

**Overview of the Electronic Communications Amendment Act 1 of 2014**

*This overview is not intended to be comprehensive and focuses on what we believe to be the more important aspects of the Electronic Communications Amendment Act 1 of 2014. Any questions or suggested corrections can be emailed to [dominic@ellipsis.co.za](mailto:dominic@ellipsis.co.za).*

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**Introduction**

The [Electronic Communications Amendment Act 1 of 2014](#) (“the Amendment Act”) was published in the Government Gazette on 7 April 2014. The Amendment Act is to come into force on a date or dates to be determined by the Minister of Communications by notice in the Gazette. The Minister may determine different dates for the commencement of different sections of the Amendment Act.

The [ICASA Amendment Act 2 of 2014](#) was published for information on the same date, the intention being to amend the Electronic Communications Act and the ICASA Act simultaneously to ensure consistency across legislation applicable to the ICT sector.

[Full history of the Electronic Communications Amendment Act 2014](#)

**Objects of the Amendment Act**

The objects of the Amendment Act are to:

- to align the Act with broad-based black economic empowerment initiatives;
- to incorporate the Authority’s recommendation on ownership and control of commercial broadcasting services;
- to refine licensing issues;
- to make further provision towards ensuring effective competition;
- to remove regulatory bottlenecks;
- to provide for the creation of a National Broadband Council;
- to make further provision for the e-rate;

- to empower the Minister to make certain information requests
- to improve the governance provisions of the Universal Service and Access Agency of South Africa; and
- to make further provision for the use of money in the Universal Service and Access Fund (USAF) .

## **Broadband**

There is now a definition of “broadband” in the ECA:

*“broadband” means an always available, multimedia capable connection with a minimum download speed as determined by the Minister by notice in the Gazette;*

A new section 72A empowers the Minister of Communications to establish a National Broadband Council (NBC) which will have the role of advising the Minister on broadband policy and its implementation. Members of the NBC are to be drawn from both the public and the private sectors.

The proposed functions of the NBC are to:

- coordinate overall broadband implementation by government at national, provincial and local government levels;
- facilitate the monitoring and measurement of broadband penetration in South Africa;
- develop a broadband implementation plan that supports the Broadband Policy for South Africa which plan must include, without limitation, skills development, research and development of broadband priority areas;
- advise the Minister and the Minister of Finance on government investment in electronic communications facilities and networks that contribute to broadband at national, provincial and local government level to avoid unnecessary duplication;
- recommend measures to increase uptake and usage of broadband as well as enhance public awareness on the benefits of broadband; and
- annually survey and evaluate the status of broadband penetration in the Republic including, without limitation, household broadband penetration and electronic communications network connectivity to municipalities and broadband providers.

The NBC must in performing its functions have regard to the provisions “of any other national law on the development of infrastructure”.

[Initial members of the NBC](#) were appointed on 4 March 2014. Additional appointments are anticipated.

## **Transformation**

The Amendment Act starts the process of aligning transformation initiatives in the ICT industry with generally-applicable broad-based black economic empowerment legislation.

The objects of the Act are amended to remove the reference to “historically disadvantaged persons, including Black persons” and replace it with “broad-based black empowerment” as defined in the Broad-Based Black Economic Empowerment Act of 2003. In similar fashion the Amendment Act requires that ICASA promote broad-based black empowerment as opposed to historically disadvantaged persons in granting licences under the ECA.

The required equity ownership by historically disadvantaged groups in section 9(2)(b) has been retained for the time being provided that broad-based black economic empowerment requirements prescribed by ICASA under section 4(3)(k) of the ICASA Act may replace it in due course.

### **Powers of the Minister**

The ECA is amended to make it clear that:

- the Minister may make national policy in respect of radio frequency spectrum licence fees as well as issue guidelines to ICASA on how these should be determined
- the Minister may issue national policy in respect of and policy directions to USAASA
- the Minister has a broad discretion as to policy directions that may be issued
- national policy – and not only policy directions – must be subjected to a public participation process.

Ministerial control over the issuing of individual licenses by ICASA is retained: this may only be done after the Minister has issued an appropriate policy direction<sup>1</sup>.

A new section 79B empowers the Minister – subject to the Promotion of Access to Information Act - to access information held by ICASA or USAASA or any other person where this information is required by the Minister for the performance of his or her functions.

### **Relationship between the Minister and ICASA**

The Amendment Act re-introduces a requirement – formerly in place under the Telecommunications Act of 1996 – that ICASA must provide a copy of proposed regulations to the Minister not less than 30 days prior to finalising them.

### **Licensing**

A number of amendments to the licensing framework are made:

- the geographic scope of individual commercial and public broadcasting licences is clarified
- the deletion of the requirement that any service licence in which a state entity (directly or indirectly) holds an ownership interest of greater than twenty-five (25%) percent of the share capital of the person providing such service must be an individual licence
- the amendment of the scope of class electronic communications service (CECS) licences so that these authorise the holder to provide commercial services of municipal scope<sup>2</sup>

### **Changes to the service licensing framework**

The following amendments are made to the service licensing framework set out in Chapter 3 of the ECA:

- Changes to section 13 and section 16 of the ECA are intended to make it clear that individual and/or class licences - or control over them - may not be let, sub-let, assigned, ceded or in any way transferred without the prior written permission of ICASA after application in the prescribed

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<sup>1</sup> The Amendment Act does remove the reference to “the policy of managed liberalisation”, so presumably it is not called that anymore.

<sup>2</sup> We are strongly opposed to this amendment

manner. In the case of class licences approval will be deemed to have been given if ICASA does not respond to a duly submitted application within 30 working days.

- Changes to section 16 are intended to specify that a licensee may not through the holding of multiple class licences assume the scope of coverage of an individual licence.
- The turnaround time for the processing of registering class licences is to be reduced from 60 days to 30 working days. Deeming provisions relating to the failure of ICASA to respond properly to a registration duly submitted also now refer to 30 working days.

### **Universal Service Obligations**

Amendments to section 8 of the ECA make it clear that ICASA can designate licensees to which universal service and universal access obligations apply. It may then prescribe additional terms and conditions on such licensees in respect of such obligations. This must be done after consultation with USAASA and take into account any determinations regarding universal service and universal access made by the Minister under section 82 of the ECA.

### **Rapid Deployment Guidelines**

Amendments to sections 20 and 21 of the ECA are intended to remove current uncertainty around the legal status of the guidelines by clarifying that the Minister will issue policy and/or policy directions whereafter ICASA will prescribe regulations governing how ECNS licensees may exercise their infrastructure rights (having regard to the policy and/or policy directions). The policy and/or policy directions must be issued by the Minister within 12 months of the coming into force of the Amendment Act. ICASA will then have a further 6 months in which to finalise the regulations.

### **Spectrum**

The Amendment Act inserts a new subsection 31(2A) into the ECA which restates that the letting, sub-letting, ceding, sharing or transferring of radio frequency spectrum licences is permissible, subject to ICASA's prior written permission having been obtained. It follows that ICASA will be required to draft appropriate regulations governing the terms and conditions applicable to letting / sub-letting / transfer of spectrum licences, including an application form<sup>3</sup>. ICASA may prescribe procedures and criteria for transfer et al applications.

ICASA is now required to notify an applicant for the amendment of a spectrum licence of its decision in respect of such application within 60 working days of receipt of the application.

### **Type approval**

The Amendment Act closes a perceived loophole in the type approval regime by clarifying that type approval certification is required, *inter alia*, by persons possessing electronic communications equipment and facilities.

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<sup>3</sup> This form already exists as an annexure to the Radio Regulations 2011, see <http://www.ellipsis.co.za/wp-content/uploads/2011/02/Annexure-C-Application-to-Transfer-a-Radio-Frequency-Spectrum-Licence.pdf>

## Interconnection

The Amendment Act redefines the reasonableness of interconnection requests. Currently an interconnection provider is entitled to refuse a request for interconnection on the basis that it would not be, *inter alia*, financially feasible to interconnect with the interconnection seeker. The Amendment Act changes “financial feasibility” to “economic feasibility”.

Further amendments are intended to ensure that

- interconnection agreements are not in any way discriminatory compared to comparable network services provided by a licensee to itself or an affiliate
- registrants for class licences are also entitled to make interconnection requests
- ICASA can in its interconnection regulations create a framework for exempting (in whole or in part) licensees that have less than 25% market share from the obligation to interconnect

## Facilities leasing

Similarly the Amendment Act amends “financial feasibility” to “economic feasibility” for the purpose of determining the feasibility of a facilities leasing request under Chapter 8 of the ECA and sets out further provisions to ensure that facilities leasing agreements are not in any way discriminatory compared to comparable network services provided by a licensee to itself or an affiliate.

A new section 43(8A) states that requests for the leasing of essential facilities are deemed “to promote the efficient use of electronic communications networks and services”. Further, recipients of a request to lease essential facilities would be required to agree on non-discriminatory terms and conditions for the implementation of the lease within 20 business days of receiving the request. Such recipient must otherwise provide that the request is not technically or economically feasible within the 20 business day period. In the absence of agreement on the terms and conditions to be applied ICASA is empowered to impose appropriate terms and conditions within 20 business days of receiving notification of a failure to agree.

Any exclusivity provision prohibited under section 43(10) of the ECA will be regarded as invalid as of one year after the commencement of the Amendment Act. Such prohibited provisions include agreements relating to access to international electronic communications facilities that restrict the ability of third parties to access such facilities.

ICASA is authorised to create a framework for exempting (in whole or in part) licensees that have less than 25% market share from the obligation to lease facilities.

The definition of “electronic communications facility” has been amended to make it clear that this definition includes

- access to wiring in multi-tenant buildings
- exchange buildings
- carrier-neutral hotels and
- data centres.

## Competition

Comprehensive amendments have been made to section 67 of the ECA, which sets out the process which ICASA must follow in determining whether a market is characterised by a lack of competition such that ICASA would be justified in imposing pro-competitive licence conditions on licensees found to have Significant Market Power in such a market.

Of note is the reformulation of the types of pro-competitive conditions which ICASA can impose: these now include the power to impose conditions relating to the distribution, access and reselling obligations for broadcasters.

## The E-Rate

Amendments to the e-Rate<sup>4</sup>:

- extend the obligation on electronic communications service licensees providing Internet services to public schools and further educations and training institutions to provide a minimum discounted rate of 50% off the total charge levied for these services to also cover
  - independent schools public and private colleges
  - private further educations and training institutions
  - public and private higher education institutions
- clarifies that the discount applies against the total charge levied, including (but not limited to)
  - any connectivity charges for access to the Internet
  - charges for any electronic communications facilities used for or in association with connectivity to the Internet
  - all call charges for access to the Internet
- affirms that an electronic communications service licensee providing this discount is entitled to a minimum of 50% off the wholesale rate charged to it by the electronic communications network service licensee for the facilities in question, which discount shall be passed on to qualifying institutions
- allow USAASA to pay the charges for Internet services on behalf of a qualifying institution (in which case USAASA shall be entitled to the discount)

## USAASA

There are extensive amendments relating to the operation and performance of USAASA. The changes proposed are intended to make it clear that USAASA is subject to the Public Finance Management Act and to improve its governance.

Other amendments seek to ensure there is consistency in provisions relating to universal access, universal service and needy persons. Interestingly there is also a proposal that the Minister of Communications, acting with the concurrence of the Minister of Finance, may prescribe additional uses of money held in the Universal Service and Access Fund (USAF).

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<sup>4</sup> The E-Rate intervention is intended to promote use of the Internet in schools by requiring that service providers grant a 50% discount on Internet services provided to schools. The implementation of this intervention has been remarkably unsuccessful to date