9 of the Constitution;
(b) The constitutional criteria of fairness, efficiency and diversity were intended to apply to broadcasting, and not to telecommunications or to electronic communications; and
(c) Given the rapid technological developments within the communications sector, it is no longer appropriate to retain the Authority's constitutional status. Constitutional entrenchment creates the danger that the regulator might be unable to adapt swiftly to an ever-changing technological environment.[3]

3.1.6 It is important to note that the Committee was of the view that this perception of ICASA's legal standing was "a misunderstanding, as the Constitution is not the only place that provides for an independent regulator. In fact, the phraseology of the enabling legislation in s3 of the ICASA Act goes much further than the constitutional provisions. Furthermore, there are other constitutional institutions, not found in Chapter 9 of the Constitution, which are

[3] Parliament of South Africa (2007). Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions. A report to the National Assembly of the Parliament of South Africa. Cape Town , South Africa. p. 193.

nonetheless independent. The relevant constitutional provisions and the legislation determine their legal status."[4]

3.1.7 In particular, on the issue of what constitutes independence the Committee pointed to the Constitutional Court judgment in the "Independent Electoral Commission v Langeberg Municipality that, although a Chapter 9 institution such as the Electoral Commission is an organ of state as defined in section 239 of the Constitution, these institutions cannot be said to be a department or an administration within the national sphere of government over which Cabinet exercises authority. These institutions are state institutions and are not part of the government. Independence of the institution refers to independence from the government. The Court could not agree that these institutions would be subject to the constitutional provisions of co-operative government when they are in fact independent from government. This means that Chapter 9 institutions are not (Committee's emphasis) subject to the co-operative government provisions set out in Chapter 3 of the Constitution. These institutions perform their functions in terms of national legislation, but "are not subject to national executive control". They are part of governance but not part of government. There is a need for these institutions to "manifestly be seen to be outside government" (Committee's emphasis). The judgement lays down that a very clear and sharp distinction must be drawn between these institutions and the Executive authority and no legislative provision or action by the Executive that would create an impression that the institution is not manifestly outside government would be constitutionally acceptable."[5]

3.1.8 The NAB is in agreement with the views of the ad hoc Committee on the independence of the Authority and holds the view that some of the current proposed amendments may have the effect of negatively compromising ICASA's independence from the Executive and commercial and other interests.

[4]Ibid at . p.193.
[5]Ibid at p.10.

3.2 Provisions in the Bill which raise constitutional and independence concerns

3.2.1 When the EC Act was finalised, its drafters were careful to avoid compromising s192 of the Constitution, and the independence granted to ICASA in legislation when dealing with policy directions made by the Minister. To this end, the EC Act, provides the Minister with the power to make policies and issue policy directions in terms of s3(1) and (2) of the EC Act, whilst at the same time preserving the independence of the regulator, by not making these polices and policy directions binding upon the regulator. In terms of s3(4) of the EC Act, ICASA only has to consider such policies and policy directions in exercising its powers and performing its duties in terms of the Act. Furthermore s3(3) of the EC Act prohibits the Minister from making policy or policy directions that may influence ICASA in terms of granting, amending, transferring, renewing, suspending or revoking a licence, except as directly permitted by the Act.

3.2.2 The NAB is of the view that the proposed amendment to s3 of the EC Act by inserting in subsection(1) after paragraph (a) a new paragraph (aA) that permits the Minister to make policy on ownership and control is likely to conflict with s3(3) of the EC Act. In addition, it is inappropriate for the Minister to make policies on this issue as the State is a sole shareholder or has a significant stake in a number of dominant companies within the electronic communications sector. It is for this reason that ownership and control issues for broadcasting have been addressed in primary legislation. The NAB is of the view that this amendment should be deleted.

3.2.3 Currently, s4(5) of the EC Act only requires ICASA to inform the Minister 30 days before making regulations of its intention and subject matter of the regulations. The proposed amendment that ICASA must make available in advance, a copy of the regulations to the Minister, who represents the State as shareholder in a number of dominant companies in the electronic communications sector, in the mind of the NAB creates an opportunity for interference, that not only undermines ICASA's independence in making regulations, but allows a significant shareholder an unfair opportunity to

influence the outcome of regulatory processes. Accordingly, the NAB proposes the deletion of this amendment to s4(5) in the draft Bill.

3.2.4 The proposed amendment to s21(1) of the EC Act envisages the Minister developing policy and policy directions, following which ICASA must make regulations. The implication being, that ICASA must implement the policy direction which would not be in line with the principle of independence and s3 of the ICASA Act. It is suggested that the drafting be changed to empower ICASA to consider the policy and policy directions or alternatively changing "must" to "may" providing, ICASA with discretion in this regard.

3.2.5 The proposed insertion of s79B provides the Minister with the power to require ICASA or any other person to provide the Minister with any data, information or documents. The ability to compel ICASA to provide any information once again infringes on ICASA's independence. Similarly, the right to demand this information from any person, especially commercial entities, who compete with public entities, constitutes an infringement on the commercial activities and right to privacy of companies and other legal persons.

3.2.6 The NAB is further of the view that the proposed amendments to Chapter 5 in respect of the radio frequency spectrum downgrades ICASA's powers in section 30(1) of the Act from controlling, planning, administering and managing the use of the radio frequency spectrum, to simply assigning same, and then only to the extent that this is for non-government use. The constitutionally entrenched right to control and the ability to manage the broadcasting services frequency bands is an essential and inseparable part of regulating broadcasting. Consequently the NAB is of the opinion that it is unconstitutional to downgrade ICASA's power to control and manage the radio frequency spectrum to one of simply assigning spectrum. The NAB's views on the Spectrum Management Agency is dealt with in more detail in the next section.

4. SPECTRUM MANAGEMENT AGENCY

4.1 The NAB does not see the requirement for a separate Agency operating in parallel with ICASA. This is not only a clear duplication of effort and resources in an area which ICASA has managed reasonably well since 1994, but also a clear infringement of the independence of ICASA, that could be viewed as an attempt by the DoC to claw back powers vested in the regulator.

4.2 The NAB acknowledges that the Minister is responsible for the representation of the country in international fora, such as the International Telecommunication Union (ITU), in regional bodies and bilateral interaction with other countries. The Minister is further responsible for determining policy regarding radio frequency spectrum allocation at a high level, and assignments for the security services. The NAB is of the view that s30 and s34 of the EC Act clearly outline the different roles played by both ICASA and the Minister. To the extent that this is not clear, or is ambiguous, the Act should be amended.

4.3 However, it is the view of the NAB that, spectrum management is a highly complex and interdependent task that impacts considerably on the economy, and it is in the public interest that it be managed by a single body, in an effective and efficient manner. Spectrum is a valuable resource and must be dealt with in a transparent and competitive manner. The arbitrary distinction between government and non-government usage does not reflect the realities of the market, where public entities and entities with significant State shareholding compete on a daily basis with commercial entities. Accordingly, the NAB proposes that all reference to the Spectrum Management Agency in the draft Bill be deleted, and that amendments be effected to clearly indicate the different role of the Minister and ICASA with regard to control, planning, administration and management of the radio frequency spectrum in a manner that accords with the Constitution and s3 of the ICASA Act.

4.4 Furthermore, the NAB holds the view that this is not a technical amendment and that prior to commencing with such a significant change to the management, control and administration of frequency spectrum in South Africa, a proper international

benchmarking should be conducted as part of the Minister's envisaged comprehensive review of the ICT and broadcasting policy landscape.

5. COMMUNITY BROADCASTING

5.1 Definitions of Community Broadcasting

5.1.1 Currently, the definitions of "community" and "community broadcasting" in the EC Act provide for two types of community broadcasting service to be licensed, the first being a geographically founded community, and the second being a community based on common interest (such as religion or language).

5.1.2 The insertion of "geographically defined" in the definition of "community broadcasting service" in our viewm has the exact opposite effect limiting the application for this type of service only to geographic founded communities. This would then have the surely unintended consequence of possibly blocking communities of interest, such as religious communities, from applying for community broadcasting service licences that cover South Africa.

5.1.3 The NAB proposes that there be no amendment to the definition of "community service broadcasting" as currently contemplated in the EC Amendment Bill because of the harmful impact on current "community of interest" community broadcasting services.

5.2 USAAF contributions by Community Broadcasting Services

5.2.1 In terms of section 89 of the EC Act, every holder of a license is obliged to contribute into the Universal Service and Access Fund (USAAF), in accordance with Regulations set by ICASA. Furthermore, the EC Act allows broadcasting service licensees contributing to the Media and Development and Diversity Agency (MDDA) to set off their MDDA contributions against their prescribed annual contributions into the USAAF.

5.2.2 The draft amendment Bill proposes amendments to s88 of the EC Act. The effect of these proposed amendments is that, broadcasting service licensees are excluded from obtaining subsidies from the USAAF. In our view, since broadcasting service licensees will no longer benefit from the USAAF, the DoC should then exempt broadcasting service licensees from contributing into the USAAF. This exemption will be more beneficial to class broadcasting service licensees (both Community Television and Community Sound Broadcasting), which by their nature, are non-profit-making entities. The DoC is further aware that the majorities of community radio stations are struggling financially, and depend on grants and subsidies from the DoC as well as donors for their financial viability. The obligation placed on them to contribute to the MDDA and/or the USAAF is therefore unduly onerous. Further, it is illogical to require community broadcasters to make contributions to a fund on which they rely for their sustenance.

5.2.3 In response to previous industry requests for exemptions by ICASA, when drafting its regulations on prescribed Annual Contributions of licensees in relation to Universal Service and Access Fund[6] (USAF Regulations), ICASA expressed in its Explanatory Memorandum on the amendments to the USAF Regulations that its inability to exempt community broadcasting service licensees was based purely on the wording of section 89 and no other reservation, as the section did not empower ICASA to provide any exemptions.

The NAB therefore proposes the amendment of section 89 of the EC Act, to exclude individual broadcasting service licensees from contributing into the USAAF as they will henceforth not benefit from the fund, and the exemption of class broadcasting service licensees from contributing into both the USAAF and the MDDA Fund. Alternatively, the NAB would propose for the amendment of Section 89(2)(a) of the EC Act, to empower ICASA to exempt certain categories of holders of licenses granted or considered to have been

[6] Final Regulations published on 11 February 2011, in Government Gazette 34010.

granted in terms of Chapter 3, and class broadcasting service licensees should not be required to make any contributions.

6. ADVERTISING AND SPONSORSHIP

6.1 The draft Bill proposes the amendment of s55 for the purposes of providing ICASA with the power to prescribe regulations on the scheduling of advertisements, infomercials and programme sponsorships. The rationale provided in the Explanatory Memorandum is that this does fall within the ambit of the Advertising Standards Authority of South Africa (ASA) Code of Advertising Practice, and that it was previously regulated by the Advertising, Infomercials and Programme Sponsorship regulations.

6.2 Advertising is an inescapable part of commercial broadcasting, and in the case of commercial free-to-air broadcasting it is the primary revenue source. As such, viewers and listeners are aware that to receive programme content, they must also receive advertising. Regulation of advertising can be seen as a consumer protection measure, for example, regulation designed to ensure that advertising claims are truthful, not exaggerated or misleading, or to protect specific groups within the community who may be vulnerable, such as children. In South Africa, this has been done through self-regulation and the legal recognition of this self-regulation by the ASA in s55(1) of the EC Act. The ASA does not regulate scheduling as this would unduly interfere in the commercial activities of licensees. The 1999 regulations mentioned in the Explanatory Memorandum also did not regulate the scheduling of advertisements and were confined to the definition of advertisements and ensuring transparency and editorial control around the broadcast of programme sponsorships and infomercials. In fact prior to the EC Act the average number of minutes for advertising per hour were dealt with in the form of licence conditions and not regulation.

6.3 Broadcasters deliver audience to advertisers. If advertising becomes too excessive the audience stops watching and the broadcaster will start to fail on the basic premise of delivering audience to advertisers. There is therefore, a natural limit to the amount of advertising that can be broadcast in any hour, whether or not there is regulation on the scheduling of advertising. The NAB is of the view that the scheduling of advertising is a commercial decision which is based on sound audience and marketing research and

goes directly to the financial viability of broadcasting service. Therefore, there is no compelling need to provide ICASA with the power to interfere in the commercial activities of broadcasting services by regulating the scheduling of advertising.

7. UNIVERSAL SERVICE AND ACCESS

7.1 Currently, in the EC Act, broadcasting services are included in the definition of universal access and universal service, but are excluded from the ambit of s82(3)(a)(i) where the Minister must determine what constitutes universal access. The exclusion is similarly in s82(3)(a)(ii) where the Minister must determine what constitutes universal provision of services. The DoC proposes deleting the explicit references to electronic communication services and electronic communication network services the result of which would be to bring broadcasting services within the ambit of these two sections.

7.2 In the NAB's view, the current exclusion of broadcasting services from the ambit of the s82(3)(a)(i) and (ii) is not accidental and broadcasting services should not be captured in the ambit of these two sections by the proposed amendment.

7.3 Universal access and universal service policies and strategies do not traditionally include broadcasting. This is because broadcasting policies and regulatory frameworks have critically different objectives to universal service and universal access as developed in the traditional telecommunications sector, which go beyond affordable access and service. Their focus is on, amongst others, diversity of content, pluralism, choice, media freedom, and protection against illegal and harmful media content. This is why the obligations placed upon licensees in the broadcasting sector have been called public service obligations ("PSOs") rather than Universal Service Access Obligations (USAOs), which have traditionally been applied to only telecommunications licensees. In the EC Act, these PSOs are captured in Chapter 9 of the EC Act and ICASA is empowered to make regulations in this regard.

7.4 The rationale for the inclusion of broadcasting services in the definitions of "universal service" and "universal access" in the EC Act in 2005 was not for the purposes of the determinations by the Minister, but to create the necessary principle for broadcasting services (ideally community broadcasting services) to be able to access funds from

USAAF to which, by virtue of s89 of the EC Act, every holder of a licence is obliged to contribute. It would not have been fair for broadcasting service licensees to be compelled to contribute to a fund, that broadcasting services would not be able to access by virtue of not being considered to fall within the ambit of “universal service” and “universal access”.

7.5 The terms "universal service" and "universal access" in the EC Act, unless the context indicates otherwise, must be interpreted in accordance with the definitions provided in s1 of the Act. Universal service is defined as meaning "the universal provision of electronic communications services and broadcasting services as determined from time to time in terms of Chapter 14". Universal access is defined as meaning "universal access to electronic communications network services, electronic communication services and broadcasting services as determined from time to time in terms of Chapter 14".

7.6 The determinations referred to in these definitions, are those which are made in terms of the current s82(3) of the EC Act by the Minister of Communications on what constitutes "universal access by all areas and communities in the Republic to electronic communications services and electronic communications network services" and "the universal provision for all persons in the Republic of electronic communications services and access to electronic communications networks, including any elements and attributes thereof".

7.7 The NAB holds the view that broadcasting services are not mentioned in s82(3), as the focus of these determinations is intended to be on access to ECS and ECNS. Broadcasting Services are carried by ECNS licensees, thus broadcasting signal distribution falls within the ambit of s82(3) in terms of network roll-out and access to broadcasting signal. However, the content elements of broadcasting services remain under PSOs and the ambit of Chapter 9 of the EC Act, rather than becoming confused with the concepts of universal service and universal access. This problem was highlighted when the previous Minister of Communications attempted to set the level of South African content on broadcasting services using these sections, and in so doing usurping ICASA’s powers to prescribe regulations in this regard in terms of section 61 of the EC Act.

7.8 The NAB recommends that s82(3) should not be amended to avoid confusion between PSOs and USAOs.

8. PROCEDURAL ISSUES

8.1 Deletion of definition of "Days"

8.1.1 The deletion of the definition of "days" as meaning working days, results in the Interpretation Act definition of "days" as meaning "calendar days" being applied. This means that all periods for consultation and so forth in the EC Act will become considerably reduced.

8.1.2 The NAB is of the view that this will negatively impact on the ability of stakeholders to make representations in a timeous and effective manner. Rather than speeding up processes it is more likely to lead to requests for extensions and condonation for late submissions which will be more of an administrative burden and actually lead to processes being prolonged more than 30 working days.

8.1.3 It should be kept in mind that the definition of "days" applies to the use of the word throughout the Act and that the impact is not reserved only for the use of the word in the context of consultations. For example, all the notification periods in Chapter 4 are considerably reduced as a result of this change to the detriment of the public interest, such as the number of days the owner of a private property (currently s25 of the EC Act provides for 28 days) has to notify an electronic communications network service licensee that a deviation or alteration of a electronic communications network facility is required, or the number of days written notice an electronic communications network service licensee has to provide to a local authority or person responsible for the upkeep of any street, road, or footpath before commencing construction or alteration. This surely was not the intention of the DoC.

8.1.4 The NAB strongly recommends the retention of the current definition of “days” and the deletion of the term calendar days where it appears throughout the draft Bill.

8.1.5 Alternatively, the amount of days allowed for consultations should be extended to a higher number to accommodate the change to calendar days. It is proposed that the “30 working days” period be altered to “60 calendar days” to offer an equivalent and significant opportunity within which to make substantive comments.

8.2 Use of the term “impose” instead of “prescribed”

8.2.1 The draft Bill proposes the deletion of the term “prescribed” and the use of the term “impose” on a number of occasions, for example, s8(3), s8(4), s9(6)(b), etc. The problem with this step is that the term “prescribed” is clearly defined in the EC Act as meaning the making of regulations, whereas the term ‘impose” is not defined but clearly implies a process that does not involve making regulations.

8.2.2 This would mean that ICASA could potentially avoid the consultation process it is required to follow in terms of s4(4) to 4(7) of the EC Act. However, as this imposition is clearly an administrative action that will affect the rights of licensees concerned it must comply with principles of administrative justice and provide procedural safeguards which is not the case here.

8.2.3 The NAB is of the view that the use of the term “prescribed” should remain as it provides procedural safeguards and mitigates against arbitrary action.

9. SPECIFIC DRAFTING COMMENTS

9.1 Definitions

9.1.1 Just a minor correction to the definition of “service licence”. The intention is that a licensee is given a service licence to provide a category/type of service,

i.e. three separate service licences would be required to provide a broadcasting service, electronic communication service (ECS) and/or electronic communication network service (ECNS). The current wording, however, implies a single service licence is required to provide all the services in Chapter 3. This is simply rectified by inserting "a" before service and deleting the "s" in services,:

" 'service licence' means a licence authorising the holder to provide a service**[s]** in terms of Chapter 3 of the Act"

9.2 Amendment of s9 of Act 36 of 2005

9.2.1 Section 9 of the EC Act provides for what ICASA needs to include in an invitation to apply (ITA) for an individual licence. The draft Bill proposes deleting s9(2)(b) requirement setting out the minimum percentage of equity ownership and replaces it with broad-based black economic empowerment (B-BBEE) requirements prescribed under s4(3)(k) of the ICASA Act. The concern with this amendment is that it requires ICASA to prescribe their requirements, whereas s4(3)(k) of the ICASA Act empowers ICASA to make B-BBEE regulations in terms of the B-BBEE Act at ICASA's discretion. This places the industry in a double jeopardy situation where it has to comply with both the regulations and the ICT Charter, whereas the current wording of s4(3)(k) allows ICASA to consider whether it is necessary to prescribe regulations against the background of what has been put in place by the Department of Trade and Industry. In the NAB's view, ICASA's discretion to make these regulations should be retained in the EC Act as well, accordingly it is proposed that the paragraph be re-worded as follows:

"(b) include the…broad-based black economic empowerment requirements that may have been prescribed by the Authority under section 4(3)(k) of the ICASA Act;".

9.3 Amendment of s65 of Act 36 of 2005 (Commercial Sound Broadcasting concerns)

9.3.1 The NAB is of the view that the amendments to subsections (2) to (5) of s65 of the EC Act do not make sense when read together. In particular, s65(2) and

s65(4)(a) directly contradict each other. Section 65(2) limits a licensee to three (3) commercial sound broadcasting services whilst section s65(4)(a) limits a licensee to two (2) commercial sound broadcasting services. Furthermore, the amendments reflect a reduction and not an increase in the number of commercial sound broadcasting services that can be controlled by a person. Currently, the position is that one can control two FM and two AM commercial sound broadcasting services, permitting a commercial sound broadcasting service to control a total number of 4 commercial broadcasting service licences.

9.3.2 The NAB proposes that the number of commercial sound broadcasting services that can be controlled by a person be increased as proposed in the ICASA 2004 Ownership and Control recommendations submitted to the then Minister and that they be adopted in place of the proposed amendments to s65(2) to (4). These recommendations were based on a percentage being set and the recommended text by ICASA was as set out below:

"(2) No person shall, directly or indirectly, exercise control over more than thirty five percent of the total number of licensed commercial sound broadcasting services provided that:

(a) when the calculation of the number of licensed commercial sound broadcasting services that a person may be in control of does not result in an integer and that when that number is rounded to the closest integer, that integer results in a percentage that is higher than the thirty-five percent limitation set out in subsection (2); and/or

(b) when a person exceeds the thirty-five percentage limitation set out in subsection (2) only because one or more other licensees have had their licences suspended or revoked by the Authority, or one or more licensees have ceased broadcasting (temporarily or permanently), in which case the Authority shall consider an application by the relevant person for exemption from the limitations in terms of subsection (6)(a).

(3) Notwithstanding the provisions of subsection (2), no person shall, directly or indirectly, exercise control over more than two commercial sound broadcasting licences which have the same licence areas or substantially overlapping licence areas."

9.4 Transitional Provisions

9.4.1 The DoC proposes the deletion of s92 and s93. The motivation provided in the explanatory memorandum for the deletion is that, ICASA has completed the conversion of the "existing licences". The NAB has no objection to the deletion of s92(1) and (6) and the whole of s93 which deal with the conversion of existing licences. However, although the heading of s92 is "Existing licences", s92(2) to (5) and s92(7) deal with other transitional issues which do not involve the conversion of existing licences. The NAB would recommend that the transitional provisions in s92(2) to (5) and s92(7) must be retained as they still keep alive deeming provisions and processes commenced under previous legislation, which allow a range of services to continue to operate lawfully and their deletion would have serious consequences for these services. For example, the Sentech Vivid service by virtue of s92 currently continues to operate lawfully.

10. CONCLUDING REMARKS

The NAB supports the work of the DoC with regard to the technical amendments that repeal obsolete or unnecessary provisions, removal of anomalies, and ensuring consistency with the Constitution, until such time that the Act can be reviewed in line with the proposed new overarching ICT and broadcasting policy. However, the NAB would caution the DoC from going beyond the technical amendments necessary for a "cleaning-up" of the EC Act until the envisaged ICT and broadcasting policy review announced by the Minister in January 2012 has been completed, to avoid duplication of effort or pre-determining of policy outcomes in that process.