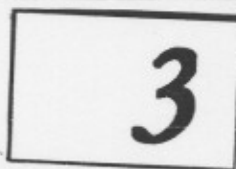


SA RUGBY (PTY) LTD trading as

SA Rugby™



5th Floor S.A Sports Science Institute Building Boundary Road Newlands 7700
P O Box 99 Newlands 7725 Tel + 27 21 659 6700 Fax +27 21 685 3088 www.sarugby.net

28th August 2006

The Committee Secretary
Ntombekhaya Mbuqe

Dear Sir

**NATIONAL COLOURS COMMISSION REGULATIONS, 2006 AND THE
NATIONAL SPORT AND RECREATION AMENDMENT BILL, 2006**

1. **THE BILL AND DRAFT REGULATIONS**

- 1.1 We have considered the implications for the South African Rugby Union (SARU) should the National Colours Commission Regulations, 2006 (the Draft Regulations), be promulgated in their present form, which leads us to draw the following to your attention.
- 1.2 In considering this matter it quickly became apparent that it would be imperative for us to deal also with the proposed amendments to the National Sport and Recreation Act, 110 of 1998 (hereafter Act 110/98) which are taken up in the National Sport and Recreation Amendment Act 2006 (hereafter the Bill) as the Draft Regulations, if promulgated, will derive their statutory authority from the amended Act.
- 1.3 It appears that the Bill was intended for publication in Government Gazette No. 27787 of 22 July 2006.

Reg No. 2000/026786/07, wholly owned by SOUTH AFRICAN RUGBY UNION
DIRECTORS: M Tshume (Chairman), JJ Prinsloo (Managing), Dr A Bacher,
JAA Basson, BR Haddad, PJ Heymans, OPM Hoskins, LM Stofile



statutorily designated constituent components including the National Federations (as defined) in the Bill. (Bill S.1(1)(i) p.4).

2.1.2 SASCOC will be the overall recognised national co-ordinating macro-body for the promotion and development of high performance sport and recreation in the Republic. (Bill S.3(1) p.4). (The Bill does not define "high performance sport" and it is not clear whether the concept can apply to all sporting codes).

2.1.3 SASCOC will have the discretion to require:

2.1.3.1 a government ministry;

2.1.3.2 a government department;

2.1.3.3 a provincial authority,

to consult with it concerning their activities relating to sport, recreation, physical education, training programmes and development of leadership qualities. (Bill 3(c) p.4-5, Act S.3(a)).

2.1.4 SASCOC will have the power to impel all sport and recreation bodies (which includes the National Federations and a trust or registered company of such a Federation or any agency or body involved in sport or recreation) to consult and co-ordinate with it on any matter prescribed by regulation. (Bill 3(a) p.5, 1(j) p.4 and S.16 p.12 – 14 (a) – (t)).

Furthermore, in terms of the Bill:

2.1.5 The National Department of Sport and Recreation will be statutorily

required to enter into "a service level agreement" (not defined) in respect of functions assigned to SASCOC under the Act and the Minister must, after consulting with SASCOC, make regulations in relation thereto. (Bill S.5 p.5 – 6).

2.1.6 The Minister must first consult with SASCOC before determining the general policy to be pursued with regard to sport and recreation. (Bill S.6(a) p.6).

2.1.7 SASCOC will determine priorities in the annual allocation, as Ministerial policy, of funds for the creation and upgrading of multi-purpose sport and recreation facilities (in consultation with provincial and local authorities and relevant sport and recreation bodies). (Bill S.6(b) p.6; Act S.4(2) and 4(2)(b)).

2.1.8 SASCOC will be empowered to exercise certain powers in relation to education and training needs in sport and recreation. (Bill S.9 p.7 – 8).

2.1.9 It will be SASCOC which must, in accordance with its funding policy and S.10, provide physical facilities for sport and recreation on a national level (depending on the availability of funds). (Bill S.10(a) p.8 – 9).

2.1.10 SASCOC will have the power to allocate funds in relation to the funding of sport and recreation in the Republic in accordance with its funding policy. (Act S.10 p.6).

2.1.11 SASCOC is required to establish a national colours board to consider all applications for awarding national colours. (Bill S.13(a) p.10, Act S.11).

2.1.12 The Minister will be required to (must) consult with SASCOC before

making regulations under the Act. In terms of such regulations matters such as the hosting and funding of major international sporting events, awarding of national colours and the fitness industry will be regulated. (Bill S.14 and particularly (n), (o) and (p)).

2.2 Consequences of the Bill

2.2.1 In terms of the Bill, SASCOC will take over the effective control of sport and recreation in the Republic with wide executive and administrative powers (including the disposition of public funds) in the Republic.

2.2.2 SASCOC will in essence, should the Bill become law, substitute for an effective ministry of sport in the Republic which largely abdicates ministerial and government power to SASCOC under the Bill.

2.2.3 The Bill, therefore, gives rise to the following constitutional questions namely:

2.2.3.1 can the legislature appoint or designate a non-governmental private entity – in this case SASCOC – to perform executive and administrative acts and essentially to substitute as a sports ministry of the Republic?

2.2.3.2 can the legislature appoint such a body to exercise powers over the affairs of a series of legal persons with their own constitutions which administer professional sport in the Republic as National Federations in tandem with private companies and/or trusts which administer the professional aspects of the relevant sporting codes?

2.2.4 in particular, can the legislature statutorily determine that the National

Federations (as private-law voluntary associations of persons) are impelled to be members of a private company incorporated under Section 21 of the Companies Act, 1973, or of any other non-governmental association of persons?

- 2.3 A full consideration of the above constitutional issues is beyond the ambit of this memorandum. Suffice it to say, however, that insofar as Section 1(i) of the Bill impels such of the National Federations comprising voluntary associations of persons to become members of i.e. forcibly associated with SASCOC (whether a non-governmental private law Section 21 company in terms of the Companies Act, 1978, or other non-governmental association of persons), the said Section is in conflict with the right to freedom of association entrenched in Section 18 of the Bill of Rights of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).
- 2.4 The provisions of Section 13(9) of the Bill are also of particular concern to us as the section seems to contain mutually exclusive propositions and the second proposition to exclude an appeal or review of the decisions of SASCOC in respect of disputes between members *inter se* or members of a National Federation and a member or members. This section would, therefore, be in conflict with the right to just administrative action entrenched in Section 33(1) of the Bill of Rights of the Constitution. (Bill 14(d) p.11).

3. COLOURS AND THE ERSTWHILE SOUTH AFRICAN SPORTS COMMISSION (SASC)

In order to record a complete picture we set out our view below of the matter of National Colours during the time of SASC.

- 3.1 SASC was established as a statutory body on 10 September 1999 in terms of Section 3 of Act 109 which provided:

"A juristic person to be known as the South African Sports Commission is established."

- 3.2 SASC was intended to be the overall co-ordinating body for promoting and developing sport and recreation in the Republic and was charged with developing guidelines for this purpose (Section 2(1)(2) of the National Sports and Recreation Act 110 of 1998) (Act 110/98).
- 3.3 In terms of Section 11 of Act 110/98 SASC *"must establish a National Colours Board (hereafter the NCB) which will consider all applications for the awarding of national colours"*.
- 3.4 In terms of Section 11(2) of the Act 110/98 *"The National Colours must be awarded in accordance with the applicable Regulations"*.
- 3.5 No NCB presently is in existence under the provisions of Section 11 of Act 110/98 and no Regulations have been published pursuant thereto.
- 3.6 However, in terms of the Bill, the South African Sports Confederation and Olympic Committee (SASCOC) will be substituted for the SASC in Section 11 of Act 110/98, the provisions of which will otherwise remain unchanged.
- 3.7 Prior to the disbandment of SASCOC by the South African Sports Commission Repeal Act, 8 of 2005, SARU (as it then was) and SASCOC concluded an agreement in principle which gave rise to the National

Sports Colours Framework, with which we deal in paragraph 9 below.

4. THE SOUTH AFRICAN SPORTS CONFEDERATION AND OLYMPIC COMMITTEE (SASCOC)

In this paragraph we set out aspects of the proposed relationship between SASCOC and the National Federations which are of real concern to us. We proceed on the basis that the Bill when referring to SASCOC means the Section 21 company referred to in the following paragraphs as this conclusion appears to us to be inescapable.

- 4.1 SASCOC was incorporated as Section 21 company No. 2004/033949/08 under the Companies Act, 1973, on 26 November 2004 (that is prior to the statutory disbandment of the SASC on 1 August 2005).
- 4.2 Should the NSR Bill, become law, SASCOC will be vested with wide-ranging powers (as it steps into the shoes of SASC in terms thereof) which include extensive powers of control over the affairs of the major National Federations.
- 4.3 The draft control provisions to be inserted in Act 110/98 include the following:
- 4.3.1 in terms of the definitions section SASCOC will be a non-governmental sports body consisting of seven constituent components of which the major professional National Federations are but one and whose powers and autonomy will be diluted by the equivalence of the other constituent components, being the Olympic National Federations, the Commonwealth National Federations, school sport, tertiary institution sport, National Federations catering for athletes with disability and the All Africa Games National Federations;

4.3.2 most importantly the definition of "sport or recreation body" means any National Federation, agency, body, including a trust or registered company of such a National Federation, agent or body, involved in the administration of sport or recreation at national level. In other word SASCOC will exercise control over the companies which professional sport have created under their constitutions to govern the activities of the codes concerned at the professional level. Such companies will include SA Rugby (Pty) Limited, SAFA Promotions (Pty) Limited and Cricket South Africa (Pty) Limited;

4.3.3 If the Bill becomes law, Section 2(1) of the amended Act 110/98 will place SASCOC in the position of the overall recognised national co-ordinating macro-body for the promotion and development of high performance sport and recreation in the republic (high performance sport not being defined);

4.3.4 Section 2(4) of the amended Act 110/98 will require all National Federations to consult and co-ordinate with SASCOC in respect of any matter that might be prescribed under the Act by a Regulation. (Regulations concerning the awarding of national colours are specifically provided for in Section 14(o) of the amended Act 110/98).

4.3.5 These Regulations will concern virtually all aspects of the governance of sporting codes and recreational activities in the Republic. (Bill S.14 p.13-14).

4.4 As a result of its incorporation under the Companies Act, SASCOC also derives extensive powers over the National Federations from the provisions of its registered Memorandum and Articles of Association, which provisions are contractually binding upon its members and which

together comprise the constitution of SASCOC in terms of clause 1.1 of its Memorandum of Association.

4.5 National Sports Federations which run codes of sport also on a professional level in the Republic must therefore also be wary of the provisions of the Constitution of SASCOC as they impact upon the financial and other autonomies of the National Federations concerned.

4.6 In regard to the foregoing we have taken cognisance of the following clauses in the Articles of Association of SASCOC namely:

4.6.1 National Sports Federations must make application to and be accepted as a member by a general meeting of SASCOC (articles clause 5.1);

4.6.2 As already recorded herein, the National Federations will be statutorily included as members of SASCOC in any event if the Bill becomes law (see paragraph 2 above);

4.6.3 Membership renders members subordinate to SASCOC and members are required and bound to comply with its constitution, regulations and rules and any directives issued by SASCOC from time to time;

4.6.4 SASCOC may also make rules in relation to the colours and emblems of national members and, notably, also to amendments to the constitution of members which are contracts in private law (clause 7 of the Articles of Association).

4.7 Thus, by virtue of the proposed amendments to Act 110/98 and the taking up of unqualified membership of SASCOC, the professional National Federations leave themselves open to a loss of control and autonomy in

the financial and other administration of their codes of sport across the board and therefore also on the professional level. This situation is compounded by the prejudicial provisions taken up in the Draft Regulations (with which we deal hereinbelow).

- 4.8 We find it noteworthy in the above regard that the main object of SASCOC in its Memorandum of Association "is to promote and develop high performance sport in the Republic of South Africa as well as to act as the controlling body for the preparation and delivery of Team South Africa and all multi-sport international games including but not limited to the Olympics, Paralympics, Commonwealth Games, world games and All Africa Games".
- 4.9 It appears to us that the Constitution of SASCOC and the National Colours Commission Regulations have been constructed mainly with track and field sports and the like in mind without proper consideration having been given to the particular and different position of the National Federations which control professional sporting codes such as Rugby Union, Association Football and Cricket.
- 4.10 In our view the activities of SASCOC should be confined to those matters dealt with in paragraph 4.8 above whilst the principle of autonomy should apply to the National Federations which govern professional sporting codes in the Republic. Our position is that these bodies are best suited to this task and should be free to act accordingly.

5. THE NATIONAL COLOURS COMMISSION REGULATIONS, 2006
(DRAFT REGULATIONS)

- 5.1 In considering the purport of the Draft Regulations it is our position that

regard must be had to the following two important underlying considerations namely:

- 5.1.1 The principle of financial self-sufficiency established under Section 10(1)(b) of Act 110/98 which when amended will require SASCOC to establish a funding policy which will encourage creativity and self-reliance on the part of National Federations in relation to funding;
- 5.1.2 There is no provision in Act 110/98 which can empower SASC (or SASCOC after amendment) or the Minister to expropriate or take over the property or statutory property rights of a National Federation whether this be by means of Regulations or otherwise.
- 5.1.3 As we record below, any such provision would in any event be in conflict with Section 25 of the Bill of Rights of the Constitution if applied to National Federations in the context of the sports legislation.

6. EXPROPRIATION

- 6.1 SARU is the registered proprietor of a number of trade marks in South Africa and numerous overseas territories, the first of which dates from 31 January 1977.
- 6.2 SARU is the owner of copyright (both locally and internationally) in a number of emblems and marks.
- 6.3 Furthermore, SARU is the proprietor under the Heraldry Act of a number of emblems of which the earliest registration dates from 10 September 1937.