REPRESENTATIONS

Introduction

1 Electronic Media Network Limited ('M-Net") and MultiChoice Africa (Pty) Ltd ("MultiChoice") welcome the opportunity to make representations on the Broadcasting Amendment Bill ("the Bill").

2 We request an opportunity to make oral representations to the Parliamentary Portfolio Committee on Communications.

3 The nature of these representations will vary. As regards certain provisions of the Bill, our comments are detailed : we are concerned that a number of provisions lack conceptual clarity, certain provisions are unnecessary, and words and phrases are not used consistently. This is likely to result in uncertainty, interpretative difficulties and endless litigation by aggrieved parties, which will make the regulation of the industry difficult. These consequences will be most unfortunate for the broadcasting industry. As regards other provisions, our comments are more broadbrush and deal with fundamental principles.

s1 - Definitions

4 Prior to commenting on certain definitions, we wish to make a few general comments. Firstly, the Bill amends a number of definitions in s1 of the Broadcasting Act. However, many of the definitions, which are to be amended, are also contained in s1 of the Independent Broadcasting Authority Act ("the IBA Act"). In order to avoid the same word or phrase being defined differently in the IBA Act and the Broadcasting Act, as amended, these definitions in the IBA Act will need to be amended identically.

5 Secondly, the approach to defining certain inter-related phrases requires consideration. The IBA Act and the Broadcasting Act both define the following words and phrases, and define them identically -

5.1 “broadcasting licence”;

5.2 “broadcasting licensee”;

5.3 “broadcasting service”;

5.4 “broadcasting signal distribution”;

5.5 “broadcasting signal distribution licence”;

5.6 “broadcasting signal distribution licensee”; and

5.7 “licensee”.

6 We propose that the definition of “broadcasting signal distribution service” be introduced in the Bill and that this means “a service whereby broadcasting signal distribution is provided”. Given the existing definition in both Acts of “broadcasting signal distribution licence” and our proposal that a definition of “broadcasting signal distribution service” be introduced, there is no need to insert a definition of “distribution licence” and “distribution service” (see paragraph (k) amending s1). Not only is the insertion of these two definitions unnecessary, but it will result in different defined terms being used for the same concept. This will lead to interpretative difficulties. We therefore propose that these two new definitions be deleted from the Bill.

7 As regards the definition of “broadcasting licence”, because of the existence of the IBA Act and the Broadcasting Act, there is understandably concern as to whether a service is licensed, or deemed to be licensed, in terms of the one or the other or both Acts. The proposed amendment to the definition of “broadcasting licence” seems to attempt to address this concern, but does not do so adequately. We propose that the definition of “broadcasting licence” as proposed in the Bill (see paragraph (d) amending s1) be amended so that it reads :

“‘broadcasting licence’ means a licence granted and issued by the Authority **[in terms of this Act]** to a person for the purpose of providing a

defined category of broadcasting service, or deemed by this Act or the IBA Act to have been so granted and issued".

As a creature of statute, the Authority may only act under its governing legislation, namely the IBA Act and the Broadcasting Act. The definition therefore does not have to state "in terms of this Act". One also avoids the problem as to whether a broadcasting licence is granted and issued in terms of the IBA Act, or the Broadcasting Act.

8 Although the Bill attempts to tidy up the definition of "broadcasting licence", this has not been done in relation to the definition of "broadcasting signal distribution licence". We propose that in order to address the above-mentioned concern, and in order to be consistent, the definition of "broadcasting signal distribution licence" in the present Broadcasting Act be amended so that it reads as follows :

"'broadcasting signal distribution licence' means a licence granted and issued by the Authority **[in terms of this Act]** to a person for the purpose of providing signal distribution for broadcasting purposes, or deemed by this Act or the IBA Act to have been so granted and issued".

9 For the sake of consistency, the definition of "licensee" in the Broadcasting Act ought to be amended so that it reads :

"'licensee' means the holder of any licence granted and issued **[under this Act]** by the Authority, or deemed by this Act or the IBA Act to have been so granted and issued".

10 Given our above proposals, we suggest that "licence" (see paragraph (n) amending s1) be amended so that it reads "'licence' means a broadcasting licence or a broadcasting signal distribution licence".

11 Having addressed all these issues, one needs to go through the IBA Act, the Broadcasting Act and the Bill to determine whether these defined words and phrases are used, as opposed to other words and phrases. On our analysis

there seem to be little or no problems with the IBA Act. However, in the Broadcasting Act, s1 (the definition of "common carrier"), s2(p) and (q), s33(1), s34(1) and s34(2) need to be amended in minor respects so as to ensure the consistent use of these defined words and phrases. As but one example of what we mean, in s33(1), the term "signal distribution" is used, when it ought to be "broadcasting signal distribution". As regards the Bill, there are numerous instances where these defined terms have not been consistently used. We will be commenting on most of these provisions, and putting forward alternative proposals, in which proposals we have ensured that we use these defined words and phrases.

12 Concerning the proposed new definition for "national sporting event" (see paragraph (s) amending s1), we wish to point out that the very purpose of the sports inquiry the Authority is currently conducting is to consider the interpretation and application of s30(7) of the Broadcasting Act. To attempt to define "national sporting event" in the Broadcasting Act would completely pre-empt and undermine the Authority's inquiry. For example, the Authority, in its Discussion Paper asks: "How should the Authority interpret the term 'national sporting events'? Please motivate your answer and provide the legal basis for your response where possible." The Authority also asks: "What criteria should be used to determine which events should be considered as national sporting events?" This approach accords with the approach taken in other countries where the broadcasting of sports events is regulated. For example, in Australia, the Australian Broadcasting Authority proposed three criteria that ought to be applied in determining what sports events ought to be listed. Similarly, in the UK, an Advisory Group determined the criteria, but went on to indicate that even if an event meets these criteria, the listing of the event will not be automatic. The Advisory Group identified at least six additional factors that would have to be considered. In Europe a similar approach has been adopted - the regulators have identified numerous criteria, which have to be considered. Given the complexities and nuances involved, and the fact that the meaning to be given to "national sporting events" may change over time, we believe it is more appropriate to give meaning to the phrase "national

sporting event" by way of regulation, as opposed to in the primary legislation. Our Authority, after having had the benefit of hearing extensive representations on these issues in the current sports inquiry, will be able to flesh out by way of regulation the meaning to be given to this phrase and the criteria to be applied. For all these reasons we do not believe this phrase should be defined in the Broadcasting Act. Given these representations, the proposed new definition of "national interest" (see paragraph (r) amending s1) is unnecessary. In any event, the proposed new definition of "national interest" makes no sense - a reading of Chapter 1 of the Constitution does not assist one in giving meaning to "national interest" : the Chapter deals with issues such as the supremacy of the Constitution, citizenship, the national anthem, the national flag and languages.

13 As regards the proposed new definition of "radio station" (see paragraph (v) amending s1), firstly, we do not believe there is a need for this definition, since "sound broadcasting service" is defined in both the Broadcasting Act and the IBA Act. Secondly, the proposed new definition is likely to cause confusion given the definition in both the broadcasting and the telecommunications legislation of "radio" and the provisions of s30 of the Telecommunications Act. We are also concerned that the wording of this proposed new definition is so wide that it could include third parties providing programming to a sound broadcasting service, persons in the advertising industry, etc. We accordingly propose that this definition be deleted from the Bill.

s3 - South African broadcasting system

14 Given the proposed amendment to s56(1) of the IBA Act (see item 3 of Schedule 1), s3(5)(f) of the Broadcasting Act is problematic, and in any event ought to be deleted, since there is no need for it - by virtue of s56(1) of the IBA Act, and subject to s56(2), all broadcasting licensees will be required to comply with the Code of Conduct for Broadcasting Services as prescribed.

s4 - Licences

Proposed new subsections (1) and (5) of s4

15 We have a number of comments concerning the proposed new s4(1) and (5) :

15.1 Chapter III, and in particular s4 of that Chapter, deals with broadcasting services and broadcasting licences. Broadcasting signal distribution is dealt with in another Chapter, namely Chapter VII. There accordingly should be no reference to broadcasting signal distribution in s4.

15.2 s4(1) and (5), whether one is considering the Broadcasting Act or the Bill, are trying to achieve the same purpose : there is accordingly no need for both subsections.

15.3 Defined words and phrases ought to be used.

15.4 In lines 11 and 12, there is no need for the phrase "whether by satellite or by terrestrial transmitters", since "broadcasting service" has already been defined. This wording in the Bill is also dangerous, in that it only refers to a broadcasting service provided by satellite or terrestrial transmitters - what about other forms of broadcasting services, such as cable, ADSL, power lines and other forms of transmission of broadcasting signals which do not involve a satellite or terrestrial transmitter? Surely it is not the intention of the legislature that a cable subscription television broadcasting service, for example, be allowed to operate without being licensed?

15.5 In lines 15 to 17, we are not sure what is meant by the phrase "in accordance with the conditions prescribed by the Authority". If it is a reference to licence conditions, there is no need for this phrase, given the provisions of s43(2) of the IBA Act and the regulations relating to applications for the granting, issuing, renewal, amendment and

transfer of broadcasting signal distribution licences.[1] Furthermore, the use of the word "prescribed" is inappropriate, since many licence conditions are not prescribed by regulation - they are written into the licence by the Authority. Alternatively, if it is meant to refer to the manner in which one is to apply for a licence and the processing of that licence, there is also no need for this phrase, since s41 to s43 of the IBA Act deal in detail with this issue.

We therefore propose that subsection (5) be deleted and that subsection (1) be reworded as follows :

"Subject to the provisions of this Act, a person may not provide a broadcasting service without a broadcasting licence."

Given our proposed definition of "broadcasting licence", this is all that needs to be said.

Proposed new s4(2)

16 Whilst the provisions of s4(2) of the Broadcasting Act are not ideal, they are preferable to the proposed new s4(2), the purpose of which amendment we fail to understand.

17 Firstly, the proposed new subsection (2) does not indicate by when persons providing a broadcasting service without a licence at the commencement of the Broadcasting Amendment Act must have applied for a licence - we doubt the intention is to leave this open-ended. The proposed new s31(2) does not compel a person who, at the commencement of this Act, provides a subscription broadcasting service, to apply for a subscription broadcasting licence : s41(4) of the IBA Act provides that a person may of their own accord and at any point in time apply to the Authority for a broadcasting licence. A person who, at the commencement of this Act, provides a broadcasting service, could therefore take advantage of the situation by enjoying the

[1] R1315, *Government Gazette* 16628, 25 August 1995, regulation 7

protection of the deemed provision without ever applying for a broadcasting licence.

18 Secondly, the intention of s4(2) of the Broadcasting Act was that persons who, at the commencement of the Broadcasting Act, were lawfully providing a broadcasting service, but who did not have the necessary licence, provided they applied timeously, would be protected until such time as the Authority had decided the application, and in the event of a decision to grant the application, had issued the licence. The proposed new s4(2) does not guarantee this protection, because it allows the Authority to gazette the falling away of the deeming provision at an unspecified date, which could be before the Authority has decided an application, thus suddenly rendering the provision of the service unlawful. This proposed provision therefore has serious implications : it would potentially interfere with vested rights and legitimate economic interests and expectations, and could infringe the property clause of the Constitution.

19 We accordingly propose that s4(2) of the Broadcasting Act be clarified by substituting it with the following subsection :

> "Any person who, at the commencement of the Broadcasting Amendment Act, 2002, provides a broadcasting service without a broadcasting licence is deemed to have the necessary permission to continue to provide such service -
>
> (a) provided such person applies to the Authority for the required licence within six months of the commencement of the Broadcasting Amendment Act, 2002; and
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> (b) until the Authority has granted or refused the licence and, in the event of a decision to grant the application, has issued such licence."

20 Neither the Broadcasting Act nor the Bill define “this Act”. In most cases where “this Act” is used in the Broadcasting Act or in the Bill, there can be little doubt that this would be interpreted to mean the Broadcasting Act, 1999, as amended by the Broadcasting Amendment Act, 2002. However, there are certain sections where it is critical that there is certainty as to what is meant by the phrase “at the commencement of this Act”. We refer in particular to s4 and s34 of the Broadcasting Act, the proposed amendments to these sections of the Broadcasting Act as contained in the Bill, and our proposals as regards these two sections. Is this date the day on which the Broadcasting Act came into operation, namely 30 June 1999, or is this the day on which the Broadcasting Amendment Act will come into operation? It is imperative that this issue is clarified, and that the necessary amendments are made as regards these two sections. It is for this reason that we have used the phrase “the commencement of the Broadcasting Amendment Act, 2002”.

Existing subsection (4) of Broadcasting Act

21 Given our representations in paragraph 15.5 above, and given the proposed new s4(8) (which latter subsection we will comment on in a moment), there is no need for s4(4) of the Broadcasting Act, which accordingly ought to be deleted. In addition, the use of the word “prescribed” is inappropriate (see paragraph 15.5 above).

Authorisation of channels - subsections (6) to (8) of s4

22 Under s4(6) of the Broadcasting Act, each channel provided in a multi-channel environment must be authorised by the Authority on application by the person providing the broadcasting service. Subsection (7) deals with transitional arrangements. Whilst the provisions of these two subsections are not ideal, they are preferable to the proposed new subsections (6) to (8), which we fear will simply result in greater confusion. Difficulties with these proposed new subsections include the following :

22.1 We fail to understand why a distribution service/licence is referred to in these subsections. As we have pointed out above, Chapter III, and s4 in particular, deal with broadcasting services. There accordingly should be no reference to broadcasting signal distribution services or licences in s4. Furthermore, channels are packaged together into a broadcasting service offered to the public.

22.2 The subsections do not indicate who is to seek authorisation - is it the broadcasting service, the distribution service or each channel? Under the present system it is the broadcasting service - we believe this system should continue.

22.3 The repeated use of the term "channel(s) and radio station(s)" is unnecessary and will create uncertainty - the reference should simply be to "channel(s)".

22.4 A channel is not "licensed" (see the wording of present s4(6) of the Broadcasting Act) - it is "authorised". Nor does a channel "carry on a broadcasting service" - rather, it is packaged/included in a broadcasting service.

22.5 It is unwise to require channels included in a service offered to the public to be defined in a broadcasting licence, since these channels change constantly. They are often withdrawn from a service, and new channels are constantly added. If channels are defined in a broadcasting licence, each withdrawal or addition of a channel would require an application to amend the broadcasting licence, which is a time-consuming and expensive process. In terms of the regulations dealing with licence fees, the application fee for each application to amend a broadcasting licence is R200 000.00. The changes to channels is far more appropriately dealt with by way of authorisation - a simpler, quicker and less expensive process.

23 Given these difficulties with the proposed new subsections (6) to (8) of s4, and with a view to improving the existing provisions of the Broadcasting Act, we propose that the following subsections be substituted :

"(6) Subject to subsection (8), a broadcasting service may not consist of or include in that broadcasting service a channel unless the Authority, on application by the person providing the broadcasting service, has authorised the channel.

(7) The Authority must prescribe the procedure for the authorisation of channels.

(8) Any channel which constitutes or is included in a broadcasting service provided at the commencement of the Broadcasting Amendment Act, 2002 is deemed to have been authorised by the Authority."

s5 - Classes of licences

24 We support the attempt to simplify s5(2). However, terms as defined in the IBA Act and the Broadcasting Act ought to be used, and there needs to be greater consistency in the use of terms. We accordingly propose that the existing s5(2) in the Broadcasting Act be replaced with the following subsection :

"(2) Subject to the provisions of this Act, the broadcasting licences are categorised in the following classes -

(a) free-to-air sound broadcasting service;

(b) free-to-air television broadcasting service;

(c) satellite subscription television broadcasting service;

(d) terrestrial subscription television broadcasting service;

(e) cable subscription television broadcasting service;

(f) low power radio service; and

(g) any other class of licence as prescribed by the Authority."

25 We fail to understand the need for the addition of a subsection (3) to s5. Firstly, for reasons we have already stated, there should be no reference in s4 to broadcasting signal distribution services or licences. Secondly, and leaving aside the sections of the IBA Act referred to in this proposed new subsection (2) which deal with broadcasting signal distribution (s35 to s38), the remaining sections of the IBA Act referred to are wide enough to deal with an application for a broadcasting licence, whether it is one contemplated in the IBA Act or the Broadcasting Act. Thirdly, many of the IBA Act sections referred to do not even deal with applications for licences. Finally, it is dangerous to refer to only some of the sections of the IBA Act and not others. Why, for example, is s48 referred to, but not s49 and s50?

Chapter IV dealing with SABC

26 We do not intend dealing with the provisions of this section in detail. Instead, our comments are of a general nature and will deal with fundamental principles.

Role of Minister

27 s16 of the Constitution deals with freedom of expression. s16(1) provides :

"Everyone has the right to freedom of expression, which includes -

(a) freedom of the press and other media;

(b) freedom to receive or impart information or ideas;

(c) freedom of artistic creativity; and

(d) academic freedom and freedom of scientific research."

28 s192 of the Constitution deals with the broadcasting authority. It provides :

"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."

29 A number of provisions in this Chapter envisage the involvement of the Minister in a manner which we believe will not survive constitutional scrutiny. These provisions are set out below :

29.1 The proposed new s6(4) requires the Board to submit to the Minister for approval policies governing the exercise of accurate, accountable and fair reporting in order to advance the national and public interest of the Republic. The Board and journalists of the SABC will be subject to these policies (see the proposed new s6(5)).

29.2 The proposed new s10(3) requires the SABC, in relation to the public broadcasting service division, to submit to the Minister for approval a proposed budget, a three year business plan, and policies relating to news editorial policy, programming policy, local content policy, educational policy, universal service and access policy, and language policy. These policies, by virtue of the proposed new s10(4), must include a code of conduct relating to the programming content of the SABC.

29.3 Similar requirements exist in the proposed new s11(2) in relation to the commercial broadcasting service division of the SABC.

29.4 In terms of the proposed new s13A(2), the Minister must appoint the non-executive directors of the public service management board and of the commercial service management board.

29.5 By virtue of the proposed new s13A(4), read with the proposed new s8(4), the powers and duties of each board are to be determined by the Minister.

30 The management of the SABC, including the determination of its budget and its business plan, ought to be left to the appropriate persons and structures within the SABC, who ought to act independently of the government of the day.

31 As regards the programming content of the SABC, to the extent that any external party is to regulate this, by virtue of s192 of the Constitution, this may only be by the Authority.

Confusion about Charter and lines of authority and accountability

32 The Charter of the national public broadcaster is an important instrument. Unfortunately, what constitutes the Charter of the SABC is unclear. Part 2 of Chapter IV of the Broadcasting Act supposedly deals with the Charter. However, the only possibly relevant section in that Part is s8. The Bill introduces a number of additional provisions (e.g. s6, s10(3) and (4), and s11(2)) which deal with the determination and application of policies, and a code of conduct, that one would have thought ought to be included in the Charter of the SABC. We propose that an attempt be made to reorganise this Chapter so that the Charter is more clearly and coherently dealt with.

33 The Chapter on the SABC is also confused in its handling of the powers, functions and duties of different persons and structures, and the lines of authority and accountability between them. For example, the proposed new s13(11) provides that the Board determines the overall policies of the SABC. However, the proposed new s6(4) and (5), s10(3) and (4) and s11(2) provide that the Minister in fact determines crucial policies. A slightly different example relates to the proposed new s6, which requires the Board to "ensure accurate, accountable and fair reporting by the Corporation in order to advance the national and public interest of the Republic", whilst it also states that the Board and individual journalists "of the Corporation shall be subject to the policies of the Corporation dealing with accurate, fair and reasonable journalism and thus exercise care and skill and act in the best interests of the Corporation". These interests may in fact conflict. Furthermore, the most

important consideration, namely that the national public broadcaster ought to operate in the "public interest" is not reflected anywhere. What is in the "public interest" may conflict with the interests of the government/the ruling party/the Minister, and/or "the national and public interest of the Republic" and/or with "the best interests of the Corporation". As to what are "the best interests of the Corporation", is also unclear - are these the interests of the public broadcasting service division or of the commercial broadcasting service division, which interests may in turn conflict with one another. These fundamental issues need to be resolved.

Separate funding and accounting of public and commercial divisions

34 The Broadcasting Act, as amended by the Bill, contains a number of provisions which require separate accounting for the public and commercial broadcasting services divisions of the SABC (see for example the proposed new s9(2), s10, s11, and items 14 and 15 of Schedule 2).

35 As regards the funding of the SABC as a whole, s8(b) of the Broadcasting Act provides that it is to be funded "by advertisements, subscription, sponsorship, licence fees or any other means of finance".

36 As regards the funding of the public broadcasting service division, s10(2) of the Broadcasting Act provides that it is to be funded by "advertising and sponsorships, grants and donations, as well as licence fees levied in respect of the licensing of persons in relation to television sets, and may receive grants from the State". s11(d) of the Broadcasting Act provides that the commercial broadcasting service division must "subsidise the public services to the extent recommended by the Board and approved by the Minister".

37 However, both the Broadcasting Act and the Bill are silent as to the funding of the commercial broadcasting service division. In order for there to be fair competition between free-to-air commercial broadcasting services and the commercial broadcasting service division of the SABC, the latter division should not be funded, either directly or indirectly, by any monies appropriated

by Parliament, nor any monies from an organ of state, nor from television licence fees. The Broadcasting Act, as amended by the Bill, needs to state this important principle, and to also state that the public broadcasting service division may not subsidise, either directly or indirectly, the commercial broadcasting service division. This is certainly the intention of the drafters of the Bill, as is evident from the Explanatory Memorandum, which states :

> "The Bill seeks to ensure that the public broadcasting service division of the Corporation does not subsidise the commercial broadcasting service of the Corporation."

The Bill needs to give effect to this intention.

Confusion about policies to apply to, and regulation of, commercial broadcasting service division

38 The policies and regulations which are to apply to the commercial broadcasting service division of the SABC and the licences of that division must be clearly stated. However, if one reads s11(a) and (b) of the Broadcasting Act, together with the definitions in the Broadcasting Act of "commercial broadcasting service" and "public broadcasting service", this clarity is lacking. It is important that this issue is addressed when amending the Broadcasting Act.

Transfer of licences

39 The proposed new s22(1) and (2) do not accord with what is envisaged by s74 of the IBA Act. Furthermore, there is no need to refer to s4(2) of the Broadcasting Act. We propose that these two subsections be reworded as follows :

> "(1) The old Corporation, before the date of conversion, must apply in terms of s74 of the IBA Act to the Authority in writing for permission to transfer the licences issued to the old Corporation to the Corporation.

(2) The Authority, on granting this permission, may impose such conditions as are necessary to achieve the objects of this Act and of the IBA Act."

s30 - Objectives of commercial broadcasting services

40 s53 of the IBA Act already deals with local television content. s53(2) provides:

"The Authority shall in respect of a television broadcasting licence impose and specify therein such conditions, as prescribed, regarding local television content and independent television production, which, without derogating from the generality of the aforegoing, may include any condition requiring the broadcasting licensee -

(a) annually to expend a specified sum of money, subject to reasonable yearly escalation or, alternatively, a specified minimum percentage of his or her gross revenue, on programmes which have a local television content;

(b) to allocate a specified minimum percentage of his or her total broadcasting time to television programmes which have a local television content;

(c) …"

41 The Authority, in the current local content regulations, has addressed the position of terrestrial subscription television broadcasting services. In the forthcoming licensing of additional subscription broadcasting services, including satellite subscription broadcasting services, the Authority will no doubt formulate local television content requirements appropriate for these services. There is therefore no need for the proposed new s30(8). Furthermore, this proposed new subsection conflicts with s53, and lacks s53's sophistication and flexibility. Both paragraphs (a) and (b) of subsection (8) fail to appreciate the distinction between a subscription broadcasting service and a free-to-air broadcasting service. The success of a subscription

broadcasting service depends on its ability to distinguish its broadcasting service from those of free-to-air broadcasting services, and to provide to subscribers the programming subscribers and potential subscribers would like to watch.

s31 - Subscription television service

42 We note the deletion of s31(1) and the amendment of s31(2). However, if the Committee accepts our proposals concerning s5, then the cross referencing in s31(2) would need to be amended accordingly : in other words, the reference ought to be to "licences classified under section 5(2)(c) and (d)".

43 However, we oppose the proposed new s31(3) and (4). The existing provisions of s49(7) and s50(4) and (5) of the IBA Act envisage that the Authority may conduct a public inquiry and make recommendations concerning the amendment of s49 and s50 respectively. These recommendations are to be made to the Minister, who is required to table them in the National Assembly. Parliament therefore makes the decision as to whether to adopt or reject the recommendations. The Minister's role is simply to serve as a conduit.

The current s33(2) and (3) of the Broadcasting Act provide :

> "(2) Subject to subsection (1), the Authority must issue recommendations as to whether sections 49 and 50 of the IBA Act are applicable to broadcasting services carrying more than one channel and the extent and the terms upon which such sections must apply.
>
> (3) Sections 49 and 50 of the IBA Act must not apply to such broadcasting services unless the Authority has issued such a recommendation, and that recommendation has been adopted by the National Assembly."

(Note that the phrase "Subject to subsection (1)" in s33(2) does not make sense - it ought to be deleted, and the opening of this subsection ought to be

rephrased so that it reads “The Authority must conduct an inquiry and issue recommendations …”.)

s33(2) and (3) of the Broadcasting Act conform with the process set out in s49(7) and s50(4) and (5) of the IBA Act.

In contrast, the proposed new s31(3) contemplates the issuing of recommendations by the Authority to the Minister as to whether s49 and s50 of the IBA Act ought to apply to broadcasting services broadcasting more than one channel. The proposed new s31(4) contemplates that these sections will not apply until the Authority has issued the recommendation and “such recommendation has been adopted by the Minister, in which event such sections shall apply to the extent so adopted.”

44 The following points need to be noted concerning the proposed new s31(3) and (4) :

44.1 s31(4) contemplates the involvement of the Minister - she decides whether to adopt, in whole, or in part, or not at all, the recommendations of the Authority.

44.2 s31(4) contemplates no role at all for the legislature, the decision is the sole responsibility of the executive arm of government.

44.3 s31(4) contemplates that the mere adoption of the anticipated recommendation by the Minister can make s49 and s50 of the IBA Act apply immediately to broadcasting services broadcasting more than one channel. In contrast, the decision of Parliament applicable to other categories of broadcasting services takes effect on the expiry of the existing licence term of each of those broadcasting services. See s50(6) of the IBA Act.

44.4 These two new subsections conflict with s49(7) and s50(4) and (5) of the IBA Act. They also conflict with s33(2) and (3) of the Broadcasting Act.

44.5 These new subsections also introduce a distinction between the way in which broadcasting services broadcasting more than one channel are to be dealt with as regards the application of s49 and s50 of the Act, namely by executive decree, and all other categories of broadcasting services, whose fate as regards s49 and s50 of the IBA Act are to be determined by the legislature, acting on the recommendations of the Authority.

The Explanatory Memorandum is curiously silent as to all of this.

45 The provisions of the proposed new s31(3) and (4), and particularly the involvement of the Minister in the manner contemplated, are unlikely to pass constitutional scrutiny for the following reasons :

45.1 The application of s49 and s50 of the IBA Act potentially involves the deprivation, and possibly the expropriation, of property, which may only be "in terms of law of general application" (see s25(1) and (2) of the property clause of the Bill of Rights in the Constitution). Providing that the Minister, by executive decree, can make s49 and s50 of the IBA Act apply to a broadcasting service broadcasting more than one channel would not be by way of a "law of general application" - the proposed new s31(4) would therefore immediately fall foul of the property clause.

45.2 The Constitution contemplates a clear separation of powers between the legislature, the executive, and the judiciary. s43 of the Constitution provides that the legislative authority of the national sphere of government is vested in Parliament. These proposed new subsections are in breach of this doctrine and this provision of the Constitution.

45.3 The different treatment of broadcasting services broadcasting more than one channel, on the one hand, and other categories of broadcasting services, on the other both procedurally and

substantively, constitutes unfair discrimination, and would be in breach of the equality clause (s9) of the Constitution.

45.4 They limit the constitutional right to freedom of expression (s16 of the Constitution) in a manner, which is neither reasonable nor justifiable.

45.5 They infringe the provisions of s192 of the Constitution, which requires that an independent authority is to regulate broadcasting in the public interest.

We accordingly propose that these proposed two new subsections be deleted from the Bill.

s32A - Regional television services

46 The proposed new s32A seeks to establish two regional television services. These are to be established by the Minister as one or more corporate entities to be licensed to conduct a northern region television service and a southern region television service, with the State initially as the sole shareholder.

47 Whilst we appreciate concerns about the rolling out of programming, and particularly television programming, in indigenous languages, we do not believe this is the appropriate way in which to address the problem. Instead, an attempt must be made to find ways in which the SABC can meet this objective, which ought to include the better resourcing of the SABC. After all, the mandate of the public broadcasting services includes ensuring that the needs of language groups are taken into account (see s2(e)(i) of the IBA Act), and the SABC is best placed to address this issue.

48 Furthermore, s32A is unlikely to survive constitutional scrutiny, since it compels the Authority to licence broadcasting services, more particularly, services, which are owned entirely by the State.

49 We have already referred to s192 of the Constitution, which provides that "National legislation must establish an independent authority to regulate broadcasting in the public interest …". The ICASA Act gives effect to this

constitutional requirement by establishing an independent authority, namely the Independent Communications Authority of South Africa.

50 The IBA Act provides that a broadcasting licence may only be granted by the Authority following an application for the licence, which application must be dealt with in terms of prescribed procedures, which are transparent and contemplate extensive public participation.

51 These constitutional and statutory provisions are intended to ensure that broadcasting licences are granted, and their terms and conditions are determined, by an independent authority, in a manner that is impartial, and without fear, favour or prejudice. More particularly, the Authority must act without any political or commercial interference. This intention is supported by a number of statutory provisions. One of these is s13A of the IBA Act, which empowers the Minister to issue policy directions to the Authority. To ensure compliance with s192 of the Constitution, this section allows the Minister to issue policy directions related to only a number of specified issues. Note, however, that "No such direction may be issued regarding the granting of a broadcasting licence or regarding the amendment, suspension or revocation of a licence." Note too that the Authority is only required to consider a policy direction. The Authority is not required to give effect to a policy direction.

52 It is accordingly unconstitutional for the Broadcasting Act, as amended by the Bill, to require ICASA to licence the proposed two regional television services, and to issue these licences to wholly state-owned entities.

s34 - Signal distribution and objectives

53 As regards the proposed new s34(2)(g), the opening phrase should be reworked so that it reads "provide efficient delivery …". More importantly, we believe the phrase "considering prevailing market structures and in accordance with prescribed standards" is inappropriate. "Prevailing market structures" have no bearing on the "efficient delivery of programming". As

regards standards, we do not believe these should be determined by way of regulation, but rather by the industry. Internationally, attempts to legislate standards have failed dismally. We therefore propose that this paragraph read :

"(g) provide efficient delivery of programming using the most effective technologies available at reasonable cost."

Note that this is identical to the wording of s36(1)(b) of the Broadcasting Act, and therefore also has the benefit of being consistent.

54 The proposed new s34(4) ought to be amended, as it does not provide adequate protection to persons who, at a certain point in time are providing a service lawfully, and then suddenly, through no fault of their own, become unlawful. This is because the subsection allows the Authority to gazette the falling away of the deeming provision at an unspecified date, which could be before the Authority has decided on an application, thus suddenly rendering the provision of the service unlawful. This proposed provision therefore has serious implications: it would potentially interfere with vested rights and legitimate economic interests and expectations, and could infringe the property clause of the Constitution. The other difficulty with the proposed provision is that it does not state by when such persons are to apply for a multi-channel distribution licence.

55 We accordingly propose that this subsection be reworded as follows :

"Any person who, at the commencement of the Broadcasting Amendment Act, 2002, provides a broadcasting signal distribution service without a broadcasting signal distribution licence is deemed to have the necessary permission to continue to provide such service -

(a) provided such person applies to the Authority for the licence within six months of the commencement of the Broadcasting Amendment Act, 2002; and

(b) until the Authority has granted or refused the licence and, in the event of a decision to grant the application, has issued the licence."

56 The reference to "the commencement of the Broadcasting Amendment Act, 2002" is particularly important. s34(4) is a new subsection - it was not in the Broadcasting Act. Thus, if this provision were to simply refer to "the commencement of this Act", this is likely to be interpreted to mean "the commencement of the Broadcasting Act". This would render the provision retrospective in its effect, with potentially serious consequences. It is in order to avoid these difficulties that we have proposed the phrase "the commencement of the Broadcasting Amendment Act, 2002".

Amendment to delegations provision in IBA Act

57 Whilst we appreciate the purpose of the proposed amendment of s69 of the IBA Act dealing with delegations, and that the Authority needs to be able to delegate its powers, functions and duties so as to cope with its workload, we believe the proposed amendment may go too far. For example, we do not believe that the Council should be permitted to delegate the power to grant, renew, amend or transfer any public or commercial broadcasting service, nor should the powers contemplated in s56(2) and s66 be capable of delegation. These powers either relate to major licensees, such as the licensing of the SABC's broadcasting services and additional subscription broadcasting services, or to issues that will affect the entire broadcasting industry. We suggest that in order to ascertain whether the power to delegate is appropriate, a careful sift of the IBA Act, the Broadcasting Act, the Bill, and the ICASA Act be conducted to determine which sections ought to be referred to in the proposed new s69(4).