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OVERVIEW OF THE DRAFT ELECTRONIC COMMUNICATIONS AMENDMENT BILL 2017

The Draft Electronic Communications Amendment Bill 2017 was published for public comment on 17 November 2017. Comments are due by Sunday 17 December 2017. The below is an overview of – not a commentary on – the most important aspects of the Bill for the benefit of those not fluent in legalese. As a general comment, note that the Bill is for the most part a straightforward translation of the provisions of the ICT Policy White Paper regarding spectrum, rapid deployment of infrastructure and open access into legislation.

Full text of the Bill and updates

Wireless Open Access Network (WOAN) & High-Demand Spectrum

The Bill proposes the insertion of Chapter 3A to provide for the issuing of an electronic communications network service (ECNS) licence and radio frequency spectrum licences to the WOAN.

The licensing process will be initiated by the Minister issuing a policy direction to ICASA for it to publish an invitation to apply (ITA). Before this can happen (1) ICASA must have made recommendations on the terms and conditions including universal service and access obligations which will apply to the WOAN, and (2) the Minister must have considered incentives to be applied, such as waived/reduced spectrum licence fees, access to rights of way and funding from the Digital Development Fund for network deployment in rural areas. ICASA's recommendations must be finalised within 12 months of the commencement of the finalised Amendment Act.

The WOAN will be required to:

- provide wholesale open access to its networks and facilities;
- provide for active infrastructure sharing that includes but is not limited to national roaming, radio access network sharing and enabling mobile virtual network operators, for voice and data based on the latest generation of technologies;
- adopt cost-based pricing;
- allow access to its networks or facilities as prescribed by the Authority; and
- comply with specific network and population coverage targets.

ICASA **can only proceed to assign licences for high-demand spectrum not assigned to the WOAN once:**

- the WOAN is functional;
- the licensee has procured "a minimum of 30% capacity or such higher capacity as determined by the Authority, in the WOAN for a period determined by the Authority"; and

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- universal service and/or access obligations have been imposed "and such obligations are complied with in rural and under-serviced areas before the assigned spectrum may be used in other areas by the licensee".

ICASA must – within 24 months of the commencement of the finalised Amendment Act – conduct an inquiry as contemplated in section 4B of the ICASA Act and make recommendations to the Minister "on the terms and conditions, as well as the time frame, under which the exclusively/individually assigned high demand spectrum not assigned to the WOAN, must be returned to the Authority, taking into account policy, market developments and extent of availability of open access networks".

Spectrum

In line with the policy set out in the National ICT Policy White Paper, significant changes are proposed to the manner in which the ECA provides for the management of radio frequency spectrum.

Institutional arrangement

Under the Bill many of the functions currently exercised by ICASA will be transferred to the Department and Minister. This includes the creation of two new spectrum management bodies within the Department.

Under a new section 29A, the Minister will continue to be responsible for the international dimensions of spectrum management, but will now also hold responsibility for:

- developing and approving the NRFP including the allocation of spectrum for the exclusive use by national security services (currently ICASA develops the NRFP and submits it to the Minister for approval);
- establishing a National Radio Frequency Spectrum Planning Committee and National Radio Frequency Spectrum Division as contemplated in section 34A; and
- coordinating with the Minister of Communications on spectrum allocated to broadcasting services.

ICASA's broad powers are to be reduced: from "controls, plans, administers and manages the use and licensing" of spectrum to "administers and manages the assignment, licensing, monitoring and enforcement of spectrum use", except where this has been reserved to the Minister.

Under the Bill ICASA would be required "to comply" with ministerial policies and policy directions relating to spectrum, i.e. it would have no discretion as it currently does.

Additional obligations imposed on ICASA include:

- conducting periodic spectrum usage audits for submission to the Minister and publication on its website;
- maintaining a "high quality and appropriately accessible real-time database" of spectrum assignments, excluding assignments to security services, that includes real-time updates from sector-specific agency databases (see below);

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- advising the Minister on areas for future research, development and planning;
- ensuring that spectrum licensees submit an annual report on its spectrum usage to the Authority and Minister setting out specified information;
- taking appropriate action to ensure compliance with the provisions of this Chapter, including developing an effective monitoring and enforcement system allowing for adjudication of spectrum disputes; and
- developing an automated licensing system for non-high-demand spectrum.

The provision requiring the prior approval of ICASA for any transfer of a spectrum licence or transfer of control over a spectrum licence inserted by the 2014 amendments is to be repealed.

ICASA's power to prescribe procedures and criteria for high-demand spectrum assignments is to be removed.

A new section 3A makes it explicit that licences "are renewable annually, despite the duration of the licence". Renewal of a licence will be condition on the annual usage report having been submitted to ICASA and the Minister.

The use-it-or-lose-it principle is to be introduced: ICASA will be entitled to withdraw a licence where the licensee fails to use the assigned radio frequency spectrum for a period of one year. This will not apply to:

- passive science services due; and
- SMMEs and new entrants exempted by the Minister on the recommendation of the Authority and on good cause shown.

New sections are to be inserted on the following:

Universal access and universal service obligations of radio frequency spectrum licences

ICASA must impose universal access and universal service obligations – approved by the Minister – on existing and new radio frequency spectrum licensees. These obligations must be comparable across licensees in similar radio frequency spectrum bands. Licensees must report annually on compliance – these reports must be made publicly available – and ICASA must evaluate compliance annually as a condition of renewal of the licence(s).

Radio Frequency Spectrum Trading

ICASA will be required to develop spectrum trading regulations for non-high-demand spectrum which will allow trading in this spectrum. The regulations are to cover, inter alia, prevention of hoarding and a requirement that the transferring licensee must have used the spectrum in the previous year to prevent circumvention of the use-it-or-lose-it principle.

Explicit provision is made for the Minister to issue policy directions to ICASA on spectrum trading and spectrum use rights "in order to fulfil specific national objectives".

Radio Frequency Spectrum Sharing

Spectrum sharing will be permitted subject to ICASA's approval. This approval will be contingent on the sharing not negatively impacting competition or constituting spectrum trading. ICASA is required to develop spectrum sharing regulations.

Radio Frequency Spectrum Refarming

Licensees will be permitted to refarm licenced spectrum subject to approval from the Authority. Approval cannot be given if the application will negatively impact on competition. If there are universal service and/or access obligations on other licensees in the refarmed band, these must be equally applied, as must licence fees. ICASA must develop spectrum refarming regulations.

High-demand Spectrum

The Bill proposes the following definition:

"'high demand spectrum" means spectrum where-
(a) demand for access to the radio frequency spectrum resource exceeds supply; or
(b) radio frequency spectrum is fully assigned, as determined by the Minister responsible for Telecommunications and Postal Services, by notice in the Gazette, after consultation with the Authority;";

It will now be a function of the Minister – after consultation with ICASA – to publish a notice setting out a determination of what constitutes high-demand spectrum and the unassigned spectrum to be assigned to the WOAN. The first determination must be made within 6 months of the commencement of the finalised Amendment Act; thereafter "as required".

Assignment of high-demand spectrum must be done in accordance with the principles of open access set out in Chapter 8 (see below) and "in line with the principles of non-exclusivity, subject to the NRFP".

National Radio Frequency Spectrum Planning Committee and National Radio Frequency Spectrum Division

The Minister is required to establish:

- a National Radio Frequency Spectrum Planning Committee that includes representation from relevant Government stakeholders, "to ensure fairness and equitable distribution of radio frequency spectrum"; and
- a National Radio Frequency Spectrum Division within the Department to, inter alia, coordinate the work of the National Radio Frequency Spectrum Planning Committee.

Sector-specific Agencies

The Bill provides for recognition of the South African Marine Safety Authority (SAMSA) and the Civil Aviation Authority (CAA) as sector-specific agencies which will enter into agreements with the Minister and ICASA

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allowing them to assign spectrum assigned to it to registered users in the sector in accordance with prescribed regulations. The agencies will be required to maintain a database of users which allows real-time updating of the corresponding database held by ICASA.

SADC roaming provisions

A new Chapter 7A provides for the implementation of the SADC Roaming Policy Guidelines by ECS licensees providing international roaming services to or from any SADC country. This includes:

- transparent, fair, and non-discriminatory pricing;
- provision of adequate information in relation to retail prices and billing cycles;
- a prohibition on roaming prices being lower than underlying costs and should not distort competition in the region;
- pricing to be cost-based and "not be too excessive in comparison with prices charged for the same services at national level";
- end-users must consent to roaming connections; and
- quality of service must be at least equivalent to those applicable in each SADC country.

ICASA is required to prescribe SADC roaming regulations within 6 months of the commencement of the finalised Electronic Communications Amendment Act, taking into account the SADC Roaming Policy Guidelines and SADC Model Roaming Regulations. These regulations may be conditional on reciprocal terms and conditions being imposed on providers in another SADC country.

The regulations may include rate regulation for the provision of roaming services, including without limitation, price controls on wholesale and retail rates as determined by ICASA.

Note that – although the heading refers to SADC roaming – the last provision of this chapter notes that it refers, with the necessary changes, to international roaming to any other jurisdiction.

Rapid deployment of electronic communications networks and electronic communications facilities

Chapter 4 of the ECA is to be extensively revised: the draft Bill proposes deletions of some existing sections and the insertion of 16 new sections – 20A to 20P – which set out a new institutional structure and detail the rights and obligations of ECNS licensees and landowners respectively.

ECNS licensees right to enter and use property

The draft Bill seeks to repeal sections 22 and 23 of the ECA which currently deal with the rights of ECNS licensees to enter onto land for the purposes of the deployment of infrastructure.

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Under a new proposed section 20G:

- ECNS licensees will have “the right to enter upon and use public and private land for the deployment of electronic communications networks and facilities”, subject to complying with the following:
  - provision of written notice of proposed access to an owner and, if applicable, occupier of the affected land, specifying the (a) reasons for the activity, (b) the date of commencement, (c) the objection process and (d) environmental, health and safety information, as may be applicable;
  - **provision of all information required by the automated application process, if any, and securing of a wayleave**;
  - exercise of due care and diligence to minimise damage, following good engineering practice, and taking of all reasonable steps to restore the property;
  - compliance with best practise and regulatory and industry standards in the design, planning and installation of the electronic communications network or facility;
  - taking of reasonable steps to minimise interference with operations of a public utility;
  - keeping the GIS database updated; and
  - upholding the principle of open access and infrastructure sharing and avoiding unnecessary duplication of infrastructure.
- licensees are entitled to select appropriate land and gain access to such land for the purposes of constructing, maintaining, altering or removing their networks or facilities;
- licensees **retain ownership of networks and facilities** constructed; and
- property owners are entitled to object to the Authority in the prescribed manner at least 14 days before the licensee commences with the activity, if the proposed network or facility will cause significant interference with the land.

The right of a licensee to enter onto land to maintain their networks will no longer be subject to the giving of 30 days’ notice: only prior written notice will be required.

Adequately served

A location will be regarded as "adequately served" where there is a network or facilities that enable ECS including voice and broadband at the quality and speeds provided in the National Broadband Policy, which has been deployed “to and within a set of premises such as a gated complex, an office park, a shopping mall, a government building or a block of flats, by an ECNS licensee” (referred to in this section as an "access provider"), where the access provider has the ability to connect each and every occupant or user within such premises.

Such a network will be deemed to be an essential facility as that term is defined and dealt with in the ECA and Bill. This has implications in terms of the licensee being regarded as a deemed entity which is subject to additional obligations under the open access provisions (see below).

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ICASA is required to ensure that access providers in respect of an adequately served location:

- make available the network or facilities or elements thereof should be available to access seeking licensees on an open access basis;
- allow occupants to select and receive a service from their ECS provider of choice; and
- establish a "meet-me" facility at a suitable point within the premises "at which all access seeking licensees may install their own electronic communications facilities or equipment so as to interconnect with the network of the access provider, or that the access seeking licensee may use those facilities of the access provider as would enable it to provide services as requested".

No competing networks or facilities may be deployed in adequately served premises without the approval of ICASA, where such deployment will not discourage service-based competition.

Essential facilities

The Bill proposes the following definition:

"essential facility" means-
(a) an electronic communications facility or combination of electronic communications or other facilities that is exclusively or predominantly provided by a single or limited number of licensees and cannot feasibly (whether economically, environmentally or technically) be substituted or duplicated in order to provide a service in terms of this Act; or
(b) broadband infrastructure in the International Standardisation Organisation Open Systems Interconnect model layer 2 or layer 3 as prescribed by the Authority;

Access to high sites for radio-based systems

Under a proposed section 20H, ECNS licensees have a right to access and use any high site (defined as "any structure or feature, constructed or natural, including buildings, which is suitable for radio-based systems") for the deployment of a network or facility "that promotes broadband". The only exception is where this is not technically feasible.

The owner of a high site "may not refuse access to an ECNS licensee for the installation of networks and facilities that promote broadband". Government-owned high sites must be made available on request at a cost-based rental.

Access to trenches

Rapid deployment regulations are to prescribe the processes and procedures that enable a **single trench for fibre**. The regulations must specify:

- that licensees must consult with other parties in the interest of the single trench policy;
- the manner in which other licensees can get access or capacity at a later stage if they are unable to participate at the time of trenching;

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- obligations on licensees to include excess capacity in their deployment and to lease spare capacity to other licensees at reasonable rates or prescribed rates where applicable;
- procedures and processes for resolving disputes between licensees, landowners and other parties; and
- the role of Rapid Deployment National Co-ordinating Centre to coordinate stakeholders.

Access to government infrastructure

Government entities controlling rights of way for the construction of infrastructure must allow licensees to use such rights of way to deploy networks and facilities. The Rapid Deployment National Co-ordinating Centre is to ensure dialogue between licensees and authorities, to ensure that networks and facilities are considered when deploying new infrastructure.

Access to buildings

Licensees are permitted access any building with multiple tenants for the purpose of inspecting the building, deploying and maintaining networks and facilities for the building or subscribers outside the building and "providing ECS".

New property developments and buildings

New property developments and buildings must provide for the installation of facilities such as ducts, conduit pipes and space for radio equipment. This is to be enforced by authorities making approvals for new developments conditional upon compliance and the National Building Regulations and Building Standards and any other relevant regulations must be amended to give effect to this within 24 months of the coming into force of the finalised Amendment Act.

Emergencies

No entity may refuse access to any site or charge a fee for access to any site for the deployment of networks or facilities during emergency situations.

Application process / procedure

All applications and related processes for approval, authorisation, licence, permission or exemption and processes relating to any consultation and participation required by the relevant laws for the deployment of networks and facilities must, in order to expedite the matter, **run concurrently**.

Authorities responsible for the approval, authorisation, licence, permission or exemption:

- must acknowledge receipt of an application within a week and immediately indicate any outstanding information;
- may impose reasonable conditions and standards;
- may not prohibit a licensee from deploying networks or facilities; and

- must align their processes with the processes contemplated in section 20F(1).

Fees, charges and levies

No access fee may be charged by landholders where the networks or facilities are not intrusive (e.g. such as buried or overhead cabling), does not constitute a cost to the landholder, or does not deprive the landholder of its own use of the land.

Reasonable access fees may be charged in cases where more intrusive networks or facilities, such as masts, are erected on property.

A once-off administrative fee may be charged by landholders based on the administrative cost of dealing with an application.

Where there is a dispute regarding access fees or compensation, ICASA must determine a reasonable fee on an expedited basis. Importantly, the licensee is entitled to continue deployment pending resolution of the dispute by ICASA.

Institutional structure

Roles and responsibilities are apportioned as follows:

The Minister	• provide oversight over implementation; • liaise with other responsible parties; and • establish a Rapid Deployment National Coordinating Centre and a Rapid Deployment Steering Committee
Rapid Deployment National Co-ordinating Centre	• support rapid deployment of networks and facilities and must work with the SIP 15 infrastructure team; • interface with local municipalities to fast track rights of way and way-leave approvals; • oversee establishment of common automated wayleave application system or systems based on an understanding of common information requests across various bodies; • oversee the creation of a geographic information system database and mapping of all fibre deployments and other network and facility deployments; • oversee the coordination of infrastructure rollout and participation in other infrastructure coordination fora such as SIP 15; • oversee the engagement with relevant industry bodies dealing with rapid deployment or any aspect thereof; • provide advice to ECNS licensees on the provision of electronic communications networks and facilities; • within 24 months of establishment must develop processes for the granting of an approval, licence, exemption or similar in consultation with environment, health,

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	safety, security, heritage, building, aviation or other authorities, to enable rapid deployment networks and facilities; • consult with relevant authorities to ensure the alignment of these processes; and • promote and encourage consistency in the time taken by authorities to grant approvals for the deployment of electronic communications networks and facilities
ICASA	• prescribe and enforce rapid deployment regulations.
SALGA	• promote uniformity in processes and prices, which prices must be cost-based, charged for wayleave applications; • ensure that municipalities, when planning infrastructure, make provision for the installation of networks and facilities including ducts for fibre optic cabling, conduit pipes and space for radio equipment; and • ensure that municipalities provide information on existing and planned municipal infrastructure including ICT infrastructure to the Rapid Deployment National Co-ordinating Centre for inclusion into the GIS database.
Government landowners	• provide information on existing and planned infrastructure including ICT infrastructure to the Rapid Deployment National Co-ordinating Centre for inclusion into the GIS database; • provide clear rules and guidelines relating to access to their facilities; • when developing infrastructure deployment plans, make provision for the installation of networks and facilities; • act on all similar requests to access their land or other property within a reasonable time, considering the nature and scope of the request and must treat licensees equally; and • must treat licensees equally when imposing technical standards and "are not allowed to impose different setback, height, or safety restrictions in residential and commercial zones".

Rapid Deployment Regulations

ICASA must finalise regulations setting out:

- the structure of the GIS database, its security and the manner in which it can be accessed;
- obligations applicable to ECNS licensees for the rapid deployment of networks or facilities;
- processes and procedures to enable a landowner to object to the Authority at least 14 days before the licensee commences with the activity, if the proposed network or facility will cause significant interference with the land;
- high sites that "are not technically feasible" for access and use by a licensee for the deployment of networks and facilities that promote broadband;
- processes and procedures that licensees must follow to request access to high sites of government, including the determination of cost-based rentals;

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- processes and procedures that enable single trenching for fibre in each geographic location where it is technically feasible to do so;
- guidelines on reasonable access fees that may be charged by landholders to licensees for deploying networks or facilities that are intrusive; and
- procedures and processes for resolving disputes that may arise between a licensee and any landowner on an expedited basis.

ICASA must ensure that licensees:

- provide information on existing and planned networks and facilities, including alterations or removals, to the Rapid Deployment National Coordinating Centre for inclusion into the GIS database and to ICASA and other ECNS licensees;
- seek out alternatives to new deployment of electronic communications networks and facilities, notably through the sharing or leasing of existing facilities;
- contribute to research and development on new deployment methods;
- comply with environmental requirements;
- co-ordinate activities wherever appropriate, avoiding anti-competitive behaviour; and
- advise landholders in writing of their right to recourse through the Authority.

Open access

Chapter 8 of the ECA – which previously dealt with electronic communications facilities leasing – will now relate to the obligation to provide open access.

The heart of this obligation is that:

- **all ECNS licensees** must provide wholesale open access to their networks and facilities upon request to another licensee / licence-exempt person, with the relationship to be governed by a wholesale open access agreement complying with “**general open access principles**";
- ECNS licensees determined by ICASA to be **vertically-integrated operators** must also undertake accounting separation between their ECNS and ECS divisions; and
- ECNS licensees determined by ICASA to **be deemed entities** must also (a) allow for active infrastructure sharing (including national roaming, RAN sharing and enabling MVNOS, for voice and data based on the latest generation of technologies, (b) use cost-based pricing, (c) allow access to its network and facilities as prescribed by ICASA, and (d) comply with network and population coverage targets.

General open access principles are defined to mean “providing wholesale open access to electronic communications networks on terms that are effective, transparent and non-discriminatory".

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Open access to networks or facilities must – unless otherwise requested – be non-discriminatory as among comparable types of networks or facilities and not be of a lower technical standard and quality than that provided by the licensee to itself or to an affiliate “or in any other way discriminatory compared to the comparable network services provided by such licensees to itself or an affiliate".

The critical intervention will be wholesale open access regulations to be drafted by ICASA within 18 months of a finalised Electronic Communications Amendment Act coming into force. These are to cover, inter alia:

- reference offers containing model terms and conditions for the different open access categories (i.e. ECNS licensee / vertically-integrated entity / deemed entity);
- time frames and procedures for negotiating, concluding and implementing wholesale open access agreements.
- a list of vertically-integrated entities and the criteria used to determine this list;
- accounting separation procedures for vertically integrated entities;
- determination of deemed entities;
- quality, performance and level of service to be provided, including time to repair or restore, performance, latency and availability;
- wholesale rates (can be done without reference to the competition provisions of the ECA);
- information sharing about current future network planning;
- a list of essential facilities; and
- the manner in which unbundled facilities are to be made available.

Deemed entities

In order to determine deemed entities, ICASA will be required – following a process to define markets in the sector – to determine whether any ECNS licensees have (a) significant market power in a market, or (b) has a network making up more than 25% of network infrastructure in that market, or (c) controls an essential facility or a scarce resource. If any of (a) – (c) holds true, such licensee will be a deemed entity.

Open access pricing principles

Amendments have been proposed to section 47 which deals with wholesale pricing principles in an attempt to overcome previous legal difficulties with the use of this section. It will now be mandatory – “must” as opposed to “may” – for ICASA to prescribe a regulatory framework for the establishment and implementation of wholesale rates applicable to specified types of open access including cost-based pricing for deemed entities. The need for ICASA to have reference to the competition provisions in Chapter 10 of the Act is to be removed.

ICASA is required to review open access pricing principles every two years.

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Competition

Section 67 of the Act – extensively amended in 2014 – has been largely redrafted.

It requires as a first step that ICASA – within 12 months of the coming into force of a finalised Amendment Act – publish a notice which:

- defines "all the relevant markets and market segments relevant to the broadcasting and electronic communications sectors, including ICT services dependent on the use and provision of the Internet, including internet exchange points, hosting and data centre services"; and
- sets out a schedule for the review of these markets, prioritising markets "with the most significant impact on consumer pricing, quality of service and access by users to a choice of services and markets relevant to policy directions issued by the Minister".

The notice must be refreshed every three years to assess the continued validity of the definitions.

Where ICASA conducts a review of a specific market it must prescribe regulations determining (a) whether there is effective competition, (b) if not, whether any licensee has significant market power, and (c) if so, impose appropriate pro-competitive license conditions.

Market reviews are to take no longer than 12 months.

Market definitions and reviews can only be undertaken after consultation with the Competition Commission and the existing MOU between ICASA and the Commission must be amended to allow for consultation between the two bodies on market definitions and reviews and other matters – including mergers / acquisitions involving licensees – within 3 months of the coming into force of a finalised Amendment Act.