



NAB
National Association of Broadcasters

**NAB written submission to the DTSPS on the National
Integrated ICT Policy discussion paper**

30 January 2015

1. Introduction

- 1.1. On 14 November 2014, the Department of Telecommunications and Postal Services, (“the DTPS”), published the National Integrated ICT Policy Discussion Paper (“the Discussion Paper”) for public comment. Stakeholders have been invited to make written submissions on the various policy options outlined in the Discussion Paper. The closing date for public comment is 30 January 2015. The National Association of Broadcasters (“the NAB”) notes the public consultation process that commenced in 2013 with the publication of a National Integrated ICT Policy Framing Paper (April 2013), followed by the National Integrated ICT Policy Green Paper in January 2014. The NAB participated in these public processes, including consultative workshops hosted by the DTPS. We once again welcome the opportunity to make further written inputs to the Discussion Paper. The NAB would appreciate an opportunity to engage further with the DTPS should the opportunity arise.

- 1.2. The NAB is a leading industry representative organisation for South African broadcasters, signal distributors, and channel providers. The current NAB membership includes:
 - 1.2.1. the three television services and 18 radio services of the SABC;
 - 1.2.2. licensed commercial radio broadcasters (including: Primedia, Kagiso Media, Tsiya Group, AME, MSG Afrika, Classic FM, Kaya FM and YFM);
 - 1.2.3. licensed commercial television broadcasters (e.tv, Multichoice, M-Net, StarSat);
 - 1.2.4. a host of community radio broadcasters and one community television broadcaster TBN;
 - 1.2.5. both the licensed broadcast signal distributors and the selective and preferential broadcast signal distributors, Sentech and Orbicom.
 - 1.2.6. A range of individual audio-visual content providers and associate members.

2. Presidential Proclamation

- 2.1. Following the State President’s announcement of his new Cabinet Ministers on 25 May 2014, and the establishment of two government departments for the ICT industry, namely the DTPS and the Department of Communications, (“the DoC”), the Presidency passed two Proclamations¹ to bring clarity and context to the powers

¹ Proclamation 47 of 2014 and Proclamation 79 of 2014.

and roles of the respective government departments. Notably, on 2 December 2014, the Presidency passed Proclamation 79 of 2014 (“the Proclamation”).² The objective of this Proclamation was to solidify roles and responsibilities of the two Ministers as entrusted by existing legislation, namely the Electronic Communications Act 36 of 2005 (“the ECA”), and the Independent Communications Authority of South Africa Act 13 of 2000 as amendment (“the ICASA Act”).

2.2. The Proclamation allocates all broadcasting roles and responsibilities under legislation to the Minister of Communications, while all legislative roles and responsibilities relating to Telecommunications and Postal Services fall under the authority of the Minister of the DTSPS.

2.3. The NAB welcomes the publication of the Proclamation as it provides certainty on the respective jurisdictions of the DTSPS and the DoC, although there are some issues which will need to be addressed by both Ministries. In respect of the issues which will need to be addressed by both Ministries, the NAB reiterates its call for coordination between the two Ministers and their respective departments, the details of which should be formalised and contained in a memorandum of understanding (“MOU”).

2.4. DoC Broadcasting Policy Review

2.5. On 12 November 2014, the Minister of Communications initiated a Broadcasting Policy Review process, by inviting interested parties to give input on issues that the proposed broadcasting Policy Review process should cover. It is the NAB’s understanding that, in order to give effect to the Proclamation, all broadcasting research and findings should be handed over to the Department of Communications for consideration in the Broadcasting Policy Review Process. This will avoid a duplication of effort and contain any unnecessary additional costs. To this end, a formal hand over process should be implemented as soon as possible.

2.6. The splitting of the former DoC into the DTSPS and DoC will require some administrative re-alignment. Any national ICT policy process must therefore take account of these significant changes. From the NAB’s point of view, while it may be blatantly clear that issues pertaining to broadcasting, audio and audio visual services should be handed over to the Minister of Communications as suggested, there are key cross cutting issues that impact on the entire ICT industry, which still

² Published in Government Gazette 38280 on 2 December 2014.

need to be addressed by both Ministries. For instance issues of the radio frequency spectrum, signal distribution issues, issues around e-skills and institutional arrangements thereof, and of course the overlapping roles played by a couple of state owned entities (“SOE’s”) such as Sentech. Our submission will focus on these issues

- 2.7. The NAB urges the DTSP to immediately engage the DoC on the best way forward, and to conclude a Memorandum of Understanding (“MOU”) to address areas of overlap, and agree on a hand over process to the DoC, of for broadcasting related issues covered in the Discussion Paper. The NAB further recommends that the finalisation of current process be placed on hold until such time that an MOU is concluded between the relevant departments.

3. Specific Comments on the Discussion Document

CHAPTER 2 - POLICY OPTIONS: KEY PRINCIPLES AND APPROACHES
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- 3.1. The NAB welcomes the principles articulated in the Discussion Paper, as the foundation of policy making. We have previously supported an evidence-based approach to both policy and regulation and would like to reiterate our view. **Evidence based** – Policy formulation and regulatory intervention will be evidence-based, proportionate and consistent with the objectives to be achieved.
- 3.2. This chapter also raises the issue of the open internet and net neutrality, specifically whether there is a need for South Africa to develop a net neutral policy. In essence, net neutrality or network neutrality is a public policy principle that all internet content must be treated alike and move at the same speed over the network³. The principle addresses a very real threat, that network operators will use their power as gatekeepers of internet access to restrain access to competing services, prioritise their own services at the expense of competitors, charge online service providers a premium to guarantee fast delivery of their content or restrict the use of certain applications on their network. Net neutrality seeks to ensure that networks remain

³ “No tolls on the Internet”, Washington Post 8 June 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/07/AR2006060702108.html>

neutral to data passing through it and does not discriminate between different types of data.

- 3.3. The NAB supports the principle of net neutrality based on non-discrimination and neutral treatment of data by network operators. We are aware of the debates on this issue in other jurisdictions, but note the recordal in the Discussion Paper that no respondents have argued against the introduction of a net neutral policy.
- 3.4. We support Option Two proposed in the Discussion Paper, namely the introduction of a full net neutral policy. With regard to the questions raised in Option Two, our proposals are as follows:
- 3.5. **Who determines the rules to be applied** - it is not necessary that detailed net neutrality rules be captured in policy. In fact, this would be ill advised. Rather, policy should endorse the principle and empower ICASA to set requirements for transparency and quality of service. The policy will have to be followed by a legislative amendment to ensure that ICASA is properly empowered in law.
- 3.6. Please note that we are only proposing that ICASA's powers to impose obligations on network operators be set out in legislation, the actual net neutrality rules would be more effectively addressed in regulation, because this permits greater flexibility if the rules need to be changed;
- 3.7. **Who enforces these rules** – in line with the above proposal, the rules would be enforced by ICASA;
- 3.8. **Which providers should the rules apply to** – the rules should apply to both fixed and mobile networks, but should take into account the features of each type of network;
- 3.9. **Which entities should the rules apply to** – the rules should apply to all services which are lawfully provided for. This means that network operators would be permitted to discriminate against any unlawful services.

CHAPTER 3 - POLICY OPTIONS: INFRASTRUCTURE AND SERVICES

3.10. Regulating for converged networks

- 3.11. Convergence has brought about a shift in the ICT sector, and has acted as an enabler for socio-economic development. The convergence of technologies and services has interrupted the traditional way in which ICT's and in particular broadcasters operate locally and worldwide. Regulators are as a result required to respond to these changes and to create a conducive regulatory climate. The challenge for regulators worldwide is to address fair competition between regulated broadcasters and unregulated services.
- 3.12. In line with a report by CASBAA (2012 report)⁴ on Asia-Pacific Pay-TV and OTT, in Asia Pacific OTT regulation is still a new phenomenon, and various jurisdictions have applied different approaches to regulating OTT services. The Report found that few governments in Asia distinguish between different types of services and have implemented differential regulatory approaches. In Asian markets OTT video is subject to only the relatively loose regulations applied to internet services.
- 3.13. To this end, the CASBAA Report recommends that governments must review their existing regulatory constraints on broadcasters in light of the competitive challenge from legitimate OTT video. Steps should be taken to reduce regulatory codes, taxation policies, content controls, etc. to reduce the burden on traditional broadcasters.
- 3.14. The NAB is of the view that OTT services pose a real competitive challenge to the broadcasting industry. The difficulty is that broadcasters and OTT providers will not be competing on a level playing field. OTT services offer content and programming identical to broadcasters, but without any license or regulatory obligations.
- 3.15. We propose that, since this issue falls within the ambit of audio and audio-visual policy options, it should properly be addressed by the DoC as part of the Broadcasting Policy Review. We will raise key questions around regulatory parity, the licensing regime to be adopted in licensing these services, and consideration for

⁴ The CASBAA 2012 reports "A tilted playing field – Asia Pacific Pay TV and OTT".

any reduced regulatory burdens and obligations on incumbent licensees with the Minister of Communications.

3.16. Universal Access and Service

3.17. Historically, universal access and universal service concepts have been applied to the telecommunications sector. The concept of universal service envisages a service which is available to everyone; offered under identical conditions; and offered at an affordable price.⁵

3.18. The traditional aim of **universal service** (“US”) policies is to facilitate “universal availability of connections to individual households to public telecommunications networks”. This means that universal service is measured against the availability of ICTs in homes.

3.19. **Universal access** (“UA”), on the other hand, is aimed at enabling conditions where each citizen has a reasonable means of access to a publicly available telephone, such as public pay telephone, community tele-centers or community internet centers. Universal access is measured based on numbers of people with access to publicly available ICTs such as telephone lines per 100 people. In some countries universal access is defined in terms of distance (e.g. public telephone within 20 km), while in others it is defined in terms of time (e.g. telephone access within 10 minute walk).⁶

3.20. The primary difference between the two concepts is that universal service is focused on the availability of services at a household level, whereas universal access aims to have basic telecommunication services available at a community level.

3.21. Universal service and access are not broadcasting concepts and should never have been extended to cover broadcasting. In the ECA - the definition of universal access in the ECA includes broadcasting services, but then no other provision of Chapter 14 of the ECA dealing with universal service and universal access includes broadcasting services. In moving forward therefore, the NAB urges that any reference to broadcasting in legislation relating to the US and UA should be deleted. Likewise, any reference to broadcasting services and an attempt to introduce

obligations on broadcasters in the Discussion Paper should, and any other future DTPS process should be deleted.

3.22. Broadcasters have very different obligations to telecommunications operators. Instead of universal service obligations, broadcasters have **public interest obligations related to content**. We will address our submissions relating to the public interest obligations of broadcasters to the DoC. Our proposal on the options presented is that the definition of universal service should be amended to exclude broadcasting.

3.23. While the NAB has made an observation regarding the weaknesses of USAASA, and the maladministration thereof, the NAB would like to suggest that greater oversight over USAASA be exercised by the policy maker, particularly when it comes to the administration of the Universal Service Fund (“USAF”). Further since the DTPS is conducting a study to establish areas of overlap among state owned entities, we believe the best possible solution will be found for USAASA to address the anomalies.

3.24. Spectrum Management

3.25. The effective management of scarce radio frequency spectrum will be essential for the future growth of both telecommunications and broadcasting services. Of all the issues requiring co-ordination between ministries, spectrum is most critical to the operations of licensees.

3.26. The Discussion Paper invites comments on the preferred policy options in relation to spectrum policy objectives. The NAB supports option two⁷ that advocates the review of the current policy objectives of 2010 Radio Frequency Spectrum Policy. From the NAB’s point of view, the policy objectives should be reviewed to incorporate the findings of the ITU-R studies mapping out future allocation of the 640-790 MHz band, and these policy objectives should not be captured in legislation but rather be retained in the Radio Frequency Policy, as a living document, to be reviewed every 5 years.

3.27. In terms of allocation of powers and responsibilities between the policy makers and the regulator, the NAB believes that due to the overlapping duties of the Ministers on

⁷ On page 89 of the Discussion Document.

spectrum issues, both Ministers must retain the power to set spectrum policies and policy objectives pertaining to their individual portfolios, and as shall be addressed in the MOU. The two Ministers must represent South Africa at the ITU on spectrum issues in their respective capacities and portfolios, while ICASA should retain its powers to develop the national frequency plan in line with the ECA. Both departments must coordinate and agree on the country's position ahead of the ITU meetings and conferences. In jurisdictions where two government departments are responsible for ICT, as is the case in South Africa, both Ministers represent the country at the ITU.

- 3.28. The Discussion Paper further addresses issues of spectrum pricing, and invites inputs on the preferred policy option. In accordance with the Proclamation, the NAB will direct all spectrum issues in the broadcasting sector to the DoC.
- 3.29. The Discussion Paper asks a question about whether auctions should be included as a pricing model. The NAB and its members are vehemently opposed to spectrum auctioning, and cannot respond to any spectrum auction questions until there is clarity on the role the Minister of Communications plays in relation to broadcasting spectrum. In international jurisdictions, the auctioning of the digital dividend has not yielded the projected economic returns for some countries. The NAB therefore proposes that post the migration, and in the event that the DTSP makes a policy decision to auction spectrum, broadcasting spectrum must be ring-fenced, and not be subjected to auctions.
- 3.30. With regard to the suggestion in Option 2 that a spectrum management agency may be established, we would like to record our objection to this proposal and reflect that the NAB has consistently opposed this proposal since it was suggested.

CHAPTER 5- POLICY OPTIONS: AUDIO AND AUDIO-VISUAL CONTENT SERVICES

- 3.31. The bulk of Chapter 5 addresses matters pertaining to broadcasting and, as previously indicated, the NAB will direct its submissions on these matters to the Minister of Communications. Notwithstanding this, we will make inputs on the section dealing with Piracy under this chapter.

- 3.32. The issue of piracy is twofold: it relates to broadcast signal piracy on one hand and to online signal piracy on the other. Online services are governed by the Electronic Communications and Transactions Act 25 of 2002 (“the ECT Act”) -which has been assigned to the Minister of DTPS⁸, while broadcasting services are governed by the ECA and the Broadcasting Act. While it is clear that any issues pertaining to broadcasting signal piracy will be dealt with by the Minister of Communications, an overlap arises when it comes to addressing issues of online signal piracy, as broadcasters, internet service providers, and telecommunications operators play on the online space.
- 3.33. To the NAB’s knowledge, currently there is no national policy of any form on piracy. However, the NAB is encouraged to note that the Discussion Paper recognises that the law will reinstate statutory prohibitions on piracy, and that participation at the WIPO level, and WIPO Treaties are critical, on the other hand, the Discussion Paper fails to address how issues of overlap on online signal piracy will be addressed. To this end, the NAB calls for coordination between the two Ministers.
- 3.34. Broadcasting is important for South Africa. Broadcasting not only delivers sport and entertainment, but also news, political and social commentary, coverage of national and local elections and information about emergencies and disasters. Broadcasting also helps social cohesion and nation-building bringing the citizens of our “rainbow nation” together by giving them a common forum and information in their own languages.
- 3.35. However, broadcasting does not just happen by itself; it is the result of significant investments by licensed broadcasters in the creation of news, public affairs and other programming with important social benefits. Licensed broadcasters also invest in the acquisition or licensing of programming from third parties, which they arrange and package with their own content in creating their programme schedule.

⁸ In terms of the Presidential proclamation dated 21 July 2014

- 3.36. Licensed broadcasters also invest in the equipment and infrastructure required to transmit that schedule as an electronic signal. If financial returns are diverted to signal and content pirates, then it becomes difficult for a licensed broadcaster to continue to make these significant investments in its signal. The loss of licensing revenue for broadcast programming does not just hurt the broadcaster, but everyone else in the supply and distribution chain.
- 3.37. Digital technology has fundamentally changed the way in which content is created, manipulated and shared and allowed broadcasting to evolve to the next level, but it has also simplified the practice of broadcast signal piracy. A pirate can now capture a broadcast signal with a simple tuner card or the station's signal streamed on line using a home Personal computer or laptop. The pirate can then stream that broadcaster's signal on his or her own "channel," using one of the popular websites that enable live streaming of what is supposed to be user-generated content. These unauthorized live streams are then aggregated and distributed to a much larger global audience by websites that link to or actually embed them.
- 3.38. Some of the larger aggregation websites actually provide directories of the pirated signals. Sites that host and aggregate pirate broadcast signals are able to generate significant revenue by selling banner ads, pop-up ads, and pre-roll ads that appear before those streams, which are often placed by automated systems without regard to their legality. A local example of such piracy is that South Africa benefited from the World Cup in 2010, but so did online pirates. International research showed that during the World Cup in South Africa there were a total of 16,426 streams on 17 sites with pirated content.⁹
- 3.39. In South Africa and internationally, a co-ordinated response is necessary to safeguard the investment made in broadcast content by the intellectual property rights-holders. This entails updating the current protections in national intellectual property and copyright laws and related legislation, as well as entering into regional

⁹ Net Result. **Update on Digital Piracy of Sporting Events 2011**. Accessed: 8 January 2015. http://www.wipo.int/export/sites/www/ip-sport/en/pdf/piracy_report_2011.pdf

and international treaties to safeguard these rights. The Minister of Communications, the Minister of DTPS and other government ministries all have a role to play in dealing with the damage that piracy has on local content industries. The role of the Minister of Communications on issues related to broadcasting and the draft Treaty for the Protection of Broadcasting Organisations will no doubt be dealt with in the Broadcasting Policy Review process. However, the Minister of the DTPS, who is responsible for the Electronic Communications and Transactions Act, needs to address issues related to online content piracy, circumvention of geo-blocking and intermediary liability in this policy review process.

- 3.40. The NAB recommends that policies to impose requirements on ISPs to co-operate with government, law enforcement and rights-holders to monitor and block illegal streaming websites be considered. Such policy steps should also be accompanied by legal remedies to make illegal circumvention of geo-blocking or technology measures employed by broadcasters or intellectual property rights-holders to protect their content.

CHAPTER 6- POLICY OPTIONS: ICT INDUSTRY GROWTH

3.41. ICT Charter

- 3.42. Both the ECA and the ICASA Act, recognise ownership by historically disadvantaged people of broadcasting and telecommunications entities, and empowerment requirements in terms of BBBEE legislation. From a regulatory, monitoring and compliance point of view, ICASA among others published a Compliance Procedure Manual¹⁰ in terms of which licensees are required to report annually on their ownership status in relation to ownership and shareholding status by HDI's women and persons with disabilities. Furthermore, broadcasters, in terms of their licence conditions, are obliged to report annually to ICASA on the status of their BBBEE and transformation status.

¹⁰ Published in government gazette 34863 on 15 December 2011.

- 3.43. In response to whether or not further policy amendments are necessary to address the broad objectives of transformation and BBEEE¹¹, the NAB believes that this will not be necessary as interventions have been implemented recently. In April 2014¹², Parliament passed the EC Amendment Act, which among others aligned the ECA to the BBEE legislation by substituting the concept of HDI's with Black Economic Empowerment¹³, as initially the ECA recognised empowerment in line with HDI's.
- 3.44. Consequently, since the ICT Charter falls under the DTPS, and that the DTPS has no jurisdiction over the broadcasting sector, the NAB urges that the ICT Charter be amended to exclude broadcasters as ICT stakeholders, consequently broadcasters must be excluded from the application of the Charter.
- 3.45. We further urge that the process of appointing the ICT Charter Council initiated by the DTPS on 3 November 2014, be withdrawn/ amended, as it calls for the nomination of "two members each from the four ICT sub-sectors namely Broadcasting, Electronics, Information Technology and Telecommunications". Broadcasters should be eliminated from this process. Broadcasters should not be represented in this forum.

CHAPTER 7- POLICY OPTIONS: INSTITUTIONAL FRAMEWORKS

3.46. Licensing and regulation of ICT services

- 3.47. The NAB in its submission on the Green Paper expressed its support for the independent regulator and independent regulation. Furthermore, in as much as ICASA has the characteristics of an independent body, those similar to entities listed in Chapter 9 of the Constitution¹⁴; is not classified with such entities in the Constitution.

¹¹ At page 226 of the Discussion Document.

¹² Published in government gazette 37536 on 7 April 2014.

¹³ Amended section 1© and 2(h) of the EC Amendment Act.

¹⁴ Chapter 9 State Institutions supporting Constitutional Democracy- listed in section 181(1) of the Constitution.

- 3.48. The Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions, chaired by Prof Kader Asmal¹⁵ (“the Asmal report”) noted the exclusion of an independent broadcasting regulator in the list of Chapter 9 institutions, and conclude that “the Constitution is not the only place that provides for an independent regulator. In fact the phraseology of the enabling legislation goes much further than the Constitutional provisions”. To this end certain provisions of the ICASA Act resemble those of the Constitution. For instance section 3(3)¹⁶ of the ICASA Act repeats the provisions of section 181(2)¹⁷ of the Constitution.
- 3.49. It is important to note that, some of the recommendations by the Asmal Report indicate that the independence of ICASA is sufficiently protected in legislation. For purposes of the Discussion Paper therefore, and bearing in mind the process for amending the Constitution, the NAB sees no need for the amendment of section 181 of the Constitution to incorporate ICASA.
- 3.50. To the extent that both Ministers have overlapping roles and responsibilities towards ICASA, in terms of the overlapping roles assigned the Ministers under the ICASA Act, the NAB would like to reiterate the proposals it made in the Green Paper submission, in strengthening the Relator, and these recommendations cut across most of policy issues and options raised in the Discussion Paper.
- 3.51. The NAB believes that in order to address the inefficiencies ICASA is plagued with, the entire structure and staffing of the regulator should be reviewed, including at Council level. To this end the following can be considered:
- 3.51.1. Policy should introduce two chairpersons, one for broadcasting, with relevant understanding of broadcasting, regulatory and industry expertise, while the other chairperson will oversee telecommunications issues. Similar models have been adopted in a number of jurisdictions such as in Canada, where legislation provides for two standing committees within the Canadian Radio-Television and Telecommunications Commission

¹⁵ Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions 31 July 2007, on page 193

¹⁶: The provision of section 3(3) of the ICASA Act is verbatim of section 181(2) of the Constitution: *the Authority 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*”.

¹⁷ Section 181(2) of the Constitution provides: *the Institutions are independent, and subject only to the Constitution and the law, and must be impartial and must perform its functions without fear, favour or prejudice*”.

("CRTC"), one for broadcasting and the other for telecommunications. The UK model on the other hand provides for the establishment of a Content Board, tasked with all matters relating to content across various platforms, a Consumer Panel as well as various advisory committees. The NAB also notes that the international jurisdictions listed in the Discussion Paper are aligned with the NAB's motivation for separate chairpersons.

3.51.2. The NAB supports the proposal for part-time Councillors operating as non-executive directors. This will provide a clear separation of powers between Council and operational functions. We believe however that the current appointment process by Parliament should be retained.

3.51.3. The NAB further supports the principle of reducing the number of Councillors. However, in the event that part-time Councillors are appointed, the NAB proposes that the chair of ICASA as well as the chair of broadcasting and chair of telecoms be appointed as full-time members and that a reasonable number of part-time Councillors are appointed.

3.52. We further reaffirm our proposal that in addition to legislated functions of the Authority as well as those of the Chairperson of the Authority¹⁸, principles of efficiency, transparency, clarity, predictability and a performance driven culture should underpin the operational machinery of the Regulator and these principles should be incorporated into legislation as General Duties of the Regulator. A similar approach has been adopted in the UK Communications Act 2003, wherein the following critical issues were added to the duties of the regulator:

3.52.1. promoting competition across networks and services;

3.52.2. Providing equal treatment of technology, network and means of communications;

3.52.3. reviewing regulatory burdens and carry out regulatory impact assessments on a regular basis;

3.52.4. increasing the ease with which business can be conducted in the ICT sector;

¹⁸ Section 4 of the ICASA Act

- 3.52.5. publishing its decisions, policy statements and resolutions promptly and adhering to legislated time frames;
 - 3.52.6. adhering to reasonable timeframes during public processes and the issuing of licenses;
 - 3.52.7. conducting and take into account local and international research and/or conduct relevant international benchmarking.
- 3.53. On the funding of ICASA, the report commissioned by the DTSPS on the ICASA Funding Model published in May 2013 rightfully observes that while some of the financial inefficiencies of ICASA may be attributed to legislation, ICASA also faces challenges, among others, with revenue collection, inadequate staffing and a lack of relevant skills. The Report goes further to state that often funds allocated by the DoC end up falling short of ICASA's requirements, or ICASA has to suspend certain expenditure in order to stay within the MTEF allocations¹⁹. Evidently an alignment is required between the ICASA budget and what Parliament ultimately grants, and a major intervention is required for ICASA to be a financially sustainable entity.
- 3.54. From the legislative point of view, the provisions of section 15(1A) of the ICASA Act²⁰, appear to be providing sufficient leeway for both the Minister of Communications and the Minister of Finance to allow for ICASA to among others, retain some of the monies received from ICASA activities. This in our view paves the way for a hybrid model which the NAB advocates. This model has been adopted in a number of jurisdictions such as Australia, the UK and Uganda to name a few.
- 3.55. The hybrid model envisages that ICASA would retain some of its administrative fees such as licence fees, fines, licence application fees etc., which will cover regulatory and administrative costs, while Government will continue providing part of the funding, which will cover certain government mandate line items that do not have a matching revenue stream. In the UK 60% of OFCOM funding is from the fiscus. A balancing act will also be necessary, as a total dependence of administrative fees is unpredictable. Given the roles and responsibilities of the DTSPS and the DoC, it is imperative that ICASA's budget is developed in consultation with these two departments.

¹⁹ At page 48 of the ICASA Funding Model Research Report May 2013.

²⁰Which provides "the Authority may receive money determined in any other manner as may be agreed between the Minister and the Minister of Finance and approved by Cabinet"

3.56. Self-regulation and co-regulation

- 3.57. To the extent that the DTSPS intends introducing self-regulatory bodies in the telecommunications and postal sector, the NAB recommends that policy must introduce accreditation/recognition procedures for any sector body, administering a code of conduct, seeking to be set up as a self-regulatory body. Instances of self-regulatory bodies are prevalent in the broadcasting sector and the internet service provider space. The NAB would recommend that the DTSPS should take guidance on the approach adopted by sections 54²¹ and 55²² of ECA, and section 71 of the ECT Act, which provides the Minister to recognise an industry representative body for purposes of self-regulation.
- 3.58. Generally a body seeking accreditation as a self-regulatory body needs to demonstrate that it administers and enforces a code of conduct, and the code has disciplinary mechanisms (warnings, fines, sanctions etc.) that are enforceable. The NAB suggests that the criteria as set out in the ICASA Act on the establishment of the Complaints and Compliance Committee (CCC -Section 17A) be used as a guide when establishing a self-regulatory body.
- 3.59. Furthermore, the NAB would propose that in the selection of suitable candidates to serve on a self-regulatory body, transformational issues of race, gender, age, disability, and geographic location (urban and rural) must be considered. Furthermore, Codes of such a body must be amended regularly, as is the case with the ICASA Broadcasting Code Review processes.
- 3.60. Section 54 of the ECA recognises the existence of a self-regulatory body which to the satisfaction of ICASA has proved that its members adhere to a code of conduct enforced by the body. To this end, in 1993, the NAB established a self-regulatory body the Broadcasting Complaints Commission of South Africa (“the BCCSA”). The BCCSA has over the years successfully administered two codes, one for free to air broadcasting service licensees and the other for subscription broadcasting licensees.
- 3.61. The ECA requires that the code/s administered by the BCCSA must be acceptable to ICASA. When the BCCSA drafted and implemented the Subscription

²¹ recognising a code of conduct for broadcasters

²² recognising the Advertising Standards Authority

broadcasting Code in 2008 it consulted and sought acceptance from ICASA of the Code.

- 3.62. During its term of existence, the BCCSA has among others received international and presidential recognition for its effectiveness in self-regulation. Furthermore the BCCSA has hosted a number of regulatory bodies from other countries for benchmarking purposes. Recently the BCCSA successfully hosted the Kenyan Communications Authority for a fact-finding mission.

3.63. State Owned Entities

- 3.64. While the Discussion Paper points out that it is conducting a micro study on areas of duplication and possible rationalisation on State Owned Entities (“SOE’s), it is encouraging to note that the Presidential Proclamation categorically outlines SOE’s accountable to the DTPS. In conducting the study, the DTPS is advised to have regard for the findings of the Report of the Presidential Review Committee on State-Owned Entities released on 30 April 2013(“the PRC Report”). The PRC was established in 2010 by the President in response to the need to improve SOE policy and to strengthen the role of SOEs in society in general, and in the economy in particular, and to ensure that SOE’s respond to a clearly defined public mandate and support the developmental state aspirations of the South African Government. The NAB therefore believes that, in, looking at overlapping roles and responsibilities of current SOE’s, the DTPS is duty bound to consider mergers to ensure efficient and effective entities that serve the public interest.

- 3.65. In the meantime, while the DTPS is in the process of conducting the study, it is worth pointing out that there are those SOE’s which have historically served the interests of broadcasters, and are now assigned to the DTPS, such entities include Sentech (broadcast signal distribution) and NEMISA (broadcast training). In our view, the broadcasting sector needs a dedicated skills development machinery to cater for the future of digital broadcasting. We therefore view NEMISA as a credible institution to further these needs. The NAB proposes for co-ordination between the two Ministers via the MOU, for these SOE’s, defining respective oversight roles of the Ministers over these SOE’s.

3.66. Skills Development

- 3.67. It is envisaged that the ICT sector will produce a significant amount of job opportunities, both direct and indirectly. It is therefore critical that government and

private sector should apply a concerted effort in ensuring that the right skills are available to meet the looming skills gap created by digitisation. In order to accommodate the medium to long term e-skills needs, the NAB proposes that not only should e-literacy be incorporated into the curriculum of primary schools, but it should be encouraged and extended into higher learning at technical training colleges and universities, to ensure that the demand is met in fields of electronics, engineering, digital media etc., with adequate funding.

- 3.68. While the Proclamation stipulates that both NEMISA and iKamva National e-Skills Institute (iNeSI) fall under the domain of the DTPS, it is worth pointing out that NEMISA was established to provide training in the production and technical skills applicable to the TV, radio and broadcasting industries, a field outside the mandate of the DTPS. It is to this end that the NAB recommends that NEMISA be retained as a training institution for broadcasting, as the industry continues to transform and develop and gear up for digital broadcasting. Part of the initial remit of NEMISA was to develop skills for disadvantaged individuals, particularly women and people living in rural areas. The NAB believes that NEMISA still has a critical role to play in fulfilling these objectives and in working closely with the broadcasting industry in meeting the continued skills gap in the industry. The NAB believes that this is one other part that will be addressed by way of a MOU, to address cross cutting issues.
- 3.69. While the NAB views both iKamva and NEMISA as critical institutions in the creation of e-skills, the NAB urges that the MICT SETA and government should not only focus on capacitating government training institutions, but also provide support and accreditation for in-house, and industry led training institutions.

4. Conclusion

- 4.1. The NAB welcomes the opportunity to make its written submissions. The NAB reiterates that in moving forward, there must be an alignment to give effect to Proclamation 79 of 2014. Collaboration between the two Ministers and departments on all cross-cutting/ overlapping issues will facilitate processes going forward.
- 4.2. The NAB looks forward to continued engagement with government in all policy processes and remains committed to the growth, development and sustainability of a vibrant South African broadcasting system.

