in terms of the ECA and the Discussion Document in a manner that will benefit all industry players, and support the proposition that intellectual property rights be contractually negotiated between the parties.

3.16.4. The NAB contends that the Authority has no jurisdiction to deal with intellectual property rights and should therefore have no authority to deal with intellectual property issues. This view is shared by WOW.

3.16.5. IPO refers to the Recommendations proposed in the MHA Report on this question. The submission of SASFED and IPO on the draft regulations suggest that the Authority give effect to the Copyright Act through regulations to provide for a robust and proactive approach to Intellectual Property.

3.16.6. e.tv contends that there is no basis for the Authority to regulate intellectual property rights.

3.16.7. SABC contends that the Authority has no role to play in the regulation of intellectual property rights. It maintains that intellectual property should be adjudicated by the Copyright Tribunal.

3.17. **IS INTELLECTUAL PROPERTY RIGHT NOT SUPPOSED TO BE BASED ON A COMMERCIAL AGREEMENT BETWEEN THE COMMISSIONING PARTIES?**

3.17.1. MNET argues that the copyright laws of South Africa allow for the variation in the ownership of copyright in terms of a contractual agreement. However, MNET does not indicate whether this is something they would be prepared to consider. MNET further submits that the high cost of production in South Africa, and the fact that broadcasters pay for the production of programming is the only reason that all the rights to the intellectual property are held by the broadcasters.

3.17.2. The NFVF agrees that intellectual property rights arrangements should be based on commercial agreements between the parties. This view is shared by ODM.

3.17.3. SASFED agrees that intellectual property rights can be contractually negotiated, but because of the reluctance of the broadcasters to do this, SASFED feels that support for this from the Authority may have some influence on how intellectual property rights are negotiated.

3.17.4. IPO agrees with the question posed and argues that the current Copyright Act is narrowly interpreted to protect the self interest of the broadcaster. It refers to Recommendations proposed in the MHA Report.

3.17.5. e.tv reiterates that the matter of intellectual property rights is one for negotiations between the parties and that the Authority does not have the legislative authority to regulate such matters. e.tv contends further that should the Authority play a role in regulating intellectual property it would be acting contrary to the principle that the Authority should refrain from unreasonable intervention in the commercial activities of licensees.

3.17.6. SABC submits that intellectual property rights should be based on the existing legislative framework and agreement between the parties.

3.17.7. WOW disagrees with this question. It argues that it is the commercial agreement that is prepared on the basis of which party is the holder of intellectual property rights and not vice versa. In other words WOW submits that the holder of intellectual property rights determines the terms of commercial agreement.

3.18. **HOW SHOULD CONFLICT RELATED TO INTELLECTUAL PROPERTY RIGHTS BE ADJUDICATED?**

3.18.1. MNET is of the view that the Authority should have no role in the resolution of conflicts, and that conflict resolution should be left to the parties to determine by agreement.

3.18.2. The NFVF states that disputes around intellectual property rights should be resolved by the parties as provided for in the contractual terms agreed to by the parties. However, they also felt that the Authority should have an opportunity to investigate complaints against broadcasters arising out of such disputes.

3.18.3. SASFED proposed that the Authority should set up a complaints office which could deal with all complaints and unfair practices arising from intellectual property. The Authority would then take up these complaints with the broadcasters.

3.18.4. The NAB stated that intellectual property disputes should be adjudicated as provided for in the Copyright Act, which provides for what constitutes infringement of copyright, and stipulates appropriate remedies. This view is shared by ODM, SABC and WOW.

3.18.5. IPO refers to the Recommendations proposed in the MHA Report on this question.

3.18.6. e.tv argues that conflicts between the parties arising from intellectual property rights must be resolved between the parties. If parties could not reach agreement then the conflict should be referred to the appropriate court.

3.19. **SHOULD THE AUTHORITY REQUIRE THE BROADCASTING SERVICE LICENSEES TO PUBLISH GENERIC PRICING SCHEDULES IN THEIR COMMISSIONING POLICIES?**

3.19.1. MNET did not directly address this issue. However, they have indicated that the Authority could, through regulations, require broadcasters to draw up

and publish codes of practice setting out the principles that would apply, including terms for the commissioning of independent programming.

3.19.2. The NFVF did not feel that there is a need for such a requirement, but that broadcasters should make it known what they were prepared to pay.

3.19.3. ODM agrees that this practice would be beneficial in improving the transparency required for the industry. However, they felt that a heavier burden should be placed on the public broadcaster.

3.19.4. SASFED states that this practice would be of benefit in promoting transparency in the industry. It contends that such pricing schedules should cite the price ranges per genre, should be in line with international standards, and be amended annually in accordance with inflation. It submits that detailed line by line costing practices should be done away with and left up to the producers to work out within budgetary constraints.

3.19.5. IPO does not believe that it is relevant for the broadcasting service licensees to publish generic pricing schedules in their commissioning policies. It suggests that projects should be priced on their specific merits, requirements and viability and that viability should be measured by commercial terms alone.

3.19.6. e.tv is vehemently opposed to the idea that licensees be required to publish generic pricing schedules in their commissioning policies. It argues that pricing is a commercially sensitive matter and as such it would be prejudiced if its competitors had access to its local production costs. In response to the draft regulations the broadcaster further submits that the costs of commissioning a programme are dependent on numerous factors arising on a case-by-case basis and that it is impossible to provide an exhaustive list of factors which will inform programme "pricing"[8]

[8] e.tv submission on the draft regulations

3.19.7. SABC rejects the Authority's suggestion of requiring the broadcasters to publish generic pricing schedules in their commissioning policies as there is, in its view, no basis for such generic pricing.

3.19.8. WOW contends that pricing varies from one production to the other and that, it is highly subjective. It therefore argues that publishing generic prices on a policy document would be futile as there are many drivers that determine the pricing of productions.

3.20. **SHOULD THE AUTHORITY BE INVOLVED IN THE COMMERCIAL NEGOTIATIONS OR LEAVE THOSE TO THE PARTIES? IF YES, TO WHAT EXTENT AND IF NO WHY?**

3.20.1. MNET is of the view that the Authority should not get involved in negotiating the commercial terms of the agreement between broadcasters and independent producers, as this would negate the principles of the freedom of contract. This view is shared by NFVF and ODM.

3.20.2. SASFED is of the view that it would not be ideal for the Authority to get involved in the commercial negotiations between the parties. It however states that through the use of a levy paid to independent producer organisations such as SASFED, free legal advice could be offered to independent producers to assist them negotiate better terms. It further proposes that such contracts could be lodged with the Authority for transparency, and to monitor any favouritism given to any independent producer.

3.20.3. IPO agrees to the Authority's involvement in commercial negotiations. It suggests that the extent of the Authority's involvement should be limited to mediation or facilitation of the process between the independent producer organisations and the broadcasters. It argues, however, that it is not necessary for the Authority to be involved in individual commercial negotiations. This, it argues, should be left to the parties once the legislative framework has been put in place.

3.20.4. e.tv submits that any involvement by the Authority in commercial negotiations should not take place as this would constitute unreasonable interference in the commercial activities of licensees. This view is also expressed by NAB and SABC. In addition, argues e.tv, such involvement would be contrary to the parties' rights to freedom of contract.

3.20.5. With regard to the impact of commissioning policies, e.tv submits that in any consideration of local production and commissioning, the Authority must take cognisance of the potential prejudice to broadcasters' vis-à-vis the potential benefit of the independent production sector. For the fact that the broadcaster pays the entire costs of the production and thereby carrying the risk of the production failing, e.tv argues that it is entirely fair and reasonable that broadcaster retain all rights to the production.

3.20.6. WOW submits that the negotiations between the parties are commercial negotiations and only in the event of disputes should a third party be involved.

3.21. **WHAT WOULD BE REASONABLE TIME TO SECURE A COMMISSIONING CONTRACT?**

3.21.1. ODM is of the view that taking international best practice into account, duration of six months would be ideal.

3.21.2. SASFED proposed duration of not more than 2 months.

3.21.3. The NAB did not respond to this issue.

3.21.4. IPO opines that a period within which to secure a contract should be negotiated between the parties. However it recommends that a maximum of six months should be set from brief to contract.

3.21.5. e.tv failed to address questions 25-38 directly. It reserved the right to deal with these questions fully at the hearing and after it has had the opportunity to consider in detail other international examples. However, it made few points which appear to be a response to some of the questions mentioned above. These points will be discussed under the specific question to which they relate.

3.21.6. According to the SABC, a reasonable time to secure a commissioning contract depends on the nature of the contract in question.

3.21.7. WOW opines that this would depend on the nature of the commissioning brief. However, it submits that a reasonable time frame could be three months.

3.22. **ARE THE PRODUCERS CLEAR ABOUT DIFFERENT RIGHTS THAT THE BROADCASTERS SEEK TO SECURE AND THE DURATION?**

3.22.1. The NFVF was not able to make a determination on this issue, but contend that this should be agreed to and clearly set out in the contract between the parties.

3.22.2. ODM is of the view that the producers as well as the broadcasters are clear about the different rights to be secured.

3.22.3. SASFED states that independent producers are usually clear about the different rights that the broadcasters secure, as this is recorded in the commercial agreements. However, it argues that one negative aspect of how these rights are secured is that broadcasters secure all secondary rights, which prevents the independent producers from exploiting any of these rights. SASFED proposes that secondary rights should be separated from primary rights as opposed to lumping them all together, and the duration for which they are held by the broadcaster should not be in perpetuity.

3.22.4. IPO argues that there are no negotiations on the issue of rights as the broadcasters take all the rights.

3.22.5. The SABC states that its policy and procedures for the procurement of local content television programmes put the rights issue in clear terms.

3.23. **WHAT LESSONS CAN BE ADOPTED FROM CHANNEL 4?**

3.23.1. The NFVF identified the following as the lessons that can be learnt from Channel 4: Clarity over different categories of right; the duration for which a broadcaster seeks to secure such categories of rights; clarity over prices that a broadcaster is willing to pay for the different categories of rights; clear commissioning processes with reasonable timelines for negotiations and provision for monitoring and dispute resolution.

3.23.2. ODM is of the view that the lessons to be learnt from Channel 4 were more relevant and applicable to the public broadcaster. It submits that the major lesson to be learnt is transparency.

3.23.3. SASFED states that they are in agreement with the practices cited in the Discussion Document as being worth noting for the South African industry. SASFED also indicated that a funded and strong independent regulatory body would also be beneficial to the South African industry. They also highlighted the following as lessons learnt:

3.23.3.1. clear commissioning processes;
3.23.3.2. mentoring of producers to editorial guidelines; and
3.23.3.3. increased revenue enjoyed by Channel 4.

3.23.4. SABC failed to address this question. Instead it refers to number 22 of its submission which does not have any relevance to this question.

3.24. **WHAT SHOULD BE THE BASIS FOR ASSESSING THE INDEPENDENT PRODUCERS BY BROADCASTERS TO PROCURE THE RIGHT PROGRAMME?**

3.24.1. ODM and SASFED are of the view that an independent producer's track record should be the gauge used to assess a producer's ability and to determine whether to procure programming from them.

3.24.2. SABC submits that it sets out the criteria for each genre in the RFP book. It is of the view that models differ from country to country, hence it rejects the Native American Public Telecommunications context because it differs from theirs.

3.24.3. e.tv states that its assessment of proposals submitted by independent producers is approached on a case by case basis in accordance with its own procurement policy. Issues such as the independent producer's capacity to fulfil his or her obligations, budgetary requirements and the like are taken into consideration during assessment.

3.24.4. WOW suggests that experience, ability to fund the production, and ability to understand the values of the broadcasters and translate them into a production is the basis for assessing independent producers.

3.25. **WHAT WILL BE A FAIR TIME PERIOD FOR BROADCASTERS TO COME UP WITH THEIR POLICIES FOR COMMISSIONING OF INDEPENDENTLY PRODUCED SOUTH AFRICAN PROGRAMMING?**

3.25.1. The NFVF is of the view that the broadcasting service licensees and the independent producers should agree between themselves on this issue.

3.25.2. ODM indicated that one year would be ideal as it would provide sufficient time for engagement with all stakeholders.

3.25.3. SASFED is of the view that a period of six months from the date of mandate. It submits that such policies should be developed in consultation with SASFED and the IPO.

3.25.4. e.tv contends that it already has a preferential procurement policy and thus it is unable to comment on any timing issues regarding the development of such a policy. However, it believes that the development of a preferential procurement policy and the conclusion of any agreement with independent producers is a private matter in which the Authority should not in any way intervene in this regard.

3.25.5. The SABC suggests that, considering the administrative work involved in this process, 18 months would be ideal.

3.25.6. WOW suggests a minimum of six months.

3.26. **LEARNING FROM INTERNATIONAL EXPERIENCE, WHICH COMMISSIONING METHOD(S) WILL BE PREFERABLE IN SOUTH AFRICA AND WHY?**

3.26.1. MNET submits that the international practice leans towards a light touch approach, and is therefore not regulated. It submits further that only the United Kingdom regulates commissioning procedures and terms of trade, but these regulations are not imposed on commercial free-to-air broadcasters and subscription broadcasters. MNET does not specifically identify or recommend any of the international trends for application in South Africa. It does however point out that any international practices should be viewed in light of empowering legislation in those countries, and which practices may not be applicable in South Africa due to the lack of similar empowering legislation. Overall, on this issue, MNET advocates for a light touch approach.

3.26.2. SASFED is of the view, that there are lessons to be learnt from all three modes of commissioning practices – BBC, CBC and PBS. However, it

argues that the British and Canadian models seem to suit South Africa better.

3.26.3. The SABC contends that the terms of trade are unique from one country to another and that none of the methods presented in the Discussion Document matches the South African commissioning environment.

3.26.4. WOW prefers a combination of Channel 4 commissioning methods and the Native American Public Telecom PBS. It prefers the adoption of the following points from Channel 4: commissioning guidelines, editorial guidelines, and proposal development. With regard to PBS commissioning method, WOW prefers the adoption of program rights.

3.27. **WHAT EXAMPLES CAN BE EXTRACTED FROM THE ABOVE INTERNATIONAL CASES TO HAVE EFFECTIVE TERMS OF TRADE?**

3.27.1. MNET submits that the Codes of Practice used in the United Kingdom are exemplary for developing effective terms of trade for South Africa.

3.27.2. The NFVF submits that what can be learnt from Channel 4 is that they have effective terms of trade.

3.27.3. SASFED indicated that the following would allow for better terms of trade for the South African industry:

3.27.3.1. reasonable time frames for delivery of programmes;
3.27.3.2. reasonable time frames for contract negotiations;
3.27.3.3. clear commissioning process with a reasonable timetable for negotiations;
3.27.3.4. clarity of prices for different rights;
3.27.3.5. clarity of different categories of rights;
3.27.3.6. mentoring and financial commitment to the developmental stage of creating a programme; and

3.27.3.7. the broadcaster only acquire the rights that it needs to broadcast the programme.

3.27.4. SABC submits that BBC's co-production models and turnaround time and frameworks for contracts may be followed.

3.28. **SHOULD THE AUTHORITY REQUIRE BROADCASTERS TO SUBMIT THEIR COMMISSIONING POLICIES FOR APPROVAL OR FILLING?**

3.28.1. MNET submits that the Authority should require that broadcasters submit their commissioning policies for approval with the Authority. MNET is of the view that this would ensure that relations between broadcasting service licensees and independent producers are conducted on a fair and transparent basis.

3.28.2. The NFVF supports the filling of such policies with the Authority, but not the approval thereof. In their submission to the draft regulations NFVF changed their view by suggesting that there should be approval.

3.28.3. ODM argues that this would constitute undue interference by the Authority in the commercial activities of the broadcasters. However, they contend that this obligation could be imposed on the public broadcaster given its public service remit.

3.28.4. SASFED is of the view that broadcasters should submit their policies for approval with the Authority.

3.28.5. e.tv believes that the development of a preferential procurement policy and the conclusion of any agreement with independent producers is a private matter and that the Authority should not in any way intervene. Accordingly requiring the Authority to approve any policy should not be considered. However, e.tv says that it has no objection to providing the Authority with any of its policies should it so require.

3.28.6. The SABC does not address this question directly. Instead it states that it believes the policies should only be submitted in so far as they give effect to provisions of the regulations.

3.28.7. WOW is of the view that it is not necessary to require broadcasters to submit their commissioning policies to the Authority for approval or filing.

3.29. **SHOULD THE AUTHORITY ASK BROADCASTERS' TO KEEP THE FILES OF PROCURED INDEPENDENT PRODUCERS FOR SUBMISSION WHENEVER THE AUTHORITY REQUIRES THOSE?**

3.29.1. The NFVF is in favour of such a practice being encouraged and adopted. This view is shared by SASFED.

3.29.2. ODM is of the view that this practice could be imposed on the public broadcaster as it has a larger local content quota.

3.29.3. Given that the relationship between e.tv and any independent producer with which it contracts is a private matter, e.tv submits that it should not be required to submit any such confidential information to the Authority. However, e.tv is prepared to make available to the Authority information relating to the identity of the producers it uses, the extent of local content it produced and such similar information.

3.29.4. The SABC concedes to this question. It points out that this may assist in case there is suspicion that a licensee has not complied with its commissioning procedures.

3.29.5. WOW submits that the Authority should request broadcasters for information only under the guide provided by the Promotion of Access to Information Act No 2 of 2000 ("**PAIA**").

3.30. **CAN THIS INFORMATION BE CONTAINED IN THE WEBSITES OF THE BROADCASTERS FOR PUBLIC INSPECTION TO PROMOTE CONSUMER INVOLVEMENT?**

3.30.1. The NFVF is in favour of such practice, and indicated that such a practice would make a great contribution for consumer involvement.

3.30.2. ODM contends that this would not be ideal as such policies would relate to the relationship between the broadcaster and the independent producer.

3.30.3. SASFED is of the view that full disclosure would not be ideal as there is a need to protect competitive production, know-how and privacy. It submits that partial disclosure would be more ideal.

3.30.4. e.tv contends that only information which is in the public domain should be contained in the websites of broadcasters.

3.30.5. For fear of misuse by third parties, the SABC argues that confidential information should not be published and posted on the website.

3.30.6. WOW submits that information may be provided through the website provided that such information is not confidential. It contends that any additional information will have to be requested as provided in PAIA.

3.31. **SHOULD THE AUTHORITY ADVICE BROADCASTERS TO PUT THEIR COMMISSIONING DETAILS INCLUDING SCHEDULES ON THEIR WEBSITE, ADVERTISE FROM TIME TO TIME ON TELEVISION AND INFORM THE PRODUCERS' ORGANISATIONS ABOUT THOSE?**

3.31.1. The NFVF and SASFED are in favour of this proposed practice.

3.31.2. ODM also agrees with this proposal, and are of the view that this would be a good practice as it would enhance transparency.

3.31.3. The SABC disagrees with this suggestion. It argues that this should be left to the licensees as it may have financial implications for the licensees.

3.31.4. WOW submits that the Authority should grant broadcasters the liberty to decide on the method to be employed in communicating with independent producers.

3.32. **PLEASE MAKE SUGGESTION ON AN EFFICIENT MONITORING MECHANISM FOR COMPLIANCE WITH THE REGULATIONS ON COMMISSIONING.**

3.32.1. MNET submits that in order to ensure effective oversight and monitoring of the Regulations, there will need to be in place a system of annual reporting by the broadcasting service licensees on their terms of trade.

3.32.2. The NFVF submits that a monitoring mechanism in line with section 2(s)(i) of the EC Act would be ideal. Some of the indicators which the NFVF pointed out would effectively measure diversity in all its forms were:

3.32.2.1. total number of independent production commissions per year;

3.32.2.2. geographical spread of commissions in terms of percentage per broadcaster;

3.32.2.3. demographics of the independent production companies commissioned; and

3.32.2.4. amount spent in total and per broadcaster on local content from the independent production sector in relation to applicable quota per licence category per annum.

3.32.3. NFVF proposes that a penalty for non-compliance should be equivalent to the value of the commissioned programme.

3.32.4. ODM submits that the current monitoring mechanisms utilised by the Authority to monitor compliance should be supplemented to provide the required monitoring of broadcasters commissioning processes.

3.32.5. SASFED proposes the following:

3.32.5.1. the establishment of an active complaints and compliance office set up by the Authority;

3.32.5.2. the allocation of staff by the Authority to monitor the process;

3.32.5.3. a staff member of the Authority to act as an observer during contractual negotiations; and

3.32.5.4. setting up of an archive of contractual agreements reached by broadcasters on intellectual property as a means of transparency in the industry.

3.32.6. The SABC submits that the SA Television Content Regulations together with polices and procedures of individual broadcasters are sufficient mechanisms to monitor compliance.

3.32.7. WOW is of the view that commissioning policies should be in the form of guidelines instead of regulations.

3.33. **ANY SUGGESTIONS ON THE DRAFTING OF THESE REGULATIONS?**

3.33.1. MNET submits the following suggestions should be covered in the drafting of the regulations:

3.33.1.1. that broadcasting service licensees set out in the terms of trade their overall approach to, and the details of, the commissioning process;

3.33.1.2. a system of review to ensure effective oversight and monitoring of the application of the Code of Practice; and

3.33.1.3. dispute resolution mechanisms for the resolving of disputes that arise in respect of the provisions of the Code of Practice, rather than the terms of a specific commercial negotiation.

3.33.2. WOW proposes that the Authority initiate the drafting of guidelines, and not of regulations, based on intensive research and in view of world trends.

3.34. ARE THERE OTHER RELEVANT ISSUES THAT THE AUTHORITY NEED TO CONSIDER THAT ARE NOT RAISED IN THIS DOCUMENT?

3.34.1. ODM requests that the Authority, in assessing the impact of the current regulatory process on the various broadcasters, take into account that subscription broadcasters procure entire channels and not individual programming.

3.34.2. IPO recommends the following in its supplementary submission: (i) guidelines be issued by the Authority on commissioning practice and terms of trade in line with international best practices, (ii) new terms of trade with broadcasting service licensees, and (iii) a platform be created by the Authority where independent producers and broadcasters can engage in constructive dialogue.

3.34.3. The SABC suggests that the Authority should consider all relevant regulations and legislation that already govern production of content for a holistic view on commissioning requirements.

3.34.4. In its supplementary submission WOW proposes a distinct regulatory framework between the public service broadcaster and commercial broadcasters. The reasons advanced for such proposal is that the public service broadcaster is a public entity that is funded by taxpayers and exists to advance the national and public interest, whereas commercial service broadcasters are business corporations that are established with a unique vision to advance the interests of their shareholders. Due to the fact that commercial service broadcasters are privately owned entities, WOW argues that they should reserve full discretion over which programmes to commission, which production houses to work with, and the allocation of various rights associated with each production. It

recommends that the Authority should develop commissioning regulations which should be mandatory to the public broadcaster on the basis that its mandate is to serve public interest. It submits that these commissioning regulations should be adopted as a non-binding framework applicable to commercial service broadcasters.

3.35. **TELKOM MEDIA**

3.35.1. Telkom Media does not address the questions raised in the Discussion Document directly. Instead it addresses the questions generally without following the order as contained in the Discussion Document.

3.35.2. Telkom Media fully supports the objectives identified in the Discussion Document. It contends that the South African industry is out of step with international best practice. It argues that this has accordingly limited South Africa's ability to participate meaningfully in a multi-platform, globalised economy.

3.35.3. Telkom Media submits that the Television Content Regulations should provide that the independence of independent television production be measured, inter alia, in terms of whether or not the producer retains any intellectual property rights therein. It agrees that the South African Copyright Act has to be amended to do away with the exception vesting copyright in a person commissioning a cinematograph film instead of in the author of the work. This, argues Telkom Media, ought to be done to facilitate further exploitation of cinematograph films by parties other than commissioning broadcasters which generally do not exploit them effectively.

3.35.4. Telkom Media concurs with the findings of the report MHA Report that the issue of rights is central and crucial to this undertaking. It submits that there is a need for a commissioning work framework that fundamentally shifts the ownership model for underlying rights, distinguishing between

primary rights and secondary rights, and generally aligns the interests of broadcasters and producers.

3.35.5. Telkom Media suggests that the Authority's role should be to create and sustain the ecology within which broadcasters and producers deal with each other, rather than becoming involved in the details of commissioning practice. It proposes adoption of the UK model.

3.35.6. Telkom Media does not support the idea of standard commissioning policy. It proposes instead that licensees should have the ability to develop these individually to serve their individual interests, and enable distinctive relationships with producers.

SECTION C: FINDINGS AND RECOMMENDATIONS

4. INTRODUCTION

4.1. An analysis of the submissions made by the interested parties indicates that there is some level of agreement on the issues facing the broadcasting and independent production sector in South Africa. However, the degree with which the various parties agree on the issues at hand is influenced by the interests of the particular stakeholder. For instance, on issues that seemingly affect independent producers more than they do broadcasting licensees, the stakeholders representing the independent production sector seem to take a very strong stand towards regulation, whereas the broadcasting stakeholders lean towards self regulation or "light touch" regulation.

4.2 This document will be structured as follows:

4.2.1 matters of general concern;
4.2.2 matters that the Authority may competently address by regulations; and
4.2.3 matters that the Authority may not competently address by regulations.

4.3 MATTERS OF GENERAL CONCERN

4.3.1 We establish that the matters that follow below were generally of general concern among the independent producers and/or the broadcasting service licensees.

4.3.2 The IPO, SASFED and NFVF are of the view that the Authority is mandated to intervene in issues of terms of trade with broadcasting service licensees. They substantiated their position by reference to section 61(1) of the EC Act, and Regulation 7 of the Television Content Regulations. On the other hand, the broadcasting service licensees are of the view that whilst the Authority may be mandated to make regulations in terms of section 61(1) of the EC Act, it should be careful not to intervene in the commercial activities of broadcasters,

which would be impermissible in law. In general, the broadcasting service licensees are in favour of self regulation.

4.3.3 There was a common view between the IPO and SASFED that the commissioning practices employed by the SABC were unfair and restrictive. They further contended that whilst freedom to contract is an important element of a trade relationship between parties, the continued in-equality in the bargaining position of the independent producers as against the broadcasting service licensees results in unfair terms of trade for commissioning of local independently produced programming. As a result of the aforesaid, they submit that these unfair and restrictive practices could be best dealt with by the Authority through regulatory interventions in the form of guidelines on commissioning practices and new terms of trade. The broadcasting service licensees generally were of the view that the unfair and restrictive commissioning practices experienced by the independent producers were specifically common to the SABC, and therefore further supported the view that self regulation was working adequately.

4.3.4 With regard to the different methods of commissioning programming, IPO and SASFED identified co-production, licensing and pre-sale agreements as other commissioning methods that may be utilised. However, the general response received from broadcasting service licensees is that they are only aware of the commissioning methods as outlined in the Discussion Document.

4.3.5 There was consensus amongst the independent producer bodies that their independence as independent producers was compromised as broadcasting service licensees reduces them to *quasi* employees and removes control over the production from the independent producers.

4.3.6 There is also a general concern amongst the independent producers that the quality of commissioned programming that they can produce is often adversely impacted by the low production fee paid by the broadcasting service licensees. Micro-management and control in the production process were also factors specific to the SABC that were highlighted as impacting on the quality of programming produced. The broadcasting service licensees

raised lack of experience, funding, and facilities by the independent producers as factors affecting the quality of commissioned programming.

4.3.7 The independent producer bodies also highlighted the current exception to the ownership of copyright as a serious area of concern. They argued that copyright ownership should be assigned to the producer who will be entitled to exploit the commissioned work domestically beyond the broadcaster's rights to broadcast the commissioned programming locally, internationally as well as the ancillary rights on other platforms. They also argue for a distinction to be drawn between primary, secondary and tertiary rights in the terms of trade. The broadcasting service licensees on the other hand argued that the ownership of copyright in commissioned programming by them was legitimate as provided for in the exception to the general ownership of copyright, and did not think that the current regulatory framework in respect of copyright ownership should be amended.

4.3.8 There was consensus amongst both the broadcasting service licensees and the independent producers that the Preferential Procurement Policy was sufficient to ensure that the desired transformation is achieved in the industry, and as such, unnecessary for the Authority to further regulate transformation.

4.3.9 With regards to the suggestion by NFVF on penalties, the Authority is guided by section 17H of the ICASA Act of 2000 which sets limits on penalties that can be imposed for lack of compliance.

4.4 MATTERS THE AUTHORITY MAY NOT COMPETENTLY ADDRESS BY REGULATIONS

4.4.1 Having considered the submissions made by the participants and the legal and regulatory framework that applies to the Authority, the Authority concludes that it is not desirable or competent for it to deal with the matters set out below.

Broad Based Black Economic Empowerment (BBBEE)

4.4.2 The governing legislation for BBBEE is the Broad Based Black Economic Empowerment Act No 53 of 2003 ("BBBEE Act"). The objectives of this Act are to facilitate broad-based black economic empowerment[9].

4.4.3 The Authority is of the view that the BBBEE Act is adequate for the purposes of ensuring and implementing the transformation required in the broadcasting sector. To regulate further would therefore constitute duplication of regulation and also create an undue administrative burden on the industry.

Copyright and Intellectual Property

4.4.4 Whilst the Authority is the broadcasting regulator, the broadcasting industry is also influenced in other respects by policies and legislation administered by the DTI and CIPRO.

4.4.5 The Authority has noted the problem of full ownership of copyright that is brought about by the exception to the ownership of copyright in the Copyright Act. Considering that the position can be negotiated in contract, the Authority is of the view that any discontentment arising from the copyright laws should be brought to the attention of the DTI and CIPRO by the affected parties.

4.4.6 As the legislative landscape evolves, the Authority shall continue to monitor the developments of Copyright law especially regarding its implication on broadcasting policy.

Dispute Resolution

4.4.7 The Authority can also not interfere in the resolution of disputes between the parties to a commercial agreement. The parties are required to determine such disputes as provided for in their commercial agreements. The Authority

[9] Section 2, Broad Based Black Economic Empowerment Act No 53 of 2003.

shall only intervene as permitted by the EC Act where a broadcasting service licensee has breached any of its licence conditions or the provisions of the EC Act and other relevant laws.

4.4.8 The Authority does not have legislative powers to adjudicate disputes between parties arising from a commercial agreement.

Pricing and Commercial Negotiations

4.4.9 The EC Act provides that the Authority shall not unduly interfere with the commercial activities of the broadcasting licensees.[10] In light of this legislative restriction, the Authority shall not require that broadcasting licensees publicise their programming pricing on their websites, or interfere in commercial negotiations relating thereto.

4.4.10 The Authority is of the view that pricing should be left to the discretion of the broadcasting service licensees so as to promote competition. In addition, such a practice could be construed to amount to price fixing and thus an anticompetitive measure which is prohibited in terms of the Competition Act[11].

Access to Information

4.4.11 Access to information held by private or public bodies is governed in terms of the PAIA. In particular, Sections 11 and 50 of Chapter 1 provide for the process to be followed by any party wishing to acquire information from any public and private body respectively. It is therefore not necessary for the Authority to further regulate on these aspects.

4.4.12 With regards to the publicising of commissioning schedules, the broadcasting service licensees should have a discretion as to the medium of communication they prefer to use, as the imposition of any such a requirement would have cost implications for their businesses.

[10] Section 2(y), Electronic Communications Act No. 36 of 2005
[11] Section 4(1) (b) (i) Competition Act No 89 of 1998

4.5 MATTERS THAT THE AUTHORITY MAY COMPETENTLY ADDRESS BY REGULATIONS

4.5.1 The Authority has as one of its objects to regulate broadcasting in the public interest and to ensure fairness and diversity of views broadly representing South African society, as required by Section 192 of the Constitution[12]. It is the function of the Authority, among others, to exercise the powers and to perform the duties conferred and imposed upon it by the ICASA Act, the underlying statutes and any other law[13].

4.5.2 The Authority may make regulations on any matter consistent with the objects of the ICASA Act and the underlying statutes or that are incidental or necessary for the performance of the functions of the Authority[14].

4.5.3 One of the primary objects of the EC Act is, among others, to promote the development of public, commercial and community broadcasting services which are responsive to the needs of the public[15]. It is further one of the objects of the EC Act to refrain from undue interference in the commercial activities of licences while taking into account the electronic communication needs of the public[16].

4.5.4 In terms of the Television Content Regulations, public, commercial and subscription television licensees shall ensure that their terms of trade and commissioning procedures are, *inter alia*, fair, transparent and non discriminatory[17].

4.5.5 Therefore any intervention by the Authority through regulation will in broad terms be constrained by the parameters set out in 4.1 to 4.3 above.

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[12] Section 2 (a), ICASA Act
[13] Section 4(1)(a), ICASA Act
[14] Section 4(3)(j), ICASA Act
[15] Section 2(r), EC Act
[16] Section 2(y), EC Act
[17] Regulation 7.1, Television Content Regulations

5 RECOMMENDATIONS

5.1 It is apparent from the submissions made by the independent producers and the broadcasting service licensees that whilst certain aspects of commissioning of independently produced South African programme may be working efficiently, there are still areas of concern which may negate the essence of the obligation upon public, commercial and subscription broadcasting licensees to ensure that their terms of trade and commissioning procedures are, *inter alia*, fair, transparent and non discriminatory as contemplated in Regulation 7 of the Television Content Regulations[18].

5.2 Generally the Authority accepts that self regulation would be ideal. However, taking into account the prevailing practices and the submissions made by the various participants, the Authority is persuaded to make regulations to regulate the commissioning of independently produced South African programming as contemplated in Section 61(1) of the EC Act. These regulations will be complementary to Regulation 7 of the Television Content Regulations and will seek to give meaning to the concept of fair, transparent and non discriminatory commissioning practices as contemplated in that regulation. The regulations aforesaid will introduce the requirement for broadcasting service licensees to submit to the Authority for approval commissioning protocols in order to enable the Authority to monitor the commissioning practices of independently produced South African programming and to ensure that the same is conducted in a manner that is fair, transparent and non-discriminatory, without hampering the flexibility of broadcasting service licensees to deal with the pertinent commercial issues in any manner they deem appropriate.("**the Protocol**").

5.3 Approval in this case does not extend to substantive issues, but the focus is on ensuring that all minimum requirements set out in the regulations are filed as part of protocols. The Authority does not intend checking whether provisions submitted in commissioning protocols are correct or not, but simply to check

[18] Television content Regulations as published in Government Gazette No 28454, published on 31 January 2006.

whether those provisions are there or not and whether they detail the minimum information required or not. The Authority makes this finding, taking into account the varying licence conditions of the broadcasting service licensees, the provisions of the Television Content Regulations[19] and the limitations on its powers as contained in the EC Act[20] and the ICASA Act[21].

5.4 Confidential information submitted in commissioning protocols will be dealt with in accordance with section 4D of the ICASA Act 13 of 2000.

[19] Regulation 7, Television Content Regulations
[20] Section 2(y) EC Act
[21] Section 4(3)(j), ICASA Act