Independent Communications Authority of South Africa
Pinmill Farm, 164 Katherine Street, Sandton
Private Bag X10002, Sandton, 2146

Office of the Chairperson
Tel: +27 11 321-8215
Fax:+27 11 321-8547

20 May 2005

Mr. M.K Lekgoro MP
Chairperson
Parliamentary Portfolio Committee on Communications
Parliament of the Republic of South Africa

Fax: (021) 021-403-3845

Dear Honourable Mr. Lekgoro,

CONVERGENCE BILL [B9-2005] – WRITTEN SUBMISSION BY THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA ("ICASA")

The Independent Communications Authority of South Africa ("ICASA", hereinafter referred to as "the Authority") thanks the Parliamentary Portfolio Committee on Communications for the opportunity to supplement and amplify its written submission on the Convergence Bill [B9-2005] submitted on 8 April 2005 at the public hearings. To facilitate the honourable members' ability to view the additional information supplied in the public hearings against the context of the original submissions the Authority has placed the information in the original submission. The previous submission can be therefore be discarded as this version replaces it.

This icon where it appears in the text, indicates where the original submission made to the Parliamentary Portfolio Committee on Communications has been supplemented or amplified further.

This proposed legislation presents a substantial revision to the current telecommunications and broadcasting sectors and is without doubt the most important legislative development since the 1996 Telecommunications Act and the 1993 Independent Broadcasting Authority Act ("IBA Act").

The Authority welcomes this development and sees the promulgation of this legislation as a timely event, signalling the logical maturation of the sector on its path of managed liberalisation towards and open and competitive one. The Authority supports the central purpose of the Bill and notes the definite need to address the convergence of technologies in the communications sector; the implications of migrating to digital transmission, and the need to establish a new statutory regime for licensing which is flexible and responsive to the changing needs of the communications sector. When finalised, the Authority hopes that such legislation will assist in creating continued certainty and increased confidence in the regulatory environment for both local and foreign investors; consumer choice and through enhanced competition, better quality of service and reduced costs of communications.

Prior to further detailed discussion, the Authority wishes to make the following general points which should be considered as a contextual framework within which our detailed comments should be considered:

1. The opportunity presented by Convergence legislation provides *inter alia*, the occasion to remedy possible past defects with sector legislation. A golden opportunity exists to correct problems that may have presented themselves in the past. As such, the Authority will highlight areas in the Convergence Bill as it stands that animate this concern. Particular reference here is made to the preservation of the concurrent roles played by both the Minister of Communications and ICASA in core regulatory matters. However, the Authority urges the Committee in its deliberations to address the various problems that may have arisen over the last decade and which have been brought before the Committee through numerous policy processes, in line with a maturing policy domain and communications sector.

2. The Convergence Bill aims to bring about (i) a *consolidation* of legislation governing the telecommunications and broadcasting sectors and (ii) the promotion of *convergence* of network services and technologies in these sectors. These have different policy objectives and it is our submission, that they should not be conflated. To a certain extent, it does seem that there is an understanding from the drafters that there is still need to continue to recognise the importance of maintaining the two policy objectives in the Bill. In this regard, the Authority draws the Committee's attention to the separate definition of communication services and broadcasting services. However, we note that in the formulation of Chapter 3 this principle was lost. The Authority will make both written and oral submissions in this regard in an effort to ensure that this unintended consequence is avoided. That notwithstanding, the Authority urges the Committee to keep these two objectives clear in their minds during further deliberations.

3. To the extent that the Convergence Bill attempts to consolidate the distinct legislation governing broadcasting and telecommunications, reference must be had, at all times to the constitutional standard applicable to broadcasting by virtue of Chapter 9 of the Constitution, which addresses state institutions supporting constitutional democracy. In this regard particular attention must be had to section 192 of the Constitution which provides for an independent body to be charged with regulating broadcasting. When attempting to consolidate these sectors and their principal pieces of legislation, the higher standard of independence and constitutional muster needs to be met for both

sectors, to ensure that there is no dilution of the constitutional protection afforded to broadcasting. Further articulation of this concern is contained in both our written and oral submissions.

4. With regard to the above two points, the Authority further submits that as a result of the effort to consolidate the legislation, ICASA will require a higher degree of discretion in operations than previously afforded to it. In attempting to facilitate convergence, due regard should be had to the reality that such convergence has not yet occurred in the sector on a large scale and the majority of licences will still remain distinct, as will their regulation. Different licences will require different treatment at times. The Authority will require discretion to determine these instances. It should be noted that while arguing for a greater degree of discretion, ICASA is subject to the general dictates of Administrative Law, which will ensure that such discretion is used in accordance with the principles of effective regulation and natural justice.

5. As a general note, all current timelines proposed in the Bill, with particular referencing to licensing and transitional provisions are considered onerous. The Authority urges the Committee to consider the implications to the sector and the Authority in finalising timeframes for regulation which will be entrenched into law. As far as possible, the Authority requests the Committee approve the principle of setting a timeframe, but allow the Authority the opportunity to determine timeframes that will give effect to the objects of this Bill and best serve the interests of the sector at large.

6. The Authority is aware of various references to proposed amendments to the ICASA Act, in the Convergence Bill. There is however, no indication of the tabling of an ICASA Act Amendment Bill. The Authority submits that both pieces of legislation are inextricably linked and mutually supportive. Neither can exist without the other. The Authority has proposed provisions in the Schedules to give meaning to the references made in the Convergence Bill to the ICASA Act. The provisions that are being referred to do not exist and presuppose that the ICASA Act will have been amended by the time that the Convergence Bill is enacted. The Authority does not have a clear indication of what the timing is for ICASA Act Amendment Bill. If the ICASA Act Amendment Bill is to be tabled shortly and is aimed at commencing on the same date as the Convergence Act, there will be no problem. However, if there is disjoint between the commencement dates, then the ICASA Act needs to be amended through the schedules of the Convergence Act.

7. Similar concerns are raised with respect to a consolidation of the procedures contained in the Independent Broadcasting Authority Act, which are not addressed by the Convergence Bill and which could be effected by the ICASA Act Amendment Bill. The Authority makes reference to this in our comments on Chapter 9.

8. In line with our comment in (6) above, the Authority has made submissions on a new funding model for inclusion in the schedules of the Convergence Bill in order to amend the ICASA Act.

9. The Authority notes with some concern the move away from the use of the word “shall” to the use of the word, “must” throughout the Bill. Unless the drafters have a specific reason for this in mind, we propose that all uses of

the word “must” be replaced with the conventional usage of the word “shall”, to bring the legislation in line with other legislation.

10. The Authority also submits that in order to avoid jurisdictional overlap in certain communications matters, the provisions of section 82 of Chapter 8 of the Competition Act No. 89 of 1998, should be included with the necessary changes to facilitate the entering into of agreements with other regulatory agencies, as may be necessary from time to time.

We look forward to participating further in this process and welcome the opportunity to address the Committee in the upcoming oral hearings. We also remain at the Committee’s disposal to assist with further clarifications and any assistance that the Committee may require in its deliberations(including drafting assistance).

Yours sincerely,

MANDLA LANGA
CHAIRPERSON

GENERAL EXPLANATORY NOTE:

Words in bold type in square brackets indicate deletions from the text of B9—05.

Words underlined with a solid line indicate insertions in the text of B9—05.

CHAPTER ONE – INTRODUCTORY PROVISIONS

Preamble

It is noted that in the preamble to the Convergence Bill the following phrase was included "to make provision for the regulation of communications and network services". While the term "communications" is defined in the Bill, the terms "network" or "network services" are not defined terms. "Communications network" and "communications service" are however, defined terms.

Similarly, it is also noted that the phrase "to provide for granting of new licences and new social obligations" is contained in the preamble. The term "social obligations" is not a defined term. While this may appear a trivial semantic consideration, there may be subsequent problems of interpretation when using terms in the preamble which are not defined in the legislation, which may result in unanticipated outcomes.

Ad Section 1: Definitions

The Authority is of the view that the definition section of the Convergence Bill is key to its effective operation. Along with Chapter 3 in the Bill, the definitions contained in Chapter 1 form the bedrock of the licensing framework. The Authority has numerous concerns with various definitions as currently formulated. We have proposed alternatives below.

1. The Authority proposes the following definition to **"apparatus"** - means any apparatus or equipment used or destined, designed or adapted to be used in connection with <u>a communications service</u>.

   It should be noted that the Telecommunications Act defines "radio apparatus" as a telecommunications facility which is capable of transmitting or receiving any signal by radio, excluding a sound radio set or a TV set. The current definition of "apparatus" in the Bill appears to cover "radio apparatus". The Bill also defines "communications facility" and this seems to be an all encompassing definition, including "apparatus". The term "communications network" is also defined. It could therefore be argued that

any piece of equipment e.g. wires may constitute “apparatus”, “a communications facility” and a “communications network”. It thus needs to be determined as to whether or not defining “apparatus” is superfluous.

It is unclear how the definition of **“application”** differs from “communications service” licences as contemplated in the Bill. The Authority questions whether there is a need for this category as one exists for communication services. Moreover, section 85 in the Bill does not set out what would constitute an application service licensee. Hence, the Authority suggests the removal of the existing definitions of application service licensee and application service.

The Authority for the purpose of regulation making suggest the amendment of the definition of application as follows:
‘‘application service’’ means any technological intervention by which value is added to a communications network service or communication service which includes the—

(a) manipulation;
(b) storage;
(c) retrieval;
(d) distribution;
(e) creation; and
(f) combination, of content, format or protocol for the purpose of making such content, format or protocol available to customers;

2. The Authority proposes that the definition of “broadcasting” be deleted if our submission on the definition of “broadcasting services” is accepted. Alternatively, that it be amended as follows to take into account the International Telecommunications Union definition of broadcasting:

‘‘broadcasting’’ means any form of unidirectional communications service intended for direct reception by—

a) the public;
b) sections of the public; or
c) subscribers to any broadcasting service,

having appropriate receiving facilities, whether carried by means of radio frequency spectrum or any other communications network or any combination thereof, and ‘‘broadcast’’ is construed accordingly.

3. The Authority recommends that **“broadcasting service”** be reformulated as follows:

"means any service which consists of the provision **[broadcasting]** of audio-visual material **[television]**or audio material **[to]** for reception by **[(a)]** the public, **[(b)]**sections of the public **[(c)]** or subscribers to such a service, and which service is conveyed by means of a communications network, but does not include –

(a) **[(i)]** a service **[(including text services)]** which **[that]** provides no more than data or **[no more than]** text, **[(]** whether with or without associated still images **[)]**;
(b) a service in which the provision of audio-visual material or audio material is incidental to the provision of that service;
[(ii) a service or components of service that make programmes available on demand on a point-to-point basis, including a dial up service]
(c) a service or a class of service, which the Authority may prescribe as not falling within this definition;"

The benefit of the above definition is that it is broad enough to include a number of new and future multimedia programme offerings over communication networks, but allows the Authority the discretion to limit that which may constitute broadcasting. The above definition also means that the proposed definition of broadcasting in the Bill can be deleted.

4. The Authority suggests the following amendment for **''broadcasting service licence'' -** means a licence granted and issued by the Authority in terms of this Act to a person for the purposes of providing a defined category of broadcasting services.

5. With regards to **''broadcasting signal distribution''**, the Authority recommends that either the word 'includes' be reinserted so that the meaning is restored, namely that broadcasting signal distribution, as defined, includes multi-channel signal distribution or, that 'and multi-channel distribution' be deleted as it already forms part of a communications process and is not an additional process. Thus the proposed reformulation would read:

"broadcasting signal distribution" means the process whereby the output signal of a broadcasting service is taken from the point of origin, being the point where such signal is made available in its final content format, from where it is conveyed, to any broadcast target area, by means of a communications process ~~and includes multi-channel distribution~~.[1]

[1] In light of our new proposal on the insertion of multiplex services, all proposals on multi-channel distribution in the original submission should be deleted.

The Authority proposes that the definition of **"carrier pre-select"** remains as proposed in the draft Convergence Bill.

6. The following definition is proposed for **"communications"** - means the emission, transmission or reception, of sound, data, text, visual images, signals or a combination thereof~~,~~ by means of electricity, magnetism**, [wire],** radio, or other electromagnetic waves, **[optical]**, **[electromagnetic systems]** or any agency of a like nature, whether with or without the aid of tangible conductors.

7. The following definition is proposed for **"communications facility"** - means any wire, cable, antenna, mast or other means which is or may be used for or in connection with communications.

8. The following definition is proposed for **"communications network"** - means any system or series of communication facilities used principally for or in connection with the provision of communication services, but does not include consumer equipment.

9. The following amended definition is proposed for **''communications service'' -** means any service provided over a communications network in terms of this Act or related legislation which is **[normally]** provided **[for remuneration]** to—

   a) the public;
   b) sections of the public; or
   c) the subscribers to such service,

   [and consists wholly or mainly of the conveyance of communications over communications networks, including transmissions over communications networks used for broadcasting,] but excluding content services.

10. The Authority proposes the following revision to the definition of **''communications service licensee'' -** means a person authorised to provide communications services in terms of a [class**]** license issued under this Act. Without the deletion of the word "class", the definition fetters the Authority's discretion to determine whether certain sub-categories of communications service licensees should be dealt with as individual or class licensees.

11. While no amendment to the definition of **''Complaints and Compliance Committee''** is required, the Authority submits that this is a clear example of an instance where the ICASA Act Amendment Bill has relevance to the Convergence Bill, particularly section 17H. This is noted to highlight the fact that the two pieces of legislation are inextricably linked.

12. The following amended definition is proposed with respect to **''end user'' -** means a subscriber and persons who use the services of a licensed service referred to in the Act **[Chapter 3]**.

    ICASA submits that the use of the term 'subscriber' and 'person' appear redundant, and that deletion of 'subscriber and' should be considered.

13. With respect to **"end user equipment",** the Authority assumes that *broadcasting* end user equipment was also intended for inclusion by the drafters. For the avoidance of any doubt, the Authority suggests the inclusion of "TV and set top boxes" in the list.

The Authority proposes to revert to the original definition proposed in the draft Convergence Bill, namely: **''essential facility'' -** means a communications facility or facilities that –

(a) cannot reasonably be duplicated and without which competitors cannot reasonably provide services to their customers,

(b) are declared by the Authority to be an essential facility in terms of this Act or related legislation a communications facility or facilities that cannot be reasonably duplicated and without which competitors cannot reasonably provide services to their customers.

14. With respect to **"financial interest"** the Authority notes that it made a submission on the Final Recommendations sent to the Minister on Ownership and Control, recommending that the definition of 'financial interest' in section 1 of the IBA Act should be deleted. The Authority thus recommends the deletion of this definition and the consideration of the final recommendations to the Minister in the context of the Convergence Bill. The Authority would be happy to provide a copy of this submission to the Committee if required.

The Authority proposes the following definition of "interconnection" in line with our supplementary submission on Chapter 7 of the Bill.

"Interconnection" means the physical or logical linking of communications networks of two communications network service licensees or communications service licensees.

15. The Authority proposes the following amendment to **"number portability" -** means the ability of subscribers to a communications service to retain existing numbers allocated by a communications service licensee without impairment of quality, reliability, or convenience when switching from one communications service licensee to another.

16. The Authority proposes revision to **''prescribed''** as follows - means prescribed by regulation made in terms of this Act or the related legislation; and prescribe shall have the same meaning.

17. The Authority proposes the amendment of **''public broadcasting''** as follows **–** means any broadcasting service provided by the South African Broadcasting Corporation.

18. The Authority proposes that **''radio''** be amended in line with the ITU definition and consistent with the current definition contained in the Telecommunication Act as follows - means an electromagnetic wave which is propagated in space without artificial guide and having a frequency below 3000 GHz.

19. With respect to the term **"registered party",** the Authority recommends for clarity purposes that the term "registered political party" be used instead.

20. With respect to **"related legislation",** the Authority submits that in the absence of a proposed name change for the Authority, reference to 'Independent Communications Authority Act' should correctly read the 'Independent Communications Authority of South Africa Act'.

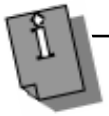
21. The definition of **''Republic''** should read – means the Republic of South Africa [, its possessions, air space and territorial waters].

    It is not necessary to expressly include or exclude any description of what constitutes the Republic, as public international law applies, including land within borders, airspace and territorial waters, etc.

22. The Authority submits that **''service charter''** should be amended with the following insertion - means a document, developed by the licensee in consultation with its staff and customers, which sets out the standards of service customers can expect and is a performance measurement and accountability tool that focuses on customer service outcomes.

23. The Authority proposes the following definition for **''sound broadcasting service'' -** means a broadcasting service consisting of the transmission of audio signals and the reproducing of the signals in the form of sounds, but not also in the form of images or other visible signs or signals **[destined to be received by a sound radio set]**.

24. The Authority's comments with respect to **''transition period''** are dealt with under comments regarding Chapter 13. No amendment is required in the definition, although the Authority proposes considerable amendments to the timeframes stipulated in Chapter 13.



Miscellaneous Comments: The Authority proposes that the definition of Multi-channel distribution service be deleted and replaced by:

"**multiplexing** means the sending of multiple signals or streams of information on a carrier at the same time in the form of a single, complex signal and then recovering the separate signals at the receiving end."

and

"**multiplex service** means an entity that compiles, operates and markets a content offering on a digital multiplex, manages available transmission capacity and also decides on conditional access and subscriber management services that will be used."

In line with the amendments to the Bill proposed Chapter 9 the following definition is required:

"low power sound broadcasting service means a community, private or public sound broadcasting service which radiates power not exceeding ten watts;"

Ad Section 2: Objects of the Act

The following comments and proposals are submitted with regard to the proposed provisions under section 2 of the Convergence Bill dealing with the objects of the Act.

1. The Authority notes the expanded list of objects in the Convergence Bill. We support this policy statement but remain extremely concerned by the omission of the goal seeking to advance the interests of people with disabilities. This policy goal is central to the all encompassing goal of universal access and universal service.

The Authority proposes the following insertion in the objects of the Bill:

"(z) ensure that the needs of people with disabilities are taken into account in the provision of services in terms of this Act"

2. Section 2 (i) provides as follows: "encourage the interoperability of communications networks and communications network services".

According to its definition, communications network services constitutes the sale, lease or otherwise of a communications network or communications facilities by a communications network service licensee to itself, another communications network service licensee or for resale to a communications service licensee or person providing licensed services in terms of Communications Act or related legislation. It is proposed that this section therefore be amended to read:

"encourage the interoperability of communications networks and communications services or any other licensed services in terms of this Act or the related legislation".

The Authority proposes the deletion of sub-paragraphs (x), (y) and (z) as they contain terms which are no longer applicable in a converged environment and their replacement with the following:

"(x) provide access to communication network services for broadcasting services;"

and

"(y) encourage the development of multiplex services."

CHAPTER TWO - POLICY AND REGULATIONS

General Comment on inclusion of Authority's regulatory powers in this Bill

For the sake of consistency, all sections dealing with the Authority's regulatory powers should be moved to the ICASA Act in order to consolidate the powers and functions of the Authority in a single piece of legislation. It is however appropriate to leave the sections dealing with the Ministers' powers in the Convergence Bill as is.

1. Ad Section 3: Ministerial policies and policy directions

1.1 This section appears to entrench the co-regulatory system between the Minister and the Authority; involve a diminution of the Authority's existing powers in terms of sections 5(4) of the Telecommunications Act and sections 13A of the Independent Broadcasting Authority Act ("IBA Act") and could provide for serious inroads into the Authority's independence as set out in section 192, Chapter 9 of the Constitution.

1.2 In terms of subsections (1), (2) and (3) the matters on which the Minister may make policy and issue policy directions are far broader in both scope and form than those matters currently set out in sections 5(4) of the Telecommunications Act and section 13(A)(5) of the IBA Act.

1.3 The Convergence Bill does not provide for the Minister to have exclusive policy jurisdiction over the matters set out under section 3(1) and it is important to note that these matters all overlap with the Authority's functions and powers.

1.4 Moreover, the Bill fails to create a clear separation of powers between the Authority and the Minister and, in many cases, clearly overlapping jurisdiction is envisaged. The fact that the Minister may make policy and issue policy directions on certain matters, does not necessarily oust the Authority's policy jurisdiction with respect to the same matters. As mentioned in our introductory comments, this blurring of roles and responsibilities in the Telecommunications Act has caused certain operational problems in the past. This is an opportunity to remedy this in line with the principles of effective and responsive regulation.

1.5 The Authority therefore proposes that this situation be remedied, with a separation of powers clearly defined in the new legislation.

1.6 The Authority submits that the provisions section 3(1)(d) and (e) of the Bill will allow for overlapping jurisdiction and may militate against efficient regulation of the sector by the Authority. In particular, with respect to policy directions in terms of subsection (2)(a), the Minister may direct the Authority to undertake -

> "….an inquiry in terms of section 17F of the ICASA Act on any matter within the Authority's jurisdiction and the submission of reports to the Minister in respect of such matter";[2]

Section 17F provides for a public process and a public outcome. It is therefore unclear what "submission of reports to the Minister" would mean in this context, or why it should be required.

All the Authority's regulatory outcomes, whether through inquiries or regulations, are publicly available.

1.7. Furthermore, in line with section 13A(3) of the IBA Act we propose the following insertion in section 3(2) of the Bill:

> "(e) Any inquiry contemplated in subsection (2)(a) shall be financed by money appropriated to the Authority for that purpose.

1.8. Subsection (2) is another departure from the current legislation in that it does not afford the same protections as set out in section 13A(5)(c) & (d) in the IBA Act. We note that earlier versions of the Convergence Bill however did carry a provision affording such protection and submit that these should be reinstated. Alternatively, the Authority submits that the following subsections be inserted:

> "(f) No policy direction may be issued regarding the granting of a licence or regarding the amendment, suspension or revocation of a licence.
>
> (g) No policy direction may be issued which interferes with the independence of the Authority or which affects the powers and functions of the Authority."

[2] This is an example of where the Convergence Bill directly refers to an amendment provided for in the ICASA Act Amendment Bill – which has not yet been tabled.

As mentioned in our introductory comments, the consolidation of the Telecommunications Act and the IBA Act should retain the same level of constitutionality as currently provided for in the IBA Act. It can be argued that if these provisions are not retained it will undermine section 192 of the Constitution, and section 3 of the ICASA Act which provides that:[3]

(3) The Authority is independent, and subject only to the Constitution and the law, and must be impartial and must perform its functions without fear, favour or prejudice.
(4) The Authority must function without any political or commercial interference.

1.9. Subsection (4)(a) of the Bill potentially removes the Minister's current obligation to consult with the Authority prior to issuing or publishing policy directions, as is currently required by the existing legislation. Section 13A(4) of the IBA Act provides that:

(4) The Minister *shall,* before a direction contemplated in subsection (2) is issued, consult the Authority.

Similarly, section 5(4)(b)(i) of the Telecommunications Act provides that:

(b) The Minister *shall*, before a policy direction contemplated in paragraph *(a)* is issued-
(i) consult the Authority;

Thus, in terms of the existing legislation, the Minister must consult the Authority before issuing a policy direction on both broadcasting and telecommunication matters.

The Authority urges the retention of this obligation and proposes the following amendment to section 3(4)(a):

When issuing a policy direction under subsection (2) the Minister –
(a) <u>shall</u> **[may]** consult with the Authority

1.10. Ministerial policy directions should be published when issued and not just published for consultation. We therefore propose the following insertion in section 3 of the Convergence Bill:

<u>"(8) When issuing a final policy direction, the Minister shall publish such policy direction in the Government Gazette".</u>

[3] The ICASA Act Amendment Bill does not propose to amend section 3 of the Act which provides for the Authority's independence.

2. Ad Section 4: Regulations by the Authority

The Authority proposes that this section would be best placed in the Scedules to the Convergence Bill as an amendment to the ICASA Act. Please refer to the Schedules for our comments on regulation making.

CHAPTER 3 – LICENSING FRAMEWORK

This Chapter is of central importance to the core operations of the Authority. The Authority is of the view that the licensing framework as set out in this Chapter read together with Chapter 13 is currently **not workable** from a practical implementation perspective.

As indicated in our first submission to the Parliamentary Portfolio Committee, the Authority has developed proposals on how the system of individual and class licensing can be properly and more appropriately designed.

The Authority approves of the idea of individual and class licences, as this is a licence concept used in the United Kingdom and Malaysia to good effect. In these jurisdictions Individual licences are granted for activities where a high degree of regulatory control is needed and customised or special licence conditions are required for each licence, in addition to standard terms and conditions. Class licences are issued with standard terms and conditions for a specific class or sub-category of licence which does not require a high degree of regulatory control. Such a licensing system allows a regulator to concentrate on those licences which require more attention and reduce the regulatory or administrative burden of licences which do not require a similar degree of focus.

However, the manner in which the Convergence Bill proposes to implement individual and class licences is not in line with the manner in which it is done in other jurisdictions. Generally, individual and class licences are not conceived of as being categories of licence, but rather types of licences within broad categories of licensable activities or markets. The Malaysian Communications and Multimedia Act, 1998, for example, identifies four categories of licensable activities or markets, namely Network Facilities Providers, Network service Providers, Applications Service Providers and content Applications Service Providers. Within these four categories provision is made for individual or class licences, allowing the Malaysian Communications and Commission to adjust it's regulatory approach to different types of service providers in each of the broad categories.

The licensing model proposed in Chapter 3 of the Convergence Bill would have the unintended effect that large and small service providers in the area of Communication Networks would be dealt with as individual licensees. The Authority therefore proposes that Communication Network services, Communication Services, radio frequency spectrum, and broadcasting services be considered as being the licensable activities, with individual and class licences being the two types of licences provided for within these categories. The Authority should also have the power to exempt certain activities from licensing within the specified categories (See proposed amendment to section 6 of the Bill).

A table has been attached which maps existing licences within the newly proposed licensing framework.

The Authority therefore proposes the following amendments be inserted in section 5(2):

"**5.** (2) The Authority may, upon application in the prescribed manner, grant individual or class licences for the following categories of licences:

(a) Subject to subsections (4) and (5), communications network services;

(b) radio frequency spectrum licences;

(c) subject to subsection (6), broadcasting services licenses; and

[*(d)* such other services as may be prescribed.]

(d) communication services."

The Authority proposes the substitution of the current section 5(3) in the Bill with the following section:

"5(3) In prescribing which services will require an individual or a class licence, the Authority shall consider, among other things, the following:

(a) the socio economic impact of such a service;

(b) the geographical area in respect of which the service will be provided

(c) the duration of the provision of the service;

(d) the competitiveness of the specific service market;

(e) radio frequency requirements;

(f) technical requirements;

(g) national security;

(h) public interest;

(i) environmental impact;

(j) potential turnover of the proposed service; and

(k) the rights and obligations of other licensees."

The Authority wishes to point out that licensing is just one tool that can be used in order to achieve the objectives of policy. In the case of application services, the Authority holds the view that licensing is not an appropriate tool and therefore it was not included in the list of services which require licences. However, this exclusion from licensing does not preclude application services from being subject to regulations issued by the Authority. Hence, as stated in the definitions section and re-iterated here, the Authority suggests the removal of the existing definitions of application service licensee and application service.

The Authority for the purpose of regulation making suggest the amendment of the definition of application as follows:
''application service'' means any technological intervention by which value is added to a communications network service or communication service which includes the—

(a) manipulation;
(b) storage;
(c) retrieval;
(d) distribution;
(e) creation; and
(f) combination, of content, format or protocol for the purpose of making such content, format or protocol available to customers;

Notwithstanding our general concerns about the licensing framework we have endeavoured in this submission to make specific comments on matters of procedure, licence conditions and related policy.

1. Ad section 5: Licensing

1.1. *Subsections (4) and (5)*

To some extent, the dual regulatory system with the Minister is retained with communication network service licences (as provided for in subsections (4) and (5)). As currently envisaged, communications network services would include large and small operators, subsection (4) would hamper the Authority from implementing regulation that would promote small business opportunities in this sector.

In the first submission to the Parliamentary Portfolio Committee it was indicated that the Authority would make further recommendations regarding section 5(4) and (5) of the Bill. In terms of national economic policy it might be necessary to allow the Minister to retain control in setting market entry dates for large communication network services. However, in line with the amendments recommended above on how to deal with individual and class licences the Authority believes that section 5(4) and (5) need to be amended so that they do not have the unintended consequence of limiting small operators from engaging in self provisioning of, for example, broadcasting signal distribution.

The Authority proposes the following amendments be inserted in section 5(4) and section 5(5):

"5(4) The Authority may only accept and consider applications for individual communications network services licences as from a date to be fixed by the Minister by notice in the *Gazette*.

and

"5(5) The Minister may determine the date when and the geographical area within which individual communications network services licences may be granted."

1.2. *Subsection (6)*

Subsection (6) duplicates section 4(1) and (2) on regulations in the Bill.

The Authority proposes that subsection 6 be deleted in its entirety, but does find merit based on past experience to retain 5(6)(a)(iv). Therefore, subsection (6) should substituted for with the following subsection:

"(6) The Authority must prescribe regulations setting out the terms and conditions for granting temporary authorisations and licences for testing purposes."

1.3. *Subsection (8)*
It is not clear why this subsection is here as the Authority would in any event have to licence in keeping with the objects of the Act, where 8(a) is stated and 8(b) is referred to as historically disadvantaged persons. The Authority would recommend the **deletion** of this subsection as it is incorrectly placed and furthermore the Authority will be proposing regulatory powers on empowerment, ownership and control, and related matters.

1.4. *Subsection (9)(a)*
The Authority recommends that the licence term of 25 years contemplated in subsection (9)(a) be limited to communication network services and that the Authority be empowered to prescribe different terms for different categories and classes of licences.

To give effect to the recommendation made above the Authority proposes that subsection (9) be substituted for by the following subsection:
"(9) The Authority shall prescribe the period for which a licence is issued for different categories and classes of licences, with the exception of individual communication network services which are issued for a period of 25 years, unless a shorter period is requested by applicant at the time such applicant applies for the licence."

The Authority recommends that in terms of consistency subsection 10 would be better placed in Chapter 13 as it deals with transition specifically and not licensing in general.

2. Ad section 6

The Authority proposes the following amendment:
"The Authority may prescribe the type of ~~communications~~ service ~~or applications service~~ that may be provided without a licence".[4]

[4] In light of the Authority's proposal that applications services not be considered a licensing category the reference to applications service in the original recommendation above falls away.

Ad section 7

As a result of the recommendations made above amending section 5(2) and (3) the Authority proposes the following amendment to section 7 of the Bill:

"Subject to the provisions of this Act and of the related legislation, and such exemptions as may be prescribed by the Authority, no person may provide any service referred to in section 5(2) **[and (3)]** except under and in accordance with the terms and conditions of an individual or class licence."

3. Ad section 8: Terms and Conditions for Licences

3.1. The Authority proposes that section 8(2)(a) be amended as follows:
"Such standard terms and conditions may take into account—
(a) whether the service is intended for the public generally or a limited group such as the provision of—
~~(i) application services~~;[5]
(ii) communications services; or
(iii) communications network services,
[to broadcasting service licensees or providers of content services];"

3.2. The Authority proposes the following amendment to section 8(2)(o):
"rollout targets in respect of radio frequency licences to ensure the extent to which optimum use is made of **[that]** the allocated radio frequency spectrum **[is utilized]** and to ensure the withdrawal of the licence when such rollout targets are not met."

3.3. The Authority proposes that subsection (3), 4) and (5) be moved to the chapter dealing with competition matters and that the substantive provisions be amended to conform to similar provisions and/or terminology in the Competition Act.

3.4. Subsection (6) provides for additional terms and conditions for primarily communication network service licences and communication services.

[5] In light of the Authority's proposal that applications services not be considered a licensing category the reference to applications service in the recommendation above falls away

Subparagraph (j) appears out of place in the "shopping list of conditions" for former telecommunication services:
"(j) with regard to broadcasting services, the appropriate amount of South African programming, including—
(i) music content;
(ii) news and information programmes; and
(iii) where appropriate, programming of local or regional significance".
Not only is this section out of place but subparagraph (i) is a poor replacement for section 53 of the IBA Act which provides for the imposition of specific broadcasting licence conditions regarding local television content and South Africa music. This section provides for the making of regulations on a range of South African content issues, including independent television production.

3.5. The Authority proposes that Section 53 of the IBA Act should be included in Chapter 9 of the Convergence Bill - Broadcasting Services and subsection (6) of section 8 of the Bill should be **deleted**.

4. Ad section 9: Application for and granting of individual licences

4.1. *Subsection (1)*
The Authority recommends the following amendment to subsection (1) to make provision for invitations to apply:
"(1) After an invitation by the Authority has been issued **[A]** any person may, subject to the provisions of this Act and of the related legislation, where applicable, apply for an individual licence in the prescribed manner."

4.2. *Subsection (2)*

4.2.1. The Authority recommends the following amendment to subsection (2):
"In the case of an application for an individual licence the Authority **[must]—**
(a) must give notice of all the material particulars of the application in the *Gazette* and invite interested persons to submit written representations in relation to the application within the period mentioned in the notice;
[(b) publish the percentage of equity ownership held by persons from historically disadvantaged groups;]
(c) may publish the proposed licence conditions that will apply to the licence;
(d) must give applicants an opportunity to submit written responses to any representations submitted in terms of paragraph *(a)*;
[(e) submit to the Minister the proposed licence conditions for approval.]"

4.2.2. The deletion of section 9(2)(b) is proposed on the grounds that the proposed amendment to 9(2)(a) covers the content of (b).

4.2.3. The deletion of section 9(2)(e) is proposed on the grounds that it requires the Authority to submit to the Minister the proposed licence conditions for approval. As this section refers to all individual licences, this would involve more Ministerial involvement in the licensing process than is currently provided for existing legislation. This provision also appears contrary to principles of Administrative Law and may also be unconstitutional as it will include broadcasting licences.

5. Ad section 10: Amendment of individual licence

This section proposes that the Authority "may amend an individual licence in consultation with the licensee" and provides a creditable list of occasions when a licence may be amended. It is clear however, that the Authority could be hampered by having to amend licences in consultation with licensees. It is therefore proposed that the introduction to section 10 be amended as follows:
"The Authority may amend an individual licence **[in consultation with the licensee]** –"

This section is silent on procedural matters and the Authority and there is a need for consolidated procedure taking into account the provisions of the IBA Act and the Telecommunications Act.

The Authority as indicated in the above recommendation has drafted proposals in relation to section 10 and the lack of procedure. It is proposed that the current section 10 become section 10(1) with the following amendments.

"10(1) The Authority may amend an individual licence **[in consultation with the licensee]**—

(a) to make the conditions of the individual licence consistent with conditions being imposed generally in respect of all individual licences granted in the same category **[for the purpose of ensuring fair competition between those licensees]**;

(b) for the purpose of ensuring fair competition between licensees;

(c) to the extent requested by the licensee and then only if and in so far as the proposed amendment -

(i) does not militate against orderly frequency management;

(ii) will not prejudice any other licensee; and;

(iii) will not be inconsistent with the provisions of this Act or the related legislation or with any agreement or convention contemplated in paragraph (h);

(d) to the extent necessitated by technological change

(e) in accordance with an order under section 17M of the ICASA Act following a finding and recommendation by the Complaints and Compliance Committee;

(f) where the Authority is satisfied that the amendment is necessary to ensure the achievement of the objectives of the Act and of the related legislation following an adverse finding by the Competition Tribunal under the Competition Act, 1998 (Act No. 89 of 1998);

(g) if the amendment relates to universal access or universal service and is necessary, in the opinion of the Authority, as a result of—

(i) changed circumstances in the market; or

(ii) lack of communications network services or communications services in specifically identified areas of the Republic.

(h) to such extent as may be necessary in the interest of orderly frequency management, provided the amendment will not cause substantial prejudice to the licensee; or

(i) to such extent as may be necessitated by virtue of any bilateral, multilateral or international agreement or convention relating to communications to which the Republic is bound, whether as a party or otherwise."

The Authority proposes that to provide a procedure for the above subsection (1), a subsection (2) be inserted that reads as follows:

"(2)(a) Whenever the Authority considers amending a licence in terms of subsection (1), it must give notice in the *Gazette* of the proposed amendment and the date upon which the proposed amendment is to take effect and invite interested persons to make their representations to the Authority within a period of 30 days.

(b) The provisions of subsections (3), (4), (5), (6), (7), (8), (9), (10), (11), (12) and (13) of section 17F of the ICASA Act shall apply with the necessary changes to any amendment of a licence contemplated in this section.

(c) Notwithstanding the provisions of (b) the Authority may decide that the amendment does not require a public hearing.

(3) After having decided to amend a licence, the Authority shall cause such amendment to be published in the *Gazette* as soon as possible

(4) In regard to the taking effect of any amendment of a broadcasting licence, the Authority may propose or fix different dates for different matters dealt with in the amendment and may, instead of proposing or fixing dates, specify means of determining dates: Provided that, unless the licensee otherwise agrees in writing, such amendment shall not take effect until after the expiration of a reasonable time, which shall not be less than 18 months from the date of publication of the notice referred to in subsection (3).

(5) The Authority may only exercise its powers under paragraph (a) of subsection (1) so that an amendment takes effect, in the case of a single licence -

(a) on the grant or renewal of the licence; or

(b) after half of the term of the original licence or any renewal has run; and

(c) once during a complete licence term.

6. Ad section 13: Transfer of individual licence or change of ownership

The subject matter of this section should be set out in two separate sections and renamed accordingly. Section 13 should be “transfer of individual licence” and section 19C would deal with “empowerment, ownership and control of licensees”. As currently worded, this Bill falls short of providing the Authority with an extensive mandate to deal effectively with all these matters. A consolidated and comprehensive section is required here.

The Authority is of the view as indicated above that as currently worded, this Bill falls short of providing the Authority with an extensive mandate to deal effectively with all these matters. As such the Authority recommends a consolidated and comprehensive section on empowerment, ownership and control, which should be at the end of the chapter and be section 19C. The Authority therefore proposes the deletion of section 13(3) and (4) and the inclusion of the following section in the Bill:

"**Empowerment, ownership and control**

19C(1) The Authority in accordance with the objectives of this Act and related legislation must consider:

(a) when granting a licence the empowerment of historically disadvantaged groups including women and the youth and people with disabilities; and

(b) as far as is reasonably possible the application of any relevant code of good practice issued in terms of the Broad-Based Black Economic Empowerment Act when determining qualification criteria for the issuing of licences or other authorisations in terms of this Act."

The Authority has proposed an empowering provision to prescribe regulations promoting empowerment and setting limits on ownership and control for all licensed services similar to section 52 of the Telecommunications Act, subject to specific statutory limitations on broadcasting services as currently applied in terms of sections 48, 49 and 50 of the IBA Act and in line with the recent recommendations made to the Minister to amend sections 48, 49 and 50 of the IBA Act. Therefore what is set out is a composite proposal incorporating the power to make regulations together with statutory limitations on the ownership of broadcasting services.

"19C(2) Subject to sections 19D, E and F, the Authority, taking into account the objects of the Act, may make regulations on matters relating to empowerment, ownership and control which may include regulations on, but not limited to, the following –

(a) defining what constitutes control;

(b) promoting broad-based black economic empowerment and historically disadvantaged persons;

(c) limitations on, or the prohibition of the ownership of control of or the holding of any financial or voting interest in a licensee;

(d) any matter relevant or ancillary to the promotion of diversity of ownership in the communications industry; and

(e) the procedure to be followed by a licensee who is required to seek approval for the change of control of a licence when such approval does not involve an amendment or a transfer of a licence.

19C(3) No regulations referred to in subsection (2) shall be made until the Authority has conducted an inquiry in terms of section 17F of the ICASA Act, which may include a market study."

Limitations on foreign control of commercial broadcasting services

19D(1) One or more foreign persons shall not, whether directly or indirectly –
- (a) exercise control over a commercial broadcasting service licensee; or
- (b) have issued share capital in a South African unlisted public or private company holding a commercial broadcasting service licence equal to or exceeding twenty-five percent of the issued share capital.

(2) Two or more foreign persons shall not, directly or indirectly, have issued share capital in a South African unlisted public or private company holding a commercial broadcasting service licence equal to or exceeding thirty-five percent of the issued share capital.

(3) One foreign person shall not, directly or indirectly, have issued share capital in a South African listed public company holding a commercial broadcasting service licence equal to or exceeding thirty-five percent of the issued share capital.

(4) Foreign persons who are directors of a commercial broadcasting service licensee shall not equal or exceed twenty-five percent of the total number of directors on the board.

(5) On application by any person the Authority may, on good cause shown and without departing from the objects and principles as enunciated in section 2, exempt such person from adhering to any one of the limitations contemplated in the preceding subsections on grounds that include the following:
- (a) the promotion and facilitation of broad-based black economic empowerment;
- (b) the promotion of foreign direct investment and job creation;
- (c) undertakings by the foreign shareholder to sell shares back to South African citizens with a specified period; and
- (d) undertakings to transfer expertise to South African citizens.

(6) An exemption in terms of subsection (5) may be made subject to terms and conditions as the Authority deems appropriate and equitable in the circumstances.

Limitations on control of commercial broadcasting services

19E(1) No person shall, directly or indirectly, exercise control over more than one commercial television broadcasting service licence;

(2) No person shall, directly or indirectly, exercise control over more than thirty five percent of the total number of licensed commercial sound broadcasting services provided that:

(a) when the calculation of the number of licensed commercial sound broadcasting services that a person may be in control of does not result in an integer and that when that number is rounded to the closest integer, that integer results in a percentage that is higher than the thirty-five percent limitation set out in subsection (2); and/or

(b) when a person exceeds the thirty-five percentage limitation set out in subsection (2) only because one or more other licensees have had their licences suspended or revoked by the Authority, or one or more licensees have ceased broadcasting (temporarily or permanently), in which case the Authority shall consider an application by the relevant person for exemption from the limitations in terms of subsection (6)(a).

(3) Notwithstanding the provisions of subsection (2), no person shall, directly or indirectly, exercise control over more than two commercial sound broadcasting service licences which have the same licence areas or substantially overlapping licence areas.

(4) (a) On application by any person the Authority may, on good cause shown and without departing from the objects and principles enunciated in section 2 of this Act, exempt such person from adhering to any one of the limitations contemplated in the preceding subsections on grounds that include the following:

(i) the promotion and facilitation of broad-based black economic empowerment; and

(ii) ensuring the survival of a commercial broadcasting service.

(b) An exemption in terms of paragraph (a) may be made subject to such terms and conditions as the Authority deems appropriate and equitable in the circumstances.

(5) The Authority may, whenever deemed necessary in view of developments in technology or for the purpose of advancing the objects and principles enunciated in this Act, after due inquiry in terms of section 17F of the ICASA Act make recommendations to the Minister regarding the amendment of any of the preceding subsections, which recommendations shall be Tabled in the National Assembly by the Minister within 14 days after receipt thereof, if the National Assembly is then in session, or, if the National Assembly is not then in session, within 14 days after the commencement of its next ensuing session

Limitations on cross-media control of commercial broadcasting services

19F(1) Cross-media control of broadcasting services shall be subject to such limitations as from time to time determined by the, by the National Assembly so acting, in accordance with the provisions of the Constitution.

(2) (a) No person who controls a newspaper or newspapers shall exercise, direct or indirect, control of both a commercial sound broadcasting service licence and a commercial television broadcasting service licence.

(b) No person who is in a position to control a newspaper shall exercise, direct or indirect, control of a sound or a television broadcasting service licence where the newspaper or all the newspapers that it controls has a total weekly ABC circulation of twenty-five percent of the total weekly ABC circulation in that broadcast service licence area.

(c) The shareholding and financial structures of commercial broadcasting service licensees shall form part of their annual reports submitted to the Authority.

(3) On application by any person the Authority may, on good cause shown and without departing from the objects and principles as enunciated in section 2, exempt such person from adhering to the limitations contemplated in the preceding subsections on grounds that include the following:

(a) the promotion and facilitation of broad-based black economic empowerment; and

(b) ensuring the survival of a commercial broadcasting service.

(4) An exemption in terms of subsection (3) may be made subject to terms and conditions as the Authority deems appropriate and equitable in the circumstances.

(5) The Authority may, whenever deemed necessary in view of developments in technology or for the purpose of advancing the objects and principles enunciated in this Act, after due inquiry in terms of section 17F of the ICASA Act make recommendations to the Minister regarding the amendment of any of the preceding subsections, which recommendations shall be Tabled in the National Assembly by the Minister within 14 days after receipt thereof, if the National Assembly is then in session, or, if the National Assembly is not then in session, within 14 days after the commencement of its next ensuing session.

(6) A determination made in terms of subsection (1), whether pursuant to the first inquiry or to any subsequent inquiry conducted in accordance with the provisions of this Act, shall not be applicable to and not be enforceable against any broadcasting service licensee to which such determination relates for the duration of the term of the licence valid at the time such determination is made, but shall become applicable to and enforceable against such a broadcasting service licensee only upon the renewal of his or her licence upon the expiration of such period."

7. Section 18: Refusal of application for class licence

7.1. The Authority proposes the insertion of a subsection (1)(d) under section 18 in the Bill, as follows:
"the application fails to comply with the requirements as set out in the regulations."

7.2. The Authority recommends the insertion of a section to deal with the issue of transfer of class licences, as follows:

"**Transfer of class licence**

19A. A class licence may not be assigned, ceded or transferred to any other person without the prior written permission of the Authority."

7.3. The Authority also proposes the insertion of the following section to deal with the requirement to keep a register of licences:

“Register of licences

19B (1) The Authority shall keep a register in which it shall record all licences granted in terms of this Act as well as any amendments to or transfers of such licences.
(2) The register referred to in subsection (1) shall be open to inspection by interested persons during the normal office hours of the Authority.
(3) The Authority shall at the request of any interested person and on payment of such fee as may be prescribed (if any), furnish him or her with a certified copy of or extract from any part of the said register.”

CHAPTER 4 - COMMUNICATIONS NETWORKS AND COMMUNICATIONS FACILITIES

1. Ad Section 21: Guidelines for the rapid deployment of communications facilities

The Authority proposes that section 21(1) be broadened to include the Ministry of Land Affairs amongst other institutions (including the Authority) in terms of consultation and drafting of guidelines, as follows:

The Minister must, in consultation with the Minister of Provincial and Local Government and the Minister of Environmental Affairs, Minister of Land Affairs, the Authority and other relevant institutions,…"

2. Ad Section 22: Entry upon and construction of lines across land and waterways

Sections 22 (1)(a) and (b) make use of the word "Republic" and also makes reference to "territorial waters" and "adjacent shores" of the Republic. The Authority reiterates its proposition that the definition of the word "Republic" read simply as "The Republic of South Africa" which is taken to include airspace and territorial waters in line with public international law.

3. Ad Section 29: Electrical Works

The Authority proposes that the provisions of section 29(2) include a provision specifying a time limit within which the concerned person has to respond to the request for any such works as contemplated in section 29(1). The Authority suggests the redrafting of section 29 (2) as follows:

> If….
>
> (a)….
> (b)…
>
> the communications network service licensee must give **[reasonable notice] at least 30 (thirty) days** notice of its requirements to the person concerned.

CHAPTER 5 - RADIO FREQUENCY SPECTRUM

1. Ad Section 30: Control of radio frequency spectrum

1.1 Section 3(1)(a) provides that the "Minister may make policies…in relation to-

(a) the radio frequency spectrum, for the purposes of *planning* (our emphasis) communications services"

When one refers to section 30(1), the Authority "controls, *plans* (our emphasis), administers and manages the use…" and licensing of the radio frequency spectrum. The Authority submits that the word "planning" as used in section 3 (1)(a) and "plans" as used in 30(1) creates ambiguity in the powers to be exercised between the Minister and the Authority.

1.2 Section 34(8) and (9) provide that the Minister approves the Radio frequency plan prepared by the Authority. In light of the above, the Authority proposes **deletion** of the word "planning" in section 3 (1) (a), as it becomes redundant. The Authority suggests the following amendment to section 3 (1)(a):

…the radio frequency spectrum, for the purposes of [planning] introducing communications services..

1.3 With regard to section 30(3), the Authority proposes a **deletion** of the words
"in the use of" and a redrafting as follows:

The Authority must, in performing its functions in terms of subsection (1), ensure that in [the use of] using the radio frequency spectrum, harmful interference to authorised or licensed users of the radio frequency spectrum is minimized to the extent reasonably possible.

1.4 The Authority proposes a redrafting of section 30(5) as follows:

The Authority may decline to investigate in-band interference [in] of radio frequency bands that do not require frequency spectrum licensing.

2. Ad Section 31: Radio frequency spectrum licence

Section 31(3)(c) states that a radio frequency licence may be amended "to effect the migration of licensees in accordance with such radio frequency plan and the transition from analogue to digital broadcasting, if the amendment will not cause *substantial prejudice* (our emphasis) to the licensee".

It is submitted that the use of the words "substantial prejudice" should **not** be used. There is no test to determine what would constitute "substantial prejudice" and operators would introduce various factors to substantiate "substantial prejudice" which will lead to the frustration of the intent of the proposed section. Alternatively, the Authority supports the formulation as contained in section 34(13), wherein the Authority is granted the discretion to move holders of the frequency spectrum licence to other bands.

3. Ad Section 32: Control of possession of radio apparatus

The Authority suggests that section 32(5) be amended to include the following:

> Radio apparatus seized under subsection (4)(b) must be held by the Authority <u>at the cost of the contravening person</u> until-
>
> (a) its possession is authorized in terms of subsection (1) or (4)(a); or
> (b) it is dealt with by a court <u>of law</u>.

4. Ad Section 34: Radio frequency plan

Section 34 (1) makes use of the word "users". The Authority submits that it is more appropriate to use the words "holders of radio frequency spectrum licences" or "potential holders of radio frequency spectrum licences" as this is consistent with this Chapter. The Authority therefore proposes that section 34(1) be amended as follows:

> The Authority must, within 12 months of the coming into force of this Act, prepare a radio frequency plan for the allocation of the radio frequency spectrum among **[users]** <u>holders of a radio frequency spectrum licence</u> and **[potential users]** <u>potential holders of a radio frequency spectrum licence</u>.

CHAPTER 6 - TECHNICAL EQUIPMENT AND STANDARDS

The Authority has altered its previous submission under Chapter 6 and the following content should be viewed as replacing that submission with regards to section 35. The previous submission on section 36 in the Bill remains as is.

Type Approval is both a technical function and an administrative one. The technical requirements are mandated by regulations which refer to technical standards. Thus, the Authority submits that the section should be properly titled "EQUIPMENT TYPE APPROVAL AND STANDARDS" and that the heading above section 35 should similarly read, "Equipment type approval…" and not "Approval of Type". Moreover, the use of the term "Equipment Type Approval" is a generic term used worldwide and facilitates standardisation of terminology.

The Authority submits that the following draft of section 35 should be considered:

"Equipment Type Approval [Approval of Type]

35. (1) No person may use, supply, sell, offer for sale or lease or hire any type of communications equipment or communications facility, including radio apparatus, in connection with communications, unless that type of communications equipment, communications facility or radio apparatus has, subject to subsection (2), been approved by the Authority.

(2) The Authority may prescribe—

(a) the types of communications equipment or types of communications facilities the use of which does not require approval.**[which may include, among others—**

(i) communications equipment;

(ii) communications facilities; and

(iii) radio apparatus that has been approved for use within the European Union or other jurisdictions; and]"

This subsection gives the regulator the discretion to exempt equipment from type approval. However, communications equipment/facilities cannot be exempt as these are precisely the type of equipment that the Authority requires to be type approved. As such, this clause is a direct contradiction to 35(1).Moreover, listed examples are not required as the regulator should have the discretion, after conducting an inquiry, to decide what should be exempt

The Authority submits that it cannot exempt radio apparatus approved for use in Europe. These apparatus would be required to be type approved in South Africa. European Union countries have signed a Memorandum of Understanding which allows mutual recognition of type approval. They self declare equipment based on the R&TTE directive. This directive has severe penalties for non-compliance under European Law. These penalties would not be applicable in South Africa and only South African law would apply.

The same comments made above with respect to section 35(2)(a) apply equally in section 35(2)(b), hence the following amendment is proposed.

"(b) circumstances under which the use of communications equipment or a communications facility or radio apparatus does not require approval**. [which may include, among others—**

(i) end user equipment;
(ii) communications equipment;
(iii) communications facilities; or
(iv) radio apparatus used for research and development, demonstrations of prototypes and testing.]"

Ad Section 36: Technical standards for equipment and communication facilities

The Authority notes that the proposed Chapter 6 is telecommunications specific. We suggest the use of more encompassing provisions that would accommodate a converged environment. In this regard the Authority proposes that it be given the power to prescribe regulations on, amongst others:

d) Protection of the interests of end users of communications services with regard to the supply, provision or making available of goods, services or communications facilities in association with the provision of communications services;
e) creating an enabling environment with regard to interoperability and for securing or otherwise relating to network access;

The Authority thus proposes that that the above two sub-paragraphs be inserted under section 36(2

CHAPTER 7 – INTERCONNECTION

The Authority notes that in terms of the definition of "interconnection" as well as the provisions of this Chapter, interconnection is confined to communications network service licensees. We further note that there are other class licensees that are introduced by the Bill which the interconnection regime needs to take cognizance of.

General

Chapter 7 – Interconnection is a crucial cornerstone to the attempt to facilitate and sustain competition in the communications sector. Overall, the provisions in the Bill must remain at the level of principle, and effect given to these principles via regulations to be prescribed by the Authority.

We also wish to note that the Authority published draft interconnection and facilities leasing guidelines for comment in February 2005 which are largely in keeping with the provisions in the Convergence Bill. Various written submissions have already been received by stakeholders and the regulations will be the subject of public hearings later this year.

The Authority is largely satisfied with the provisions pertaining to Interconnection, subject to the following considerations:

Definitions

For ease of reference, we reiterate our proposed definitions highlighted in the definitions section of our submission.

The Authority proposes an amendment to the definition of "Interconnection" to **include** categories of licensees beyond just communications network service licensees. As the cornerstone of competition, interconnection needs to be more inclusive, subject only to the constraints of technical feasibility and the promotion of efficient use of communications networks and services. The definition of "Interconnection" needs to include any person seeking interconnection.

As such, we propose the following revised definition:

> **"Interconnection"** means the physical or logical linking of communications networks of two communications network service licensees or communications service licensees.

As a result of this amendment to the definition, the rest of Chapter 7 will need to be amended to include communications service licensees in addition to communications network service licensees. The following sections have reference, and the following amendments are proposed:

> 37.(1) Any person licensed in terms of Chapter 3 shall **[A communication network service licensee]**, on request, interconnect to any other licensee in accordance with the terms and conditions of an interconnection agreement entered into between the parties for the purposes…
>
> 37.(3) For the purposes of determining whether a request is reasonable the Authority shall **[must]** take into account whether the requested interconnection –
>
> (a) is technically and financially feasible; and,
>
> (b) will promote the efficient use of communications networks and services.
>
> 37.(4) In the case of unwillingness or inability of a licensee **[communication network service licensee]** to negotiate or agree on terms and conditions of interconnection, either party may notify the Authority in writing and the Authority may –
>
> 37.(6) Subject to section 38(3), where a licensee **[communication network service licensee]** has an interconnection agreement on file with the Authority in terms of section 29 and another licensee **[communication network service licensee]** agrees to interconnect with such licensee [communication network service licensee] on the same terms and conditions as contained in the agreement on file with the Authority, the agreement shall **[must]** be considered technically and financially feasible and promoting the efficient use of communications networks.

38.(2) The interconnection regulations and interconnection agreement principles may include matters relating to –

(a)
(b)
..
..
(j) the requirement that a licensee **[communications network service licensee]** negotiate and enter into an interconnection agreement with an applicant for a communications network service licence or communications service licence.

38.(3) Where the regulations require negotiations as contemplated in subsection (2)(j), references in this Chapter to a communications network service licensee or communications service licensee must be considered to include a reference to an applicant.

38.(4) The interconnection regulations may –

(a)…
(b) exempt (in whole or in part) licensees **[communications network service licensees]** from the obligation to interconnect under section 37(1) where the Authority finds…..

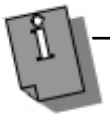
39.(3) The Authority shall **[must]** publish interconnection agreements and the rates and charges contained in such interconnect agreements submitted in terms of subsection (1).

39.(5) The Authority shall **[may]** …

39.(6) Where the Authority determines that any term of condition of an interconnection agreement is not consistent with the regulations, the Authority shall **[may]** in writing - …

41.(3)(c) ...rate control mechanisms applied to licensees **[communications network service licensees]** for specific interconnection services within the relevant market or market segment.

CHAPTER 8 - COMMUNICATIONS FACILITIES LEASING



The Authority has as promised supplemented its submission with regard to communications facilities leasing. It is submitted that section 47 under this Chapter be moved to the proposed Chapter 7 to deal with Competition, Tariffs and Interconnection. This latter point was expanded upon below at the discussion on Chapter 11.

In line with our comments pertaining to Chapter 7, the Authority is of the view that Chapter 8 – Facilities Leasing is also a critical enabler of competition. Moreover, if facilities are leased in a cost-oriented manner, the price of communications services in the country will be dramatically reduced. Overall, the provisions in the Bill must remain at the level of principle, and effect given to these principles via regulations to be prescribed by the Authority.

The Authority is largely satisfied with the provisions pertaining to Facilities leasing, subject to the following considerations:

With respect to our written submission on the definition of “essential facility” in the Bill, in light of our subsequent submissions on interconnection and facilities leasing, the Authority proposes an amendment to our definition to retain (b) in the current draft definition. Hence, the amended definition will read:

> **“essential facility”** means a communications facility or <u>facilities that –</u>
>
> <u>(a) cannot reasonably be duplicated and without which competitors cannot reasonably provide services to their customers,</u>
> (b) are declared by the Authority to be an essential facility in terms of this Act or related legislation.

In this regard, the Authority is of the view that ***all undersea cables must be declared an essential facility.*** This will have enormous significance for the introduction of meaningful competition into the South African communications market and will contribute substantially to the much needed decrease in pricing of international bandwidth. The Authority will be holding discussions with the Competition Commission on this matter in terms of our Memorandum of Understanding.

As such, the Authority also welcomes the inclusion in the Convergence Bill of section 42(8)(a) and 42(9) and strongly support their retention in the final Act. Any existing contractual concerns emanating from current exclusivity provisions can be addressed through the drafting of transitional provisions. We remain at your disposal to assist in this regard.

The Authority also proposes in the Schedule, amendments to the ICASA Act to include a general empowering provision for the Authority under "Functions of the Authority" (section 4(3)) that reads as follows:

> (m) in the public interest, regulate all communications activities having an effect within the Republic of South Africa.

Connected to this, the Authority thus notes that an amendment to section 8(5) will be required to read as follows:

> 8.(5). A licensee is considered to be dominant in a market or submarket if that licensee –
>
> (a)….
>
> (b)….or,
>
> (c) has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant communications market as a result of:
>
> i. control over essential facilities, or;
>
> ii. use of its position in the market.

As a general comment, the Authority is also of the view that **the local loop must be unbundled** and non-discriminatory access to the local loop must be provided to other operators on a transparent and cost-oriented basis. This is the key policy instrument needed to ensure competitive access to the consumer and to ensure the growth of broadband in the country.

Our comments with respect to the usage of “must” and “shall” pertain.

In addition, the Authority has already made various comments regarding the importance of commencing the Convergence Bill and the ICASA Amendment Bill simultaneously, or, including the necessary provisions of the ICASA Amendment Bill in a schedule to the Convergence Bill, in order to give effect to the provisions of the latter. As regards interconnection and facilities leasing, we note that the following sections will be meaningless and un-implementable unless one of the above two recommendations is adopted, specifically, sections 37.(4)(c); 40(1) and (3); and section 45 where reference is made to the Complaints and Compliance Committee.

Retail and wholesale tariffs

The Authority proposed that this section should be moved to Chapter 7 and removed from Chapter 10. We have no specific comments with regard to section 61. However, section 61 needs to be read with Sections 8(3), read with section 8(6)(h).

Section 61 is a specific section that relates to retail and wholesale prices for certain markets identified by the Authority. Section 8(6)(h) refers to a general licence condition that may be contained in any licence category.

The Authority submits that section 8(6)(h) is acceptable as drafted, but that the word, “determination” should be added at the beginning of the section to give the Authority undisputable power in defining the principle to be used. Thus, to ensure the smooth operation of the clauses read together, the Authority proposes the following amendment to section 8(6)(h):

> 8.(6) The additional terms and conditions contemplated in subsection (3) may include –
>
> (a)…
>
> (b)…
>
> (h) determination of such price controls, including requirements…

CHAPTER 9: BROADCASTING SERVICES

The Authority proposes that section 5 of the Broadcasting Act be repealed in its entirety and that the following section be inserted immediately after section 48 in the Convergence Bill:

"Categories and Classes of Broadcasting Service Licences

48A (1) Subject to the provisions of this Act and the related legislation, the Authority may on such conditions as it may determine, issue a sound or television broadcasting service licence for a specified area in the following broadcasting service categories:

(a) A public broadcasting service;
(b) a commercial broadcasting service;
(c) a community broadcasting service

(2) Subject to this Act and the related legislation, the Authority shall prescribe regulations for the following classes of broadcasting services –

(a) free-to-air broadcasting services;
(b) subscription broadcasting services;
(c) low power broadcasting services; and
(d) any other class of broadcasting service."

The Authority has noted that there are some aspects of the IBA Act and Broadcasting Act which have been repealed without being brought into the Convergence Bill. The omission of these provisions could lead to a regulatory vacuum for the purposes of licensing and therefore need to be included in this chapter. The Authority has therefore proposed that the following provisions must be included in Chapter 9.

“Public broadcasting licences

48B(1) In the event of the Authority considering the granting of a new public broadcasting licence it shall, with due regard to the objects and principles as enunciated in section 2, *inter alia* take into account –

(a) the demand for the proposed broadcasting service within the proposed licence area;
(b) the need for the proposed service within such area, having regard to broadcasting services already existing therein; and
(c) the technical quality of the proposed service, having regard to developments in broadcasting technology.”

“Commercial broadcasting licences

48C(1) In considering any application for a commercial broadcasting licence, the Authority shall, with due regard to the objects and principles as enunciated in section 2, *inter alia* take into account –

(a) the demand for the proposed broadcasting service within the proposed licence area;
(b) the need for the proposed service within such licence area, having regard to the broadcasting services already existing therein;
(c) the expected technical quality of the proposed service, having regard to developments in broadcasting technology;
(d) the capability, expertise and experience of the applicant;
(e) the financial means and business record of the applicant;
(f) the business record of each person who, if a licence were granted to the applicant, is or would be in a position to control the operations of the applicant either in his or her individual capacity or as a member of the board of directors or top management structure;
(g) the applicant’s record and the record of each person referred to in paragraph (f), in relation to situations requiring trust and candour;
(h) whether the applicant is precluded by or in terms of sections 19 D, E and F from holding a broadcasting licence; and
(i) whether either the applicant or the person referred to in paragraph (f) has been convicted of an offence in terms of this Act or the related legislation.”

“

“Community broadcasting licences

48D(1) In considering any application for a community broadcasting licence, the Authority shall, with due regard to the objects and principles as enunciated in this Act consider –

(a) whether the applicant is fully controlled by a non-profit entity and carried on or to be carried on for non-profitable purposes;
(b) whether the applicant is managed and controlled by a board which is democratically elected, from members of the community in the proposed licence area;
(c) whether the applicant proposes to serve the interests of the relevant community;
(d) whether the programming proposed by the applicant:
    (i) reflects the needs of the people in the community which must include amongst others cultural, religious, language and demographic needs;
    (ii) is informational, educational and entertaining; and
    (iii) focuses on grassroots community issues, including, but not limited to, developmental issues, health care, basic information and general education, environmental affairs, local and international, and the reflection of local culture; (e) whether the applicant proposes providing a distinct broadcasting service dealing specifically with community issues which are not normally dealt with by any other broadcasting service covering the same area;
(f) whether, as regards the provision of the proposed broadcasting service, the applicant has the support of the relevant community or of those associated with or promoting the interests of such community, which support shall be measured according to such criteria as shall be prescribed;
(g) whether the applicant proposes to encourage members of the relevant community or those associated with or promoting the interests of such community to participate in the selection and provision of programmes to be broadcast in the course of such broadcasting service;
(h) whether all surplus funds derived from the running of the community broadcasting station will be invested for the benefit of the particular community

(2) A community broadcasting service licence may only be granted by the Authority in the free-to-air class of broadcasting service.”

Temporary broadcasting service licences

48E(1) The Authority may grant and issue temporary broadcasting service licenses for a period not exceeding a maximum of 12 months, the terms and conditions which shall be as prescribed in regulations.
(2) A temporary broadcasting service licence shall not be renewable: Provided that the provision of this subsection shall not preclude –

(a) a person whose temporary broadcasting service licence has expired, to apply de novo for such a licence; and
(b) such person from being granted and issued with such a licence, in accordance with the provisions of this section and the regulations contemplated in subsection (1).

Authorisation of Channels

48F(1) a person who provides a licensed broadcasting service consisting of more than one channel may not include a channel in such a service unless on application by such person the Authority has authorised the channel.
(2) The Authority must prescribe the procedure and the appropriate conditions for the authorisation of channels.
(3) Any person who immediately before the commencement of this Act was deemed to have permission to continue to provide an unlicensed broadcasting service consisting of more than one channel is deemed to have permission to continue to include those channels if such person applies to the Authority for the authorisation of the channels within three months after the publication of the regulations contemplated in subsection (2). The permission is deemed to continue until the Authority has granted or refused such application.

1. Ad section 50 Record of programmes broadcast by broadcasting service licensees

The Authority is of the view that a period of 30 days is not sufficient for retention of programmes. The requirement in the United Kingdom, for example, is 90 days for television programming and 42 days for radio programming. The Authority recommends that section 50.(1)(*a*) be amended as follows:

> "retain, for a period of not less than **[30]** 60 days, a recording of every programme broadcast in the course of his or her broadcasting service;"

2. Ad section 57 Restriction on subscription broadcasting services

2.1 In line with the Authority's inquiry into sports broadcasting rights in terms of section 30(7) of the Broadcasting Act the following amendments are proposed:

"57.(1) Subscription broadcasting services may not acquire exclusive rights **[for]** that prevent the free-to-air broadcasting of national sporting events as identified in the public interest from time to time by the Authority **[in]** after consultation with the Minister of Sport and in accordance with the regulations prescribed by the Authority."

2.2 The Authority proposes the deletion of clause 57(2) as the content thereof should not be limited to subscription broadcasting licensees only and recommends that it be substituted with:

"57.(2) Subscription broadcasting services may draw their revenues from subscriptions, advertising and sponsorships. In no case may advertising or sponsorships, or a combination thereof, be the largest source of revenue."

2.3 The Authority further proposes the insertion of the following clause:

"57.(3) The Authority shall prescribe the extent to which subscription broadcasting service licensees must carry any service of television programmes provided by a public broadcasting service, which must at all times be offered as available (subject to the need to agree terms) to be broadcast by a subscription broadcasting service that is available for reception by members of the public in the Republic of South Africa."

2.4 To make the imposition of South African Content quotas applicable to all broadcasting service licensees the Authority proposes the insertion of the following section:

"**Imposition of South African television content, music content and independent production quotas**

57.A (1) Broadcasting services shall contribute to South African television content, South African music content and independent television production in terms of regulations prescribed by the Authority.

(2) Regulations in terms of subsection (1) shall become binding on and enforceable against the licensee concerned on the expiration of a

reasonable period, not shorter than 18 months, as shall be determined by the Authority in the regulation."

At the public hearings on South African content regulation held by the Independent Communications Authority of South Africa in May 2001, it was pointed out that independent production quotas are a critical mechanism for achieving diversity in programme production, for encouraging a wide range of views and experiences to be reflected on air, and for creating opportunities for a great number of people to enter the television production industry, particularly historically disadvantaged individuals (HDIs). In practice, however, this has not happened.

2.5 In 2003 the Authority attempted to facilitate a forum comprising of broadcasters, independent producers and other interested stakeholders to develop an industry standard for commissioning practices. This attempt failed as the South African Broadcasting Corporation refused to participate on the basis that the there was no direct regulatory imperative in the enabling legislation requiring them to do so. The Authority therefore made recommendations to the Minister that the IBA Act be amended to require broadcasters to have a code of commissioning practices that meet minimum guidelines set by the Authority, these amendments may have become superseded by the Convergence Bill process. The Authority is of the view that these recommendations are still relevant in the context of the Convergence Bill and they are set out below:

"Code relating to programme commissioning.

57B In terms of regulations to be prescribed by the Authority, a television broadcasting service licensee shall draw up and from time to time review a code of practice setting out the principles a licensee will apply when agreeing to terms for the commissioning of independent productions.

3. Ad Section 58 Broadcasting service objectives

The introduction of a multi-channel signal distribution in the Broadcasting Act has been viewed as blurring the distinction between broadcasting and signal distribution. Multi-channel distribution service is defined as a broadcasting signal distribution service that provides broadcasting signal distribution of more than one channel at the same time on the same signal.

In the view of the Authority multi-channel signal distribution was an imperfect attempt to deal with what is referred to as a multiplexing ("muxing"). Multiplexing refers to the sending of multiple signals or streams of information on a carrier at

the same time in the form of a single, complex signal and then recovering the separate signals at the receiving end. The multiplex operator has the capability to operate as a network operator and a content provider. From a licensing perspective, introducing the concept of a multiplex service will allow new players an opportunity to enter the market while maintaining the status quo in relation to incumbent broadcasting and broadcasting signal distribution services (includes multi-channel distribution).

The Authority proposes that there be a distinction between broadcasting services, broadcasting signal distribution and multiplexing based upon a value chain approach. To this end the following amendments are proposed to section 58 in the Bill:

"**Broadcasting signal distribution [service] objectives**

58. Where a communications network service licensee provides broadcasting signal distribution [or multichannel distribution services], such [provider] licensee must, subject to the [general terms and conditions of its] licence conditions determined by the Authority –
(a) give priority to the carriage of South African broadcasting **[**channels**]** services [, including local programming where the Authority considers it appropriate**]**;
(b) provide universal access for all South Africans to broadcasting services; and
[(c) provide a diversity of type of broadcasting services and content;
(d) deliver public services, including educational, commercial and community services;]
[(e)] (c) be open, interoperable and harmonised with the Southern African region and be able to meet international distribution standards."

The Authority further proposes the insertion of a new section 59 in the Bill as follows:

"Multiplexing service objectives

59. Where a multiplex service provides multiplexing for one or more broadcasting services on a digital multiplex, such service must, subject to the conditions determined by the Authority –

(a) give priority to the carriage of South African broadcasting channels;
(b) provide a diversity of type of broadcasting services and content;
(c) deliver public services, including educational, commercial and community services; and
(d) be harmonised with the Southern African region and be able to meet international standards."

In light of the amendments proposes above the following definitions should be included in section 1 of the Bill:

"multiplexing means the sending of multiple signals or streams of information on a carrier at the same time in the form of a single, complex signal and then recovering the separate signals at the receiving end."

and

"multiplex service means an entity that compiles, operates and markets a content offering on a digital multiplex, manages available transmission capacity and also decides on conditional access and subscriber management services that will be used."

4. Ad Section 59 Application of Act

It is the view of the Authority that this clause is not correctly placed here and should rather be at the end of Chapter 13.

In the place of section 59 the Authority has proposed under Chapter 3 that a sections be inserted on Empowerment, Ownership and Control. The Authority notes that the Convergence Bill is silent on matters of media ownership and control other than the principle being captured in the objects of the Act. Government stated in the White Paper on Broadcasting Policy, 1998, those commercial broadcasters should be expected to fulfil significant public policy goals. "To ensure that the broadcasting system meets the needs of South Africa, it is imperative that effective ownership and control of broadcasting system remain in the hands of South African citizens. However, in order to

meet their obligations private broadcasters need access to adequate amount of capital. An appropriate balance must be met between these priorities".[6] This principle was captured in the IBA Act under sections 48, 49 and 50 read together with Schedule 2 of that Act, unfortunately these provisions have not been carried over into the Convergence Bill and therefore the Authority has made proposals under Chapter 3. In May 2004 the Authority submitted proposed amendments to these sections to the Minister in accordance with the provisions of the IBA Act for tabling in Parliament.

6 The White Paper on Broadcasting Policy, 1998, at page 40.

CHAPTER 10 – CONSUMER ISSUES

1. Ad Section 60: Code of conduct and customer service charter

1.1. The Authority notes that Chapter 10 uses words that are not defined in the Bill, namely that of “licence” and “licensees”.

1.2. Section 51 read with section 52 deals exclusively with broadcasting service licensees. Whilst we support this separation, the Authority submits that the provisions as proposed in Chapter 10 create duplication with regard to the applicability of the codes of conduct referred too. The Authority therefore proposes to harmonise the effect in section 60(2), and proposes that this be brought in line with section 51 by the inclusion of the following in section 60(2):

> The Authority may develop different codes of conduct for different categories of licences. <u>All communications network services licensees and communications service licensees shall adhere to the Code of Conduct for such services as prescribed.</u>

1.3. The Authority proposes that provisions in relation to section 60(4) be amended to be peremptory with regard to the development of minimum standards for customer service charters as follows:

> The Authority **[may]** <u>shall</u> develop different…

1.4. The Authority proposes the following insertion to section 60(5):

> The matters which a customer service charter may address include, but are not limited to –
>
> (a) the provision of information to customers regarding services, rates, performance and consumer complaint procedures;
> (b) provisioning and fault repair services;
> (c) the protection of private consumer information;
> (d) customer charging, billing, collection and credit practices;

(e) complaints, procedures for consumers and provision of remedies and redress of matters that form the subject matter of such complaints; and
(f) any other matter of concern to customers;

1.5. As highlighted in our comments on Chapter 1, section 2, the Authority notes with some concern that there is no object, specific provision or section in the Bill dealing with matters pertaining to people with disabilities. The Authority proposes that a new section 60A be inserted as follows:

People with disabilities

60A. The Authority shall prescribe regulations setting out a code on people with disabilities that will be applicable to all categories of licences.

1.6. The Authority proposes the establishment of a consumer advisory panel to advise the Authority on any matter relating to consumer issues. We therefore propose the insertion of a section 60B as follows:

Consumer Advisory Panel

60B (1) The Authority shall establish a consumer advisory panel that will advise the Authority on matters relating to consumer issues in the Republic.
(2) The constitution of the consumer advisory panel shall be as prescribed.

CHAPTER 11 – GENERAL

The Authority submits that Chapter 11 includes matters that are not necessarily related or logically grouped. Moreover, we respectfully submit that Chapter 11 is incorrectly titled. With the following proposed changes, the Chapter should correctly read "Numbering and emergency services". It is proposed that this Chapter be re organized as follows:

i. Section 62 be moved and placed in Chapter 10.

ii. Section 63 should be regrouped with section 61 and placed under Chapter 7 and retitled "Competition, Tariffs and Interconnection".

iii. Section 64 should be the last section in Chapter 11.

iv. The current section 66 should follow the current section 67.

v. Section 72 should be deleted in its entirety as it leads to the clearly unintended consequence of broadcasting services not being able to continue broadcasting legally until their licences are converted.

Thus, the section headings for Chapter 11, with relevant numbering to be inserted, should correctly read as follows:

- Numbering plans and number portability
- Carrier pre-selection
- Directory services
- Establishment of public emergency communications centres
- Duties of 112 emergency centres and licensees
- Public emergency number
- Standards, capabilities and operating procedures of 112 emergency centres

The Authority however submits its proposals on the rest of this Chapter as currently numbered in the Bill.

1. Ad Section 64: Offences and penalties

Section 64 makes any contravention of the provisions of any and all sections of the Bill to be an offence, whether contravened by licensees or non licensees.

The fact that these contraventions are made to be statutory criminal offences means that the criminal courts of South Africa will have jurisdiction over all contraventions. The Authority will not have jurisdiction to adjudicate over those matters that involve licensees.

This is clearly not the intention of the legislature and requires urgent remedial action. The Authority has submitted proposals under the proposals on the schedules of the Bill on how this section should be amended to address this concern.

2. Ad Section 65: Numbering plans and number portability

2.1. Section 65 (7)(a) provides for the recovery of fees by licensees with respect to administration costs. It is submitted that this formulation is vague. The Authority suggests that this section be amended to read as follows:

> The fees licensees must pay for the allocation of numbers to recover numbering administration costs as determined by the Authority

2.2. Section 65(7)(d)(ii) uses the word "service provider", which is a term that is not defined in Chapter 1 of the Bill. The Authority proposes that the terms "communications network service licensee" and "communications service licensee" be used instead.

3. Ad Section 68: Establishment of public emergency communications centres

The Authority proposes the insertion of the word "end" before the word "user" in section 68 (2), in line with the Chapter 1, as follows:

> "A 112 Emergency Centre is a service by means of which the end user of a …"

CHAPTER 12 - UNIVERSAL SERVICE AGENCY

1. Ad Section 74: Functions of Agency

The Authority notes that the functions of the Universal Service Agency in section 74 are limited to communications services and communications network services. The contributions to the Universal Service Fund, we would submit, would be correctly placed if it were to be drawn from these two licence categories.

Section 81 (1) however stipulates that contributions should be drawn from all licensees including broadcasting service licensees. As the Committee is aware, broadcasting service licensees are already making contributions to the Media Development and Diversity Agency (MDDA). If the provisions of this section are promulgated as proposed in the Bill, it would have the consequence that broadcasting service licensees would be subject to double taxation.

Our recommendation is that broadcasting services be excluded from the provisions of this section.

2. Ad Section 80: Application of money in Universal Service Fund

The Authority welcomes the powers granted to it in terms of section 80(2) and (3) relating to the designation of areas to be declared under-serviced. In terms of the duties that the Authority is charged with, amongst others the duty to ensure consumer protection, the ability of it to intervene in the provision of services to those specific areas will go some way to achieving the goals of universal service and access.

The Authority proposes the following amendment to section 80(3):

> The Authority shall review and update, at least bi-annually, the definition of under serviced area prescribed **[and]**, the list of designated under serviced areas eligible for construction payments from the Universal Service Fund and the areas that have already been granted.

CHAPTER 13 - TRANSITIONAL PROVISIONS

General Comment on Chapter 13

It is clear from the sections in this Chapter that the transitional provisions envisage a huge re-regulation and licence conversion project by the Authority. This project will require the allocation of considerable financial and human resources and may divert regulatory attention from opening up markets and licences to new players.

While it is important to have transitional provisions when moving from one legislative system to another, these provisions should cause as little disruption as possible to licensees and should be seamless in nature.

1. Ad section 84: Existing licences and section 85 Licence conversion

The Authority proposes a simpler way of defining existing licences as follows:

> **"84.** (1) Subject to Chapter 3 **[—]** ***[(a)]*** all licences granted, issued or deemed to have been **[considered to be]** granted or issued in terms of the Telecommunications Act, the Broadcasting Act, the Independent Broadcasting Authority Act and the Sentech Act,
> ***[(b)*** **radio spectrum licences and signal distribution licences granted or issued or considered to be granted or issued in terms of the Broadcasting Act and the IBA Act;**
> ***(c)*** **all licences granted or issued or considered to be granted or issued in terms of the Sentech Act; and**
> ***(d)*** **all public, commercial and community broadcasting licenses considered to be granted or issued in terms of the Broadcasting Act and the IBA Act,]** (in this chapter collectively referred to as ''existing licences'') remain valid under this Act until converted by the Authority in terms of section 85.

1.1. *Subsection (2)*

The Authority notes that the manner in which subsection 2 is currently would not cover those services which have been granted permission to continue broadcasting in terms of the Broadcasting Act. The Authority recommends that this subsection be amended as follows:

"(2) Notwithstanding section 7 and subject to subsection (3), any person who, immediately before the commencement of this Act, lawfully provided a communications service or a broadcasting service without a licence is considered to have permission to continue to provide such service, if—

(a) such person applies to the Authority for the necessary licence within 90 days of the commencement of this Act; or
(b) the Authority exempts such service in terms of section 6."

1.2. *Subsection (4)*

1.2.1. Subsection (4) provides that:

"(4) Existing licences referred to in subsection (1) must be converted by the Authority, in terms of section 85 within 12 months from the commencement date of this Act".

This is clearly an impossible task when one considers that existing licences (including spectrum licences) are all those licences ever issued in terms of the IBA Act, Telecommunications Act, Broadcasting Act and Sentech Act.

We have made a general comment regarding timeframes in our introductory comments, but also wish to highlight that time frames set out in statutes, particularly in the Telecommunications Act have regularly been missed or ignored with little or no consequences, except for a loss of credibility for the process. To remedy this, the Authority proposes that it be granted the flexibility to determine appropriate timeframes with due regard to the rights of licensees and the principles of effective regulation.

1.2.2. In any event section 84(4) seems to be contradicted by section 85(2), particularly paragraph (b) which provides:

"(2) The Authority must, subject to section 84(5) publish, by notice in the *Gazette*, a schedule in terms of which the Authority plans to undertake the existing licence conversion process. Such notice must—

(a) identify the existing licences that must be converted through the process of granting new licences and those services that are exempted as provided in section 6;
(b) set out a time frame for such conversion, including but not limited to the expected time frame for granting new licences under this Act;

(c) set out the form and content, including information that must be provided to the Authority by the holders of existing licences to assist the Authority in the conversion process;
(d) set out the process the Authority plans to undertake in converting such existing licences; and
(e) confirm the rights of the applicants to participate in such process".

1.2.3. In line with our introductory comments, it is therefore proposed that the statutory time frame in section 84(4) be **deleted** and the more flexible approach provided for in section 85(2) be retained.

It is noteworthy that subsection (6) provides that:

> "(6) Subject to subsection (1), existing licences remain in full force and effect until converted by the Authority in terms of this section".

1.3. *Subsection (3)*

Subsection (3) of section 85 sets out a framework for the conversion of existing licences and the issuing of new licences and defines or maps out which existing licences are communications services; communications network services or communication facilities; broadcasting services; application services and spectrum licences.

As indicated in our comments on Chapter 3 of the Bill, the Authority highlighted the problems with the proposed framework and set out a new way in approaching a system involving individual and class licences.

The Authority has made proposals under Chapter 3 that Communication Network services, Communication Services, radio frequency spectrum, and broadcasting services be considered as being the licensable activities, with individual and class licences being the two types of licences provided for within these categories. The Authority should also have the power to exempt certain activities from licensing within the specified categories. [1]

A table has been attached which maps existing licences within the newly proposed licensing framework.

Consequently, paragraphs (e) – ((j) section 85(3) should be amended to reflect the possibility that individual and class licences may be granted in each licensing category. It is therefore proposed that these paragraphs be deleted and replaced as follows:

(e) The following communications services will be granted individual communication service licences:
- (i) multiplex service;
- (ii) common and private carrier broadcasting signal distribution services;
- (iii) international telecommunication services;
- (iv) local access telecommunication services;
- (v) mobile cellular telecommunication services;
- (vi) mobile data telecommunications services
- (vii) national long distance telecommunication services;
- (viii) public switched telecommunication services;
- (ix) under-serviced area licensee; and
- (x) any other services prescribed by the Authority as communication services requiring individual communication service licences.

(f) The following communications services will be granted class communication service licences:
- (i) value added network services;
- (ii) multimedia services; and
- (iii) any other services prescribed by the Authority as communication services requiring class communication service licences.

(g) The following communications network services or communications facilities will granted individual communication network service licences, regardless of whether the authority to provide such facility, system, network, apparatus, station or other similar service was authorised in connection with any service or whether such authorisation was contained in one or more licences:

(i) common carrier and private carrier networks for broadcasting signal distribution;
(ii) carrier of carriers;
(iii) a telecommunication facility;
(iv) a local exchange facility;
(v) a telecommunication system;
(vi) a mobile cellular telecommunication network;
(vii) a public switched telecommunication network;
(viii) an under service area licence network;
(ix) a radio apparatus;
(x) a radio station; and
(xi) any other similar facility or network prescribed by the Authority as a communication network requiring an individual communication network licence.

(h) The following communications network services or communications facilities will granted class communication network service licences, regardless of whether the authority to provide such facility, system, network, apparatus, station or other similar service was authorised in connection with any service or whether such authorisation was contained in one or more licences:

(i) a broadcasting signal distribution licence issued to a person in terms of section 33(1)(a)(iii) of the IBA Act;
(ii) self help stations
(iii) any other similar facility or network prescribed by the Authority as a communication network requiring a class communication network licence.

.

(i) The following broadcasting service licences will be granted individual broadcasting service licences:

(i) public, commercial, and community sound and television broadcasting services issued or deemed to have been issued in terms of the Broadcasting Act and the IBA Act, whether provide free-to-air or via subscription; and

(ii) any other broadcasting service prescribed by the Authority as a broadcasting service requiring an individual broadcasting service licence;

(j) The following broadcasting services will be granted class broadcasting service licences:

(i) low power sound broadcasting services;

(ii) and any other broadcasting service prescribed by the Authority as a broadcasting service requiring a class broadcasting service licence;

(k) Short-term radio frequency spectrum licences are temporary authorisations and licences contemplated in section 5(6).

(l) Spectrum licences are radio spectrum licences and may be granted on an individual or class basis as follows.

(i) The following spectrum licences will be granted individual radio spectrum licences:

(aa) 3G;

(bb) 1800MHz;

(cc) 900MHz;

(dd) spectrum which requires exclusive assignments and coordination with neighbouring countries; and

(ee) any other spectrum licences prescribed by the Authority as a radio spectrum service requiring an individual radio spectrum service licence

(ii) The following spectrum licences will be granted class radio spectrum licences:

(aa) Wifi 2.4 GHz and 5.8GHz;

(bb) maritime ship station licences;

(cc) radio amateurs;

(dd) Short Range Devices Citizen Band (CB) radio;

(ee) any other spectrum licences prescribed by the Authority as a radio spectrum service requiring a class radio spectrum service licence

2. Ad section 87: Existing regulations

As drafted, subsection (2) appears to negate the need for a time frame as set out in subsection (1) as follows:

> "(1) Within twelve months of the coming into force of this Act, the Authority may repeal or amend the regulations made under—
>
> *(a)* section 119A of the Post Office Act, 1958 (Act No. 44 of 1958);
> *(b)* the Telecommunications Act;
> *(c)* the Broadcasting Act;
> *(d)* the IBA Act;
> *(e)* the Radio Act; and
> *(f)* the Sentech Act,
>
> which were in force immediately prior to the commencement of the this Act, in accordance with the provisions of this Act.
>
> (2) The regulations referred to in subsection (1) remain in force until they are amended or repealed in terms of this Act.

It is therefore proposed that the introduction to subsection (1) be amended as follows:

> "(1) **[Within twelve months of the coming into force of this Act, t]** T<u></u>he Authority may repeal or amend the regulations made under—

SCHEDULES

The Authority has made detailed representations on proposed amendments to the Schedules of the Convergence Bill. This includes a proposal that the following *existing* provisions of the ICASA Act should be amended in the schedules of the Convergence Bill:

- Functions of the Authority
- Funding of the Authority

In addition, the following *new provisions* required as a consequence of the repeal of the Telecommunications Act and the IBA Act should be inserted in the ICASA Act:

- Minutes of Council and its Committees
- Confidentiality (Council Members)
- Limitation of liability
- Liquidation
- Restriction on use of the name of the Authority
- Inquiries
- Establishment of Investigation Unit
- Establishment of Complaints and Compliance Committee
- Functions of Complaints and Compliance Committee
- Procedures of the Complaints and Compliance Committee
- Findings by the Complaints and Compliance Committee
- Recommendations of the Complaints and Compliance Committee
- Powers of the Authority in cases of non-compliance
- Offences and Penalties
- Confidential Information (from members of the public)

Act No. 4 of 1999 Broadcasting Act, 1999

The Authority, after considering the extent of the repeals to the Broadcasting Act, 1 999, holds the view that it should be renamed the South African Broadcasting Corporation Act, 1999.

Act No. 13 of 2000 Independent Communications Authority of South Africa Act, 2000

As promised above the Authority has proposed provisions to give meaning to the references made in the Convergence Bill to the ICASA Act. The Authority is aware of various references to the ICASA Act in the Convergence Bill. The provisions that are being referred to in the ICASA Act do not exist and presuppose that the ICASA Act will have been amended by the time that the Convergence Act is enacted. The Authority does not have a clear indication of what the timing is for ICASA Act Amendment Bill. If the ICASA Act Amendment Bill is to be tabled shortly and is aimed at commencing on the same date as the Convergence Act, there will be no problem. However, if there is disjoint between the commencement dates the following amendments need to be included in the Schedules of the Convergence Act to ensure that there is no regulatory vacuum when the Act commences.[7]

Amendment of section 4 in Act 13 of 2000

1. Section 4 of Act 13 of 2000 is hereby amended by the substitution of section 4 for the following section:[8]

Functions of Authority.—

(1) The Authority –

(a) shall exercise and perform the powers, functions and duties conferred and imposed upon **[the former authorities by or under]** it by this Act, the [underlying statutes] the related legislation[9] and by or in terms of any other law**[;]**.

[(b)may exercise the powers conferred upon the former authorities by or under the underlying statutes;]

(c) subject to section 231 of the Constitution, must act in a manner that is consistent with the obligations of the Republic under any applicable international agreement.

[7] The amendments contemplated above, if accepted, will also require that the preamble and the definitions section of the ICASA Act be amended to be in line with the Convergence Act and that references to "broadcasting and telecommunications" in the Act be replaced with the term "communications".

[8] The Convergence Bill proposes the repeal of the IBA Act and the Telecommunications Act, this would necessitate the functions currently residing under those Acts being consolidated under the ICASA Act.

[9] Related legislation shall have the same meaning as defined in the Convergence Bill.

(2) The Authority is subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999).

(3) Without derogating from the generality of subsection (1), in addition to the powers and functions conferred upon it elsewhere in this Act, related legislation or any other law, the Authority--

(a) shall grant, renew and amend licences;

(b) shall manage the radio frequency spectrum in accordance with bilateral or international treaties entered into by the Republic;

(c) may make regulations on any matter consistent with the objects of this Act and the related legislation;

(d) shall develop and enforce licence conditions consistent with the objects of this Act and the related legislation for different categories of licences;

(e) shall approve technical parameters, transmitters and transmission characteristics to be used by licensees;

(f) may inspect transmitters and other communications apparatus used for communications;

(g) may undertake inquiries on any matter within its jurisdiction;

(h) may conduct research on all matters affecting communications in order to exercise its powers and perform its functions;

(i) may make recommendations to the Minister on policy matters and amendments to this Act and the related legislation, which accord with the objects of this Act and related legislation which promote development in the communications sector;

(j) shall investigate and adjudicate complaints submitted in terms of this Act, the related legislation, and licence conditions;

(k) may by notice in writing direct the holder of a licence in terms of the related legislation to produce or furnish to the Authority, at a time and place specified in the notice, any documents and information, as may be specified in such notice and relating to any matter which may have a bearing on the fulfilment of the object of this Act or the related legislation in respect of which a duty or obligation is imposed on such licence holder;

(l) shall assist the Government in preparing for international conferences in particular those convened by the International Telecommunications Union, and for that purpose, may attend such conferences, and where applicable, implement any decisions adopted at such conferences to which the Republic is a party;

(m) shall in the public interest, regulate all communications activities having an effect within the Republic of South Africa.

2. The following section is hereby inserted in Act 13 of 2000 immediately after section 14:[10]

14A. Appointment of experts.—

(a) The Authority may appoint as many experts as may be necessary, including experts from other countries, with a view to assisting the Authority in the performance of its functions.

(b) The terms, conditions, remuneration and allowances applicable in respect of any expert by virtue of his or her appointment in terms of subsection (1), and the work to be performed or services to be rendered by virtue of such appointment, shall be determined in a written agreement entered into for that purpose between the Authority and the expert concerned.

3. Section 15 of the Act is hereby amended—[11]

[10] This amendment would be necessitated by the proposed repeal of the IBA Act and the Telecommunications Act to allow the Authority to continue to appoint experts when necessary.

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

(1) The Authority is financed from **[money]** monies appropriated by Parliament and derived from:
(i) annual licence fees;
(ii) administration fees;
(iii) spectrum fees;
(iv) numbering fees and
(v) National Revenue Fund.

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

(3) (a) **[All revenue received by the]** The maximum amount of fees to be retained by the Authority **[in a manner other than in accordance with]** in terms of subsection (1), shall be approved by Parliament on the recommendation of the Minister in concurrence with the Minister of Finance, and in consultation with the Authority, provided that the remainder of the monies shall be paid into the National Revenue Fund within 30 days after receipt of such revenue.

(b) At the end of each financial year, the Authority must account to the National Treasury and Parliament for all monies received and must transfer any unspent monies to the National Revenue Fund.

(c) In the event that the monies received by the Authority in terms of subsection (1) and paragraph (3) are insufficient to meet the Authority's approved budget in any financial year, the Authority may, with the express approval of Parliament, retain such additional percentage of monies received in terms of subsection (1) required in order to meet the shortfall.

(c) by the insertion in section 15 of the following subsections immediately following subsection (4):

(5) The Council shall, in the name of the Authority, open and maintain, with a bank registered as such in the Republic or with any other financial institution so registered and approved by the National Treasury, an account, in which all moneys received by the Authority as contemplated in subsection (1) must be deposited and

[11] The Convergence Bill imposes a number of duties and responsibilities on the Authority that would require a more flexible funding model than the one currently in place.

from which all payments to or by the Authority or on The Authority's behalf shall be made.

(6) The financial year of the Authority starts on 1 April of any year and ends on 31 March of the subsequent year.

4. The following section is hereby inserted in Act 13 of 2000 immediately after section 15:[12]

15A Annual Report

(1). The Authority shall submit an annual report to the Minister on all matters within its jurisdiction, as soon as may be reasonably practicable after the end of each financial, including but not limited to -

(a) the financial statements of the Authority referred to in section 40(1)(e) of the Public Financial Management Act, 1999 (Act No. 1 of 1999), including the Auditor General's report on those statements;
(b information on the issuance, renewal and amendment of licences;
(c compliance with standards;
(d) spectrum planning and allocation;
(e) progress on meeting South African content requirements;
(f) details of all inquiries undertaken within the year; and
(g) statistical overview of the regulated communications industry;

5. The following section is hereby inserted in Act 13 of 2000 immediately after section 16:[13]

16A. Regulations.—

(1) The Authority may make regulations on any matter consistent with the objects of this Act and the related legislation and on any matter necessary and incidental to the exercise of its powers and functions,

[12] The requirement for annual reports and audited financial statements currently reside in the Telecommunications Act and the IBA Act which are being repealed by the Convergence Act It is appropriate that this requirement reside in the ICASA Act.

[13] Currently, the Authority is limited to prescribing regulations on only those matters where it is expressly stated that regulations may or must be prescribed, whereas the above proposal would give the Authority broader powers to make regulations in the public interest. This is in line with submissions already made to the Minister on the draft ICT BEE Charter. This will necessitate the inclusion in the ICASA Act of a section setting out the procedures for making regulations, in line with the Principles of Administrative Justice Act.

Without derogating from the generality of this subsection, the Authority may make regulations with regard to –

(a) any technical matter necessary or expedient for the regulation of licensed services;

(b) any matter of procedure or form which may be necessary or expedient to prescribe for the purposes of this Act or the related legislation;

(c) the payment to the Authority of charges and fees in respect of—

(i) the supply by the Authority of facilities for the inspection, examination or copying of material under the control of the Authority;

(ii) the transcription of material from one medium to another;

(iii) the supply of copies, transcripts and reproductions in whatsoever form and the certification of copies;

(iv) the granting of licences in terms of this Act or the related legislation;

(v) applications for and the grant, amendment, renewal, transfer or disposal of licences or any interest in a licence in terms of this Act or the related legislation;

and

(d) generally, the control of the radio frequency spectrum, radio activities and the use of radio apparatus.

(2) Different regulations may be made in respect of different—

(a) classes or categories of licences granted in terms of this Act or the related legislation, and

(b) categories of radio users, radio frequencies, radio frequency bands and licences.

(3) Any regulation made by the Authority in terms of subsection (1) may declare any contravention of that regulation to be an offence, provided that any such regulation must specify the penalty that may be imposed in respect of such contravention.

(4) The Authority shall before any regulation is finalised, publish such regulation in the *Gazette*, together with a notice—

(a) declaring the Authority's intention to make that regulation; and

(b) inviting interested parties to make written representations on the regulation to the Authority within a period of at least 30 days.

(5) The Authority may conduct public hearings in respect of a draft regulation.

(6) The provisions of subsection (4) do not apply with regard to—

(a) any regulation made by the Authority which, after the provisions of that subsection have been complied with, has been amended after receipt of comments or representations received in terms of a notice issued under that subsection; or

(b) any regulation which the public interest requires should be made without delay."

Amendment of section 17 in Act 13 of 2000[14]

5. Section 17 of Act 13 of 2000 is hereby amended –

(a) by the substitution of the title for the following title:

[Standing and special committees] Delegation of functions. –

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

(1) Subject to subsection (2), **[The]** the Council may **[establish standing committees or special committees for such purposes as the Council may deem necessary with a view to assisting it in the effective exercise and performance of its powers and duties]**, in writing, delegate any power, function, or duty of the Authority in terms of this Act or the related legislation to –

(a) any councillor;

(b) any committee of the Council; or

(c) the chief executive officer referred to in section 14 of this Act.

(c) by the repeal and deletion of subsections, (2), (3), (4), (5), (6), (7), (8), and (9) of section 17 in their entirety and there substitution with the following subsections:.

(2) The power to make regulations may not be delegated in terms of subsection (1)

(3) A power, function, or duty delegated to the chief executive officer may be performed by any other staff member of the Authority authorised by the chief executive officer, except where precluded by the terms of such delegation

(4) Subject to subsection (5), a delegation in terms of subsection (1) or (3) –

(a) is subject to such conditions as may be determined by the Council or chief executive officer, as the case may be; and

(b) may at any time be amended or revoked.

[14] This amendment is necessary as the repeal of the IBA Act and Telecommunications Act contemplated in the Convergence Bill would be repealing the relevant sections pertaining to delegations by the Council.

(5) The Council or chief executive officer, as the case may be, is not divested of any power, function, or duty or relieved of any duty which it may have delegated in terms of subsection (1) or (11) and may amend or revoke any decision made in terms of such a delegation except where any licence will be affected by the revocation or the amendment of the decision.

(6)The power to grant, renew, amend or transfer any licence may only be delegated to a Councillor, or to a Committee of Council.

(7) Notwithstanding the provisions of this section, any committee delegated with the power to grant, amend, revoke, transfer or renew a licence in terms of this Act, must report its decision to the Council.

6. The following sections are hereby inserted in Act 13 of 2000 immediately after section 17:[15]

17A. Minutes of Council and its committees

(1) The Authority and each of its committees shall prepare and keep minutes of the proceedings of every meeting of the Council and of each of its committees and circulate copies of such minutes to all councillors or members of each of its committees, as the case may be.

(2) The minutes prepared in terms of subsection (1), when signed at a subsequent meeting of the Authority or at a subsequent meeting of its committees, by the person presiding at such meeting, are deemed to be, in the absence of proof of error in the minutes

(a) a true and correct record of the proceedings which they purport to minute; and

(b) prima facie evidence for purposes of any proceedings in terms of this Act or the underlying statutes before a court of law or any tribunal or commission of inquiry of

(i) the proceedings of the meeting of the Authority or of such committee, as the case may be; and

(ii) the matters they purport to minute.

[15] The insertion of these provisions is made necessary by the proposed repeal of the IBA Act and the Telecommunications and the direct reference to these provisions being in the ICASA Act by the Convergence Bill.

17B. Confidentiality

(1) No –

(a) councillor;

(b) member of a committee of the Council;

(c) expert appointed in terms of section 14A;

(d) member of the staff of the Authority;

(e) inspector appointed by the Authority pursuant to section 17G; or

(f) person serving on the complaints and compliance committee appointed pursuant to section 17H.

may disclose any information in regard to any matter which may come to his or her knowledge in the performance of any function in terms of this Act or the underlying statutes or by virtue of the office held by him or her, except –

(i) in so far as the provisions of the Constitution, this Act, the underlying statutes or any other law require or provide for the publication of or access by the public or any interested person to information relating to such matter;

(ii) in so far as may be necessary for the due and proper performance of any function in terms of this Act or the related legislation; or

(iii) on the order of a competent court of law or authority.

17C. Limitation of liability

(a) The chairperson,

(b) A councillor,

(c) A member of a committee of the Council,

(d) An expert appointed in terms of this Act or underlying statutes,

(e) A member of the staff of the Authority,

(f) Inspector appointed pursuant to section 17G, and

(g) persons serving on, or at the request of, the complaint and compliance committee pursuant to section 17H.

is not personally liable for any damage or loss suffered by any person in consequence of any act or thing which was performed or done or omitted

in good faith in the course of the exercise or performance of any function or duty in terms of this Act or the related legislation.

17D. Liquidation.—The Authority shall not be placed in liquidation except under authority of and in accordance with an Act of Parliament specially adopted for that purpose.

17E. Restriction on use of name or description implying connection with Authority.—No person shall apply to any venture, undertaking, business, company or other association or body (whether corporate or incorporate) a name or description signifying or implying some connection between such venture, undertaking, business, company or other association or body, of the one part, and the Authority, of the other, except with the consent of the Authority.

17F. Inquiries by Authority.—

(1) The Authority may conduct an inquiry into any matter with regard to –

(a) the achievement of the objects of this Act or the related legislation;

(b) the exercise and performance of its powers, functions, and duties in terms of this Act or the related legislation;

(c) regulations and guidelines proposed or made in terms of this Act or related legislation and compliance by applicable persons therewith; and

(d) compliance with the terms and conditions of any licence by the holder of such licence issued pursuant to one or more of the related legislation.

(2) The Authority shall conduct an inquiry into any matter required in terms of this Act or the related legislation.

(3) The Authority shall, by notice in the *Gazette*, give notice of its intention to conduct an inquiry and such notice shall indicate the subject matter of the inquiry and invite interested persons to

(a) submit written representations within the period specified in the notice for submitting such representations, provided, however, such period may not be shorter than thirty (30) days from the date of publication of the notice in the *Gazette*; and

(b) indicate in their written representations whether they require an opportunity to make oral representations to the Authority.

(4) Written representations made pursuant to a notice referred to in subsection (3) shall be, subject to subsection (6), open to public inspection during the normal office hours of the Authority at the Authority's premises.

(5) The Authority shall, when so requested by any person and upon payment of the prescribed fee, provide a copy or an extract of any representations made.

(6) The Authority shall, at the request of any person making written representations, determine that any document or information that is commercially sensitive or any other matter reasonably justifying confidentiality, may not be open to public inspection, if such document or information can be separated from the written representations or other documents in question.

(7) When a request for confidentiality is made pursuant to subsection (6) the provisions of section 17O shall apply.

(8) Oral representations referred to in subsection (3)(b) shall, subject to subsection (11), be open to the public.

(9) The Authority may, for the purpose of any inquiry conducted in terms of this section,

(a) through the person presiding at any such inquiry, by notice in writing in the prescribed form, require from any person such particulars and information as may be reasonably necessary, material and relevant in connection with any such inquiry;

(b) by notice in writing in the prescribed form under the hand of a councillor, addressed and delivered by an authorised person

or a sheriff to any person require such person, in relation to any such inquiry to –

(i) appear before it at a date, time and place specified in such notice;

(ii) make a statement; and

(iii) submit to it all documents or objects in the possession or custody or under the control of any such person and which may be reasonably necessary, material and relevant in connection with that inquiry; and

(c) through the person presiding at any such inquiry, after explaining applicable rights under the Constitution and this section, question any person referred to in subsection (9)(b) in connection with any matter which may be reasonably necessary, material and relevant in connection with that inquiry.

(10) Subject to this Act

(a) The chairperson presiding at the inquiry must determine the procedure at the inquiry.

(b) A person making oral representation to, or appearing in terms of subsection (9)(b) before the Authority may have a legal representative or other adviser present.

(c) The Authority may inspect, and retain for such period as may be reasonable for the purposes of this Act or the underlying statutes, any document or object submitted to it.

(11) The chairperson presiding at the inquiry may, in exceptional circumstances, after hearing the relevant representations from any person that is at the time present at and concerned with the inquiry, and having regard to

(a) any reasonable apprehension of prejudice or harm to the person to be questioned;

(b) the rights of reply and rebuttal of any person whose rights may be adversely affected; and

(c) if it is in the interests of the achievement of the objects of the inquiry that any part of the inquiry be held behind closed doors, direct that the public or any class thereof may not be present.

(12) The nature of documents or objects referred to in subsection (9)(b)(iii) and the matter upon which information is sought must be mentioned in the notice referred to in subsection (9)(b).

(13) The Authority must, within 180 days from the date of conclusion of the hearing--

(a) make a finding on the subject matter of the inquiry; and

(b) publish in the *Gazette* –

(i) a summary of its finding; and

(ii)the details of the place where and the time when the finding and the reasons for the finding can be obtained by the public.

The findings of the Authority, made pursuant to this subsection (13), shall be enforceable and binding on all licensees and other stakeholders in the communications industry to the extent that such findings are applicable to their regulated activities.

17G. Establishment of Investigation Unit

(1) The Authority shall establish an investigation unit and appoint suitably qualified inspectors.

(2) The investigation unit shall:

(a) monitor compliance by licensees of licence terms and conditions;

(b) monitor compliance by licensees with the provisions of this Act and the related legislation, regulations passed under the related legislation and with the findings made in terms of section 17F(13) applicable to them;

(c) initiate, investigate and evaluate any alleged or suspected –

(i) non-compliance by the licensee with its licence terms and conditions, provisions of this Act or the underlying statutes, or any regulations passed under the related legislation and any breach by the licensee of an agreement between the licensee and its subscribers;

(ii) failure to provide a licensed service to any customer or consumer that the licensee is required to provide under the terms of its licence, this Act or the related legislation;

(d) refer matters to the complaints and compliance committee for adjudication where the investigation unit determines that a licensee is in non-compliance with the terms and conditions of its licences, provisions of this Act or the related legislation or any regulations passed under the related legislation or failed to provide a licensed service;

(e) appear before the complaints and compliance committee;

(f) proceed in terms of regulations prescribed by the Authority; and

(g) cooperate, as necessary, with applicable law enforcement officials.

(3) Matters referred to the complaints and compliance committee by the investigation unit pursuant to subsection (2)(d) shall be in writing and in the form of a notice of potential non-compliance. Such notice shall describe the potential non-compliance setting out in such detail as to inform the complaints and compliance committee of the matter, including the alleged non-compliance and such notice of potential violation shall be accompanied by the record developed by the investigation unit in carrying out its obligations pursuant to subsection (2)(c).

(4) An interested person who has reason to believe that a licensee is guilty of any non-compliance with the terms and conditions of its licence or the provisions of this Act or the related legislation or regulations passed under the related legislation applicable to the licensee, may submit a written complaint with the Authority within sixty (60) days after the occurrence or the alleged or suspected non-compliance or of becoming aware of the alleged or suspected non-compliance. The Authority shall direct the complaint to the investigation unit for disposition in accordance with this section 17G.

(5) The investigation unit shall initiate, investigate and evaluate the complaint in the prescribed manner.

(6) Should the investigation unit be of the view that the complaint lacks merit, it may dismiss the complaint.

(7) If the complaint is dismissed by the investigation unit, the complainant may appeal to the complaints and compliance committee in the prescribed manner.

(8) Should the investigation unit be of the view that the complaint has merit, it may either refer the complaint to –

(a) the relevant industry representative body for resolution, if any; or

(b) the complaints and compliance committee for adjudication.

(9) Where the investigation unit refers the complaint pursuant to subsection (8), it shall forward the record developed by the investigation unit compiled in carrying out its obligations pursuant to subsection (5).

(10)An inspector appointed pursuant to subsection (1) shall be provided with a certificate of appointment signed by or on behalf of the chairperson of the Council in which it is stated that he or she has been appointed an inspector in terms of this Act or the related legislation.

(11) When an inspector performs any function in terms of this section 17G, he or she shall have such certificate of appointment in his or her possession and show it at the request of any person affected by the performance of that function.

(12) An inspector appointed in terms of this section 17G may, in order to carry out his or her functions under this Act or the related legislation, at any reasonable time and without prior notice enter any premises and

(a) inspect and make copies of, or extracts from, books, records or other documents;

(b) demand the production of and inspect the relevant licence or authority;

(c) inspect any radio apparatus, studio, plant, transmitters, apparatus, other equipment or other broadcasting or communications facilities on the premises;

(d) inspect anything referred to in paragraph (c) which is in the possession of or used by, or suspected of being in the possession of or being used by, any person in contravention of this Act, the related legislation or an applicable licence.

(13) The Authority may prescribe regulations governing the practices and procedures of the investigation unit.

(14) No person shall—

(a) fail to comply with a demand of the investigation unit or inspector**;**

(b) hinder or obstruct an inspector in the exercise of his or her powers in terms of this section 17G; or

(c) falsely hold himself or herself out as an inspector.

17H. Establishment of Complaints and Compliance Committee

(1) The Authority shall establish a complaints and compliance committee which shall consist of not more than seven (7) members, which two members shall be councillors and another an appointed chairperson.

(2) The Chairperson of the complaints and compliance committee must be

(a) a judge of the High Court of South Africa, whether in active service or not; or

(b) an advocate or attorney with at least ten (10) years appropriate experience; or

(c) a magistrate or retired magistrate with at least ten (10) years appropriate experience.

(3) The Chairperson of the Committee is responsible for managing the case load of the complaints and compliance committee with administrative support provided by the Authority;

(4) Panel members of the complaints and compliance committee shall;

(a) have suitable qualifications and experience in communications, economics, engineering, broadcasting, law, commerce, technology, information communication and technology industry, public affairs or consumer affairs;

(b) must be committed to the purposes and principles of this Act and the related legislation;

(c) not be an office bearer of a party, movement, organisation or body of a political nature;

(d) not be an unrehabilitated insolvent;

(e) not be mentally unfit or disordered;

(f) not be convicted of an offence after the enactment of the Constitution of the Republic of South Africa 1993 (Act No 200 of 1993) and sentenced to imprisonment without the option of a fine.

17I. Functions of Complaints and Compliance Committee

The complaints and compliance committee shall have the powers to-

(a) adjudicate any matter referred to it by the investigation unit;

(b) adjudicate appeals from complainants arising under section 17G;

(c) make any finding or recommendation to the Authority necessary or incidental to the performance of its functions in terms of this Act or related legislation and in achieving the objects of this Act and the related legislation;

(d) proceed in terms of regulations prescribed by the Authority; and

(e) adjudicate alleged violations of this Act and the related legislation referred to it by the Authority.

17J. Procedures of the Complaints and Compliance Committee

(1) If the complaints and compliance committee is of the view that any complaint or matter referred to it by the investigation unit lacks merit, it may dismiss the complaint or matter.

(2) If the complaints and compliance committee is of the view that the complaint or matter referred to it by the investigation unit has merit, it must adjudicate the complaint or matter.

(3) Where the complaints and compliance committee adjudicates a complaint or matter referred to it by the investigation unit it shall –

(a) serve the licensee to the dispute with a copy of the complaint or in the case of a matter referred to the complaints and compliance committee by the investigation unit, the notice of potential non-compliance referred to in section 17H;

(b) request the other party to the dispute to respond to the complaint or notice of potential non-compliance, as applicable, in full and in writing within thirty (30) days (or such other time period as may be determined by the complaints and

compliance committee) from the date on which the licensee was served; and

(c) give the complainant or investigation unit, as applicable, an opportunity to reply to such response.

(4) Upon consideration of the record developed in the case, the complaints and compliance committee may conduct a hearing.

(5) Where the complaint and compliance committee determines to conduct a hearing pursuant to subsection (4), the provisions of section 17F paragraphs (3) through (13) apply with the necessary changes.

(6) The complaint and compliance committee may hold one or more pre-hearing conferences for the purpose of giving direction to the parties regarding the procedures of any hearing, and other matters the complaints and compliance committee determines are relevant, including consideration of matters of process raised by the parties to assist in conducting hearings.

(7) Notwithstanding the provisions of this section, the Authority may prescribe procedures for the handling of urgent complaints, notices of potential non-compliance, and for complainants seeking urgent relief.

(8) (a) The complaints and compliance committee shall keep a record of all complaints and notices of potential non-compliance received by it and of all its proceedings, rulings and findings in relation to such complaints and notices of potential non-compliance.

(b) The records referred to in subsection (a) shall be kept at the offices of the Authority and, except for information that the complaint and compliance committee determines is confidential, be open to inspection by interested parties during the normal office hours of the Authority.

(c) Except for information determined to be confidential by the complaint and compliance committee, the Authority shall, at the request of any interested party and on payment of such fee as may be prescribed, furnish him or her with a certified copy of or extract from such record.

(9) The complaints and compliance committee may at any time adjourn any proceeding for purposes of allowing the parties to reach a settlement. When a settlement is reached and the complaints and compliance committee finds such settlement to be in compliance with the relevant licence terms and conditions, this Act or, as applicable, the underlying statutes, it may forward the settlement to the Authority as a recommendation pursuant to section 17L.

17K. Findings by the Complaints and Compliance Committee

(1) The complaints and compliance committee must make a finding within ninety (90) days of the hearing referred to in section 17J.

(2) If no hearing takes place, the complaints and compliance committee must make a finding within ninety (90) days of receiving the written response and any replies or other pleadings requested by the complaints and compliance committee pursuant to section 17J.

(3) In making a finding the complaints and compliance committee must take account of the record developed in the process, the objects of this Act and of the related legislation.

17L.Recommendations of Complaints and Compliance Committee

(1) Upon having made a finding that a complaint is justified or that a violation set out in a notice of potential non-compliance forwarded to the complaints and compliance committee by the investigation unit has occurred, the complaints and compliance committee must in writing make a recommendation to the Authority regarding which steps in subsection (5) should be taken against the licensee.

(2) The complaints and compliance committee must forward its finding, recommendations and the record of the proceedings to the Authority for appropriate action in terms of section 17M.

(3) The complaints and compliance committee must when so forwarding its recommendations to the Authority, inform the licensee in writing.

(4) The complaints and compliance committee shall before making a recommendation on the sanction to the Authority hear the licensee on this issue and take the following into account:

(a) the nature *of the non-compliance*;

(b) consequences of the non-compliance;

(c) gravity of the violation;

(d) the circumstances under which it occurred;

(e) the steps the licensee took to remedy the complaint or violation; and

(f) the steps taken by the licensee to ensure that similar violations or matters giving rise to the complaint will not occur in the future;

(5) The complaints and compliance committee may recommend that one or more of the following orders be issued by the Authority:

(a) direct the licensee to desist from any further contravention;

(b) direct the licensee to pay as a fine the amount prescribed by the Authority in respect of such non-compliance or non-adherence;

(c) direct the licensee to take such remedial or other steps not in conflict with this Act or the underlying statutes as may be recommended by the complaints and compliance committee;

(d) where the licensee has repeatedly been found guilty of material violations

(i) prohibit the licensee from providing the licensed service for such period as may be recommended by the complaints and compliance committee, subject to the proviso that a broadcasting or communications service, as applicable, must not be suspended in terms of this subsection for a period in excess of thirty (30) days; or

(ii) amend or revoke his or her licence;

(e) direct the licensee to comply with any settlement.

17M. Powers of the Authority in cases of non-compliance.—

(1) The Authority after consideration of the record of proceedings, the finding and the recommendation of the complaints and compliance committee may make an order as contemplated in section 17L(5), thereafter it shall inform the licensee of its decision and provide a copy of its order where one has been made.

(2) Any order by the Authority, made in terms of subsection (1) is considered to be final and binding on the parties, subject only to a review by the High Court in terms of the Promotion of Administrative Justice Act, 2000(Act No. 3 of 2000).

(3) The provisions of this section 17M do not preclude any person from bringing an action in any court, provided, however, the Authority shall have primary jurisdiction.

The orders of the Authority shall in all respects be effective and binding on the parties named therein unless a stay or equivalent order of a court of competent jurisdiction is granted.

17N. Offences and Penalties.—

(1) Any natural or juristic person who -

(a) in applying for a licence in terms of this Act or the related legislation or for the renewal, amendment or transfer of such a licence, in his or her application furnishes any false or misleading information or particulars or makes any statement which is false or misleading in any material respect, or who wilfully fails to disclose any information or particulars material to his or her application;

(b) provides a service without a licence as required by this Act or the related legislation or fails to obtain the prior written permission of the Authority before transferring a licence;

(c) fails to keep records as required by this Act or the related legislation;

(d) fails to comply with any order made by the Authority in terms of section 17M(1),

(e) contravenes the provisions of section 17E;

(f) acts in disregard of any prohibition imposed by order of the Authority in terms of section 17M(1);

(g) fails to produce any licence issued to him or her under this Act or the related legislation on the demand of any authorised person, or who hinders or obstructs any authorised person in the exercise or performance by the latter of his or her powers, functions or duties in terms of this Act or the related legislation;

(h) has been required in terms of section 17F(9)(b) to attend and make a statement or to produce any document or object before the Authority who, without sufficient cause, fails to attend at the time and place specified in the notice, or to remain in attendance until the conclusion of the inquiry or hearing for the purpose he or she is required or until he or she is excused by the chairperson from further attendance, or having attended, refuses to make a statement after he or she has been required by the chairperson to do so or fails to answer fully and satisfactorily any question lawfully put to him or her, or fails to produce any document or object in his or her possession or custody or under his or her control, which he or she has been required to produce;

(i) makes a false statement before the Authority on any matter, knowing such statement to be false or not knowing or believing it to be true;

(j) wilfully interrupts the proceedings at any such inquiry or hearing or wilfully hinders or obstructs the Authority or any member thereof in the performance of its or his or her functions at the inquiry or hearing,

shall be guilty of an offence and liable on conviction -

(i) in the case of an offence contemplated in paragraph (a) of this subsection, to a maximum fine of R250 000;

(ii) in the case of an offence contemplated in paragraph (b) of this subsection, to a fine not exceeding the greater of R1 000 000 or 10% of the person or licensee's annual turnover for ever day or part thereof during which the offence is continued;

(iii) in the case in the case of an offence contemplated in paragraph (c), (d), (e), and (f) to a fine not exceeding R100 000.

(iv) in the case of an offence contemplated in paragraph (g), (h), (i) and (j) of this subsection, to a maximum fine of R50 000;

(2) The court convicting a person of any offence referred to in paragraph (2)(b) of this section may, in addition to any fine which it may impose in terms of that paragraph, declare any transmitters, apparatus and other equipment and any article, object or thing by means of which such offence was committed, to be forfeited to the Authority: Provided that no such declaration shall be so made upon proof to the satisfaction of the court that such transmitter, apparatus, equipment, article, object or thing is not the property of the person so convicted and that, as regards such article, object or thing, the owner thereof was unable to prevent it from being used as a means to commit such offence.

17O. Confidential Information

(1) When a person submits information to the Authority, such person may request that specific information be treated as confidential information; provided that, the request for confidentiality is accompanied by a written statement explaining why the specific information is confidential.

(2) Within fourteen (14) days of receiving a request for confidentiality, the Authority shall make a determination with written reasons whether or not confidentiality will be granted.

(3) Should the Authority determine that a request for confidentiality cannot be acceded to, the party providing the information shall be given an opportunity to withdraw such information that is the subject of the confidentiality request.

(4) When considering a request by a person in terms of subsection (1), the Authority may treat the following information as confidential information:

(a) trade secrets of the person;

(b) financial, commercial, scientific or technical information, other than trade secrets, the disclosure of which would be likely to cause harm to the commercial or financial interests of the person;

(c) information, the disclosure of which could reasonably be expected –

(i) to put the person at a disadvantage in contractual or other negotiations;

(ii) to prejudice the person in commercial competition; or

(iii) the names of prospective employees and business plans of a licensee.

No such determination of confidentiality may be made in respect of documents or information that is or subsequently becomes part of the public domain, or is required to be disclosed by operation of law, regulations or court order.

_____