

## Overview of proposals set out in the ICASA Amendment Bill 2012

### Jurisdiction over electronic transactions (sections 1, 4 and 4(3)(o))

- Proposed that ICASA be given additional roles in relation to electronic transactions. Can if it wishes make recommendations to the Minister on any matter falling (strictly speaking) within the ambit of the ECT Act.
- Consideration will be given in future to creating a new committee within ICASA for this purpose

*If there are legal, statutory or non-statutory barriers to conducting business electronically as compared to traditional means, development of e-commerce is stunted. These matters which are interlinked practically should be interlinked in law too.*

- Insertion into preamble:

*Recognising that the success of electronic commerce must be underpinned by appropriate regulation of broadcasting, electronic communications and electronic communications networks;*

### Structure of ICASA Council, functions and powers, and staffing

- **Financing of ICASA:** Will be considered as part of the Policy Review Process as needs to be carefully considered. Recognition of difficulties that have been experienced by ICASA in appointing and retaining skilled resources and in carrying out the necessary regulatory impact assessments, research and inquiries. Minister has appointed external consultants to advise her on an appropriate funding mechanism for ICASA.
- **Size of Council:** last increase did not result in increased efficiency. Size should not delay decision-making and no clear precedent on optimal size. Will be considered as part of the Policy Review Process.
- **Relationship to policy maker:** new subsection 4(4) requires the council to have regard to policy directions from the Minister when any are given. *“ICASA may be independent but as an administrative authority, it should not act alone or outside of national and sector policy.”*

A comparative analysis indicates that general trend is to allow the relevant Minister to give policy guidelines to the national regulatory authority (an "NRA") which the NRA "shall have regard to" and in practice, the directions are applied by the NRA as far as practically possible.

*“The Minister is committed to discussing policy directions with ICASA and USAASA prior to issuing them to avoid any confusion and to ensure that they are in fact capable of implementation. Policy directions are not intended to encroach on the independence of ICASA, but to ensure co-ordinated and co-operative working between the Minister and ICASA in the public interest”.*

Issue of whether or not ICASA should be required to implement policy directions, during the course of the Policy Review Process.

- **Appointment of councillors:** Minister to appoint councillors on the recommendation of and in consultation with the National Assembly.

Having regard to the recommendations of the SALRC, and the formation of other Chapter 9 Institutions including the Auditor General and the Public Protector, we have noted that the President has in other cases, appointed members of a council after receiving recommendation from the National Assembly. However in the case of the electronic communications and broadcasting sectors, the ICASA Act empowers the Minister to appoint the councillors. In pursuance of the goal of institutional independence but in order to accommodate the concerns of stakeholders, we have proposed that the Minister should appoint councillors on the recommendation of and in consultation with, the National Assembly.

- **Sole employment:** the provisions relating to the prohibition on other employment have been strengthened
- **Removal of councillors:** power to the Minister to remove a councillor on stipulated grounds – “primarily to save time, whilst ensuring that strict and objective criteria are applied in the removal of any councillor”.
- **Council meetings:** to be held at least once a month
- **Minutes of council meetings (section 11A):** to be made public within 14 days of the minutes having been signed excepting information determined to be confidential pursuant to section 4D
- **Registers:** ICASA to create and maintain a register of gifts and benefits received for public appearances, and a register of disclosures of any interest of a councillor in the private (ICT) sector or related industries and associations. Registers must be open to inspection and on request, submitted to Parliament.
- **Powers over licensing:** proposed that decisions on licensing can no longer be delegated by Council to a committee or councillor
- **Experts:** propose to remove the requirement that ICASA obtain permission from the Minister before appointing a foreign expert, recognising that this is an encroachment on ICASA’s independence. ICASA can approach the Minister for additional funding if appointment not catered for in budget.
- **Business plan:** ICASA to prepare a business plan for the year ahead and to provide this to the Minister and make publicly available. This is to enable more accurate forecasting of funding requirements, and better planning and liaison with the office of the Department of Communications. The plan may be amended where reasons are “explainable and justified”.

*“16(1)The Council shall, at least once per year, publish an annual plan which describes its proposed activities for the year with indicative timeframes.*

*(2) The Council must, in addition, -*

*(a) supply the Minister with such information and particulars as he or she may in writing require in connection with the activities of the Authority; and*

*(b) as soon as may be reasonably practicable after the end of each financial year but in any event within three months of the end of the financial year, supply the Minister with a copy of the annual report of the Authority which shall refer to the annual plan and note what has and what has not been achieved.”*

- **Code of Ethics (section 12):** ICASA to publish its Code of Ethics which must contain ICASA's commitment to certain principles including the highest standard of professionalism, and principles of corporate governance generally applicable to commercial and administrative bodies. ICASA's performance can be measured against this Code.

Independence (sections 3, 4, 5, 7, 8, 11A, 12,14A and 16)

- Long section on this in the Memorandum
- Notwithstanding the history of the IBA, ICASA is not listed in Chapter 9 of the Institution. Other Chapter 9 institutions can be distinguished in that they do not, as ICASA does, fall under a state department. ICASA's position under the DoC is reflected in many other countries.

*“The Constitutional Court of South Africa has stated that an institution will only be considered to be "independent" if it enjoys a certain degree of protection from government control. In order to determine whether an institution is independent, regard must be had to provisions regarding the appointment of officers of the institution; provisions regarding the tenure and removal of officers in the institution; and provisions concerning institutional independence.\*<sup>(2)</sup>*

*While there is no closed list of factors to determine independence and impartiality, the Constitutional Court has stated that the correct standard is an objective one, involving an enquiry into how the reasonable observer would perceive the independence of the institution in question.\*<sup>(3)</sup> Taking this into account, we have made several amendments to the ICASA structure in sections 5 to 12 whilst more significant amendments, if required, will be left to the Policy Review process.”*

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*“The Constitutional Court has referred to two elements of independence that are also relevant to ICASA. The first is "financial independence" which implies the ability to have access to funds reasonably required to enable the discharge of the functions the institution is obliged to perform in law. The second factor is "administrative independence", which implies that there will be control over those matters directly connected with the functions the institution has to perform under the Constitution and relevant legislation.”*

- Performance management has been revisited: evaluation of the performance of the Chairperson or other councillor must be conducted by a panel constituted by the Minister, in consultation with the National Assembly. Evaluation to be collective rather than individual,

Regulatory Impact Assessments (RIAs) (section 4(4))

- The Authority is also required to implement an approach to regulation that can formally be recognised as a type of regulatory impact assessment. The section also requires the Authority to act in a way that is evidence-based, proportionate, consistent, accountable and transparent.
- Proposed section 4(4):
  - "(4) The Authority shall perform its functions:*
    - (a) in accordance with sector policy and policy directions;*
    - (b) where regulatory intervention is required, in a way that is evidence-based, proportionate, consistent, accountable and transparent; and*
    - (c) carry out, prior to any act that would constitute a regulatory intervention, an assessment of its likely regulatory impact."*
- ICASA to use the OECD Guidelines (provided as part of the Memorandum)
- Section 4B inquiry is not an RIA and should not be used for this purpose.

*"Although in 2005 research was also conducted in South Africa as to whether or not RIA were required given the specific provisions of certain laws in South Africa and the report concluded that sufficient safeguards existed in legislation to not warrant RIA on the whole, the pace of technological change, market needs, and the application of competition law principles and economics within the electronic communications industry suggests that this conclusion is no longer valid."*

Complaints and Compliance Commission (sections 1, 4,15A, and 17A to F)

- Complaints and Compliance Committee to be replaced by Complaints and Compliance Commission ("the Commission") – primary difference that will not fall under ICASA but under the Minister. Commission will be closer to the Competition Commission in terms of operation.

*"It has also become clear that changes are required to the constitution of the CCC within ICASA and their respective roles and responsibilities. As ICASA may itself be a complainant, it is important to separate the powers and functions of the CCC in relation to making a finding and determining a sanction, from those of ICASA. Although decisions of both bodies should be capable of review or appeal, as the case may be, it is not appropriate for the CCC to recommend sanctions to ICASA to take a final decision on them, when ICASA may itself be acting in this case as judge and jury, and complainant."*

- Problems with the current CCC - there are significant lacunae in the Act as regards breaches of the Act or the underlying statutes by persons other than licensees. Therefore replaced the word "licensee" with the word "person" in certain cases in order to ensure that persons who are not licensees but who are in breach of the Act or the underlying statutes can bring a complaint or a dispute to the Commission.

- Recognise need for Commission to have legal and technical knowledge of specialised kind. Proposed to appoint a panel with a chairperson on a full-time basis on the basis set out in the Competition Act, constituted of a number of candidates from time to time on a rotating basis. Minister has decided on an interim basis that the panel should be assisted by experts (not as decision-makers) on a rotational basis. Commission may appoint different panels to hear different matters and each panels can have as many advisors as required. ICASA to assist the Commission in identifying experts.
- Stats on complaints lodged and processed indicate significant increases in numbers lodged over the last two years and anticipated this will continue for the short-to-medium-term.
- CCC says that its work is hampered by a lack of enforcement powers – has to be done through ICASA and ICASA has discretion in enforcement
- Will still be a right of review/appeal to the High Court. Finding of the Commission can be enforced as if it were an order of the High Court.
- Commission may impose a settlement which is based either on the commercial terms of the agreement if any, between the parties, or equity.
- Distinction between Council and Commission:
  - ICASA may still inquire into, review, monitor, investigate and enforce any matter that it is empowered to, under the ICASA Act. It may also establish committees.
  - ICASA may itself (and must in certain cases which are set out in the Act, specifically at new sections 4B(1) and 17C) refer disputes and complaints to the Commission. Consequential changes are required to Chapters 7 and 8 to refer interconnection and facilities leasing disputes to the Commission.
  - However, where ICASA wishes to investigate a matter that has not come before it as a dispute or complaint, for example, the practice of refiling (as a general practise in the market), or a competition-related matter (for example a concern that a particular market is not competitive), or the principles on rapid deployment of facilities may take place, it may use its powers under section 4B for this purpose. If the matter is later found to form the basis of a complaint or dispute, it must then be referred to the Commission along with any finding made by ICASA.
  - The Commission is not bound by this finding.
  - ICASA should not carry out an inquiry in any matter which is likely to or which is in fact, a complaint or dispute.
  - Research and development may be carried out within or outside the ambit of this section.
  - Hearings in relation to consultation documents and discussion papers may be held under section 4 of the ECA by ICASA, in the ordinary course.
  - Proposed new section 4(3)(n):

*“(n) must refer to the Commission to investigate and adjudicate, any complaints submitted to the Authority in terms of the Act, the underlying statutes, and licence conditions where these complaints are between the Authority and a licensee, or where these complaints are between more than one licensee;”*

- Financing: the Commission is to be financed by way of Parliamentary appropriation channelled through the Minister. Must have its own financial statements drawn and required to submit an annual report to the Minister.

#### Section 4B inquiries

- The time periods for concluding inquiries have been shortened to accommodate concerns that such inquiries should render results more quickly in the interests of all involved. Was a maximum of 60 days:

*“(2) The Authority must, in the Gazette, give notice of its intention to conduct an inquiry and such notice must indicate the purpose of the inquiry and invite interested persons to -*

*(a) submit written representations on or before a date specified in the notice which date may not be earlier than 30 days from the date of publication of the notice but which may be a lengthier period as determined by the Authority in its discretion in the case of inquiries of a complex nature or where substantial research or analysis is likely to be required by interested persons;*

- The period for ICASA to finalise an inquiry has been reduced from 180 to 90 days.
- ICASA required to liaise with the Competition Commission where an inquiry relates to a competition issue. To be done in terms of the Memorandum between the bodies.
- The split between issues which can be dealt with by Council under section 4B and those to be dealt with by the new CCC under section 17A is important

#### Sanctions and penalties (sections 4(3), 12 and 17H)

- ICASA to have specific power to determine penalties or sanctions as the case may be, even under regulation (section 4(3)(p))
- Powers of the Commission and ICASA in this regard have been limited with reference to specific levels of fines and other remedies in section 17H. The fines have been increased significantly to take account of the change in the value of money since the Act was first passed, and to ensure that activities that are undertaken by the Authority under legislation and regulations can be effectively enforced so as to constitute a disincentive to those licensees and other persons who may wish to operate outside the ambit of the sector legislation.
- Imprisonment introduced as a possible sanction:

*The Minister believes that a threat to civil liberty should outweigh the payment of a financial penalty and therefore sanctions may include imprisonment for certain offences, in the alternative. Penalties may be imposed up to a maximum fine or maximum term of imprisonment.*