

REPUBLIC OF SOUTH AFRICA

**INDEPENDENT
COMMUNICATIONS AUTHORITY
OF SOUTH AFRICA
AMENDMENT BILL**

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 36549 of 7 June 2013)
(The English text is the official text of the Bill)*

(MINISTER OF COMMUNICATIONS)

[B 18—2013]

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- (e) by the insertion after the definition of “Electronic Communications Act” of the following definitions:
 “**‘electronic transaction’** has the meaning assigned to it in the Electronic Transactions Act;
 ‘Electronic Transactions Act’ means the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002).”; 5
- (f) by the deletion of the definition of “former authorities”;
- (g) by the insertion before the definition of “Minister” of the following definitions:
 “**‘licence exemption’** has the meaning assigned to it in section 1 of the Electronic Communications Act;
 ‘licensee’ has the meaning assigned to it in section 1 of the Electronic Communications Act, and includes, as required by the context, a person granted a licence exemption in terms of section 6 of that Act.”; 10
- (h) by the insertion after “National Revenue Fund” of the following definition: 15
 “**‘policy directions’** means policy directions issued in terms of section 3(1A), 3(2) or contemplated in 81(1) of the Electronic Communications Act or in terms section 2A(2) of the Postal Services Act.”; and
- (i) by the deletion of the definition of “Telecommunications Act”.

Amendment of section 3 of Act 13 of 2000, as amended by section 4 of Act 3 of 2006 20

2. Section 3 of the principal Act is hereby amended by the addition of the following subsection:

- “(5) A person affected by any action, finding or decision of the Authority may apply to a court with competent jurisdiction for review of that action, finding or decision.” 25

Amendment of section 4 of Act 13 of 2000, as substituted by section 5 of Act 3 of 2006

3. Section 4 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for paragraph (a) of the following paragraph: 30
 “(a) must exercise the powers and perform the duties conferred and imposed upon it by this Act, the underlying statutes and **[by]** any other applicable law.”;
- (b) by the substitution in subsection (3) for the words preceding paragraph (a) of the following words: 35
 “Without derogating from the generality of **[subsection]** subsections (1) and (2), the Authority—”;
- (c) by the substitution in subsection (3) for paragraphs (a), (b), (c), (d) and (e) of the following paragraphs, respectively: 40
 “(a) may make recommendations to the Minister on policy matters and amendments to this Act and the underlying statutes which accord with the objects of this Act and the underlying statutes to promote development in the broadcasting, electronic transactions, postal and electronic communications sectors;
 (b) must monitor the broadcasting, postal and electronic communications [sector] sectors to ensure compliance with this Act and the underlying statutes; 45
 (c) must **[manage]** assign the radio frequency spectrum in accordance with bilateral agreements or international treaties entered into by the Republic; 50
 (d) must develop, monitor and enforce compliance with licence conditions and regulations consistent with the objects of this Act and the underlying statutes for different categories of licences;
 (e) **[must]** may grant, renew, amend, transfer and revoke licenses in accordance with the provisions of this Act and the underlying statutes.”; 55

- (d) by the substitution in subsection (3) for paragraph (h) of the following paragraph:
 “(h) may conduct research on all matters affecting the broadcasting, electronic transactions, postal and electronic communications sectors in order to exercise its power and perform its duties;”;
- (e) by the substitution in subsection (3) for paragraphs (k) and (l) of the following paragraphs, respectively:
 “(k) may make regulations on empowerment requirements in **[terms]** order to give effect to or promote the objectives of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);
 (l) may inspect **[transmitters or other]** electronic communications apparatus used for electronic communications;”;
- (f) by the substitution in subsection (3) for paragraph (n) of the following paragraph:
 “(n) must investigate and adjudicate complaints submitted to the Authority in terms of this Act, the underlying statutes, and licence conditions;”;
- (g) by the addition to subsection (3) of the following paragraphs:
 “(o) may make recommendations to the Minister on matters dealt with or to be dealt with in the Electronic Transactions Act;
 (p) except where section 74(1) of the Electronic Communications Act applies, must determine a penalty or remedy that may be appropriate for any offence of contravening any regulation or licence condition, as the case may be, contemplated in this Act or the underlying statutes, taking into account section 17H; and
 (q) must exercise the powers and perform the duties of the Authority in terms of the Postal Services Act.”;
- (h) by the insertion after subsection (3) of the following subsections:
 “(3A) The Authority, in exercising its powers and performing its duties—
 (a) must consider policy made, and policy directions issued, by the Minister in terms of this Act, the underlying statutes and any other applicable law; and
 (b) may conclude a concurrent jurisdiction agreement with any relevant authority or institution and must, at least once every three years, where necessary, review and revise the agreement by agreement with the authority or institution in question.”;
- (i) by the substitution in subsection (4) for paragraphs (f) and (g) of the following paragraphs, respectively:
 “(f) The power to grant, renew, amend, revoke or transfer any individual licence may **[only]** not be delegated to a councillor or to a committee of the Council.
 (g) Notwithstanding the provisions of this section, any councillor or committee delegated with **[the]** any power [to grant, amend, revoke, transfer or renew a licence] or duty of the Authority in terms of this Act, subject to paragraph (f) or the underlying statutes, must submit a report [its decision] on the exercise and performance of that power and duty to the Council;”;
- (j) by the addition to subsection (4) of the following paragraph:
 “(h) Notwithstanding the provisions of this subsection, the Council must exercise general control over the exercise of the powers and the performance of the duties of the Authority in terms of this Act and the underlying statutes.”.

Amendment of section 4B of Act 13 of 2000, as inserted by section 6 of Act 3 of 2006

4. Section 4B of the principal Act is hereby amended—
- (a) by the substitution in subsection (2) for paragraph (a) of the following paragraph:
 “(a) submit written representations **[within 60 days]** on or before a date specified in the notice, which date may not be less than 30 days from the date of publication of the notice; and”;

(b) by the addition of the following subsections:

“(7) The period provided for in subsection (2)(a) may be extended if an inquiry is of a complex nature or where substantial research or analysis is required by any interested person.

(8) Before the exercise and performance of any of its powers and duties in terms of this section, the Authority must—

(a) consider whether or not, in terms of any concurrent jurisdiction agreement concluded between the Authority and any other authority or institution, it would be appropriate to refer an inquiry to such authority or institution; or

(b) subject to section 67 of the Electronic Communications Act and the terms and conditions of any concurrent jurisdiction agreement concluded between the Authority and the Competition Commission, bear in mind that the Competition Commission has primary authority to detect and investigate past or current commissions of alleged prohibited practices within any industry or sector and to review mergers within any industry or sector in terms of the Competition Act.

(9) Subject to the terms and conditions of the concurrent jurisdiction agreement or unless otherwise agreed to by the Authority and the other authority or institution in question, the Authority may not take any action where a matter has already been brought to the attention of and is being dealt with by that other authority or institution.”.

Amendment of section 4C of Act 13 of 2000, as inserted by section 6 of Act 3 of 2006

5. Section 4C of the principal Act is hereby amended— 25

(a) by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:

“The Authority may, subject to section 4D and any other law governing privilege, for the purpose of an inquiry—”; and

(b) by the substitution in subsection (6) for the words preceding paragraph (a) of the following words: 30

“The Authority must, within [180] 90 days from the date of conclusion of the inquiry—”.

Amendment of section 5 of Act 13 of 2000, as amended by section 7 of Act 3 of 2006

6. Section 5 of the principal Act is hereby amended by the substitution in subsection (3)(b) for subparagraph (ii) of the following subparagraph: 35

“(ii) possess suitable qualifications, expertise and experience in the fields of, amongst others, broadcasting, electronic communications and postal policy or operations, public policy development, electronic engineering, law, [marketing, journalism, entertainment] information technology, content in any form, consumer protection, education, economics, finance or any other relevant expertise or qualifications.”. 40

Amendment of section 6A of Act 13 of 2000, as inserted by section 9 of Act 3 of 2006

7. Section 6A of the principal Act is hereby amended— 45

(a) by the substitution for subsection (1) of the following subsection:

“(1) The Minister must, in consultation with the National Assembly, establish a collective performance management system to monitor and evaluate the performance of the chairperson [and], other councillors and the Council.”;

(b) by the substitution in subsection (2) for paragraph (a) of the following paragraph: 50

“(a) set appropriate key performance indicators as a yardstick for measuring performance, including, amongst others, the matters and the time periods set out in sections 4(3A), 4B(2)(a), (7), (8) and (9), 4C(6), 7(7), 11A(3) and (4), 11B, 12(2) and 16(1) and (2);”;

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- (c) by the deletion in subsection (2) of the word “and” at the end of paragraph (b), the insertion of the expression “; and” after the word “year” in paragraph (c) and the addition of the following paragraph:
 “(d) be reviewed at least once a year.”; and
- (d) by the substitution for subsections (3), (4) and (5) of the following subsections, respectively: 5
- “(3) As soon as is practicable after the appointment of the chairperson or any other councillor a performance agreement must be concluded between the chairperson [**or**], other councillor, the Council and the Minister. 10
- (4) The evaluation of the performance of the chairperson [**or**], other councillor and the Council must be conducted by a panel constituted by the Minister, in consultation with the National Assembly, for that purpose.
- (5) The panel contemplated in subsection (4) must, after an evaluation 15 of the chairperson [**or**], other councillor and the Council, submit a report to the National Assembly for consideration.”.

Amendment of section 7 of Act 13 of 2000, as amended by section 10 of Act 3 of 2006

8. Section 7 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for paragraph (b) of the following paragraph: 20
- “(b) The chairperson may at the end of his or her term of office be re-appointed in terms of section 5 for one additional term of five years only.”;
- (b) by the substitution for subsections (4), (5) and (6) of the following subsections, respectively: 25
- “(4) [**Despite**] Notwithstanding the provisions of subsections (1) and (2), the [councillors remain] chairperson or a councillor remains in office after expiry of [their] his or her term of office until the commencement of the term of office of [their successors] his or her successor, but the extended term of office may not exceed 45 days. 30
- (5) A councillor may at the end of his or her term of office be re-appointed in terms of section 5 for one additional term of four years only.
- (6) [**Every**] A councillor— 35
- (a) serves in a full-time capacity to the exclusion of any other remunerative employment, occupation or office [**which is likely to—**];
- [a](b) must not interfere with the exercise by any [**such**] other councillor of his or her functions in terms of this Act or the underlying statutes; [**or**] and 40
- [b](c) must not create a conflict of interests between [**such employment, occupation or office**] his or her other activities and his or her office as councillor.”; and
- (c) by the addition of the following subsection: 45
- “(7) The provisions of subsection (6) do not apply to—
- (a) a councillor who is appointed on a part-time basis in an academic institution;
- (b) a councillor who occupies office as a member of a public interest organisation and performs concomitant tasks for which a honorarium is paid or payable; 50
- (c) any incidental gift received or derived by a councillor for attendance at any conference or public lecture; or
- (d) any other work which reasonably may be considered to advance the work of the Authority, 55
- but such appointment, office and honorarium, or gift must be disclosed in writing and recorded as provided for in sections 11B and 12(2).”.

Amendment of section 11 of Act 13 of 2000

9. Section 11 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1)~~[(a)]~~ Meetings of the Council must be held at least once a month at such times and places as the Council may determine. 5

[(b) However, the first meeting must be held at such time and place as the chairperson determines.]”;

(b) by the substitution for subsection (3) of the following subsection:

“(3) The quorum for any meeting of the Council is a majority of the councillors in office at the time, including the chairperson or an acting chairperson who is a councillor and appointed by the chairperson to perform the functions of the chairperson, which functions include the power to preside at a meeting in the absence of the chairperson.”; and 10

(c) by the addition of the following subsection:

“(5) The chief executive officer of the Authority must be invited to attend any meeting of the Council and may speak at any such meeting on any matter, which must be minuted, but he or she does not have a right to vote at a meeting.” 15

Amendment of section 11A of Act 13 of 2000, as inserted by section 13 of Act 3 of 2006 20

10. Section 11A of the principal Act is hereby amended by the addition of the following subsections:

“(3) The minutes, contemplated in subsection (2), must be published and made available on the Authority’s website and in its library within 14 days of the date on which they were confirmed and signed, but any information determined to be confidential in terms of section 4D must be removed prior to such publication or availability. 25

(4) Any decision regarding a licensing or regulatory matter by the Council must be published and made available on the Authority’s website and in its library.”

Insertion of section 11B into Act 13 of 2000 30

11. The following section is hereby inserted in the principal Act after section 11A:

“Code of Ethics

11B. (1) The Authority must, within 180 days of the date of the commencement of section 11 of the Independent Communications Authority of South Africa Amendment Act, 2013, publish and make publicly available on its website and in its library, a Code of Ethics, which addresses, amongst others, the processes for the disclosure required by sections 7(7) and 12(2), and which specifies the governance principles according to which the Authority or the Council functions, including, amongst others— 35

(a) principles of mutual respect and collective responsibility; 40

(b) a requirement that the Council will, at all relevant times or places, have all relevant information necessary to make an informed decision, taking account of all relevant facts at its disposal; and

(c) a commitment by the Council to conduct the affairs of the Authority in accordance with the highest level of corporate governance, including professionalism and integrity. 45

(2) All councillors and the chief executive officer must adhere to and comply with the requirements of the Code of Ethics and must, amongst others, disclose in writing any interest, financial or otherwise, direct or indirect, to the Authority for record and transmission to the register which must be kept and maintained by the Authority. 50

(3) The register must be—

(a) open for inspection during office hours on business days; and

(b) contained in the annual report referred to in section 16.”

Amendment of section 12 of Act 13 of 2000

12. Section 12 of the principal Act is hereby amended by the substitution in subsection (4) for the words preceding paragraph (a) of the following words:

“A councillor is guilty of an offence and liable on conviction to a fine not exceeding [R250 000] R1 000 000 or to imprisonment for a period not exceeding [five] three years, or to both such fine and imprisonment, if he or she—”.

Amendment of section 14 of Act 13 of 2000, as amended by section 14 of Act 3 of 2006

13. Section 14 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

“The Council must establish such staff component as it requires in order to support its own administration and to assist the Authority in the performance of its functions, and to this end the Council must appoint—”;

(b) by the substitution in subsection (1) for paragraph (b) of the following paragraph:

“(b) such other staff as the Council may deem necessary to assist the Authority and the chief executive officer, as the case may be, with all such work as may arise through the performance of its functions, including research, regulatory impact assessments, reports, the giving of reasons, preparing public consultation documents and preparing recommendations relating to this Act, the underlying statutes and the Electronic Transactions Act.”;

(c) by the addition of the following subsection:

“(4) The staff must carry out the day to day operations of the Authority as directed by the chief executive officer in accordance with the annual plan referred to in section 15A.”.

Amendment of section 14A of Act 13 of 2000, as inserted by section 15 of Act 3 of 2006

14. Section 14A of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of following subsection:

“(1) The Authority may appoint as many experts as may be necessary with a view to assisting the Authority in the performance of its functions, but any appointment of experts which is not within the budget of the Authority for a particular year is subject to the approval of the Minister.”;

(b) by the deletion of subsection (2).

Repeal of section 14B of Act 13 of 2000

15. Section 14B of the principal Act is hereby repealed.

Amendment of section 14C of Act 13 of 2000, as inserted by section 15 of Act 3 of 2006

16. Section 14C of the principal Act is hereby amended by the deletion in subsection (1) of the word “or” at the end of paragraph (b), the insertion of the expression “; or” after the word “law” in paragraph (c) and the addition of the following paragraph:

“(d) where required to do so in terms of section 12.”.

Repeal of section 14D of Act 13 of 2000

17. Section 14D of the principal Act is hereby repealed.

Amendment of section 15 of Act 13 of 2000, as amended by section 16 of Act 3 of 2006

18. Section 15 of the principal Act is hereby amended by the substitution for subsection (4) of the following subsection:

“(4) Cheques drawn by the Authority must be regarded to have been duly issued and signed on its behalf if issued under the joint signatures of the accounting officer and another member of the staff, or a councillor, of the Authority designated by the Council.”. 5

Insertion of section 15A into Act 13 of 2000

19. The following section is hereby inserted in the principal Act after section 15: 10

“Annual plan

15A. The chief executive officer must, at least three months before the end of each financial year, prepare and submit to the Council for approval an annual plan which describes the proposed activities of the Authority with indicative timeframes for the coming year.” 15

Amendment of section 16 of Act 13 of 2000

20. Section 16 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) in addition to the requirements in terms of paragraph (b), 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) by the substitution in section (1)(b) for subparagraph (i) of the following subparagraph: 25

“(i) the annual report of the Authority which must reflect in reasonable detail deliverables and those matters that were not dealt with in terms of the annual plan referred to in section 15A;”;

(c) by the substitution for subsection (3) of the following subsection:

“(3) **[The Minister]** Subject to subsection (1)(b), the chief executive officer must table **[a copy of]** the annual report and the audited financial statements of the Authority together with the Auditor-General’s report on those statements, in Parliament within 30 days **[after it has been received by him or her]** if Parliament is then sitting and, if Parliament is not in sitting, within 14 days after the next ensuing sitting of Parliament.”. 30 35

Amendment of section 17 of Act 13 of 2000, as amended by section 18 of Act 3 of 2006

21. Section 17 of the principal Act is hereby amended—

(a) by the substitution in subsection (2) for paragraph (a) of the following paragraph: 40

“(a) **[one or more councillors or any member of staff]** a councillor designated by the Council; and”;

(b) by the substitution for subsection (4) of the following subsection:

“(4) The Council must appoint the chairperson of each committee **[from the councillors designated in terms of subsection (2)(a)].**”;

(c) by the addition of the following subsection:

“(10) A committee must submit a report on its activities to the Council if and when required or on the completion of its task.”.

Amendment of section 17A of Act 13 of 2000, as inserted by section 19 of Act 3 of 2006

22. Section 17A of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection: 5
 “(1) The Authority must establish a Complaints and Compliance Committee which consists of not more than seven members, appointed for a three-year term of office which is renewable for one additional term only, one of whom must be a councillor.”;
- (b) by the insertion after subsection (1) of the following subsection: 10
 “(1A) The Authority must appoint one of the members contemplated in subsection (1) as chairperson of the Complaints and Compliance Committee.”; and
- (c) by the substitution in subsection (4) for paragraph (b) of the following paragraph: 15
 “(b) be committed to the functions and work of the Complaints and Compliance Committee and the objects of this Act and the underlying statutes and must not act or behave in a manner that undermines those functions, work or objects;”.

Amendment of section 17C of Act 13 of 2000, as inserted by section 19 of Act 3 of 2006 20

23. Section 17C of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

- “(1) (a) A person who has reason to believe that **[a licensee]** another person is guilty of any non-compliance with the terms and conditions of **[its]** a licence or with this Act or the underlying statutes may lodge a complaint with the Authority 25 within 60 days of becoming aware of the alleged non-compliance.
- (b) The Authority may—
- (i) where the complaint concerns a licensee, direct the complaint to the Complaints and Compliance Committee for consideration within 30 days of receipt of the complaint; or 30
- (ii) where the complaint concerns a person who is not a licensee, lay a charge against that person with the appropriate authority or institution or refer the matter to the appropriate authority or institution in terms of a concurrent jurisdiction agreement concluded between the Authority and that authority or institution within 30 days of receipt of the complaint.” 35

Amendment of section 17F of Act 13 of 2000, as inserted by section 19 of Act 3 of 2006

24. Section 17F of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection: 40
 “(1) The Authority must appoint suitably qualified inspectors to perform the functions provided for in this Act and may terminate any such appointment for good cause.”; and
- (b) by the substitution for subsection (5) with the following subsection: 45
 “(5) An inspector must, when instructed to do so by the Council—
- (a) monitor compliance by licensees **[of]** with licence terms and conditions and licence exemptions;
- (b) monitor compliance by licensees with the provisions of this Act and the underlying statutes;
- (c) investigate and evaluate any alleged or suspected— 50
- (i) non-compliance by a licensee with its licence terms and conditions, licence exemption, and provisions of this Act or the underlying statutes;
- (ii) breach by a licensee of an agreement between such licensee and its subscribers;
- (iii) failure to provide **[a]** an electronic communications service 55 that the licensee is required to provide under the terms of its

- licence or licence exemption, or in terms of this Act or the underlying statutes; or
- (iv) non-compliance with the Act or the underlying statutes;
- (d) refer all non-compliance matters to the Complaints and Compliance Committee for consideration where an inspector determines that a licensee has not complied with the terms and conditions of its licence, licence exemption, the provisions of this Act or the underlying statutes or failed to provide broadcasting [or] electronic communications or postal services; 5
- (e) refer all complaints to the Complaints and Compliance Committee for consideration [**after an investigation into the complaint has been carried out**]; 10
- (f) appear before the Complaints and Compliance Committee when requested by such committee; and
- (g) co-operate with law enforcement officials when performing his or her functions.”. 15

Amendment of section 17G of Act 13 of 2000, as inserted by section 19 of Act 3 of 2006

25. Section 17G of the principal Act is hereby amended—
- (a) by the substitution for subsection (1) of the following subsection: 20
“(1) The Criminal Procedure Act, 1977 (Act No. 51 of 1977), applies with the [**necessary**] changes required by the context to entries, searches and seizures by inspectors in terms of this Act.”;
- (b) by the substitution in subsection (2) for the words preceding paragraph (a) of the following words: 25
“An inspector appointed in terms of section 17F may, in order to carry out his or her functions under this Act or the underlying statutes, at any reasonable time without prior notice and on the authority of a warrant issued under subsection (4) enter any premises and, without the use of force or coercion—”;
- (c) by the substitution in subsection (2) for paragraph (a) of the following paragraph: 30
“(a) demand the production of a licence or any other document issued in terms of the underlying statutes for inspection;”;
- (d) by the substitution in subsection (2) for paragraph (d) of the following paragraph: 35
“(d) inspect any radio apparatus, studio, plant, transmitters, apparatus, other equipment or other broadcasting, electronic communications or postal service facilities on the premises;”;
- (e) by the insertion of the word “and” at the end subsection (2)(f); 40
- (f) by the substitution in subsection (2) for paragraph (g) of the following paragraph: 45
“(g) seize for further examination or safe custody any document or thing which has or might have a direct bearing on the alleged non-compliance or other act referred to in section 17F on such premises.”;
- (g) by the substitution in subsection (4) for paragraph (a) of the following paragraph: 50
“(a) A magistrate or judge may, upon request by an inspector, but subject to subsection (b), issue a warrant to such inspector.”;
- (h) by the deletion in subsection (4)(b) of the word “and” at the end of subparagraph (i), the insertion of the expression “; and” at the end of subparagraph (ii) and the addition of the following subparagraph: 55
“(iii) is material to the investigation by the inspector.”; and
- (i) by the addition of the following subsection: 60
“(8) The inspector must, at the request of the Complaints and Compliance Committee, and in the course of hearing a complaint or dispute, provide to the Complaints and Compliance Committee any document or thing which was obtained or confiscated in terms of this section.”.

Amendment of section 17H of Act 13 of 2000, as inserted by section 19 of Act 3 of 2006

26. Section 17H of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for paragraph (c) of the following paragraph: 5
 “(c) makes a false statement before the Authority, including before the Complaints and Compliance Committee, on any matter, knowing such statement to be false;”;
- (b) by the substitution for subsection (2) of the following subsection: 10
 “(2) A person convicted of an offence in terms of subsection (1) is liable, in the case of a contravention of—
 (a) subsection (1)(a), (b) **[and]** or (c), to a fine not exceeding **[R250 000]** R5 000 000;
 (b) subsection (1)(d), to a fine not exceeding **[R50 000]** R1 000 000 or to imprisonment not exceeding **[three]** two years; 15
 (c) subsection (1)(e) **[and]** or (f), to a fine not exceeding R1 000 000 or to imprisonment not exceeding **[five years]** one year; and
 (d) subsection (1)(g), to a fine not exceeding **[R15 000]** R500 000.”;
- (c) by the substitution in subsection (3) for paragraphs (i), (ii), (iii) and (iv) of the following paragraphs, respectively: 20
 “(i) in the case of an offence contemplated in paragraph (a) to a maximum fine of **[R250 000]** R5 000 000;
 (ii) in the case of an offence contemplated in paragraph (b) to a fine not exceeding the greater of **[R1 000 000]** R5 000 000 or 10% of the person or licensee’s annual turnover for **[everyday]** every day or part thereof during which the offence continued; 25
 (iii) in the case of an offence contemplated in paragraph (c), (d) **[, and]** or (e) **[of this subsection]**, to a fine not exceeding **[R100 000]** R5 000 000; and
 (iv) in the case of an offence contemplated in paragraph (f), (g) **[, and]** or (h) **[of this subsection]**, to a maximum fine of **[R250 000]** R1 000 000.”; and 30
- (d) by the substitution for subsection (4) of the following subsection: 35
 “(4) The Authority may permit inspectors to dispose, in such manner as the Authority deems fit, of equipment that has been confiscated but that cannot be type-approved.”.

Repeal of Chapter IV of Act 13 of 2000

27. Chapter IV of the principal Act is hereby repealed.

Insertion of section 23A in Act 13 of 2000

28. The following section is hereby inserted in the principal Act after section 23: 40

“Liability

23A. (1) The State Liability Act, 1957 (Act No. 20 of 1957), read with the changes required by the context, applies to the Authority, but a reference in that Act to ‘the Minister of the Department concerned’ must be construed as a reference to the chairperson of the Council. 45

(2) A councillor, the chief executive officer or any member of staff or advisor or contractor of the Authority is not liable for the contents of any report, finding, point of view or recommendation that is given in good faith and that is submitted to Parliament, published or made available in terms of the Constitution or this Act.”. 50

Substitution of section 24 of Act 13 of 2000

29. The following section is hereby substituted for section 24 of the principal Act:

“Application of Act

24. In the event of any conflict between the provisions of this Act and any other [prior] law, except for the Constitution, relating to the regulation of broadcasting [and telecommunications], electronic communications and postal services, the provisions of this Act prevail.” 5

Amendment of Preamble to Act 13 of 2000, as substituted by section 1 of Act 3 of 2006

30. The Preamble to the principal Act is hereby amended— 10

- (a) by the insertion after the first paragraph of the following paragraph:
 “**AND RECOGNISING** that the success of the information, communications and technology sector must be underpinned by appropriate regulation of broadcasting, postal services, electronic communications and electronic communications networks;” 15
- (b) by the substitution for the last paragraph of the following paragraph:
 “**ACKNOWLEDGING** that the establishment of an independent body to regulate broadcasting, postal services and electronic communications is required.”

Amendment of Contents of Act 13 of 2000, as amended by section 23 of Act 3 of 2006 20

31. The Contents of Act after the Preamble of the principal Act is hereby amended—

- (a) by the insertion after item 11A of the following item:
 “11B. Code of Ethics”; 25
- (b) by the insertion after item 15 of the following item:
 “15A. Annual plan”; 25
- (c) by the insertion after item 23 of the following item:
 “23A. Liability”; and
- (d) by the deletion of items 14B and 14D and of Chapter IV.

Short title and commencement 30

32. This Act is called the Independent Communications Authority of South Africa Amendment Act, 2013, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

**MEMORANDUM OF OBJECTS ON THE INDEPENDENT
COMMUNICATIONS AUTHORITY OF SOUTH AFRICA
AMENDMENT BILL, 2013**

1. INTRODUCTION

- 1.1 The Minister of Communications (the “Minister”) has decided that, in the intervening period prior to the development of a comprehensive Information Communication and Technology (“ICT”) sector policy, certain amendments are necessary and appropriate in relation to both the Electronic Communications Act, 2005 (Act No. 36 of 2005), (the “ECA”) and Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000), (the “ICASA” Act).
- 1.2 In this regard, the Independent Communications Authority of South Africa Amendment Bill, 2013 (the “Bill”), seeks to effect the amendments in relation to the ICASA Act (the “principal Act”).
- 1.3 The amendments are underpinned by the need for some institutional improvements to—
- strengthen the Independent Communications Authority of South Africa (“ICASA”);
 - clarify certain aspects of powers of ICASA;
 - improve the efficiency of ICASA; and
 - conform the ICASA Act and, therefore ICASA, more closely to the requirements of the Public Finance Management Act, 1999 (Act No. 1 of 1999), (the “PFMA”).
- 1.4 The result from these legislative changes is likely the following:
- greater accountability and transparency;
 - improved governance; and
 - closer working and co-ordination of effort between the Department and ICASA at policy level.
- 1.5 This should not be read to suggest any limitation on ICASA’s independence. The importance of an independent and impartial regulator for the communications sector cannot be overstated. There are dicta on the importance and bounds of independence in state institutions.¹ Moreover, impartiality is a critical aspect of natural justice, now protected by the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), (“PAJA”).
- 1.6 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.² Taking this into account, we have made several amendments to the ICASA whilst more significant amendments, if required, are left to the Policy Review process.
- 1.7 The Minister will be seeking input from experts as part of the Review to define, once and for all, the status of ICASA within the context of section 181 of the Constitution. While the 2005 Asmal Report has been carefully considered and the historical reasons for deeming ICASA to fall within this section are clear, for legislative certainty, the Minister believes a more definitive statement from the legislature is required which takes account of all

¹ See for example, *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC); *New National Party v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC); *R v Valente* (1985) 24 DLR (4th) 162 (SCC); and *Financial Services Board and Another v Pepkor Pension Fund and Another* 1999 (1) SA 167 (C).

² *Van Rooyen and Others v the State and Others* 2002 (5) SA 246 (CC) at paras 32-34. See also *South African National Defence Union And Another v Minister of Defence and Others* 2004 (4) SA 10 (T) and *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC).

arguments and comes to a reasoned conclusion which can be relied on by all parties.

- 1.8 We have earmarked certain areas for the Review Panel which has now been constituted. The areas that have been referred to the Review are the—
- creation and operation of the Spectrum Management Agency, as indicated in the context of the Electronic Communications Amendment Bill that was published for public comment in July 2012;
 - working and structure of the Complaints and Compliance Commission;
 - provisions that address ownership and control; and
 - structure, duties and powers of the ICASA Council.

2. CLAUSE BY CLAUSE ANALYSIS OF THE BILL

2.1 Clause 1: Amendment to section 1 of the Act

2.1.1 This clause seeks to amend existing, delete obsolete and insert new definitions into the principal Act. For instance, the definition of “concurrent jurisdiction agreement” is revised to permit the definition to encompass these other entities and their powers. New definitions relating to “days” and “electronic transaction”, among others, are inserted into the principal Act in order to align the Act with ECA and the Electronic Communications and Transactions Act.

2.1.2 Other definitions are also amended, inserted into or deleted from the principal Act simply to correctly reflect the changes to laws, such as the repeal of the Telecommunications Act and the correct name of ECA.

2.2 Clause 2: Amendment to section 3 of the Act

This clause seeks to amend section 3 of the Act by the addition of subsection (5) to make it clear that any person who is aggrieved by the action, decision or finding of ICASA must seek redress in a court of law. These will include decisions taken in consequence of recommendations by the Complaints and Compliance Committee (the “CCC”).

2.3 Clause 3: Amendment to section 4 of the Act

2.3.1 Besides minor amendments to the functions or duties of ICASA in paragraphs (a) to (e) of subsection (3), this clause also seeks to enable ICASA to give input to the Minister on matters that may affect or be affected by electronic transactions. In that regard, a new paragraph (o) in subsection (3) is been inserted in the principal Act to allow ICASA to make recommendations to the Minister.

2.3.2 Furthermore, although section 74 of ECA provides for limited sanctions in certain respects, and sections 17A to 17E of the ICASA Act currently deal with the powers of the CCC in relation to disputes and complaints, there is no specific power given to ICASA to determine penalties or sanctions, as the case may be, in the principal Act, even under regulation. The Bill seeks to remedy this situation by proposing a new power for ICASA in paragraph (p) of subsection (3). In this regard, ICASA must be guided by the principles of administrative justice.

2.3.3 For consistency, the proposed new paragraph (q) in subsection (3) reflects the functions of ICASA in terms of Postal Services Act. Although separate legislation exists for the regulation of postal services which describes the role of ICASA in the regulation of postal services, the Minister considers that it is more appropriate in the context of a multi-functional regulatory authority to place all the functions of ICASA in relation to its broad powers in the same section.

- 2.3.4 A new subsection (3A) is inserted in the principal Act which will require ICASA to conclude a concurrent jurisdiction agreement with other institutions when necessary and to review the same at least once every 3 years.
- 2.3.5 Inquiries may be conducted into any matter except where the matter may be or is one that is of a nature where another authority may also have jurisdiction or may have primary jurisdiction, in which case subsection (3A)(b), read with section 4B(8), will apply.
- 2.3.6 For example, in the case of matters of a competition nature, ICASA is required to liaise with the Competition Commission in terms of its concurrent jurisdiction agreement, and we have adopted wording in subsection (3A)(b), read with section 4B(8), from the suggestions provided to the Department by the Competition Commission itself.
- 2.3.7 This clause also deals with the powers of delegation of the Council. In this regard, the general powers of ICASA in relation to decisions about licensing are critically important and may not be delegated to a councillor or committee of ICASA. Furthermore, a new provision dealing with the decision to revoke a licence is inserted in subsection (4) because of the implications of such a decision.

2.4 Clauses 4 and 5: Amendments to sections 4B and 4C of the Act

These clauses seek to amend sections 4B and 4C of the principal Act in order to shorten the time periods within which inquiries may be conducted by ICASA and concluded to accommodate concerns that such inquiries should render results more quickly in the interest of all involved. This section must obviously be read with the new definition of “days”.

2.5 Clause 6: Amendment to section 5 of the Act

This clause seeks to amend section 5 of the principal Act in order to include expertise and experience in the fields of, amongst others, broadcasting, electronic communications and postal policy or operations, public policy development, electronic engineering, law, information technology, content in any form, consumer protection, education, economics, finance or any other relevant expertise or qualifications in the qualifications of councillors of ICASA. The amendment is to some extent a matter of emphasis.

2.6 Clause 7: Amendment to section 6A of the Act

- 2.6.1 This clause seeks to amend section 6A of the principal Act in order to refer to a “collective” performance management system as well as an individual one, specific sections have been referenced to introduce more certainty concerning the criteria for performance and to ensure that the process can be objectively assessed.
- 2.6.2 The principal Act currently provides that the evaluation of the performance of the Chairperson or other councillors must be conducted by a panel constituted by the Minister, in consultation with the National Assembly. The Performance Management System for the Chairperson of ICASA and other councillors, as adopted by the National Assembly, presents Government, the National Assembly as well as ICASA with a robust mechanism that evaluates and measures performance. This performance management system provides an opportunity for all parties to engage constructively and provide for more rationality in respect of the resource allocation process so that funds are allocated where they are most likely to maximise the achievement of outcomes.

- 2.6.3 Given the importance of independence and impartiality and the constitutional imperatives, several other amendments have been made to the appointment of and service by councillors, their remuneration, performance contracts, and assessment mechanisms. Performance contracts in particular have been re-considered and the Minister agrees with the suggestions of the SALRC in this regard, namely that performance should not be measured individually but rather against the Council as a whole, who in turn may measure the performance of the management of ICASA as a whole.

2.7 Clause 8: Amendment to section 7 of the Act

- 2.7.1 This clause seeks to amend section 7 of the principal Act in order to clarify that the chairperson of ICASA and other councillors may be appointed only for a maximum of two (2) terms of five (5) and four (4) years only, respectively.
- 2.7.2 Furthermore, councillors are required to serve full-time unless they are involved with academic pursuits or occupy office as members of public interests bodies or organisations, which must be disclosed in writing and recorded as provided for in section 11B and 12(2) of the principal Act

2.8 Clause 9: Amendment to section 11 of the Act

- 2.8.1 This clause seeks to amend section 11 of the principal Act to the effect that meetings of councillors must be held no less than once a month, but can be held more frequently.
- 2.8.2 Furthermore, this clause seeks to tighten the provisions relating to the quorum at meetings of the Council. The increase in the size of the Council has given rise to difficulties in the past, in part because of the collective decision-making manner in which the Council operates.
- 2.8.3 Furthermore, the Chief Executive Officer of ICASA may attend at any Council meeting in terms of a new proposed subsection (5), although he or she has no voting rights. This is so that the administrative arm of ICASA, the CEO and other staff, and the operational or regulatory arm, the Council, can be more closely aligned by the flow of knowledge between them, and so that strategy can be coordinated. Insofar as the CEO is the accounting officer of ICASA in terms of section 36 of the PFMA, the CEO should also be aware of any issues that may have an effect on the budget of ICASA.

2.9 Clause 10: Amendment to section 11A of the Act

- 2.9.1 The clause seeks to amend section 11A of the principal Act to the effect that the minutes of the meetings contemplated in section 11 must be made public. This will ensure more transparency in the workings of ICASA, and therefore more administrative comfort for licensees. Under section 11A, minutes of Council meetings must be published in the ICASA library and on the ICASA website, which initially was drafted so as to require publication within 14 days.
- 2.9.2 Confidential information will not be included in the publication provided that it has been determined to be confidential under section 4D. At this point we wish to note that the provisions of this section should not be used in circumstances where information is not truly “confidential” as described. ICASA is entitled to information to assist it in the carrying out of its functions and the application of its powers, and insofar as that information is in any event required to be published (for example in a reference interconnection offer), the information may not be classified as “confidential” by licensees.

2.10 Clauses 11 and 12: Insertion of section 11B and amendment of section 12 of the Act

- 2.10.1 Clause 11 seeks to insert section 11B into the principal Act in order to improve governance and accountability of ICASA, requires ICASA to produce a code of ethics within 180 days of this section (11B) coming into force, and specifies the governance principles according to which the ICASA and the Council must function, including the following:
- (a) the principles of mutual respect and collective responsibility;
 - (b) the requirement that the Council shall have all information necessary to make an informed decision, taking account of all relevant facts at its disposal; and
 - (c) a commitment by members of the Council to the highest level of professionalism and corporate governance.
- 2.10.2 In the formulation of this section, we have considered local and international examples of similar codes. This code also echoes the kind of principles that Chapter 9 institutions are expected to uphold. This code will also be considered when evaluating the performance of the Council.
- 2.10.3 The Minister has considered other ways in which the impartiality and accountability of ICASA can be improved. In accordance with the requirements of the Asmal Report, the Minister will also require that a register be kept for declaration of any gift, benefit or gratuity received or derived by a councillor as a result of his or her actions or omissions under the Act, which as indicated above, must be open for inspection.

2.11 Clause 13: Amendment to section 14 of the Act

This clause seeks to amend section 14 of the principal Act in order to tighten the provisions relating to the staff and administration of ICASA.

2.12 Clauses 14, 15, 16 and 17: Amendments to sections 14A, 14B, 14C and 14D of the Act

- 2.12.1 Clause 14 seeks to amend section 14A of the principal Act in order to allow ICASA to appoint experts as it may deem appropriate and necessary without consulting the Minister. Insofar as the ICASA budget is insufficient for the costs of a necessary expert(s), ICASA must approach the Minister for assistance.
- 2.12.2 Clauses 15 and 17 seek to delete sections 14B and 14D of the principal Act, as they are not applicable any longer. Section 14D is being replaced by new section 23A.
- 2.12.3 Clause 16 seeks to amend section 14C of the principal Act to confirm that information presented to ICASA must be kept confidential unless it has to be disclosed in terms of section 12.

2.13 Clause 18: Amendment of section 15 of the Act

This clause seeks to amend section 15 of the principal Act in order to clarify that when delegating authority to sign cheques, this delegation may also be to a councillor. This may be a more appropriate level of delegation in our view.

2.14 Clause 19: Insertion of section 15A into the Act

The clause seeks to insert section 15A into the principal Act in order to require ICASA to prepare an annual plan for the year ahead at least once per year and to provide this to the Minister. This will enable more accurate forecasting of funding requirements of ICASA and better planning and liaison between

ICASA and the Department of Communications. It will also enable more transparency and certainty in relation to stakeholders.

2.15 Clause 20: Amendment to section 16 of the Act

2.15.1 ICASA is a “constitutional institution” under Schedule 1 of the PFMA. The CEO’s roles are clearly set out in this Act and do not need to be duplicated in the ICASA Act. However, the role of the CEO in producing financial statements, having them audited by the Auditor-General and presenting them to Parliament has been restated through the amendment to section 16 of the principal Act by clause 20 to make it clear that this remains the role of the CEO, not the Minister or the Council, as some confusion has developed around this area in the past.

2.15.2 The CEO must, however, present the same documents to the Minister at the same time in line with the reporting requirements of other Chapter 9 institutions.

2.16 Clause 21: Amendment to section 17 of the Act

This clause seeks to amend section 17 of the principal Act in order to clarify the interworking of the committees of ICASA and ICASA itself.

2.17 Clauses 22, 23, 24, 25 and 26: Amendments to sections 17A, 17C, 17F, 17G and 17H of the Act

2.17.1 Clause 22 seeks to amend section 17A of the principal Act in order to clarify that the members of the CCC are appointed for a fixed term. It is hoped that this will enable continuity and the establishment of a body of reliable and good precedent. In addition, the Authority will appoint a chairperson from the members of this committee. The committee’s further obligations and responsibilities are dealt with in the following clauses, and are also framed to improve outcomes and process within the CCC.

2.17.2 Clause 23 seeks to amend section 17C of the principal Act in order to clarify that persons who are not licensees but who are in breach of the Act or the underlying statutes must be able to bring a complaint or a dispute to the CCC in terms of this section and licensees must be able to bring complaints about other persons.

2.17.3 Clause 24 seeks to amend section 17F of the principal Act in order to strengthen the relationship between the Council and inspectors appointed to investigate complaints and other matters on behalf of ICASA. Inspectors must not be permitted to investigate matters without strict supervision, instruction and reporting obligations.

2.17.4 Clause 25 seeks to amend section 17G of the principal Act in order to confirm that, in addition to producing a licence, other documents may also be required, including, for example, type approval certificates. A new subsection (8) is inserted to section 17G in order to require more transparency and administrative fairness to the process by requiring inspectors to produce documents that they used in support of their applications to magistrates for warrants.

2.17.5 Clause 26 seeks to amend section 17H of the principal Act in order to increase, significantly, for offences of contravening the Act, taking account of the level of fines applied in other sector-related legislation such as the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (Act No. 70 of 2002).

2.17.5.1 The purpose of the increase is 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 ICASA 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.

2.17.5.2 The Minister believes that a threat to civil liberty may outweigh the payment of a financial penalty and therefore sanctions may include imprisonment for certain offences, in the alternative.

2.17.5.3 Penalties may be imposed up to a maximum fine or maximum term of imprisonment. This is also to create certainty and consistency in sentencing.

2.17.5.4 The Minister notes that a court should not be compelled to impose a minimum sentence where public policy dictates that this would be out of step with the gravity of the offence, which is why we have chosen a maximum sentence provision.

2.17.6 Furthermore, a new subsection (4) is inserted into the principal Act in order to enable the authorisation of inspectors to dispose of equipment that cannot be type-approved, so as to simplify the requirements for storage and safe-keeping of this equipment which cannot be lawfully used by any person when it fails to meet the prescribed standards.

2.18 Clause 27: Repeal of Chapter IV of the Act

This clause seeks to repeal Chapter IV of the principal Act as it is no longer applicable due to the passage of time.

2.19 Clause 28: Insertion of section 23A into the Act

This clause seeks to insert section 23A into the principal Act to refer more accurately and completely to the State Liability Act, following the repeal of section 14D of the principal Act.

2.20 Clause 29: Substitution of section 24 of the Act

This clause seeks to substitute section 24 of the principal Act in order to clarify the fact that the provisions of the Act takes precedence over any other law, except the Constitution, relating to the regulation of broadcasting, electronic communications and postal services.

2.21 Clause 30: Amendment of Preamble to the Act

This clause seeks to amend the Preamble to the principal Act in order to reflect the amendments proposed in the Bill.

2.22 Clause 31: Amendment of Contents of Act

This clause seeks to amend the Contents of Act after the Preamble of the principal Act consequent to the insertions of the new sections to and the repeal of existing sections from the principal Act.

2.23 Clause 32: Short title and commencement

This clause provides for the short title and coming into operation of the Act, once it is assented to, signed and promulgated into an Act of Parliament by the President.

3. PERSONS AND BODIES OR ORGANISATIONS CONSULTED

3.1 The Bill was published in the *Government Gazette* 35901 dated 23 November 2012. Twenty-two (22) written submissions were received from the following stakeholders and role-players:

- Competition Commission;
- Telkom;
- National Association of Broadcasters;
- Ward 46, Tshwane East Branch of the ANC;
- Internet Solutions;
- Cell C;
- MTN;
- Vodacom;
- Neotel;
- East London IBM and Compatibles (ELIAC);
- Film and Publication Board;
- ESKOM;
- etv;
- SOS: Support Public Broadcasting Coalition
- South African Communications Forum;
- Right2Know;
- Media Monitoring Africa;
- MNet and MultiChoice;
- Cape Chamber of Commerce and Industry;
- LINK Centre;
- Kagiso Media;
- Broadband Infracore; and
- National Treasury.

3.2 Furthermore, the Minister is grateful to the South African Law Reform Commission for certain suggestions in key areas affecting the communications sector, namely, the institutional framework, the regulation of electronic communications, broadcasting, e-commerce, interception and monitoring and postal services, so as to provide a framework for the recommendations for repeal or amendments set out in subsequent paragraphs.

4. FINANCIAL IMPLICATIONS FOR THE STATE

Normal communication associated with legislative processes as well as operational costs for the implementation of specific provisions will be catered for in the MTEF.

5. PARLIAMENTARY PROCEDURE

5.1 The State Law Advisers and the Department of Communications are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

5.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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