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

10 October 2005

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

Fax No: 021 403 3845

Dear Honourable Mr Lekgoro

RE: INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA AMENDMENT BILL [B32-2005] – WRITTEN SUBMISSION BY THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA ("ICASA")

The Independent Communications Authority of South Africa ("the Authority") thanks the Parliamentary Portfolio Committee on Communications for the opportunity to make a written submission on the ICASA Amendment Bill ("Bill 32-2005"). Combined with the Electronic Communications Bill, this proposed Bill presents a significant revision to regulation as it stands and the current telecommunications and broadcasting sectors and is thus, critical to the future of the sector.

The Authority welcomes the intervention of this Bill and applauds the stated objectives listed in the memorandum of the Bill. As the proposed Bill also provides the remaining elements for the final passage of the Electronic Communications Bill, its promulgation is timely.

P.Mashile **(Chairperson)**, N Bulbulia, T Cohen, ZR Masiza, M Mohlala, L Mtimde, MM Zokwe (**Councillors**)
JB Manche **(Chief Executive Officer)**

ICASA supports the central purpose of the ICASA Amendment Bill and notes the definite need to strengthen the regulator in the face of convergence. 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, trust for consumers and operators and a clear mandate for the Authority.

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 Authority acknowledges that the amendment of the ICASA Act is a necessary next step in the process of consolidating communications legislation. However, it is critical to ensure that in consolidating the legislation there is no dilution of constitutionality required for the regulator in terms of section 192 of the Constitution and section 3 of the ICASA Act and that no unintended consequences arise.

2. As such, reference must be had, at all times to the constitutional standard applicable to broadcasting by virtue of Chapter 9 of the Constitution, which addresses institutions designed to protect democracy. In this regard particular attention must be paid to section 192 of the Constitution which provides for an independent body to be charged with regulating broadcasting. As we argued in our submission on the then Convergence Bill, the Authority 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.

    2.1. In this regard, ICASA is concerned about the proposal to amend section 5 of the ICASA Act No. 13 of 2000 with respect to the appointment of councillors, more so when read with the proposed amendments to section 8 of the ICASA Act no. 13 of 2000. We make further proposals in this regard in the body of our submission.

    2.2. In addition, this change may suggest a significant alteration to the terms and conditions of employment for existing councillors.

    2.3. Similarly, the ICASA Council welcomes the introduction of a Performance Management System (“PMS”) but the current proposal, without adequate funding of the regulator and proper remuneration of council raises concerns. An alternative system is suggested in the body of our submission that takes account of the realities of work at the regulator and the notion of collective responsibility and accountability.

    2.4. Finally, the proposal to create an elevated status for the chairperson is not in the spirit of communications regulation in South Africa. The very concept of having a council, broadly representative of South Africa, draws on the notion of leadership through collective wisdom. This becomes essential in view of sections 3,5,12 and 13 of the ICASA Act No. 13 of 2000. Once again, we have included in the body of our submission, principles governing the role of chairperson that are in accordance with generally accepted approaches to corporate governance.

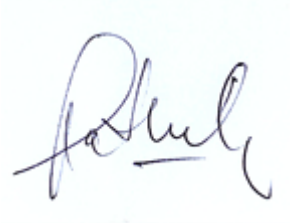
3. The Authority re-iterates our suggestion accepted by the Portfolio Committee, echoed by the majority of submissions on the Convergence Bill, that the ICASA Amendment Bill and the Convergence Bill commencement dates must be linked.

4. As mentioned in our submission on the then Convergence Bill, the opportunity presented by the Electronic Communications Bill and the ICASA Amendment Bill provides *inter alia*, the occasion to remedy past defects with sector legislation. These defects have emerged through the operation and implementation of the legislation over the last ten years of regulation. A golden opportunity exists to correct problems that have presented themselves in the past. As such, the Authority will highlight areas in the ICASA Amendment Bill that animate this concern.

5. Finally, the Authority urges the Parliamentary Portfolio Committee to consider our submission made during the course of the then Convergence Bill process, with respect to enacting the ownership and control amendments as proposed in our submission. The Authority attaches this for your ease of reference as Annexure B.

As always, 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.

Yours sincerely



PARIS MASHILE
CHAIRPERSON

GENERAL EXPLANATORY NOTE:
Words in bold type in square brackets indicate deletions from the text of B32—05.
Words underlined with a solid line indicate proposed insertions in the text of B32—05.

Ad Long Title

1. The inclusion of the postal regulator within the Authority deserves mention in the long title and the increase in size of the Council from seven members to nine does mean a restructuring of Council. The Authority therefore proposes that the Long Title in the Bill be amended as follows:

> "To amend the Independent Communications Authority of South Africa Act, 2000, so as to amend certain definitions and insert certain new definitions; to determine in greater detail the functions of the Authority; to consolidate certain powers and duties of the Authority; to provide for inquiries by the Authority; to amend the procedure for the appointment of councillors and restructuring the Council; to further regulate the financing of the Authority; to provide for the establishment of a Complaints and Compliance Committee; to provide for the appointment of inspectors; to provide for the creation of new offences and penalties; to provide for the establishment of the postal regulator within the Authority; **[and]** to amend the short title; and to provide for matters connected therewith."

Ad Preamble

2. Clause 1 of the Bill refers to the amendment of the preamble of Act 13 of 2000 by the substitution of the word "telecommunications" for the word "communications". Electronic communications or communications is the umbrella term used to cover both broadcasting and telecommunications, to replace the word "telecommunications" and not "broadcasting" would therefore not make sense and once replaced, the preamble itself would no longer make sense either thereby necessitating the proposed amendments.[1] "Postal matters" is included as the ambit of the regulator has been increased to include the postal regulator and the nature of postal services is such that they do not fall totally within the definition of electronic communications.

3. The Authority proposes that the Preamble be amended as follows:

> "**Recognising** that technological and other developments in the field**[s]** of **[broadcasting and] [telecommunications]** electronic communications are causing a rapid convergence of **[these fields]** networks and services;
> **Acknowledging** that the establishment of an independent body to regulate **[broadcasting and] [telecommunications]** electronic communications and postal matters is required."

[1] It is clear that "electronic communications" as defined in the Electronic Communications Bill (formerly the Convergence Bill) covers broadcasting and it is not separate from communications i.e. "Electronic Communications" means *"the emission, transmission or reception by any means, of information, including without limitation, voice, sound, data, text, video, animation, visual images, moving images and pictures, signals or a combination thereof."* Differentiation between communication network services, communication services and broadcasting services is only introduced at the level of licensing.

CHAPTER 1 - INTRODUCTORY PROVISIONS

Ad Amendment of Section 1 of Act 13 of 2000

4. The Authority notes the deletion of "independent" and its replacement with the word "electronic in the definition of the word "Authority". The Authority's views on independence have been articulated in the covering letter. We thus strongly support the retention of the word independent in the name of the Act. In the Electronic Communications Bill, "Communications" itself has been defined to include "electronic" communications which automatically falls under the remit of ICASA. The replacement of the word "independent" for "electronic" is not necessary. Moreover, in light of this, the costs associated with a name change of this sort may be viewed as fruitless and wasteful expenditure.

5. The Authority notes that the Electronic Communications and Transactions Act (ECT Act), 2002[2] has been included in the definition of "underlying statutes". It is not clear to the Authority why this Act has been mentioned here. When read in conjunction with the proposed amended section 4(1)(a) which states as follows:

   "4.(1) The Authority-

   (a) must exercise the powers and perform the duties conferred and imposed upon it by this Act and the underlying statutes and by any other law",

   the implication is that the Authority would have powers or duties to exercise in terms of the ECT Act. If that is the case this needs to be stated explicitly with the necessary amendments to the ECT Act being reflected for comment in the Schedules of this Act. If that is not the intention, which the Authority assumes is the case, the Authority proposes that mention of the ECT Act under the definition of "underlying statutes" be deleted.

Ad Amendment of section 2 of Act 13 of 2000

6. In line with the Convergence Bill final deliberations in September 2005, the Authority proposes that the word "electronic" be inserted before the word "communications" in the proposed amended section 2(b) and similarly throughout the Bill where the word "communications" is used it should be prefaced by the word "electronic" unless the context indicates otherwise.

[2] Act No. 25 of 2002, hereinafter referred to as the ECT Act.

CHAPTER 2 – ELECTRONIC COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

Ad Amendment of heading to Chapter II of Act 13 of 2000

7. The Authority's comments relating to "independence" generally and change of name in particular have been dealt with in the covering letter and in point (4), above.

Ad Amendment of section 3 of Act 13 of 2000

8. The integration of the postal regulator will have various budgetary and staffing ramifications for the Authority. This will have to be addressed when appropriating budget for the Authority.

Ad Substitution of section 4 of Act 13 of 2000

9. The Authority proposes the deletion of **[and chairperson]** in the title of the proposed section 4 in clause 6 of the Bill, on the basis that the Functions of the Authority should be a standalone section.

10. The Authority submits that it is unclear as to what is meant by the statement "by any other law" in section 4(1)(a) in clause 6 of the Bill. It is therefore proposed that paragraph (a) in section 4(1) be amended by inserting "of general application" as follows:

> *"(a)* must exercise the powers and perform the duties conferred and imposed upon **[the former authorities by or under]** it by this Act, the underlying statutes and by any other law of general application;

11. The Convergence Bill proposes the repeal of the Independent Broadcasting Authority Act[3] and the Telecommunications Act.[4] This necessitates the functions currently residing under those Acts being consolidated under the ICASA Act. The Authority proposes that subsection (3) of section 4 in clause 6 of the Bill be amended as follows for this purpose, as well as strengthening the regulator:

> "(3) Without derogating from the generality of subsection (1), the Authority—
>
> *…(i)* **[may attend conferences convened by the relevant United Nations Specialised Agencies]** must assist the Government in preparing for international conferences convened by relevant international organisations or any other international body and for that purpose, may attend such conferences and, where applicable, must implement any decisions adopted **[by the Agencies]** at such conferences to which the Republic is a party.

[3] Act No. 153 of 1993, hereinafter referred to as the IBA Act.
[4] Act No. 103 of 1996, hereinafter referred to as the Telecommunications Act.

(j) may make regulations on any matter consistent with the objects of this Act and the related legislation or that are incidental or necessary for the performance of the functions of the Authority;
(k) may make regulations on empowerment requirements in terms of the Broad-Based Black Economic Empowerment Act;
(l) may inspect transmitters and other communications apparatus used for communications;
(m) may undertake inquiries on any matter within its jurisdiction;
(n) shall investigate and adjudicate complaints submitted in terms of this Act, the related legislation, and licence conditions;
(o) shall in the public interest, regulate all communications activities having an effect within the Republic of South Africa."

12. The delegation of functions has to be limited in terms of its application as the power to make policy and regulation should not be able to be delegated, as contemplated in subsection (4) of section 4 in clause 6 of the Bill, as this is the primary responsibility of Council. The Authority proposes that subsection (4) be deleted and that the delegation of functions be dealt with more comprehensively under section 4A in clause 7 of the Bill.

13. The Authority proposes the deletion of subsection (5) in section 4 in clause 6 of the Bill which deals with the Chairperson's functions. This provision goes against the reason for having seven councillors, that reason being that in an independent regulator you would not wish to have a single councillor dominating the activities of the regulator. As mentioned in our covering letter, the current approach is based on collective wisdom and leadership in pursuit of the objectives of the Act. In the interests of good governance however, the Authority supports the role of the chairperson being clarified and to this end proposes that there be a separate section on the role of the chairperson based upon the principles set out in the King II Report. The proposed section to be incorporated where appropriate in the Act is as follows:

"The chairperson of the Council must-
(a) preside over meetings of Council and ensure the smooth functioning of the Council in the interest of good governance;
(b) provide overall leadership to the Council without limiting the principle of collective responsibility for Council decisions;
(c) arrange for new councillors appointed to the Council to be properly inducted and orientated;
(d) act as the main informal link between the Council and management;
(e) maintain relations with important stakeholders;
(f) ensure that all councillors play a full and constructive role in the affairs of the Authority; and
(g) ensure that all relevant information and facts are placed before the Council to enable the councillors to reach an informed decision."

Ad Insertion of sections 4A, 4B, 4C and 4D in Act 13 of 2000

Register of Licences

14. The Authority proposes that section 4A in clause 7 of the Bill dealing with the Register of Licenses is better placed in Chapter 3 of the Electronic Communications Bill which deals with the granting, amendment and transfer of licences. Accordingly it

should be deleted in the ICASA Amendment Bill and replaced with a clause 4A that deals with the Delegation of Functions. This is necessary because of the repeal of the Telecommunication Act and IBA Act which had sections relevant to delegation. The following amendments are therefore proposed:

"**Delegation of functions**

4A (1) Subject to subsection (2) the Council may in writing, delegate any power, function, or duty of the Authority in terms of this Act or the underlying statutes to –
(a) any councillor;
(b) any committee of the Council established in terms of section 17; or
(c) the chief executive officer appointed in terms of section 14.
(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.
(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 (3) 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 individual licence may only be delegated to a Councillor, or to a Committee of Council.
(7) Notwithstanding the provisions of this section, any councillor or 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."

Inquiries by the Authority

15. The wording of subsection (1) in section 4B in clause 7 of the Bill could lead to a narrow interpretation of the Authority's ability to hold an inquiry. The deletion of "**[for the purpose of improving performance]**" in subsection (1) is proposed on the grounds that it may be interpreted in such a way as to limit the scope of the Authority to only conducting inquiries where they result in performance gains. This is would be at the expense of and also to the detriment of the public interest. The insertion of a paragraph (e) in subsection (1) is proposed to cover directions given by Parliament in the underlying legislation and allow the Authority the benefit of public consultation on its interpretation and approach to powers, functions and duties. The Authority therefore proposes the following amendments to subsection (1):

(1) The Authority may **[,for the purpose of improving the performance of its functions]** conduct an inquiry into any matter with regard to –
(a) the achievement of the objects of this Act or the underlying statutes;
(b) regulations and guidelines made in terms of this Act or the underlying statutes;

(c) compliance by applicable persons with this Act and the underlying statutes;
(d) compliance with the terms and conditions of any licence by the holder of such licence issued pursuant to the underlying statutes; and.
(e) the exercise and performance of its powers, functions, and duties in terms of this Act or the underlying statutes.

16. Section 4B(2)(a) in clause 7 of the Bill indicates that submissions must be made within 60 days. This is problematic as while there will be cases where 60 days is needed there are other inquiries which may be unnecessarily delayed by a comment period of 60 days, especially if days is defined to be working days. The Authority would suggest that in place of 60 days either the wording of the IBA Act is used, namely "within the period specified in the notice" or that it be indicated that the period will be "a minimum of 21 working days".

Ad Amendment of section 5 of Act 13 of 2000

17. Clause 8(a) of the Bill proposes that section 5(1) be amended by increasing the number of councillors from seven to nine. This essentially means that there is no reduction in the number of councillors with expertise in communications matters. It can be further assumed that the additional councillors would have expertise on postal matters. However, the Authority is of the view that an increase to nine councillors would lead to a bloated top level structure. It is proposed that the number of councillors remain at seven with a view to reducing the number of councillors to five after a two year period. Councillors are expected to develop expertise in areas that they do not currently possess such knowledge in, and moreover, with the transfer of staff from postal to ICASA, such expertise will be readily accessible to councillors.

18. Clause 8(a) of the Bill further proposes the deletion of the principles that ensure that the appointment procedure for councillors is public, open and transparent. The Authority is of the view that these principles must be retained and articulated in the amended Act. This is critical to give effect to the requirements for diversity and collective leadership and to remain true to the promises of constitutionality.

19. The Authority notes that there have been no challenges to the existing law that requires or necessitates this amendment. Accordingly, we propose that the **public and transparent appointment process** currently enshrined in the ICASA Act be retained. The public has confidence in the participatory nature of the current process and this process is also well appreciated internationally

    19.1. The Authority is of the view that the President could if s/he so wished, delegate her/his role of appointing Councillors to the Minister. This would require some amendments to the current provisions to facilitate such a course of action and can be done in the following manner:

    19.2. Section 5 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

''(1) The Council consists of not less than five and not more than seven councillors appointed by the President or the Minister following a recommendation to the President **[on the recommendation of**] by the National Assembly according to the following principles, namely—
(a) participation by the public in the nomination process;
(b) transparency and openness; and
(c) the publication of a shortlist of candidates for appointment, with due regard to subsection (3) and section 6."

And by the substitution for subsection (2) of the following subsection:

'(2) *(a)* The President, may delegate the power to appoint councillors to the Minister and **[must appoint]** one of the councillors must be appointed as chairperson of the Council.
(b) The chairperson must, in writing, appoint a councillor as acting chairperson to perform the functions of the chairperson in his or her absence. **[In the absence of the chairperson, the remaining councilors must from their number elect an acting chairperson, who, while he or she so acts, may perform all the functions of the chairperson.]**
(c) Where the chairperson is unable to make an appointment, the remaining councillors must from their number elect an acting chairperson.''

Ad Amendment of section 6 of Act 13 of 2000, as amended by section 36 of Act 12 of 2004

20. As mentioned previously, broadcasting is a subset of electronic communications, the following amendments are therefore proposed:

> ‘‘*(f)* or his or her family member has a direct or indirect financial interest in the **[telecommunications]** electronic communications and postal **[or broadcasting]** industry;’’

Ad Insertion of section 6A in Act 13 of 2000

21. While the Authority supports the notion of performance management, the system of performance management outlined in clause 10 of the Bill which proposes the insertion of a section 6A contains a number of problems with respect to implementation. First, no job descriptions exist for Councillors and the measurements to be used in the proposed performance system are not clearly identifiable. Second, submitting currently appointed Councillors to the proposed system may lead to a change in employment conditions. Third, giving the chairperson the ability to enter into performance agreements with other councilors will undermine the spirit of collective decision-making in the Council, which is diametrically opposed to the spirit of collective leadership. Finally, a performance management system as contemplated might be perceived by the industry and the public as giving the Minister undue power over individual councillors resulting in the compromise of the functional independence of the Authority guaranteed by section 192 of the Constitution.

22. However, the Authority is accountable through the Minister to the National Assembly and the broader public and is in no way opposed to the introduction of an implementable and constitutionally sound performance management system. The Authority would rather propose that the approach adopted in the South African Civil Aviation Authority Act, No. 40 of 1998 be considered. This approach makes the Civil Aviation Authority, in terms of performance management, collectively responsible to the Minister of Transport. The Authority submits that this approach be followed with the necessary amendments to reflect the constitutional circumstances and situation of the Authority. This proposal would make the whole of ICASA, as an Authority, subject to a performance management system, supervised by Council, through which body the Authority acts. This will lead to unified objectives amongst all staff members and set clearly identifiable measurements across the board, whilst supporting the collective leadership principles underpinning communication regulation in South Africa.

23. The Authority therefore recommends the substitution in clause 10 of the proposed section 6A with the following:

> **“Performance agreement**
>
> **6A.** (1) The Minister and the Authority must enter into a written performance agreement relating to—
> *(a)* the State’s requirements in respect of the Authority’s scope of business, efficiency and financial performance, and achievement of objectives;
> *(b)* the principles to be followed by the Authority for purposes of business planning;

(c) such measures which are necessary to protect the financial soundness of the Authority;
(d) the principles to be followed at the end of a financial year in respect of any surplus in the accounts of the Authority; and
(e) any other matter relating to the performance of the Authority's functions under this Act or the underlying statutes.
(2) The Minister and the Authority may in writing amend the performance agreement from time to time.
(3) The Minister must publish the performance agreement in the *Gazette* and any amendment thereto must be so published at least 30 days prior to that amendment coming into operation.
(4) A copy of the performance agreement must be open to inspection by the public at the head office of the Authority during business hours.
(5) The Minister must, before the finalisation of the performance agreement or amendment thereof, table the performance agreement in the National Assembly if it is in session, and if the National Assembly is not then in session, within 14 days after the commencement of its next ensuing session.
(6) The performance of the Authority should be reviewed against agreed upon performance indicators and measures at least once a year and the Minister must table the results of such review in the National Assembly.
(7) Failure by the Authority to comply with any provision of the performance agreement does not affect the validity or enforceability of any agreement entered into, or any right, obligation or liability, acquired or incurred by the Authority.

Ad Amendment of section 8 of Act 13 of 2000

24. The proposed deletion in clause 12 of the Bill of subsections (2) and (3) in section 8 of the Act are cause for grave concern. These two subsections set out the procedure for removal of councillors and indicated that it was the National Assembly and the President who were responsible for taking action against a Councillor. The deletion of subsection (2) and (3) results in it not being clear who would take action for removal from office. Would this be the Chairperson or the Minister? Our previous comments with respect to independence should be read to pertain here.

25. Furthermore, subsection (2) provided that a Councillor would only be removed upon a finding, which implied that there would be an investigation and a hearing in order for the National Assembly to make a finding. This clearly indicated that due process would be followed and that removal would have to take place in a public and transparent manner.

26. A public and transparent process of removal is essential when dealing with a body that exists because of a constitutional imperative, to ensure that the public retain their trust in the impartial and objective decisions of such body. Recently, in another jurisdiction, the Minister of that country removed the entire board of the communication authority from office because they took a decision which was contrary to a view that was held by that Minister. This has led to grave concerns by investors about the ability of the communication authority in that jurisdiction to make licensing decisions which are impartial and fair. The power to remove a councillor from office should therefore not reside with a single person. Accordingly, the Authority recommends that subsection (2) be retained in the Act as it currently stands and that subsection (3) remain with the following amendments to empower

the Minister to initiate steps with the National Assembly for the removal of a councillor from office:

"8(3) The **[President]** Minister –…"

27. Clause 12 of the Bill proposed an amendment to subsection (1) of section 8, namely the insertion of a paragraph (g) making refusal to sign a performance agreement grounds for removal from office. If the Authority's recommendations on a collective performance agreement are taken on board with regards to section 6A this paragraph (g) should fall away. However, even if those recommendations are not taken on board paragraph (g) should fall away in any event as it is common cause by labour and industry that the purpose of a performance agreement is not for punitive measures, but rather to promote improvement in performance and provide measurable indicators for incentive rewards.

Ad Amendment of section 9 of Act 13 of 2000

28. In line with the Authority's previous comments relating to appointment, the Authority is of the view that this provision of the Act should remain as referring to the National Assembly and not the Minister.

Ad Amendment of section 14 of Act 13 of 2000

29. The Authority proposes the following amendment to subsection (1)(a) of section 14, in clause 15 of the Bill, on the grounds that the CEO is appointed over the Authority and not the Council:

"14(1)(a) a suitably qualified and experienced person as chief executive officer of the **[Council]** Authority for the purpose…

30. The Authority notes that clause 15 of the Bill does not take into consideration a situation where the CEO has resigned from office and the Council will need to appoint an Acting CEO until a suitable replacement is found. Accordingly, the Authority recommends the insertion in section 14 of the following paragraph after paragraph (b) in subsection (1A):

"c) The Council may appoint a senior official as acting chief executive officer to perform the functions of the chief executive officer when the post is or becomes vacant."

31. The Authority proposes the following new amendment to subsection (3) in section 14 of the Act, on the grounds that it will assist the Authority to attract and retain staff so as to address problems of capacity and skills:

"(3) The Authority may pay to the persons in its employ such remuneration and allowances and provide them with such pension and other employment benefits as are consistent with that paid in the **[public]** private sector.

Ad Insertion of sections 14A, 14B, 14C and 14D in Act 13 of 2000

Appointment of experts

32. Clause 16 which proposes the insertion of section 14A dealing with the appointment of experts by the Authority raises some problems in that it requires that the Authority when appointing an expert who is not a national of the Republic to obtain the Minister's approval. This proposal is not in line with the notion of administrative of functional independence from government, and in this regard it might be instructive to consider how the court has dealt with administrative or functional independence issues of chapter 9 bodies in the Constitution. In the case of *New National Party of South Africa v Government of the Republic of South Africa and Others*[5], some important statements were made on the general nature of the institutional independence of the Electoral Commission when dealing with the particular aspect of administrative independence. Namely, that administrative independence implies that there will be control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act. [6] The implication being that the Department of Home Affairs could not tell the Commission how to conduct registration, whom to employ and so on.

33. Bearing in mind the aforementioned case and section 192 of the Constitution, the involvement of the Minister in the appointment of experts may be considered unconstitutional. From a practical implementation perspective, it would also unduly complicate an already drawn out tender procedure process, unnecessarily delaying internal processes and inquiries. Moreover, the Authority submits that this formulation as currently drafted goes against widely accepted interpretations of independence which separate clearly between "operations"; "policy formulation" and "implementation". It is also not clear why this limitation has been placed on the appointment of experts, as currently section 27 of the IBA Act places no such obligation on the Authority as can be seen below:

> **"27. Appointment of experts**
>
> (1) The Council may, as and when in its opinion the circumstances so require, appoint as many experts as may be deemed necessary, including experts from other countries, with a view to assisting the Council in the exercise and performance of its powers, functions and duties and for the performance of any work arising therefrom."

34. The Authority recommends that the wording of section 27(1) of the IBA Act as set out above be substituted in the place of the proposed section 14A(a) in the ICASA Act Amendment Bill.

Transfer of Staff

35. The proposed insertion of section 14B as set out in clause 16 of the Bill to deal with the merger of the Authority and the Postal Regulator appears to be in line with previous sections in the Act which dealt with the merger of the Independent Broadcasting Authority (IBA) and the South African Telecommunications Regulatory

---

[5] 1999 (3) SA 191 (CC).

[6] Langa, DP, in whose judgment Chaskalson P and Ackermann, Goldstone, Madala, Mokgoro, Sachs and Yacoob JJ concurred. 1999 (3) SA 191 (CC).

Authority (SATRA). However, every merger is different and it is difficult to gauge impacts without having had a detailed discussion with the Postal Regulator on this proposed section. The Authority undertakes to consult with the Postal Regulator and supplement its submission in this regard, if necessary, when making oral representation to the Portfolio Committee for Communications.

Ad Amendment of section 15 of Act 13 of 2000

36. The Authority wishes to point out that to be flexible and responsive to the growing needs of the market and technological changes, it requires a new funding model. The proposed amendments to section 15 of the Act as set out in clause 17 of the Bill do not adequately address this need. The following amendments are therefore proposed to section 15 of the Act—[7]

(a) 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) 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 or 60 days, where such exemption has been granted by National Treasury, 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

[7] 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.

deposited and 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."
(7) The Council is, in accordance with the Public Finance Management Act, 1999 (Act No. 1 of 1999), the accounting authority of the Authority and charged with the responsibilities referred to in that Act as read with subsection (2).

Proposed Amendment to Section 16 of Act 13 of 2000

37. The Authority wishes to propose an additional amendment to Act 13 of 2000, to address the repeal of specific annual report requirements in the Telecommunications Act and the IBA Act.

38. The Authority proposes the deletion of paragraph (b) in subsection (1) of section 16 and the substitution for subsection (2) of section 16 of the following amendment:

"(2) 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 year, 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 licences granted, renewed, amended, revoked and suspended;
(d) spectrum planning and allocation;
(e) progress on meeting South African content requirements; and
(f) details of all inquiries undertaken within the financial year.

Ad Insertion of section 16A in Act 13 of 2000

39. As currently phrased in clause 18, the proposed insertion of 16A in the Act would prevent anyone from applying a name or description implying association with the Authority. This would pose some difficulties when the Authority's logo is used by other bodies for type approval or conferences. There should be provision for use of the logo with the permission of the Authority. The Authority therefore proposes the following amendment to section 16A in the Bill:

"16A No person may 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 and the Authority except with the consent of the Authority"

CHAPTER 3 – COMMITTEES AND INSPECTORS

Ad Amendment of section 17 of Act 13 of 2000, as amended by section 30 of Act 64 of 2002

40. The proposed deletion of subsections in clause 19 of the Bill, will allow the Council more leeway in creating committees and the number of committees in operation at one time will no longer be limited by the number of Councillors available to serve on them. However, one concern is that the deletion of subsection (8) removes the power of the Council to remunerate members of committees who are not councillors or members of staff. This would impact on committees such as the Complaints and Compliance Committee for example. It is, therefore, recommended that section 17 in clause 19 of the Bill should become subsection (1) and that the current subsection (8) be re-numbered subsection (2). The amendment to the Bill would be as follows:

> **"17.** (1) 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.
> (2) The members of any committee, including the Complaints and Compliance Committee referred to in section 17A, who are not councillors or members of the staff of the Authority must be paid such remuneration and allowances as the Council determines.
>
> This section may need to be moved closer to the section dealing with delegations from a drafting flow perspective.

Ad Insertion of sections 17A, 17B, 17C, 17D, 17E, 17F, 17G and 17H in Act 13 of 2000

Establishment of Complaints and Compliance Committee

41. Clause 20 of the Bill proposes the insertion of a section 17A which provides for the establishment of a Complaints and Compliance Committee. It appears on the face of it that such a committee would deal with matters formerly dealt with by section 100 in the Telecommunications Act and the Broadcasting Monitoring and Complaints Committee established in terms of the IBA Act. In practice though, the ambit of this Committee will be broader as new functions have been placed before the Authority in terms of the Electronic Communications Bill. This Committee would, based on a preliminary assessment, be responsible for dealing with:

- All previous section 100 complaints in terms of Telecommunications Act;
- All broadcasting complaints as previously dealt with by the BMCC in terms of the IBA Act;
- Competition disputes in terms of chapter 10 of the Convergence Bill;
- Potentially complaints about unfair commissioning procedures in terms of chapter 9 of the Convergence Bill

- Potentially sub-licensing disputes relating to Sport Broadcasting Rights in terms of Chapter 9 of the Convergence Bill
- Potential consumer complaints in terms of Chapter 12 of the Convergence Bill
- Complaints on Postal Matters

42. The above scope raises a number of questions such as whether this structure should be permanent or perhaps re-structured in a different manner so that complaints are not dealt with on consecutive basis. Moreover, different complaints require different expertise. It is not necessarily the case that the BMCC model under the IBA Act will work appropriately for former section 100 complaints, for example. The Authority is of the opinion that it requires more time to consider these issues and accordingly it will supplement its submission in this regard when making oral representations to the Portfolio Committee.

Functions of Complaints and Compliance Committee

43. In the opinion, of the Authority the proposed section 17B in clause 20 of the Bill is badly drafted and likely to cause confusion between the role of the CCC as an adjudicative body and the role of the inspectors as investigators and prosecutors in the context of the CCC. The Authority therefore proposes the following amendments to paragraph (a) in section 17B in the Bill:

> **"17B.** The Complaints and Compliance Committee—
> *(a)* must **[, through inspectors appointed by the Authority, investigate,]** hear and make a finding on—
> (i) all matters referred to it by the Authority;
> (ii) all complaints **[received by]** referred to it by the inspectors; and
> (iii) all allegations of non-compliance with this Act or the underlying statutes **[received by]** to it by the inspectors; and…"

44. The Authority further proposes the deletion of paragraph (b) in section 17B in clause 20 of the Bill on the grounds that it widens the scope of the Committee beyond that of enforcement and compliance to the extent that it trespasses on the powers of the Council.

Procedure of Complaints and Compliance Committee

45. The procedure as set out in clause 20 by the insertion of section 17C is comprehensive. However, based on the experience of the BMCC there is a need for the committee to be open to parties reaching amicable settlements through bilateral sessions where the conversation is not on record. The Authority therefore proposes the insertion of a subsection (8) in section 17C in clause 20 of the Bill, as follows:

> "(8) 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 17D."

Findings by Complaints and Compliance Committee

46. Clause 20 in the Bill proposes the insertion of sections 17D and section 17E which deal with findings by the Complaints and Compliance Committee and Decisions by the Authority respectively.

47. In section 17D, subsection (1) is essentially about the Committee making a finding on whether there was non-compliance or not, and subsection (2) then indicates that it must recommend to the Authority what action should be taken against the licensee. It is common practice that once a finding is made against a defendant they are then allowed to plead in mitigation of sentence. Subsection (2) would therefore imply that mitigating arguments would have been heard. Yet, if one goes to subsection (1) in section 17E in the Bill, the matters that the Authority must take into account are clearly the ones the CCC would have to take into account when considering mitigating arguments. In fact by having subsection (1) in section 17E the door is opened for the affected party to be heard twice, once by the Committee and then again by the Council.

48. In the view of the Authority, the Committee should be solely responsible for hearing mitigating arguments and the Authority should only consider the record of proceedings before making the decision on the action(s) to be taken. The Authority therefore proposes that the following amendment be substituted for 17D and 17E in clause 20 of the Bill.

"**Findings by Complaints and Compliance Committee**
17D. (1) The Complaints and Compliance Committee must make a finding within 90 days from the date of conclusion of a hearing contemplated in section 17B.
(2) The Complaints and Compliance Committee must **[recommend]** before making a recommendation to the Authority **[what action by the Authority should be taken against a licensee, if any**] take the following into account:
(a) the nature and gravity of the non-compliance;
(b) the consequences of the non-compliance;
(c) the circumstances under which the non-compliance occurred;
(d) the steps taken by the licensee to remedy the complaint; and
(e) the steps taken by the licensee to ensure that similar complaints will not be lodged in the future.
(3) 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 nonadherence;
(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.
(4) The Complaints and Compliance Committee must submit its finding and recommendations contemplated in subsections (1) and (2) and a record of its proceedings to the Authority for a decision regarding the action to be taken by the Authority.

Decision by the Authority

17E (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 17D(3), 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 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 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."

Inspectors

49. Clause 20 of the Bill proposes the insertion of a section 17F in the Act which deals with inspectors. The Authority notes that subsection (2) in section 17F raises a principle matter, namely whether enforcement as a function can be or should be outsourced by a government body? The Authority is of the view that in this context it should not and proposes that subsection (2) be deleted in its entirety.

50. In regards to the proposed section 17F, the Authority further proposes the following minor amendments:

"17F(5)(*c*)(iii) failure to provide a **[broadcasting communications service]** licensed service that the licensee is required to provide under the terms of its licence or in terms of this Act or the underlying statutes;
(d) refer all non-compliance matters to the Complaints and Compliance Committee for consideration where an inspector determines that a licensee has not complied with the terms and conditions of its licence, the provisions of this Act or the underlying statutes or failed to provide a licensed service **[broadcasting or communications services];**

51. The Authority notes that paragraph (e) in subsection (5) of section 17F instructs the inspector to "refer all complaints to the Complaints and Compliance Committee for consideration after an investigation into the complaint has been carried out;". Surely it cannot be the intention that all complaints, even those that are frivolous go to the Complaints and Compliance Committee? Inspectors need to be a filtering mechanism to ensure that after investigation it is only complaints with merit that are passed on to the Committee. Of course, there would have to be a mechanism to ensure that complainants do have the right to appeal such decision, if they are not satisfied with the reasons given for the dismissal of a complaint by the inspectors. Therefore the following amendments are proposed to section 17F in the Bill.

"17(5)*(e)* refer **[all]** complaints to the Complaints and Compliance Committee or the relevant industry representative body for consideration where after an investigation the inspectors are of the view that **[into]** the complaint has merit **[been carried out]'**

The Authority proposes that subsection (6) be renumbered subsection (7) and that the following amendment be substituted for subsection (6):

"(6) If a complaint is dismissed by the inspectors, the complainant may appeal to the complaints and compliance committee in the prescribed manner."

Offences and penalties

52. It would appear to the Authority that this proposed insertion of section 17H in clause 20 of the Bill has been overtaken by the section below which was agreed to in the final deliberations by the Portfolio Committee on the Electronic Communications Bill in September 2005:

74. 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 willfully fails to disclose any information or particulars material to his or her application;
(b) provides a service without a licence or registering 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 this Act or the related legislation
(e) acts in disregard of any prohibition imposed by order of the Authority in terms of this Act or the related legislation;
(f) 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;
(g) has been required in terms of this Act or the related legislation 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;
(h) makes a false statement before the Authority on any matter, knowing such statement to be false;

(i) 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), and (e) to a fine not exceeding R100 000.
(iv) in the case of an offence contemplated in paragraph (f), (g), (h) and (i) of this subsection, to a maximum fine of R50 000;

(2) The court convicting a person of any offence referred to in paragraph (1)(b) of this section may, in addition to any fine which it may impose in terms of that subsection 1, 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."

53. To the extent that the Portfolio Committee may wish to review their decision and divide the above offences and penalties between the two Bills, the Authority is prepared to assist by providing alternative drafting of these sections at such time.

CHAPTER 5 – GENERAL

Ad Substitution of section 25 of Act 13 of 2000

54. Clause 22 of the Bill proposes amendments to section 25 of the Act dealing with the short title and commencement of the Act. There appears to be a drafting error as this amended section refers to section 18(2) of the Act which was deleted by this Bill in clause 21. Furthermore, there is a duplication in that clause 26 of the Bill also proposes a short title and commencement provision.

SCHEDULE

55. The Authority has made representations on the proposed amendments to the Postal Services Act, Act No. 124 of 1998 in Schedule 1 of the Bill. These representations are contained in the Annexure to this document.

ANNEXURE A

COMMENTS BY ICASA ON SCHEDULE 1:

PROPOSED AMENDMENTS TO THE POSTAL SERVICES ACT NO 124 OF 1998

Ad definitions - Section 1 of Act 124 of 1998

1. The substitution for the definition of ‘‘Regulator’’ of the following definition: ‘‘**‘Regulator’** means the **[Postal Regulator established by section 3(1)]** Electronic Communications Authority of South African established by section 3 of the Electronic Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000);’’, has an obvious impact on ICASA in the following areas:
   a) Mandate & functions: A definite increase in workload and accountability, especially for Councillors.
   b) Operational structures and culture: Drastic in-house restructuring of the existing Authority and the incorporation of former public sector employees.
   c) Budget – Treasury has not approved any changes yet, but amendment of the ICASA Act and the Electronic Communications Bill‘s increased scope of responsibilities for the Authority will require additional funding to meet the following tasks:
      i) Redesign of current regulations to address convergence and postal matters;
      ii) Conversion of existing licences;
      iii) Redesign of licence pricing schemes;
      iv) Reorganisation of ICASA, including additional staff requirements, skills assessment and training of staff to meet convergence and postal incorporation challenges;
      v) External communication of new regulations to provide regulatory certainty for industry players.

2. The transfer of the Postal Regulator will also bring with it other costs that have not been adequately quantified. These are the costs associated with the following:
   a) Organisational redesign and business process changes to integrate the Postal Regulator into ICASA;
   b) Management of the change process;
   c) Regional offices and the administration;
   d) Re-branding of ICASA.

3. Supplementary comments on risks and further indirect impact on ICASA may be presented following a detailed analysis of the current Postal Regulator, which is still underway.

Ad Section 8(3) of Act 124 of 1998

4. Section 8(3) requires the approval of the Minister for the attendance of international conferences and meetings; "*The Regulator may - (a)send persons to attend conferences and meetings relating to postal services matters where appropriate, and, in the case of international conferences and meetings, subject to approval by the Minister; and"*

5. The Authority recommends that the reference to the Minister's approval be deleted from subsection 8(3) based on practicalities, inline with the rest of the proposed amendments to this act.

Ad amendment of Section 24 of Act 124 of 1998

6. This amendment of section 24 proposes the substitution for subsection (4) of the following subsection: ''(4) Any person who is aggrieved by the suspension or cancellation of his or her licence or registration certificate in terms of subsection (1) **[has, in addition to any right to review by the court, the right to appeal to the Minister against such suspension or cancellation and the Minister may either confirm the suspension or cancellation or direct the Regulator to restore the licence or registration certificate to the person concerned]** may apply to a court to review a decision of the Regulator in terms of this section.''

7. Section 24(1) of the Postal Services Act currently states: *"24. Suspension or cancellation of licence or registration certificate (1) Notwithstanding anything to the contrary contained in this Act, the* ***Regulator*** *may after written notice to the holder of a licence or registration certificate and* ***after due enquiry****, suspend or cancel any licence or registration certificate issued under this Act, if the holder has contravened the terms and conditions of the licence or certificate or the provisions of this Act."*

8. Subsection (1) conflicts with the proposed Section 80(3) and (4) of the Postal Services Act, and Section 17A of the ICASA Amendment Bill, which establishes the Complaints and Compliance Committee.

9. Review procedures by a court follow only after the exhaustion of all applicable administrative procedures.

10. The Authority recommends that Section 24 be corrected to reflect the proposed Complaints and Compliance Committee, with the incorporation of the Authority's comments as proposed in the discussion of Section 17A on the proposed amendments to Act 13 of 2000.

Ad The repeal of Section 60 of Act 124 of 1998

11. This section deals with Delegation. The Authority reiterates its comments and recommendations made in this regard on section 4(4) and the proposed section 4A of the ICASA Amendment Bill. This recommendation is of utmost importance for the efficient operation of the Authority and, as supported by international best practice; the PFMA; and the King Report, will contribute to its good governance.

Ad the repeal of sections 63 and 64 of Act 124 of 1998 *and* Section 62 thereof

12. The deleted section 63 made failure to produce books/ documents on request an offence. The deleted section 64 made failure to meet with the regulator on request an offence. These issues are dealt with in the proposed Section 17G and H of the ICASA Amendment Bill.

13. It is unclear why section 62 "*Failure to produce licence or registration certificate: Any postal service operator who refuses or fails to produce a licence or registration certificate for inspection when required to do so in terms of this Act is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment."* is not also repealed, as this is dealt with under Section 17G and H as well.

14. The Authority recommends that Section 62 be repealed in line with the repeal of Sections 63 and 64.

Ad amendment of Section 80 of Act 124 of 1998

15. The amendment of section 80 *(a)* by the substitution in subsection (3) for the words preceding paragraph *(a)* of the following words: ''The **[Regulator]** Complaints and Compliance Committee established by section 17A of the Electronic Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000), must investigate and **[adjudicate]** consider—''; and *(b)* by the substitution in subsection (4) for the words preceding paragraph *(a)* of the following words: ''Where the **[Regulator]** Complaints and Compliance Committee referred to in subsection (3), after investigation, finds that the licensee or the registered unreserved postal service operator has been responsible for a failure or contravention contemplated in subsection (3), the Regulator may—'', makes the proposed Complaints and Compliance Committee responsible for investigation of contraventions, and contradicts with Section 24 of this act, as discussed above.

17. The Authority recommends that Section 80(3) & (4) *and* Section 24 of Act 124 of 1998 be aligned with the intentions of Section 17A of the ICASA Amendment Bill, as proposed by the Authority in its discussion on the Complaints and Compliance Committee in Section 17A of the said Bill.

ANNEXURE B

Extract from the ICASA submission on the Convergence Bill to the Portfolio Committee for Communications, dated 20 may 2005

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 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 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 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 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."