

## Overview of the ICASA Amendment Bill 2013 [B18-2013]

*This overview is not intended to be comprehensive and focuses on what we believe to be the more important aspects of the ICASA Amendment Bill 2013 (“the Bill”). Any questions or suggested corrections can be emailed to [dominic@ellipsis.co.za](mailto:dominic@ellipsis.co.za).*

### Background & Regulatory Context

The Minister of Communications<sup>1</sup> has decided that certain amendments are necessary and appropriate in relation to both the Electronic Communications Act 36 of 2005 (the “ECA”) and Independent Communications Authority of South Africa Act 13 of 2000, (the “ICASA” Act). The changes to the latter are embodied in the [ICASA Amendment Bill 2013](#) (“the Bill”).

According to the explanatory memorandum accompanying the Bill 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”).”

The memorandum indicates that it is an intended outcome of the amendments that ICASA and the Department of Communications will have a closer working relationship and better co-ordinate their efforts at policy level.

### Impact on ICASA’s independence

The explanatory memorandum goes to some length to assuage fears that the Bill may adversely impact on the independence of ICASA:

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

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<sup>1</sup> Presumably now the previous Minister of Communications

No doubt the impact of the Bill on the actual and/or perceived independence of ICASA will be one of the most hotly-contested aspects of the Bill. It is worth noting, however, that many of the more controversial proposals in this regard have been dropped from the previous version and deferred to the ICT Policy Review Process.

### **Changes from the previous version**

The following items, included in the [previous version of the Bill](#) as released directly by the Department of Communications for public comment, have been deferred to the ICT Policy Review Process:

- 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.

### **Jurisdiction over electronic transactions**

The Bill proposes that ICASA be given additional roles in relation to electronic transactions and to this end empowers ICASA to make recommendations to the Minister on any matter falling (strictly speaking) within the ambit of the Electronic Communications and Transactions Act 25 of 2002 (“the ECT Act”). ICASA is furthermore entitled to conduct research into the regulation of electronic transactions.

The provisions relating to ICASA’s jurisdiction over electronic transactions and the proposed linkages between the regulation of electronic communications and electronic transactions appear to have been watered down significantly from the initial draft.

### **Shorter inquiries...**

The Bill proposes to streamline ICASA inquiries under sections 4B and 4C of the ICASA Act by stipulating that the period for public comment in response to a notice initiating an enquiry shall not be less than 30 working days (as opposed to the current “within 60 days”). This minimum may be increased where the complexity of the subject matter of the inquiry demands this.

No amendment is proposed to the 180 working day period afforded to ICASA to publish its findings and reasons therefore after the conclusion of the inquiry.

### **Working with other regulators**

The existing provisions relating to concurrent jurisdiction between ICASA and other regulators are to be significantly strengthened and clarified. This is to be welcomed as forum shopping between ICASA and the Competition Commission has previously led to massive delays in dealing with anti-competitive conduct.

### **Performance managing ICASA**

The Bill seeks to amend section 6A of the Act so as to make it clear that the performance management system applicable to ICASA’s Council will be both collective (i.e. in respect of the Council as a whole) as well as individual.

“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.

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<sup>2</sup> 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.”

### **Terms of appointment of councillors & the ICASA chairperson**

The Bill has a number of provisions aimed at strengthening governance:

- It clarifies that councillors may be appointed only for a maximum of 2 terms of 4 years and the Chairperson a maximum of 2 terms of 5 years.
- Provisions relating to the prohibition on other employment have been strengthened. 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. Such engagements must be disclosed in writing.

### **Minutes of Council meetings to be made public**

Minutes of meetings of ICASA’s Council are to be made public within 14 days of the minutes having been signed (excepting information determined to be confidential pursuant to section 4D). Furthermore any decision made by Council which relates to a licensing or regulatory matter must be made available on its website and in the ICASA library.

This proposal is long overdue and most welcome. Given the authority which ICASA exercises over the industry this kind of transparency is critical.

### **Code of Ethics**

The Bill proposes a new section 11B which would require that ICASA finalise and publish a Code of Ethics relating to governance and required disclosures within 180 working days of the commencement of section 11 of the ICASA Amendment Act 2013. All councillors and the CEO must adhere to this and a register must be maintained to record required disclosures.

Governance principles to be specified in the Code of Ethics will include:

- mutual respect and collective responsibility;
- 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
- a commitment by members of the Council to the highest level of professionalism and corporate governance.

Registers must be maintained reflecting declarations of gifts, benefits and/or gratuities received by councillors and these must be kept open for inspection.

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<sup>2</sup> South African Law Reform Commission

## **Annual Plans & Annual Reports**

A new section 15A is proposed which would explicitly require ICASA to prepare an annual plan for the year ahead at least once a year. A copy of this annual plan would need to be submitted to the Minister. The purpose of this amendment is to enable more transparency and certainty on the part of stakeholders while promoting more accurate budgetary forecasting and better planning and liaison between the ICASA and the Department of Communications.

The Bill also seeks to make it clear that it is the role of ICASA's CEO to prepare financial statements for ICASA and to have these audited by the Auditor-General and thereafter present them to Parliament.

Another amendment to section 16 of the ICASA Act requires that the Annual Report required from ICASA every year must "reflect in reasonable detail deliverables and those matters that are not dealt with in terms of the annual plan".

## **Complaints and Compliance Committee**

While major policy decisions on the future of the Complaints and Compliance Committee (CCC) have been deferred to the ICT Policy Review Process, the Bill proposes the following amendments:

- members of the CCC are to be appointed for a 3 year term of office which may be renewed once;
- ICASA is required to appointment a chairperson from amongst the members of the CCC;
- members of the CCC must not act or behave in a manner that undermines the functions and work of the CCC; and
- the jurisdiction of the CCC has been widened so that it can entertain complaints or disputes against persons other than licensees where these are referred to it by ICASA. ICASA will have a discretion on whether to refer the matter to the CCC or to lay a charge against the non-licensee with the appropriate authority or refer the matter to another regulator in terms of a concurrent jurisdiction agreement.

## **ICASA inspectors & inspections**

The Bill proposes amendments to sections 17F and 17G which constitute an attempt to strengthen the oversight exercised by ICASA's Council over the activities of inspectors. In this vein the Bill seeks to make it clear that ICASA may terminate the appointment of inspectors and that inspectors should only perform their functions when instructed to do so by Council. The explanatory memorandum is explicit that inspectors "must not be permitted to investigate matters without strict supervision, instruction and reporting obligations."

Proposed amendments to section 17G would make it compulsory for an inspector to provide documents or things obtained through his or her actions to the CCC.

## **Sanctions**

The Bill seeks to substantially increase fines payable for offences under the ICASA Act. For example: the maximum fine for making a false statement to the Authority of the CCC would be increased from the current R250 000 to R5 000 000. In some instances provision has been made for imprisonment as a sanction.

### **ICASA Act trumps the ECA?**

The Bill makes it clear that in the event of any conflict between the provisions of the ICASA Act and any other legislation, other than the Constitution, the provisions of the ICASA Act will prevail.

