

GENERAL NOTICE

NOTICE 891 OF 2011



Independent Communications Authority of South Africa

Pinmill Farm, 164 Katherine Street, Sandton

Private Bag X10002, Sandton, 2146

ISSUES PAPER:

**A REVIEW OF THE BROADCASTING REGULATORY FRAMEWORK TOWARDS
A DIGITALLY CONVERGED ENVIRONMENT**

DECEMBER 2011

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

INVITATION FOR WRITTEN REPRESENTATIONS

In terms of Section 4B of the Independent Communications Authority of South Africa Act (Act No 13 of 2000), interested persons are hereby invited to submit their written representations on the **Issues Paper: A Review of the Broadcasting Regulatory Framework towards a Digitally Converged Environment** published herewith by the Authority. A copy of the proposed regulation will be made available on the Authority's website at <http://www.icasa.org.za> and in the ICASA Library at No. 164 Katherine Street, Pinmill Farm, (Ground Floor at Block D), SANDTON between 09h00 and 16h00, Monday to Friday only.

Written representations with regard to the Issues Paper must be submitted to the Authority by no later than 16h00 on 16 March 2012 by post, hand delivery or electronically (in Microsoft Word) and marked specifically Attention: Mr Collin Dimakatso Mashile. Delivery address: Block A, Pinmill Farm, 164 Katherine Street, Sandton. Where possible, written representations should also be e-mailed to: regulatoryreview@icasa.org.za or by facsimile: 011 566-3672/3802 or by telephone: 011 566-3671/3801; between 10h00 and 16h00, Monday to Friday only.

The Authority will hold its public hearings from 26-30 March 2012.

Written representation(s) received by ICASA pursuant to this notice, will be made available for inspection by interested persons at the ICASA library and such copies will be obtainable upon payment of the prescribed fee.

At the request of any person who submits written representations pursuant to this notice, ICASA may determine that such representations or any portion thereof is to be treated as confidential in terms of section 4D of the ICASA Act. Where the request for confidentiality is refused, the person who made the request will be allowed to withdraw such representations or portion(s) thereof.

Persons submitting written representations are further invited to indicate, as part of their submissions, whether they require an opportunity to make oral representations.

A handwritten signature in black ink, consisting of several overlapping loops and strokes, positioned above a dotted line.

DR STEPHEN MNCUBE
CHAIRPERSON

DATE: 29/11/2011

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1. EXECUTIVE SUMMARY

The Independent Communication Authority of South Africa, hereafter referred to as the Authority, carries out its regulatory policy making function in a broadcasting environment undergoing far-reaching change: it is an entirely digital environment, it is both linear and non-linear, access is free or for a charge, and all communications platforms now offer broadcasting content. It is necessary to review previous regulations governing the broadcasting industry so as to take into account these new technological, cultural, economic and social challenges.

The need to review analogue regulatory regimes as a result of the transition to digital terrestrial television broadcasting has been recognised by various policy and regulatory authorities, such as Australia, Canada, United Kingdom and New Zealand. The authorities engaged in various public processes to adapt their existing regulatory frameworks to the new market structures and dynamics of the broadcasting industry in order to achieve their respective public policy goals.

The switch-over of broadcasting from analogue terrestrial television to digital terrestrial television is scheduled to take place in 2013.

There have been two prior reviews of the regulatory landscape, The Triple Inquiry Report (1996) and The Broadcasting Act (1999), but these both took place in the analogue transmission era.

The overall objective is to ensure that regulatory framework for broadcasting services promotes the development of public, commercial and community broadcasting services which, in the context of digital convergence and migration, are responsive to the needs of the public, which promote a plurality of news, views and information and provide a wide range of entertainment and educational programmes, a proportion of which are locally produced; and provide legal and investor certainty.

This will be achieved through the strategic review and assessment of the future needs of the broadcasting regulatory framework in South Africa. The current analogue technology-based regulatory framework for broadcasting does not fit with the reality of the continued rise of digital technology and the expected influx of competing media services on the next generation networks or platforms which are not subject to the same regulatory obligations imposed on current broadcasting services licensees.

The Authority's Issues Paper first explores the context and guiding regulatory principles for the review of the broadcasting sector regulatory framework, and then outlines the legislative background and overview of ICASA regulatory mandate.

It highlights the digitally converged regulatory frameworks in international jurisdictions. In dealing with the challenges facing the current South African regulatory frameworks, specific regulatory questions are raised for consideration by all stakeholders. The paper raises general regulatory policy issues for further comment before dealing with conclusions and consolidating all consultation questions.

From January to March 2012 the Authority will engage the relevant stakeholders and the public in a comprehensive Provincial consultative process.

The Issues Paper reflects a neutral discussion of critical regulatory frameworks moving into the digitally converged environment. At this early stage of the review process, the Authority will not draw any conclusions.

2. PART A: INTRODUCTION AND PURPOSE

2.1 INTRODUCTION

2.1.1 The Republic of South Africa will be embarking on important changes in the broadcasting sector during next five (5) to ten (10) years. The primary change is the envisaged migration from analogue broadcasting transmission system towards the introduction of digital terrestrial television broadcasting.

2.1.2 The migration to digital broadcasting will not only affect the provision of broadcasting services, but the existing regulation concerning broadcasting services operating in this environment.

2.1.3 In 2008, the Ministry of Communication issued Broadcasting Digital Migration Policy Directive (Government Gazette No: 31408), to the Independent Communications Authority of South Africa (ICASA), herein referred to as "the Authority". This Directive advanced a wide range of regulatory policy views relevant to how the Authority should regulate the broadcasting sector during the digital migration era, providing, amongst other things:

2.1.3.1 that the "must carry" arrangements, which require broadcasting services to carry certain public services, continue in the new digital environment, fulfilling the important aspect of providing public broadcasting services to all citizens; the Authority should ensure that universal access to public broadcasting services is sought to be achieved and the "must carry" requirements must be retained;

2.1.3.2 competition should be promoted within the limits of the available spectrum in order to ensure a smooth migration to digital broadcasting in the country and

to provide a multiplicity of sustainable services to benefit both the public and broadcasters;

- 2.1.3.3 the migration to digital broadcasting will create opportunities for the development, use and wide dissemination of local content in all eleven (11) official languages. It will also advance the expression and the efficient communication of the knowledge and experience of all communities and the country as a whole. It could contribute to the integration of people from different ethnic or racial backgrounds thus contributing to nation building;
- 2.1.3.4 although coverage limitations will be overcome in the digital environment, access to public broadcasting services by all South Africans, regardless of their economic status, remains a fundamental principle that should not be diluted by the digital migration process;
- 2.1.3.5 closed captioning is embedded in the television signal and becomes visible when a special decoder is used. The South African decoder will, as a matter of policy, enable viewers to see captions which assist them to read what is being said in that particular programme. Captioning is helpful in the following ways: to assist hearing-impaired television viewers; to assist in noisy environments; and to follow programming which is in a different language. Captioning services are therefore essential for addressing the needs of many people, especially those with hearing disabilities;
- 2.1.3.6 the traditional model for South African content regulation is based on minimum percentages and took into account factors which applied in a single channel analogue environment. Given the new digital broadcasting era, these content quotas shall be reviewed to embrace the new digital regime. The Authority shall, in the near future, review and develop appropriate local content regulations which will be relevant to the multi-channel digital environment; the manner in which requirements are imposed in relation to minimum levels of South African content is suited to a single channel analogue environment and the Authority should review the existing content quotas to reflect the multi-channel digital environment;

2.1.3.7 the development of Creative Industries will provide an opportunity for the coverage of South African stories, entertainment and cultures in multi-channel digital broadcasting, thus contributing towards building national identity and social cohesion, further providing an African perspective of South Africa as an integral part of the African continent.

2.1.4 The Cabinet decision in December 2010, later re-confirmed by the Ministry of Communications, stated that all transmission in analogue mode will cease by end of December 2013. Practically, this means the digital mode of transmission will be the sole means to broadcast programmes on terrestrial frequencies from January 2014. Beyond 2013 the regulatory framework for the broadcasting sector will have to be quite different and relevant to the digital era.

2.1.5 The Authority is now embarking on a regulatory review process of all existing analogue based regulatory frameworks, passed since 1994, to establish a new comprehensive regulatory framework for the broadcast sector, as South Africa enters a digital environment.¹

2.1.6 The objective of this regulatory review Issues Paper is to engage in a public consultation process which would assist the Authority in reviewing the existing regulatory framework to ensure effective and efficient regulatory policy beyond migration period. The aim is to engage with the relevant stakeholders to find the best ways of embracing the digital broadcasting environment and deliver viable regulatory framework that:

2.1.6.1 guarantees the public interest protection;

2.1.6.2 supports, amongst other things, social development, economic growth and job creations, whilst at the same time doing justice to cultural aspects;

¹ The Ministry of Communication Broadcasting Digital Migration Policy Directive (Government Gazette No: 31408), 08 September 2008

- 2.1.6.3 encourage the development of the community, commercial and public broadcasting, against the background of the digital and technological convergence of services, networks and devices; and
 - 2.1.6.4 contribute to the integration of people from different cultural or racial backgrounds thus contributing towards nation building, moral regeneration and social cohesion.
- 2.1.7 In undertaking the review, the Authority will consider the current regulatory policy and legislation relating to the broadcasting sector. It will also consider current international best practice and anticipated new regulatory policy trends in regulating the digital broadcasting sector over the next three to five years.

2.2 SCOPE

- 2.2.1 The proposed regulatory review and its outcomes will affect all licensed broadcasting services in South Africa.
- 2.2.2 This Issues Paper looks at the current regulatory frameworks applicable to the broadcasting sector, seeks answers to identified questions and ensures the introduction of a new regulatory framework that supports the development of broadcasting services in the digital era.
- 2.2.3 The review process is not prompted by a failure in the broadcasting sector, but by the need for better broadcasting regulatory frameworks that is technological-neutral, more robust and predictable.
- 2.2.4 Nothing in this Issues Paper is intended to indicate a preference by the Authority for any particular outcome or regulatory approach, to cover the new digital broadcast environment, scheduled to commence at least after 31 December 2013 or the latest after 30 June 2015.

2.2.5 The paper is divided into the following sections:

- 2.2.5.1 Part A is the Introduction and establishes the context and guiding regulatory principles for the review of the broadcasting sector regulatory framework, as well as the related regulatory review initiatives;**
- 2.2.5.2 Part B sets the legislative background and overview of ICASA regulatory mandate;**
- 2.2.5.3 Part C highlights newly introduced regulatory frameworks for broadcasting services in the multi-channel/platform environment in international jurisdictions;**
- 2.2.5.4 Part D deals with the challenges facing the current South African regulatory frameworks and raises questions for consideration by all stakeholders going into the digital environment;**
- 2.2.5.5 Part E deals with the general issues for further comment;**
- 2.2.5.6 Part F deals with conclusions and next steps, and explores ancillary issues that have an impact on the efficacy of the review of the regulatory frameworks for the broadcasting sector, including the timing of the review and implementation arrangements after the conclusion of this review process.**
- 2.2.5.7 Part G consolidates all Consultation Questions**
- 2.2.5.8 Part H outlines Annexes**

2.3 METHODOLOGY

- 2.3.1 The review began by identifying areas where the current regulatory framework does not meet the current broadcasting regulatory policy goals.**
- 2.3.2 The Authority engaged in a desk-top research, which involved Internet research, literature review, documentation analysis and correspondence with relevant authorities and stakeholder organisations. Information was also sourced from**

various Governments and regulatory authority's web sites, academic works and public documents.

2.3.3 The Authority will engage in effective consultation with provinces, community based organisations, consumers, industry, non-government organisations, academics and researchers, and relevant government departments and agencies before holding final public hearings.

2.3.4 Subsequent to the public hearings, the Authority will analyse the issues and provide regulatory roadmap for the future.

2.4 PURPOSE OF THIS ISSUES PAPER

2.4.1 The Issues Paper is intended to:

- 2.4.1.1 address various regulatory concerns raised by the South African public and industry over the last number of years;
- 2.4.1.2 assess the continued viability and regulation of public, commercial and community broadcasters;
- 2.4.1.3 assess how to balance consumer access to public interest content (e.g. sports of national interest) while fostering and promoting competition within the broadcast environment;
- 2.4.1.4 assess what is required with regards to the promotion of broadcasting quota system and the production and distribution of independent South African programmes;
- 2.4.1.5 assess how the review process should recommend new norms for commercial interactions that confirm the ability of broadcast market participants to negotiate fairly for rights;
- 2.4.1.6 assess how to continue promoting the cultural diversity objective, through quota-type mechanisms, and ensure that they are still relevant in the digital broadcast environment;

- 2.4.1.7 assess the operation of statutory regulations, self-regulation and co-regulation in the broadcasting sector, and how/whether they have, individually or collectively, delivered effective consumer protection;
 - 2.4.1.8 debate whether the scope of the existing Broadcast regulation should be extended to cover also non-licensed new broadcasting services;
 - 2.4.1.9 examine the role of the Authority in ensuring diversity and success of new programming formats on the digital platforms;
 - 2.4.1.10 inform the Authority's periodic review processes and identify eliminate outdated regulations that unnecessarily burden market, stifle investment and innovation, or no longer serve the public interest/consumers and licensees;
 - 2.4.1.11 revisit the Authority's current regulatory framework to see how it can be adjusted to take into account the digital environment;
 - 2.4.1.12 re-examine, revisit and improve Authority's current broadcasting related regulations to factor in the new multi-platform environment through which broadcast content and programming is distributed.
- 2.4.2 A central issue for the Authority and the relevant stakeholders is the appropriate regulatory framework in the current technological environment, where there is greatly increased consumer choice and a proliferation of distribution technologies for online content that does not come under the direct jurisdiction of the Authority.

Issue(s) for stakeholder consideration:

Issue 1: Do you agree with the Part A views? Please elaborate.

3 PART B: LEGISLATIVE BACKGROUND AND OVERVIEW OF ICASA REGULATORY MANDATE

The aim of this section is to provide a legislative background to the review and deal with other interrelated regulatory functions.

3.1 LEGISLATIVE BASIS FOR THE REGULATORY REVIEW

3.1.1 The broadcasting sector in South Africa is based upon a three tier system made up of "public", "commercial" and "community" broadcasting services.

3.1.2 The necessity of a broadcasting regulator is recognized and entrenched in section 192 of the Constitution of the Republic.

3.1.3 The Broadcasting Sector in South Africa is regulated by the Authority, which is the focal point of contact for economic and social regulation of broadcasting, electronic communications and postal sectors; in the Republic.

3.1.4 From the time of the transition to democracy broadcasting was regulated in terms of the Independent Broadcasting Authority Act of 1993 (the IBA Act) and the Broadcasting Act of 1999 (the Broadcasting Act). When the Electronic Communications Act (ECA), no 36 of 2005, came into force, it repealed the IBA Act in its entirety and also repealed the Broadcasting Act to a greater extent.

3.1.5 Essentially the Broadcasting Act became a statute which regulates the public broadcaster and, although there are currently other provisions which are applicable to the broadcasting sector as a whole. Chapter 9 of the ECA generally deals with the regulation of broadcasting services, essentially replicating some of the provisions in the IBA Act.

3.1.6 The core activities of the Authority focuses on:-

- 3.1.6.1** implementing of broadcast legislation and administering the broadcasting sector;
- 3.1.6.2** monitoring whether broadcasters are fulfilling their legal obligations and to impose sanctions if they fail to carry out those obligations;
- 3.1.6.3** awarding of broadcast licences;
- 3.1.6.4** developing, prescribing and reviewing code of conduct according to which complaints would be dealt with by a Complaints and Compliance Committee (CCC) and where justified, advises the Authority's Council which sanction to impose to protect audiences; and
- 3.1.6.5** promoting investment and universal access to modern global digital convergence networks and services.

3.2 INTER-RELATED REGULATORY FUNCTIONS

- 3.2.1** The current regulation of the broadcasting industry takes the approach of co-regulation combining self-regulation with legislation, much of which dates back from significant reforms undertaken since 1993.
- 3.2.2** Broadcasters have the option of either adhering to a code developed by the Authority or abiding by their own code administered by the Broadcasting Complaints Commission of South Africa (BCCSA). The public and commercial broadcasters have opted for self-regulation under the auspices of the BCCSA. Most community broadcasters have chosen to be regulated by the Authority as they do not have to make any financial contribution to its everyday operation. The Authority works with various stakeholders to develop regulations and codes of practice relating to the broadcasting sector.
- 3.2.3** The Advertising Standards Authority of South Africa (ASA), an independent body set up and funded by the marketing communications industry, oversees a self-

regulatory approach to advertising to protect consumers against manipulative advertising and unfair claims. The ASA cooperates with government, statutory bodies, consumer organisations and industry to ensure that advertising content complies with the Code of Advertising Practice.

- 3.2.4 The Authority has no interrelated legislated mandate with the Films and Publications Board (FPB). However, both institutions have a similar role in restricting and permitting content that can be viewed across various content distribution platforms. There is always the possibility that both institutions can share best mechanisms of how to better protect the public from offensive content. Moving forward it is proposed that the Authority should consider forging closer relations with FPB, since the Authority's code of conduct regulations speak of FPB classification role in the content regulation.

4 PART C: INTERNATIONAL JURISDICTIONS

4.1 THE NEED FOR REGULATORY REVIEW

- 4.1.1 The phenomenon of convergence, digitisation of platforms and the emergence of new communications networks and services has prompted regulatory policy change “in light of dramatic changes in communications technology, market structures, and the needs of a democratic society” (PIAC, 1998).
- 4.1.2 Academics, policy makers and regulatory authorities across the globe are assessing new policy actions that would help them redefine, fine-tune and restructure their evolving regulatory frameworks affecting the broadcasting sector. This is mainly within a wider context of national, regional and international approaches and responses.
- 4.1.3 It has been argued that “the market for television services has been subject to radical changes through the convergence of technologies and markets, where traditional TV broadcast services are still regulated on the basis of specific bottleneck, access and content oriented measures; and that this approach to regulation is no longer appropriate in a [digitally converged] world” (Karantanis, 2009). Furthermore, “regulators and policy makers are starting to realise that they need to engage with both industry and consumers not only to understand the changes in markets and social behaviour brought about by digital convergence, but also to respond to them in the most appropriate and effective manner” (Ariño, 2008).
- 4.1.4 Moving forward, it has been suggested that current regulatory models should be more flexible and “... involve taking a more active role in orchestrating industry self-regulation and consumer engagement [which tends to] prove superior in a context of rapid market developments” (Ariño, 2008).

- 4.1.5 Regulators today are faced with the challenge of “how broadcasting firms and markets should be organized to promote economic efficiencies and encourage a variety and plurality in programs... [as] competition policy alone does not guarantee achievement of the basic social objectives for the broadcast industry such as maintaining a pluralism of views or providing greater variety in programs”. A further submission is that “given that broadcast companies are social, cultural, economic, and political institutions, they need to be examined in that context” (Picard and Chon, 2004).
- 4.1.6 In the coming years our broadcasting systems need regulation that is enforced to the benefit of [the entire broadcasting sector], and that regulators should ensure that access for the visually - or hearing-impaired consumers to broadcasting systems is improved, rather than diminished (Milligan, 2009).
- 4.1.7 The need to revamp regulatory regimes as a result of the transition to digital broadcast has been recognized in various regions around the globe, more so in Northern America, Asia-Pacific and the European Union (EU), which have all engaged in a regulatory reform exercise, where they revisited their content regulations in light of new technological developments and changed industry landscape.
- 4.1.8 The UK Government is currently undertaking a wide-scale review of the regulatory regime framework supporting the communications sector. The review solicits views on how a communications regulatory regime can best keep pace with change, and establishes UK communications and media markets as amongst the most dynamic and successful in the world.

4.1.9 Japan acknowledged that their current analogue technology-based vertical structure and regulatory framework for broadcasting would not only inhibit the various changes, but also not fit with the reality of the continuing rise of digital technology and the IP (Internet Protocol) network. There was a need to achieve the promotion of fair competition and the strengthening of the protection of rights in the content/platform layers. These changes were first recognised in 2001, in order to make information technology (IT) a locomotive for Japan's economic revitalisation.

4.1.10 The Authority conducted its benchmark study in these countries. The regulatory policy approach in these countries is similar to that of the Authority as cultural, economic and social policy is also incorporated into their broadcasting laws that govern their broadcasting regulatory framework.

4.2 SPECIFIC COUNTRY CASE STUDIES

4.2.1 AUSTRALIA

4.2.1.1 The regulatory framework in Australia is such that radio and television are subject to a system of co/self-regulation involving broadcasters, relevant industries and the Australian Communications and Media Authority (ACMA) to ensure industry compliance with licence conditions, codes and standards. ACMA is a statutory body under the authority of the Department of Broadband, Communications and the Digital Economy within the Federal Government (DBCDE).

4.2.1.2 The ACMA carries out a range of functions under the Broadcasting Services Act 1992 and is responsible for the regulation of broadcasting sector, the internet, telecommunications and mobile devices. Australia has adopted a converged content regulation framework with statutory responsibility for

broadcasting and co-regulatory systems in place for Internet and mobile-delivered content.

- 4.2.1.3 The Australian Communications Legislation Amendment (Content Services) Act 2007 extends content regulation to live streamed internet content devices and services that provide links to content. It is also grounded in a technically complex legislative and regulatory landscape that developed as new technologies and content services came into being.
- 4.2.1.4 In 2011 the Australian Government called for submissions on terms of reference for a convergence review to take a fresh look at Australia's existing regulatory frameworks with a view to updating the framework in light of technological and market changes, including an assessment of:
- (a) the role of the regulator (the ACMA) and the views and expectations of Australian citizens;
 - (b) how to implement a transparent regulatory framework that will encourage investment in the Digital Economy; and
 - (c) whether content does not become the new competition battleground where bottlenecks and walled gardens are emerging in a converging environment.
- 4.2.1.5 This review was seen as implying platform-specific regulatory approach, rather than the regulation of particular distribution paths, where the new regulatory frameworks should not reflect a passive twentieth-century regulatory model for content, but take the opportunity to broaden the definition of Australian content (Ericsson, 2011).
- 4.2.1.6 There was also criticism that the review failed to address key issues (such as the concentration of media ownership and competition issues); "tip-toes" around significant issues such as the extended erosion of diversity in the Australia media market; is too fragmented and does not go far enough; avoids

the controversial topic of sporting rights – as the anti-siphoning list for sports was reviewed in 2010; the scope is narrowed to delivery media and content issues; and not to the regulatory environment for data and voice telephone services (Crawford and Lumby, 2011).

- 4.2.1.7 It was further stated that the Review should consider the recommendations of the Australian Law Reform Commission (ALRC), which is reviewing the Australian content of audience National Classification System to address emerging technologies and see how these two processes will inform each other where possible.
- 4.2.1.8 The above makes it clear that Australia has started addressing the same issues the Authority is looking at, for example, what are potentially contentious areas of regulation of broadcasting services where the existing free-to-air and pay television services are facing new TV-like services such as IPTV, internet TV and video on demand, all of which emerging services compete with traditional free-to-air and pay TV services for viewers; and what should be the treatment of advertising controls, programming classification and Australian content obligations that are directed to "the development of national and cultural identity". It is expected that the existing players will argue for positions that achieve a 'level' regulatory playing field across the different media technologies that can deliver TV or TV-like services.
- 4.2.1.9 The other encouraging point is that the Australian Government, just like the South African counterpart, has recognized the need to develop a coherent approach to the regulation of content which can be delivered over a variety of different platforms; especially digital content and the safety of that content. Australia has noted that the practical issues surrounding regulation of digital content suggests that a self-regulatory approach would be the most appropriate response.

- 4.2.1.10 In August 2011, the ACMA released a consultation paper on the review of the privacy guidelines for broadcasters, to assist broadcasters to better understand their obligations relating to privacy as set out in the various broadcasting industry codes of practice. In reviewing the guidelines, the ACMA considered the relevant provisions of the broadcasting codes of practice, which are in line with the law establishing a co-regulatory scheme that allows the commercial, subscription and community sections of the broadcasting industry to develop codes of practice and submit those codes to the ACMA for registration. Before registering a code, the ACMA must be satisfied that the code provides appropriate community safeguards for the matters that it covers. The code must be endorsed by a majority of providers of broadcasting services in that section of the industry and members of the public should be given an adequate opportunity to comment.
- 4.2.1.11 The co-regulatory scheme gives broadcasters an opportunity to respond to any complaints that citizens might have about non-compliance with codes of practice. Where citizens are dissatisfied with the broadcaster response, they may complain to the ACMA, which will then investigate the matter. The ACMA research into community attitudes to broadcasting and media privacy that arise in broadcast news and current affairs programs and radio competitions confirmed that the ACMA's approach to the codes (as reflected in the draft revised guidelines) is in step with current community attitudes.
- 4.2.1.12 In 2008, the Australian Senate Standing Committees on Environment, Communications and the Arts also engaged in an inquiry and an examination into the effectiveness of the broadcasting codes of practice operating within the radio and television industry, with particular reference to the frequency and use of coarse and foul language (swearing) in programs; the effectiveness of the current classification standards as an accurate reflection of the content contained in the program; the operation and effectiveness of the complaints process currently available to members of the public; and any

other related matters. The Committee indicated that because ACMA has a responsibility to conduct and commission research into community attitudes on issues relating to programs and datacasting content; [and] to assist broadcasting service providers to develop codes of practice that, as far as possible, are in accordance with community standards.

- 4.2.1.13 Another Senate Inquiry examined the effectiveness of the regulation of advertising standards and existing complaints mechanisms, particularly the performance of the Advertising Standards Board complaints system as an indicator of the effectiveness of advertising regulation. The Senate Inquiry noted that Australia has a variety of regulatory systems and this makes it difficult and complex to make complaints; resulting in low numbers of complaints, which mean that they do not adequately or accurately reflect prevailing community standards or concerns (Statham, Mooney, and Phoenix, 2011).

4.2.2 CANADA

- 4.2.2.1 In 2007, the Canadian Radio-television and Telecommunications Commission (CRTC) commissioned a report to conduct a comprehensive review of the existing regulatory framework for broadcasting services in Canada. The Canadian Broadcasting Corporation's (CBC), equivalent of the SABC, special mandate was specifically noted and stated to be beyond the scope of this review.
- 4.2.2.2 The objective of the review was to assess the effectiveness of the existing regulatory and policy framework in meeting Canadians' requirements for broadcasting services, and to recommend ways in which these requirements can be better served, with either more efficient regulation or with less regulation. The study was required to make recommendations to maximize

the reliance on market forces, always keeping in mind the overriding twin objectives of Canadian content and access to the system.

4.2.2.3 The report reviewed the CRTC's policies and regulations with respect to broadcasting, and with a detailed understanding of the industry and market conditions; and stated the following:

- (a) regulation will still remain pervasive even in areas where undertakings compete: Examples include: limits on market entry; regulated formats; restrictions on advertising; genre protection; restrictions on program content; restrictions on program production; and restrictions on program distribution and marketing;
- (b) questioned the need for genre protection between Canadian services and recommended that the CRTC stop enforcing genre protection among Canadian programming services, unless there is reason to believe that competition in respect of specific genres would not advance the policy objectives in s. 3(1) of the Act;
- (c) recommended that the Commission reassess the current advertising restrictions that apply to various classes of television services, in light of the realities of the market and new trends in narrowcast advertising, and consider whether the existing restrictions limit the revenues available to the broadcasting system. It should then consider the feasibility of removing the restrictions and allowing broadcasting undertakings to decide how best to offer their services to the public - whether through an advertising-based model, a subscription service, or on a transactional basis;
- (d) recommended that the Commission study the pros and cons of reducing the requirements on broadcasting undertakings to use high percentages of independently produced programming. This review should include consideration of economies of scale and scope in production, rights management issues, and incentives to maximize

returns from Canadian programming. At the same time, the Commission should consider rationalizing the independent production requirements of different classes of television undertakings and, in the absence of clear regulatory distinctions, impose common obligations on these services. It was also recommended that this be done in a staged manner and that following any such reduction or rationalization, the CRTC should carefully monitor the impact of the changes on Canadian content production and independent producers;

- (e) noted that market forces should have a role to play in determining the value of the service being carried. However, the Commission should be prepared to engage in a dispute settlement or adjudicative role when there is an inequality in bargaining power on either side; favouring strengthened anti-discrimination provisions and increased enforcement powers to deal with these types of disputes.

4.2.2.4 In 2008 the CRTC issued Broadcasting Notice of Public Hearing where it initiated a proceeding to consider issues pertaining to Canadian broadcasting in new media. The CRTC considers broadcasting in new media to be the distribution of audio or video content over new technologies such as the Internet or mobile devices. In 1999, the CRTC had exempted broadcasting delivered or accessed over the Internet from regulation due to its limited impact on traditional radio and television and its finding that regulation was not necessary to achieve the objectives of the Broadcasting Act. More recently, it had similarly exempted broadcasting over mobile devices.

4.2.2.5 The CRTC asked interested parties to respond to questions and to provide comments, with rationale and supporting evidence, on the following matters: the definition of broadcasting in new media; the significance of broadcasting in new media and its impact on the Canadian broadcasting system; whether incentives or regulatory measures are necessary or desirable for the creation and promotion of Canadian broadcasting content in new media, including

consideration of the potential requirement for direct financial contribution from content aggregators, ISPs and portal operators; if there are issues concerning access to broadcasting content in new media; what other broadcasting or public policy objectives should be considered; and the appropriateness of exemption orders for the new media broadcasting undertakings and mobile television broadcasting undertakings. Comments were filed on December 5, 2008 and a public hearing concluded on March 11, 2009.

- 4.2.2.6 The CRTC considered the circumstances that led to the need for regulation of Canadian content in traditional broadcasting, as they do not currently exist in the Internet environment. It believed that market forces were providing a Canadian presence on the Internet that was also supported by a strong demand for Canadian new media content. If Canadian content on the Internet diminishes, is under threat, or disappears altogether, the CRTC maintains the power to intervene and regulate to support the production/creation of Canadian Internet content.
- 4.2.2.7 The Standing Committee on Canadian Heritage decided to undertake a study on the state of the Canadian broadcasting system and how successful it has been in meeting the objectives of the Broadcasting Act of 1991. As with previous studies by this Committee, the issues of Canadian content and cultural diversity were central in the study of broadcasting. The Standing Committee identified two major subject areas; the present state of the Canadian broadcasting system, and the future directions for the Canadian broadcasting system.
- 4.2.2.8 The Authority is interested in your responses to the adapted questions posed below²:

² Adapted from the questions posed by the Standing Committee on Canadian Heritage to the Canadian stakeholders.

- (a) Is the method of determining local content requirements still appropriate and viable in promoting distinctively South African programming for the digitally converged environment?
- (b) In light of recent trends, how can the regulatory framework for local content maintain and promote a distinctive and diverse sense of local, provincial, national cultural identity?
- (c) Will globalization and technological change, especially the growing importance of the borderless Internet, undermine current ownership restrictions in broadcasting?
- (d) How has growing concentration and cross media ownership affected broadcasting?
- (e) Should South African broadcasting companies be allowed to form alliances with foreign firms if size becomes a requirement for survival in the broadcasting market?

4.2.2.9 According to von Finckenstein (2011) there is a need for a conceptual rethink of the whole Canadian regulatory system, related to the following questions:

- (a) Is the present CRTC model the best for Canada?
- (b) Should the powers of ex ante regulation be curtailed, while ex post powers of enforcement are increased? The aim should be to favour competition, with intervention limited to cases of market failure.
- (c) Should the relationship between the CRTC and the Competition Bureau be more clearly defined?
- (d) What about the CRTC and the Copyright Board? This question is also key to the Authority's current review, which is related to commissioning of programmes and ownership of rights.

EUROPEAN UNION (EU)

4.2.3 THE EUROPEAN UNION (EU) GENERAL VIEW

- 4.2.3.1 During the analogue era, the **European Union (EU)** adopted the Television Without Frontiers (TWF) Directive in 1989, which was applying to television broadcasting across EU. This Directive also contributed to the fulfilment of wider complementary cultural, social, and economic aims while contributing to the protection of fundamental human rights and pluralism.
- 4.2.3.2 In 2003 EU realised that convergence had raised serious questions, amongst other things, on the effectiveness of the TWF Directive in protecting consumers, stimulating the competitiveness of the European audio-visual industry and levelling playing field.
- 4.2.3.3 It is within the above context that the EU decided, amongst other things, to review the TVWF Directive, including more flexibility in relation to advertising and an update of the definitions, to make sure that all services similar to television are covered by the revised directive; and the establishment of a comprehensive framework for any form of electronic delivery of audio-visual content. The majority of experts consulted supported the more comprehensive approach applicable to all audio-visual content services and the following public policy objectives: protection of minors and human dignity; identification of commercial communications; minimum qualitative obligations regarding commercial communication; right of reply; maintaining and developing media pluralism crucial for the democratic process; ensuring that broadcasters reserve a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping, for European works; and cultural diversity.

- 4.2.3.4 The new directive, the Audio-Visual Media Service Directive (AVMS Directive) was approved by the European Parliament in November 2007. The AVMS, which came into force on 19 December 2007, replaced the TWFD that was operational since 1997, provided for a set of rules for Europe's audio-visual industry that covers all audio-visual media services – traditional, as well as online and on-demand audio-visual content. The AVMS Directive rebooted EU rules on traditional TV broadcasting for the digital age, and the EU countries had until 19 December 2009 to turn the modernised rules for Europe's audio-visual industry into national law.
- 4.2.3.5 One of the most important changes from the TWF Directive is that the AVMS Directive no longer differentiates between services based on distribution platforms (cable, mobile, internet, etc.). This platform-neutral approach allows traditional broadcasting services (that were regulated, e.g. with respect to advertising) to compete with similar services on the internet (that were not regulated). This level playing field objective is linked to the objective of consumer protection. Because different platforms can support the same type of services, it did not make sense to the Commission to only protect consumers that use traditional platforms.
- 4.2.3.6 The Directive ensured that the distinctive feature to determine the rules that apply to audio-visual media services, is whether the service is considered linear (traditional scheduled television broadcast services) or non-linear (on-demand services). The Directive ensures that linear services are regulated more strictly than non-linear services, and also defined a minimal set of qualitative rules that are applicable to both linear and non-linear services. This was expected to provide a basic level of consumer protection; with additional (quantitative) rules for linear services, e.g. with respect to advertising and European content/products.

- 4.2.3.7 Furthermore, the AVMS Directive loosened the rules for specific types of advertising such as product placement; where because product placement would be allowed (with certain restrictions) audio-visual media service providers then it would increase product placement revenues, to compensate for declining revenues from spot-advertising (commercial breaks between programmes and within programmes). The other issue related to the issue that editorial independence and responsibility should not be compromised by commercial interests.
- 4.2.3.8 The lessons that the Authority learnt from this analysis is that the TVWF Directive, like most of the Authority's regulatory frameworks, stipulated that television channels (public and private) are subject to a certain number of rules relating to the content of programmes in terms of, for instance, the protection of minors, advertising, sponsorship and promotion of European works. Like the South African situation, the development of DTV and new interactive audio-visual services raised the question of whether the current scope of the current analogue based regulations for the broadcasting sector are still adequate.

EUROPEAN UNION SPECIFIC COUNTRIES CASE STUDIES

4.2.4 FRANCE³

- 4.2.4.1 In France, the French's Conseil supérieur de l'audiovisuel (CSA) 2010 Annual Report states that CSA's regulatory frameworks:
- (a) have adapted to the rapid shifts in the new broadcasting environment;
 - (b) have taken into account new technological and economical challenges, as well as the industry's, and the public's, expectations; and

³ Largely drawn from Conseil supérieur de l'audiovisuel 2010 Annual Report.

(c) takes place in a new entirely broadcasting environment, both linear and non-linear, where access is free or for a charge, and all media now offer broadcasting content.

- 4.2.4.2 Similar to the Authority, the CSA pays special attention to ensuring that the digital switch-over guarantees minimum digital terrestrial television coverage in each and every French region. This is intended to ensure that the process does not create any divide, and combats any geographical divide caused by social circumstances.
- 4.2.4.3 In 2007, the CSA faced a situation where digital terrestrial radio, like in South Africa, could not join in broadcasting's digital switch-over. The CSA engaged operators, regarding digital radio implementation, and managed to address the financial and technical issues as a prerequisite to issuing licenses. This is similar to CSA's previous decision, which reviewed several policies to help operators reach financial stability.
- 4.2.4.4 In anticipation of the possible developments and the future of a fully digital broadcasting world, the CSA opened a public consultation in 2009. The consultation dealt with the proposed future for digital broadcasting and the possible usage of airwaves freed by two off-air digital pay services as more multiplexes will be freed by analogue switch-off.
- 4.2.4.5 In line with the France (2009) Law n°2009-258 - 5 March 2009, which sets forth the general framework relating to the regulation of on-demand audio-visual media services, the CSA dealt with the practical implementation thereof, where all aspects of its regulatory activity had to include non-linear services. CSA found that as the broadcasting platforms expand the public calls for regulation on all media services. Furthermore, society's expectations in respect of broadcasting regulatory policy goes beyond pluralism, ethics,

and youth protection, but also includes programme accessibility for those with disabilities, society's diversity being reflected, and obesity being combated.

- 4.2.4.6 The CSA implemented the above law and took decisive action and adopted a new pluralism simplified principle to govern the balance of politicians' speaking time on television and radio regarding national political issues. The CSA also reviewed means available to combat racism and anti-Semitism in the broadcasting media, by taking stock and making proposals in this respect. With regards to accessibility, sub-titling was made a general rule in 2010, and specific provisions in the law of 5 March 2009 were introduced setting forth obligations in terms of audio-description.
- 4.2.4.7 Another important action by CSA is with regards to their 2008 study on the portrayal of diversity on television, where they involved the entire broadcasting industry. The ultimate result was the creation of a refined methodology for the half year diversity index, setting forth commitments to be made by each editor, and monitored by the CSA, while respecting their editorial line and their freedom to create broadcasting works. The principle of annual commitments was included in each channel's license conditions, where channels started providing the CSA with their first commitment letter, with CSA monitoring compliance with such commitments very closely, and with a specific stock taking exercise taking place. It is these kinds of tools, which the Authority can learn from, that enabled CSA to fulfil its legislative mandate (i.e. guaranteeing social cohesion and ensuring that all French citizens feel broadcasting reflects who they are).
- 4.2.4.8 In 2009 the CSA realised that health issues played an increasing part in French society's expectations regarding broadcasting regulation, and its work started to reflect on this development. CSA set forth the conditions for the broadcasting of health-related announcements during the swine flu epidemic by implementing the Charter to promote a healthy diet and physical exercise

on television. Furthermore, it assessed the role of broadcasting in raising awareness regarding sustainable development issues.

4.2.4.9 CSA holds a view that there is a need for a strong, diversified and independent production and distribution industry. This should make it possible for audio-visual works to circulate and be known domestically and internationally.

4.2.4.10 In 2009 CSA reached a conclusion on the following issues, which the Authority has also taken into account when engaging in this review:

- (a) Multiple reviews by the CSA have shown that French private broadcasting companies have not reached the necessary size to compete on an equal footing with foreign groups. It is essential, however, for the private broadcasting industry to be strong, so that it may support French creativity, and, thereby contribute to the richness of the broadcasting supply, which must also be varied. Concentrations, therefore, must be analysed, and justified, taking into account the broadcasting environment of today, as opposed to what it was five years ago.
- (b) The CSA intends to help public and private broadcasting companies to meet the new economic and competition challenges. To achieve this, the CSA uses an adaptive approach to economic regulation, increasingly based on contractual relationships.
- (c) The CSA has adapted regulation to the new broadcasting environment in the public's interest and in co-operation with the industry to support the technological and competition developments.

4.2.5 IRELAND

- 4.2.5.1 In 2011, the Broadcasting Authority of Ireland (BAI)⁴ published the Draft BAI Broadcasting Services Strategy, for public consultation, outlining the BAI's proposed approach to the licensing of broadcasting services that are additional to those currently operating.
- 4.2.5.2 The strategy would have to present the BAI's vision regarding the optimum mix of broadcasting services and identifies a number of factors that may facilitate and constrain the achievement of that vision.
- 4.2.5.3 Furthermore, the strategy must inform the BAI's approach to the development of a licensing plan, ownership and control, the regulation of services, the cost of making applications for commercial sound broadcasting services, the requirement for 20% News and Current Affairs content on radio services and a review of other regulatory policies and practices.
- 4.2.5.4 Lastly, the strategy had to assist BAI to make informed decisions and fulfil the key statutory objectives of endeavouring to ensure that the number and categories of broadcasting services in the State will best serve the needs of the Irish people. It must also bear in mind their languages and traditions and their religious, ethical and cultural diversity.
- 4.2.5.5 BAI also commissioned an economic and environmental review of contemporary broadcasting landscape of Ireland to assist with the development of the Strategic Statement 2010-2013 and explore issues

4 The Broadcasting Authority of Ireland (BAI) is the body responsible for the regulation of broadcasting in Ireland. Its functions and responsibilities are set out in the Broadcasting Act 2009 ("the 2009 Act"). Section 26 (1)(a) of the Act requires the BAI to prepare a strategy for the provision of broadcasting services in the State.

related to market services; economic and revenue models for digital broadcasting; Public Service Broadcasting funding; and the shift online content services. Similar to the South African regulatory context, BAI had realised that whilst it does not regulate online content services, the media landscape was being shaped by high speed broadband. The report had to reflect on the challenges and opportunities this digital broadband environment presents, give guidance on some of the dominant trends in media convergence and their impact on broadcasting, and outline an economic and market tracking methodology to assist the BAI's strategic planning process for the future work.

4.2.5.6 The review took place at the end of two years of an economic recession which had seen broadcasting revenues significantly fall and some new services were described as being in a 'distressed financial state'. The key concern across the sector was sustainability and evidence based regulations. The review had to look at trends over ten years and compare trends in Ireland with those in comparative small nations, in order to provide a proper context.

4.2.5.7 The review noted that the BAI needs to:

- (a) take into account the economic, social, technological and cultural drivers; and
- (b) adopt an evidence-based approach to policy and strategy, which has to involve research on relevant markets, identification of market and regulatory issues, cost-benefit analysis on proposed policies and impact assessment on existing ones.

4.2.6 PORTUGAL

4.2.6.1 The Portuguese Parliament amended the Television Law, implementing the EU's AVMS Directive, through Law 8/2011, updating the Television Law (Law 27/2007), the Advertising Code and the Law on Radio and Television Public

Service Broadcasting (Law 8/2007). The law contains several provisions where, amongst others, it encourages media service providers to develop codes of conduct to co-regulate alongside the new provisions. The other debates centred on how the regulator will actively enforce the new provisions.

- 4.2.6.2 The major changes brought about by Law 8/2011 includes media ownership and management, which introduced a new set of guidelines in order to increase transparency regarding property and editorial responsibilities, with an obligation to provide online information about the ownership structure.
- 4.2.6.3 Changes were made to advertising regulation, a matter previously regulated in the Advertising Code with provisions that dated back to 1998. These changes contained several restrictions on the possibility of including sponsorship in television programmes and had no clear regulation in respect of non-linear (on-demand) services nor product placement (although it was considered by some to be included in the definition of sponsorship). Product placement and aid to production are now regulated for the first time in Portugal.

4.2.7 NEW ZEALAND

- 4.2.7.1 Following the launch of digital free-to-air broadcasting in New Zealand, the Government undertook a wide-ranging Regulatory Review of Digital Broadcasting. The central focus of the review was to solicit views on the future of regulation for digital broadcasting, but the terms of reference also required an assessment of the broader regulatory issues that affect broadcasting, such as the impact of convergence, developments in the telecommunications industry and the changing role of intellectual property in the sector.

4.2.7.2 In 2008 the Regulatory Review of Digital Broadcasting: Report-back on options following public consultation ("Cabinet Paper") was publicly released. Cabinet directed the Ministry of Economic Development ("MED"), in consultation with the Ministry for Culture and Heritage ("MCH") to conduct a competition study to address access to premium content, platforms and networks for related television channels and services.

4.2.7.3 In 2009 the MED and MCH released their Report to the Minister of Broadcasting and the Minister for Communications and Information Technology on competition issues in television broadcasting (the "Competition Report"). Some of the key findings of the Competition Report concluded that:

- (a) all other main OECD countries take a much more pro-active approach to regulating their broadcasting markets than New Zealand, which appears to be unique in relying on ex-post-application of general competition law to regulate the broadcasting market;
- (b) there was no strong case at that time for the introduction of specific regulation for the broadcasting sector; and
- (c) there were some risks relating to competition in the broadcasting market in the future, including in relation to access to premium content and transmission platforms.

4.2.7.4 As a result of Competition Report:

- (a) the MCH favoured an amendment to the Telecommunications Act 2001 to include broadcasting so that a widened Telecommunications Commission could undertake market studies of broadcasting and make recommendations to Ministers as to whether particular services (e.g access to broadcasting platforms or premium content) should be regulated; and
- (b) the MED favoured taking no further action as it considered that there was no strong case for regulating the broadcasting market at that time

as it appeared adequately competitive and there were no compelling indications of future issues.

- 4.2.7.5 Despite the preference for regulation by the MCH and the previous Labour-led Government's preference to conduct a competition study to address access to premium content and access to platforms, the new National-led Government announced on 7 April 2009 that the Regulatory Review would not proceed any further as it was preparing a new programme of action for broadcasting aligned with National's pre-election commitments, namely a successful digital switch-over and supporting public broadcasting.
- 4.2.7.6 The new National-Party led Government quoted a departmental analysis of submissions made during the review process concluded that the current market appeared workably competitive and that there were no compelling indications of future issues; and also noted that there was no strong case for the introduction of specific new regulation for the broadcasting sector. The National-led Government stressed that they wished to maintain a competitive and diversified broadcasting market; will continue to monitor market developments; noted that some useful information emerged from the research and submissions process, but have agreed that the review, as a whole, goes beyond the priorities set out in pre-election broadcasting commitments and the new Government's subsequent policy announcements.
- 4.2.7.7 The National-Party led Government Ministers explicitly stated that they are preparing a new programme of action for broadcasting policy aligned with pre-election commitments of achieving a successful digital switch-over and supporting public broadcasting through contestable funding and that "with the exception of policy development on post-digital switch-over spectrum allocation and regional television broadcasting; and on options for sensory

disabled viewers, the remainder of the regulatory review's work programme will not proceed⁵.

4.3 SUMMARY OF INTERNATIONAL BENCHMARKING

- 4.3.1 The above international benchmarking exercise indicates that some countries began the migration from analogue to digital broadcasting as far back as 2001. The migration necessitated the development of regulatory frameworks that would address new policy issues in a technologically converged environment. Countries have their unique circumstances and a new approach must therefore be appropriate to the economic, social and political aspects of the specific countries.
- 4.3.2 Furthermore, the emergence of new services and possibly new players in a technologically converged environment will affect the current regulatory policy approach. The current focus on linear services will have to be reviewed and the growing importance of non-linear services be considered. This will ensure policy predictability, viability and the continued diversity and plurality of the broadcasting sector.
- 4.3.3 In conclusion, the new regulatory policy framework should not shift the fundamental objective of regulating in the public interest and ensuring effective competition. Moving into a digital era, the regulators need to strike a balance between these two. The non-linear services should be regulated less strictly than linear services. The regulatory approach should be geared towards promoting effective and efficient competition but not negate social objective of regulating the broadcasting industry.

5 Joyce, S and Coleman, J. 2009. **Press Conference Address: Government concludes broadcasting regulatory review.** Ministry of Economic Development (MED), and the Ministry of Culture and Heritage (MCH), Wellington.

Issue(s) for stakeholder consideration:

Issue 2: What is your analysis and view on the above benchmarking, and which lessons do you believe are relevant to the Authority's Issues Paper and future issues?

Issue 3: Is the current benchmarking relevant or sufficient? Please elaborate.

Issue 4: Which other countries and issues do you believe should have considered for the benchmarking exercises and which ones do you consider being irrelevant?

5 PART D: ISSUES FOR THE SOUTH AFRICAN BROADCASTING REGULATION

The aim of this Section is to provide a general analysis of the existing regulations that govern the broadcasting sector. The Section also raises questions arising from both the international benchmarking and issues raised by stakeholders over the years when the Authority engaged in its review of specific regulations passed since 1994.

This section of the Issues Paper focusses on existing regulations that govern the broadcasting sector.

5.1 REVIEW OF OWNERSHIP AND CONTROL OF COMMERCIAL SERVICES AND LIMITATIONS ON BROADCASTING

- 5.1.1 In 2011, the Authority published the Findings Document on the Review of Ownership and Control of commercial services and limitations on broadcasting, Electronic Communications Services and Electronic Communications Network Services, in Gazette 34601 of 15 September 2011. The purpose was to enforce the relevant sections of the ECA; preserve and encourage a diversity of voices/views within the broadcasting system; promote the cultural values, economic and social goals; enhance, maintain, permit and promote efficient and effective economic competition; and help the industry navigate the negative impact of the economic downturn. The other purpose was to update the Review of Ownership and Control Position Paper: Position Paper on the Review of the Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences, of 13 January 2004, which was largely based on Sections 48, 49 and 50 of the repealed IBA Act and bring the recommendations in line with the new sections of the ECA.

- 5.1.2 The findings document was released at a time when the South African Parliament⁶ was also debating the broader ownership and control issues within the convergence environment.
- 5.1.3 It is evident that most of the newly introduced communications laws and policies within Asia-Pacific⁷, Europe⁸ and the USA aim to reduce (ownership) regulation, promote competition and cope with the challenges posed by convergence. This is coupled in part with protections of media pluralism through custom-developed indices for measuring concentration in media markets and tests for assessing media plurality in merger cases.
- 5.1.4 Evidence suggests that, with the convergence of transmission platforms, the current regulatory framework for cross-ownership between two broadcasters with similar footprints and between print media and broadcasting media has become obsolete. There is concern that in the past decade media owners have used sophisticated ownership structures to hide their ownership and the real ownership of broadcasters remained a mystery. It is this lack of transparency of

6 South Africa's Parliament Portfolio Committee on Communications Hearings on Ownership and Control, 22-23 September 2011.

7 The Australian Government acknowledges that convergence is challenging the effectiveness of the existing media ownership rules, which have limited scope and do not apply to subscription television, national newspapers, telecommunications companies or online media services; and this limited narrow definition means that the rules may not adequately reflect the degree of influence of all medium or the diversity of voices (or lack thereof) available to consumers (Department of Broadband, Communications and the Digital Economy, 2011(D):p15).

8 The UK Government, having noted the limitations with cross-media ownership rules in a converging environment, signaled that it will ask Ofcom to establish an agreed means of measuring cross-media power in the UK across all platforms with a view to introducing a new set of cross-media ownership rules. (Department of Broadband, Communications and the Digital Economy, 2011(D):p15).

media ownership that has often hidden the conflicts of interests and owners' interference with the stations' programming (Dragomir, 2008:p14). To enhance compliance and make the ownership and control issues of the broadcasting sector more transparent, there have been calls for:

- 5.1.4.1 the introduction of legal provisions empowering broadcasting regulators to examine all the ownership layers;
 - 5.1.4.2 the establishment of a central publicly available databases of media owners;
 - 5.1.4.3 the introduction of more drastic sanctions for broadcasting companies that hide ownership data or provide false data (ibid).
- 5.1.5 Moving forward, one of the regulatory policy issues will be the compliance manual and the periodical submission of correct ownership industry data, the latter applies to the community and commercial broadcasting sectors.
- 5.1.6 Regulatory attention has traditionally focused on threats arising from media ownership, resulting in narrowly tailored anti-concentration rules, in combination with specific content obligations and safeguards for editorial independence. These rules are criticized for being an anomaly in an era of media abundance (where basically every citizen can become a media supplier) – they are being called a legacy from the past which should not spill over to the new media context, but to the contrary be lifted as soon as possible (Valcke, 2011).

Issue(s) for stakeholder consideration:

Issue 5: What will be the best cross-media ownership rules that may provide a vital boost to the broadcasting industry? Should the Authority broaden, retain, abolish or change the scope of current Ownership and Control of Commercial services and limitations on broadcasting rules?

Issue 6: How should the Authority strike a balance between ensuring plurality of ownership and allowing broadcasting licensees freedom to expand and innovate?

Issue 7: How should the Authority deal with listed companies in relation to Historically Disadvantaged Individuals?

5.2 THE REGULATION OF ELECTIONS BROADCASTING

- 5.2.1 This section relates to regulations on Party Elections Broadcasts, Political Advertisements, the equitable treatment of political parties by broadcasting licensees and related matters during municipal, national and provincial elections; respectively published in Government Gazette 34086 of March 2011 volume 549 and GN R.247 in Government Gazette No 31980 of 3 March 2009. Their main purpose is to prescribe the framework and guidelines under which PEBs and PAs shall be conducted and carried by the broadcasting service licensees during the elections. These regulations are applicable to broadcasting service licensees and political parties contesting the elections during the election period.
- 5.2.2 In South Africa, there are currently political discussions of possibly unifying the National and Local Elections periods into one. During the Authority's public consultations on local government elections regulations, it became evident that the Authority's elections regulations had to be merged into one regulation, to even include issues around by-elections.
- 5.2.3 Another issue related to fair allocation of airtime in the form of free-of-charge election programmes broadcast on the public radio and television programme services at the cost of these broadcasters in order to improve the quality of political discourse.
- 5.2.4 Various jurisdictions, for example Ireland, do not have separate regulations for local government elections and national elections.

Issue(s) for stakeholder consideration:

Issue 8: In the interest of assisting broadcasters, political parties, candidates, the general public and other interested parties to interpret and apply the elections regulations, the Authority seeks your comments or advise on how these regulations should be improved and whether it would make sense to allow one regulation to apply to coverage of the General National, Provincial, Local and Bye-elections, especially in preparation for the 2014 general elections.

Issue 9: Should the Authority make any changes to the Municipal and National Elections broadcasting regulations? Please elaborate on your answer.

Issue 10: Is the regulation of current affairs during Elections well placed within the Code of Conduct for broadcasters?

Issue 11: How should the issue related to equitable treatment be interpreted in the ECA and by the Authority's regulations during elections?

5.3 REGULATIONS IN RESPECT OF THE PRESCRIBED ANNUAL CONTRIBUTIONS OF LICENSEES TO THE UNIVERSAL SERVICE AND ACCESS FUND

- 5.3.1 In 2011 (Government Gazette No 34010 of 10 February 2011) the Authority published regulations in respect of the Prescribed Annual Contributions of Licensees to the Universal Service and Access Fund (USAF), which prescribed the Annual Contributions to be paid to the Universal Service and Access Fund by persons issued with licences in terms of chapter 3 and 9 of the Act; and specify the date when such contributions to the Fund become payable and the manner in which they must be paid.

Issue(s) for stakeholder consideration:

Issue 12: Are there any USAF regulatory issues going into the digitally converged environment that should be brought to the attention of the Authority for consideration?

5.4 SPORT BROADCASTING SERVICES REGULATIONS

- 5.4.1 In 2010 the Authority published Sport Broadcasting Services Regulations in Government Gazette No 33079 of 7 April 2010 to regulate the broadcasting of national sporting events in the Republic; determine the criteria to be used in the listing of national sporting events; identify and list national sporting events; and provide dispute resolution mechanisms.
- 5.4.2 The Authority remains committed to the principles and measures that will ensure that subscription broadcasting services do not broadcast, on an exclusive basis, national sporting events as identified and listed by the Authority from time to time. This allows South Africans to watch nationally significant events on free-to-air television or listen to them on radio.
- 5.4.3 The issue of Sport Broadcasting Services regulations is currently on the public agenda. The competition by broadcasting service providers for the acquisition of transmission rights is affecting prices and access by the public. The market for sports rights is also impacted by the anti-siphoning regime, where recent examples of sports rights deals show movement towards rights packages shared between free-to-air television, subscription television, IPTV and mobile broadcasting services.
- 5.4.4 The continued relevance of the above regulations continues to be debated, considering the challenge related to ownership of rights, especially those related to and owned by the Confederation of African Football (CAF). Most African