

## Overview of the ICASA Amendment Act 2014

*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).*

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### Background & Regulatory Context

The [ICASA Amendment Act 2 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 to be proclaimed by the President.

The [Electronic Communications Amendment Act 1 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.

The objects of the Act are to

- provide for further clarity on the powers and duties of the ICASA
- introduce mechanisms to ensure the accountability of the Authority, including that of councillors and committees
- confirm the use of electronic communications networks and services for the purpose of electronic transactions<sup>1,2</sup>

[Full history of the ICASA Amendment Act](#)

### Relationship with the Minister

A new section 3A is inserted into the ICASA Act, making it explicit that ICASA, in exercising its powers and performing its duties:

<sup>1</sup> It remains unclear to us why confirmation of the obvious is necessary

<sup>2</sup> Object set out in the preceding Bill which were not carried into the Amendment Act include “to strengthen the Independent Communications Authority of South Africa” and “to improve the efficiency of ICASA”

*“must consider policy made, and policy directions issued, by the Minister in terms of this Act, the underlying statutes and any other applicable law;*

Other amendments are intended to remedy difficulties with the implementation of a performance management system for the ICASA Chairperson, councillors (individually) and Council (collectively). The evaluation of the performance of the chairperson, councillors and the Council must be conducted by a panel constituted by the Minister, in consultation with the National Assembly.

### **Spectrum management**

The amendment to subsection 4(3)(c) of the ICASA Act is interesting (underlined text represents insertions into the existing provision):

*(c) must control, plan, administer and manage the use and licensing of the radio frequency spectrum in accordance with bilateral agreements or international treaties entered into by the Republic*

### **Jurisdiction over electronic transactions**

The Amendment Act gives ICASA additional roles in relation to the regulation of electronic transactions and to this end empowers ICASA to make recommendations to the Minister on promoting the development of electronic transactions and matters to be dealt with under the Electronic Communications and Transactions Act 25 of 2002. ICASA is empowered to conduct research into the regulation of electronic transactions.

ICASA will need to be provided with the capacity to discharge this function.

### **Shorter inquiries**

Inquiries under sections 4B and 4C of the ICASA Act are to be streamlined by reducing the minimum period for public comment from 60 working days to 45 working days and the period for consideration and finalisation by ICASA from 180 working days to 90 working days.

### **Working with other regulators**

A new section 3A states that ICASA “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”.

Further amendments explicitly require ICASA – before exercising its powers in respect of inquiries under section 4C of the ICASA Act – to

- consider whether or not, in terms of any concurrent jurisdiction agreement concluded with any other authority or institution, it would be appropriate to refer an inquiry to such authority or institution; or
- subject to section 67 of the Electronic Communications Act and the terms and conditions of any concurrent jurisdiction agreement concluded with 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.

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

The Amendment Act 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.

## **Council meetings**

Meetings of the ICASA Council must be held at least once a month. A new section provides that the ICASA CEO 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.

Minutes of meetings of ICASA's Council are to be made public within 30 working days of the conclusion of the meeting (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.

## **Code of Ethics**

A new section 11B is inserted into the ICASA Act, requiring that ICASA finalise and publish a Code of Ethics relating to governance and required disclosures and the process for such disclosures within 180 working days of the commencement of the Amendment Act. 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
- 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
- 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.

A register must be maintained reflecting declarations of gifts, benefits and/or gratuities received by councillors and interests, financial or otherwise, direct or indirect.

The register must be open for inspection during office hours on business days; and contained in the annual report referred to in section 16.

## **Annual Plans & Annual Reports**

A new section 15A requires the ICASA CEO - at least three months before the end of each financial year - to prepare and submit to the Council for approval an annual plan which describes the proposed activities of ICASA with indicative timeframes for the coming year.

A copy of ICASA's financial statements, the Auditor-General's report on those statements and ICASA's annual report must be provided to the Minister within three months of its financial year end. The annual report must reflect in reasonable detail deliverables and those matters that were not dealt with in terms of the annual plan referred to in the paragraph above. The Minister may now request information in writing from ICASA in respect of its activities, which ICASA is obliged to provide.

## **Complaints and Compliance Committee**

The Amendment Act makes it clear that a person who has reason to believe that a licensee or another person is guilty of any non-compliance with the terms and conditions of a licence, the ICASA Act or the underlying statutes may lodge a complaint with the Authority within 60 days of becoming aware of the alleged non-compliance.

ICASA can then either

- direct the complaint within 30 days to the Complaints and Compliance Committee (CCC) for consideration if a licensee is targeted
- 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 within 30 days of receipt of the complaint, or
- investigate and adjudicate the complaint itself.

## **ICASA inspectors & inspections**

Amendments to section 17F of the ICASA Act make it clear that ICASA may terminate the appointment of inspectors and that inspectors are authorised to act only when instructed to do so by ICASA's Council. This is an important amendment.

Procedural refinements have been made to section 17G of the ICASA Act.

## **Sanctions**

The maximum fines set as sanctions in the ICASA Act have been substantially increased. For example: the maximum fine for making a false statement to the Authority or the Complaints and Compliance Commission has increased from the previous R250 000 to R5 000 000. On the other maximum periods of imprisonment which may have been imposed have been reduced.

## **ICASA Act trumps the ECA**

The Amendment Act 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.

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