

DD/mr/icasa amend bill
10 October 2005

Mr MK Lekgoro
Chairperson of Portfolio Committee on Communications
Parliament
90 Plein Street
Cape Town
8000

Dear Mr Lekgoro

**RE: RESPONSE BY SENTECH LIMITED TO THE ICASA AMENDMENT BILL
[B-32-2005]**

1. Sentech Limited ("Sentech") welcomes the opportunity to lodge its representations on the Independent Communications Authority of South Africa Amendment Bill ("ICASA Bill") being version [B32 – 2005]. Sentech wishes to record that it requires an opportunity to elaborate further on the issues raised in this submission should the Parliamentary Portfolio Committee on Communications elect to conduct oral hearings on the ICASA Bill.
2. Sentech would like to thank the Parliamentary Portfolio Committee on Communications for giving it this opportunity to express its views on the ICASA Bill and looks forward to participating in any hearing held by the Parliamentary Portfolio on Communications in respect of the finalisation of the ICASA Bill.

Yours sincerely

DINGANE DUBE
Executive: Regulatory & Government Affairs

Sentech Ltd Reg no 1990/001791/06

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1 INTRODUCTION

- 1.1 Sentech Limited ("Sentech") welcomes the opportunity to lodge its representations on the Independent Communications Authority of South Africa Amendment Bill ("ICASA Bill") being version [B32 – 2005]¹. Sentech wishes to record that it requires an opportunity to elaborate further on the issues raised in this submission should the Parliamentary Portfolio Committee on Communications elect to conduct oral hearings on the ICASA Bill.
- 1.2 The Independent Communications Authority of South Africa Act 13 of 2000 ("ICASA Act") is being amended to align the current powers and duties of the Independent Communications Authority of South Africa ("Authority") with those required for the regulation of a converged communications environment pursuant to the promulgation of the Convergence Bill². In pursuit of this goal, the various powers and duties granted to the Authority under the Telecommunications Act 103 of 1996 ("the Telecommunications Act") and the Independent Broadcasting Authority Act 153 of 1993 ("IBA Act") are to be consolidated under the ICASA Bill. The ICASA Bill must also be read in the context of the Convergence Bill where various references have been made to the establishment of a Complaints and Compliance Committee and an investigation unit for the purposes of regulating *inter alia* licence contraventions and complaints. To the extent that the Convergence Bill makes provision for such functions the same must be accommodated in the ICASA Bill.
- 1.3 However, the ICASA Bill goes much further than merely restructuring the current regulatory framework for the purposes of catering for a

¹ Independent Communications Authority of South Africa Amendment Bill [B32-2005] published under General Notice 1783 in Government Gazette No. 28050 on 20 September 2005.

² Convergence Bill [B9-2005] published in Government Gazette No. 27294 on 16 February 2005.

converged communications sector. In this regard, not only will the Authority undergo a name change but the scope of the Authority's regulatory powers, previously limited to the regulation of telecommunications and broadcasting, are to be widened to include the regulation of all matters pertaining to the Electronic Communications and Transactions Act 25 of 2002 ("ECT Act") and the Postal Services Act 124 of 1998 ("Postal Services Act").

- 1.4 In this submission, Sentech will highlight those aspects of the ICASA Bill which are of concern as well as those areas of the ICASA Bill deserving of further consideration and debate. The first part of this submission details Sentech's general concerns whereas the second part sets out more detailed drafting proposals suggested by Sentech.

PART I

2 ADDITIONAL POWERS CONFERRED ON THE AUTHORITY

- 2.1 In terms of section 4(1)(a) of the ICASA Bill, the Authority is to exercise the powers and perform the duties conferred and imposed on it by the ICASA Bill, the Convergence Bill, the Broadcasting Act 4 of 1999 ("Broadcasting Act"), the Postal Services Act and the ECT Act and any other law.
- 2.2 Postal services are currently regulated by the Directorate for Postal Regulation also known as the Postal Regulator.³ The Postal Regulator falls under the auspices and control of the Department of Communications ("Department") and is required to report to the Minister of Communications ("Minister") through the Director-General.⁴ The Postal Regulator is comprised of a chairperson appointed by the Minister and two officers of the Department designated by the Minister.⁵

³ Section 3(1) of the Postal Services Act 124 of 1998

⁴ Section 3(2) of the Postal Services Act 124 of 1998

⁵ Section 4 of the Postal Services Act 124 of 1998

- 2.3 The Postal Regulator is primarily responsible for the regulation of reserved and unreserved postal services. The general functions of the Postal Regulator are detailed in section 8 of the Postal Services Act. These functions include amongst others the enforcement of the Postal Services Act and the monitoring of compliance with licences issued under that Act; the promotion of the interests of users of postal services; the expansion of postal services; the promotion of universally accessible postal services and the regulation of the issuing of postal stamps.
- 2.4 If the Authority is to take over the functions and duties of the Postal Regulator, it is submitted that the Postal Services Act will have to be amended to provide for this requirement. This is due to the fact that the Authority cannot merely derive its powers to regulate the postal sector from the ICASA Bill but is also required as a natural consequence of the tenets of administrative law to derive its powers from the primary piece of legislation dealing with the regulation of postal services. In order to ensure that there is uniformity between the provisions of the ICASA Bill and the Postal Services Act and that a conflict of laws does not arise between these two statutes the Postal Services Act must be amended to vest the Authority with the powers to regulate postal services prior to the promulgation of or simultaneously with the promulgation of the ICASA Bill.
- 2.5 Electronic communications and transactions are regulated by the provisions of the ECT Act. The ECT Act is administered by a number of different government agencies. In general, the Minister is primarily responsible for the operations of the ECT Act and in particular for the development and implementation of a national e-strategy and for the formulation of an electronic transactions policy for the Republic. The Minister is also responsible for the establishment of electronic communications centres for SMMEs and for the regulation of critical databases.

2.6 Whereas the Minister is also required to make accreditation regulations under Chapter VI of the ECT Act, the Director-General of the Department is to act as the Accreditation Authority for authentication services and products and is further required to perform certain administrative functions in respect of cryptography services and products and critical databases. The Director-General must also appoint and supervise the activities of cyber inspectors⁶ in terms of Chapter XII of the ECT Act. In terms of Chapter X of the ECT Act, domain names are separately administered and regulated by the Domain Name Authority, a juristic person which has been established for this purpose.

2.7 As is the case with the Postal Services Act, the Authority is not currently vested with the required powers under the ECT Act to administer or regulate any of the provisions of that Act. In order for the Authority to perform any regulatory powers and duties in respect of the ECT Act, the ECT Act will have to be amended to specifically confer such powers on the Authority. Apart from this being a pre-requisite for the validity of the exercise of such powers from an administrative law perspective, it will also be necessary to specify which powers and duties under the ECT Act will continue to be undertaken by the Minister, the Director-General and the Domain Name Authority. For the same reasons detailed in paragraph 2.4 above, the ECT Act must be amended to specifically confer certain powers and duties on the Authority under that Act prior to or simultaneously with the promulgation of the ICASA Bill.

3 FUNCTIONS OF THE AUTHORITY

3.1 For the reasons detailed in paragraph 2 above, the Authority will not be able to exercise the powers and perform the duties conferred on it by the Postal Services Act and the ECT Act unless those Acts are

⁶ Chapter XII of the ECT Act.

specifically amended to expressly vest the Authority with such powers and duties. Section 4(1)(a) will thus be ultra vires the powers conferred on the Authority under the Postal Services Act and the ECT Act until such time as the primary Acts dealing with these activities have been amended to expressly authorise the Authority to perform such powers and functions.

- 3.2 Section 4(3) of the ICASA Bill details the various functions of the Authority. In addition to the functions detailed in sections 4(3)(a) to (i), section 4(3) of the ICASA Bill should be augmented with the power to undertake inquiries on any matter within the jurisdiction of the Authority. This power was formerly given effect to in sections 27 and 28 of the Telecommunications Act and the IBA Act respectively and is also referred to in section 3(2)(a) of the Convergence Bill. In order to ensure that the power to undertake inquiries is properly conferred on the Authority, this power must be included in section 4(3) of the ICASA Bill.
- 3.3 Section 4(3)(e) of the ICASA Bill records that the Authority is entitled to grant, renew and amend licences. As the Authority is also authorised to suspend or cancel individual licences⁷ and is also entitled to regulate the transfer of individual licences or changes in ownership⁸ of such licences under the Convergence Bill, these rights should be included in section 4(3)(e). The rights of the Postal Regulator to suspend or cancel licences issued under the Postal Services Act⁹ must also be referred to in section 4(3)(e) of the ICASA Bill.
- 3.4 The delegation of the Authority's powers and functions is dealt with in section 4(4) of the ICASA Bill wherein it is provided that the Council may in writing delegate any function of the Authority under the ICASA Act or the underlying statutes to a Councillor, a committee of the

⁷ Section 14 of the Convergence Bill.

⁸ Section 13 of the Convergence Bill.

⁹ Section 24 of the Postal Services Act.

Council or to the chief executive officer. The Council's right to delegate its powers and functions should be subject to certain limitations. In particular, the power to make regulations in terms of the underlying statutes should not be subject to any form of delegation. This is due to the fact that the right to make legislation is one which is primarily conferred on Parliament and where the right to make subordinate legislation is granted to an administrative body then only that body is authorised to make such legislation. Further, the ICASA Bill should also empower the Council to set limitations and restrictions on delegations made by it and section 4(4) of the ICASA Bill should be amended to provide for the amendment, revocation or rescission of any delegation made by the Council.

4 REGISTER OF LICENCES

- 4.1 The Authority is required to keep a register of all licences granted and amended in terms of the ICASA Bill and the underlying statutes. The register which the Authority is required to keep in terms of section 4A of the ICASA Act should be extended to include details which pertain to licences which have been renewed, transferred, suspended or revoked.
- 4.2 Similarly, the Authority should also be required to keep a register of all approvals and certifications (i.e. equipment type approvals and other similar certifications) as well as a register of all formal documents which licensees are required to maintain and submit to the Authority on an annual basis (i.e. ownership and control reports). It is submitted that the listing of these additional documents will assist consumers in determining whether equipment has been type-approved and will also facilitate transparency in respect of the level of compliance by licensees with their licence terms and conditions. In general, expanded registers will also constitute a useful source of easily accessible information for both government and the public generally.

5 INQUIRIES BY THE AUTHORITY

- 5.1 The nature and scope of the inquiries to be undertaken by the Authority are dealt with in section 4B of the ICASA Bill. The undertaking of inquiries by the Authority is a vital mechanism for the effective regulation of the communications sector and are currently frequently used by ICASA to address whether or not the objectives of telecommunications and broadcasting legislation are being met and to investigate and regulate those practices or issues which impact negatively on consumers.¹⁰
- 5.2 In order to ensure that the Authority's existing powers under the Telecommunications Act and the IBA Act to conduct inquiries are given proper effect to in the ICASA Bill, section 4B should be amended to authorise the Authority to undertake inquiries on the performance of its functions under the Act as well as on issues which affect consumers. In fact, the Convergence Bill specifically envisages the investigation of consumer complaints¹¹ and the ability of the Authority to undertake inquiries in respect of consumer issues will be key to ensuring that consumers are at all times adequately protected from abuses and that the Authority is able to make regulations in pace with technological changes as and when they begin to negatively impact consumers.

6 CONDUCT OF INQUIRIES

- 6.1 Section 4C (1) of the ICASA Bill provides that the person presiding at the inquiry must determine the procedure for such inquiry. For the sake of legal certainty, transparency and fairness, it would be preferable for

¹⁰ At the beginning of this year, ICASA undertook an inquiry in terms of section 27 of the Telecommunications Act into the manner in which Telkom provides ADSL services to consumers. The inquiry was initiated as a result of various complaints received by ICASA in respect of Telkom's ADSL service. More recently, ICASA has initiated a section 27 inquiry under the Telecommunications Act into mobile pricing.

¹¹ Section 60(6) of the Convergence Bill provides that where a customer or consumer is not satisfied after utilising the consumer complaint procedures set out in the regulations he may submit a complaint to the investigation unit established under the ICASA Act.

the same procedure to be followed for all inquiries and for the procedure to be detailed in the ICASA Bill. At a minimum, the inquiry procedure should detail – (i) the manner in which inquiries will be conducted; (ii) the time periods for the making of written submissions as well as the time periods for replying to other submissions (if applicable); (iii) the basis on which access will be granted to documents held by or filed with the Authority; and (iv) the basis on which any written submission may be amended. Accordingly, the ICASA Bill should be altered to provide for these minimum requirements.

6.2 Certain powers have also been conferred on the Authority in terms of section 4C (2) of the ICASA Bill for the purposes of conducting inquiries. In this respect, the Authority is entitled to – (i) require any person to furnish it with such particulars and information as may be reasonably necessary; (ii) require any person to appear before it upon receipt of written notice duly served by an authorised person or the sheriff; (iii) make a statement to the Authority; (iv) provide the Authority with any document or object in the possession, custody or control of such person; and (v) question any person in connection with any matter. In certain circumstances, the Authority may also determine that an inquiry be held in camera and bar access to the inquiry by any member of the public or class thereof.¹²

6.3 It is submitted that the provisions of section 4C are draconian in nature where inquiries are undertaken by ICASA in terms of sections 4B (1)(a) and (b) of the ICASA Bill (i.e. for the purposes of making regulations or guidelines or for the purposes of determining whether the Authority is achieving the objects of the Act or the underlying statutes). As the main objective of such inquiries is to encourage public input and commentary, it is inappropriate for the Authority to exercise such wide powers over members of the public. Further, as industry participants

¹² Section 4C(5) of the ICASA Bill.

and members of the public have always fully contributed and participated freely in the inquiries conducted by the Authority under sections 27 and 28 of the Telecommunications Act and IBA Act respectively, there is no need for legislation to be put in place to compel such participation. There is also a very real danger that the goodwill and spirit of collaboration which has existed in the past may be undermined where interested parties and members of the public are now forced in terms of legislation to assist the Authority with its inquiries.

- 6.4 It is further submitted that the powers conferred on the Authority under section 4C would be more apposite where the Authority is required to investigate contraventions of licences or the underlying statutes or where the Authority is required to investigate complaints submitted to it by licensees or consumers. As such, section 4C (2) of the ICASA Bill should be amended to only be of limited application to these types of inquiries.
- 6.5 It is also submitted that the provisions of section 4C (5) which enable the Authority to hold in camera inquiries is contrary to the requirement that the Authority as an administrative body performs its functions in an open and transparent manner. The provisions of section 4C (5) are also contrary to the general rule that all matters should be heard in open court and that this principle should not be capable of easy deviation.¹³

7 CONFIDENTIAL INFORMATION

- 7.1 Certain confidentiality obligations are imposed on the Authority in terms of section 4D (4) of the ICASA Bill to keep and treat certain types of information confidential. The information to be kept confidential should

¹³ Cerebos Food Corporation LTD v Diverse Foods SA (PTY) LTD and Another 1984 (4) SA 149 (T)

be extended to include information pertaining to a person's business activities, intellectual property, strategic objectives and market positioning and should further be extended to include commercial agreements where an undertaking of confidentiality is owed to a third party.

- 7.2 In addition, the circumstances under which information will not be treated as confidential should be extended to include information which subsequently becomes lawfully part of the public domain and section 4D (5) of the ICASA Bill should be amended to give effect to this requirement.

8 CONSTITUTION OF AND APPOINTMENT OF COUNCILLORS TO COUNCIL

The ICASA Bill proposes to substantially amend the procedure for appointing the Council of the Authority. Previously, the Council was appointed by the President on the recommendation of the National Assembly and it is now proposed that the appointment of the chairperson and Council of the Authority will be undertaken by an independent and impartial selection panel appointed by the Minister. Whilst Sentech has no objection to this change in the appointment procedure, the procedure must be amended to provide for the submission of a list of names of suitable candidates for the appointment of Chairperson and Councillors to the Minister and for the Minister to in fact appoint the Chairperson and Councillors of the Authority. At present, the proposed new section (5)(1A) does not provide for these requirements and must be amended if the selection and appointment procedure detailed therein is to be of any practical effect.

9 PERFORMANCE MANAGEMENT SYSTEM

Sentech supports the implementation by the Minister of a performance management system to monitor and evaluate the performance of the

Chairperson and Councillors of the Authority. In addition to this provision, the performance management reports submitted to the Minister should be made available to the public in fulfilment of the constitutional requirement that public institutions act in a manner which is both accountable and transparent.

10 TERMS OF OFFICE

In terms of the proposed amendment to section 7(3) of the ICASA Act, only a Councillor will be entitled to resign from office upon at least 3 (three) months written notice. Provision should also be made for the resignation of the Chairperson and the ICASA Bill must be amended to cater for this requirement.

11 REMOVAL FROM OFFICE

In amending section 8 of the ICASA Act, the ICASA Bill proposes to delete sections 8(2) and (3) of the ICASA Act. Section 8(2) of the ICASA Act details the manner in which a Councillor is to be removed from office after having contravened any of the provisions of section 8(1). Section 8(3) empowers the President to suspend a Councillor where steps have been taken to remove a Councillor in terms of section 8(2). No replacement section in respect of the removal of the Chairperson or of Councillors is provided for in the ICASA Bill. Nor is there a section which deals with the suspension of the Chairperson or of Councillors pending their removal from office. It is submitted that in order to ensure that the suspensions and removals are dealt with effectively that the ICASA Bill be amended to cater for these requirements.

12 APPOINTMENT OF EXPERTS

Section 14A (3) of the ICASA Bill authorises the Authority to enter into a written agreement "*setting out the expert's terms and conditions of employment*". As in most cases, experts will be appointed by the Authority

as independent consultants and not as employees, section 14A (3) of the ICASA Bill should be amended by the deletion of the word "*employment*" and the replacement of the same with "*appointment*". The Authority should also be required to ensure that any expert appointed by it is required to adhere to appropriate service levels in the undertaking of any mandate on behalf of the Authority and the ICASA Bill should be amended to cover this requirement.

13 CONFIDENTIALITY

Section 14C of the ICASA Bill imposes an obligation on all Councillors or other persons in the employ of the Authority not to disclose confidential information which they have knowledge of by virtue of their office. Section 14C should be widened to impose an obligation of confidentiality on the Chairperson and on any expert, consultant, sub-contractor or agent appointed by the Authority.

14 ESTABLISHMENT OF COMPLAINTS AND COMPLIANCE COMMITTEE

- 14.1 Two suitably qualified independent persons from the communications industry should be appointed to the Complaints and Compliance Committee in addition to those persons detailed in section 17A (2). Consideration should also be given to the appointment of both permanent and temporary members of the Complaints and Compliance Committee as there may be a difficulty in ensuring that the persons referred to in section 17A (2) of the ICASA Bill are available to carry out the functions of the Complaints and Compliance Committee.
- 14.2 Section 17A (4) details the grounds upon which a person will be qualified to be a member of the Complaints and Compliance Committee. A person will not qualify if that person is an office bearer or an employee of any party, movement or organisation of a party-political nature or is an unrehabilitated insolvent or mentally ill. It is submitted that the grounds for disqualification in section 17A (4) of the ICASA Bill

are limited in application and should be widened to include all of the disqualification grounds detailed in section 6(1)(a) to (l) of the ICASA Act.

15 FUNCTIONS OF COMPLAINTS AND COMPLIANCE COMMITTEE

Section 17B should be amended to provide for minimum time periods for the investigation of complaints and for the making of recommendations to the Authority in respect of the same. In the absence of prescribed time periods, undue delays in the resolution of complaints may occur to the detriment and prejudice of both licensees and consumers. It is also not unusual for regulatory authorities to be required to comply with specified time periods for the completion of certain activities. Section 17B should thus be amended to provide for the investigation and reporting of all complaints within a period of 60 (sixty) days from the date of receipt of the matter or complaint.

16 PROCEDURE OF COMPLAINTS AND COMPLIANCE COMMITTEE

- 16.1 In terms of section 17C (1)(a) of the ICASA Bill, persons who believe that a licensee is guilty of any non-compliance with the terms and conditions of its licence, the Act or the underlying statutes may lodge a complaint with the Authority within 60 (sixty) days of becoming aware of the alleged non-compliance. It is submitted that the 60 (sixty) day period provided for in section 17C (1)(a) may not be sufficient to enable affected persons to properly exercise all their rights in respect of the preparation of a complaint and that the 60 (sixty) day period should be extended to 90 (ninety) days in order to afford affected persons a proper opportunity to prepare the required complaint.
- 16.2 Section 17C is also only of application to complaints pertaining to contraventions of the underlying statutes and of licence terms and conditions. In terms of section 100 of the Telecommunications Act, the Authority is also empowered to investigate and adjudicate consumer

complaints and section 17C should be reviewed to incorporate the wording contained in section 100(1)(b) of the Telecommunications Act.

- 16.3 Section 17C of the ICASA Bill should also provide for specific procedural rules for the conduct of proceedings before the Complaints and Compliance Committee. These rules should at a minimum detail - (i) the manner in which complaints are to be lodged and the format in which complaints are to be filed; (ii) the fee payable, if applicable; (iii) the basis on which access will be granted to documents held by or filed with the Authority; (iv) the time periods for answering any complaint and the format in which any answer is to be given; (v) the time periods for replying to any answer and the format in which any reply is to be given; and (vi) the basis upon which any complaint documents may be amended.
- 16.4 Section 17C should also be amended to enable the Complaints and Compliance Committee to adjourn proceedings at any time so as to allow the parties to reach a settlement and the committee should also be granted the powers to have its orders made orders of court.
- 16.5 Whilst section 17C (5) empowers the Authority to prescribe procedures for the handling of urgent complaints and non-compliance matters, it is submitted that the procedures for the bringing of urgent interim relief applications before the Authority should be detailed in the ICASA Bill. The ICASA Bill should be amended to cater for the procedures applicable to urgent interim relief applications and section 17C should be amended to detail the manner in which urgent interim relief applications are to be brought before the Complaints and Compliance Committee. The form and notice periods applicable to such applications should also be specified.

17 DECISION BY AUTHORITY

Section 17E details the factors which the Authority is required to take into account when making a finding in respect of any matter heard by the Complaints and Compliance Committee but fails to set out the sanctions which the Authority may impose in respect of any adverse finding of the Complaints and Compliance Committee. In order to ensure that the Authority is vested with the necessary powers of enforcement, the ICASA Bill must be amended to list the various sanctions which ICASA would be entitled to impose pursuant to an adverse finding of the Complaints and Compliance Committee.

18 INSPECTORS

In terms of section 17F of the ICASA Bill, the Authority is entitled to appoint suitably qualified persons as inspectors for the purposes of monitoring compliance and investigating alleged or suspected instances of non-compliance. The inspectors are also entitled to investigate and evaluate breaches by a licensee of any agreement entered into between a licensee and its subscribers and any failure to provide broadcasting communication services in accordance with a licence, the ICASA Bill or the underlying statutes. Section 17F should also allow for appointed inspectors to investigate a failure to provide communication services in accordance with the terms of any licence, the ICASA Bill or the underlying statutes. In addition, the powers conferred on the inspectors under section 17F should not be confined to the investigation of licensees only but should also be extended to the illegal or unlicensed provision of broadcasting services or communications services.

19 GENERAL

- 19.1 The Convergence Bill refers to various sections in the ICASA Bill and it may be necessary to ensure that the cross-references contained in the

Convergence Bill are aligned with the provisions of the ICASA Bill. In particular, I highlight the following –

- 19.1.1 The establishment of a Complaints and Compliance Committee in terms of section 17H of the ICASA Act.¹⁴
- 19.1.2 The establishment of an investigation unit in terms of section 17G of the ICASA Act.¹⁵
- 19.1.3 Section 3(2)(a) of the Convergence Bill which provides for the undertaking of an inquiry in terms of section 17F of the ICASA Act on any matter within the jurisdiction of the Authority and the submission of reports to the Minister in respect of such matter.
- 19.1.4 The amendment by the Authority of an individual licence in accordance with an order under section 17M of the ICASA Act following a finding and recommendation by the Complaints and Compliance Committee.¹⁶
- 19.1.5 The making of regulations on the transfer of individual licences or the change of ownership on individual licences after conducting an inquiry in terms of section 17F of the ICASA Act.¹⁷
- 19.1.6 The suspension or cancellation of an individual licence in accordance with an order issued by the Authority in terms of section 17M of the ICASA Act.¹⁸
- 19.1.7 The resolution of interconnection and facilities leasing disputes in accordance with sections 40 and 45 of the Convergence Bill.

¹⁴ Definition of Complaints and Compliance Committee in section 1 of the Convergence Bill.

¹⁵ Definition of an investigation unit in section 1 of the Convergence Bill.

¹⁶ Section 10(d) of the Convergence Bill.

¹⁷ Section 13(4)(b) of the Convergence Bill.

¹⁸ Section 14(1)(b) of the Convergence Bill.

- 19.1.8 The undertaking of an inquiry in respect of the list of communications facilities to be prescribed by the Authority in terms of section 42(3) of the Convergence Bill.¹⁹
- 19.1.9 The production of broadcast recordings and program scripts or transcripts to the Complaints and Compliance Committee.²⁰
- 19.1.10 The adjudication of complaints concerning alleged breaches of the Code of Advertising Practice by broadcasting service licensees who are not members of the Advertising Standards Authority of South Africa in accordance with sections 17H to 17N of the ICASA Act.²¹
- 19.1.11 The adjudication of consumer complaints submitted to the investigation unit in accordance with the provisions of section 17G of the ICASA Act in terms of section 60 of the Convergence Bill.

PART II

20 GENERAL DRAFTING COMMENTS

20.1 Chapter I – Introductory Provisions

20.1.1 Definitions

- 20.1.1.1 A definition of the "Convergence Act" has been provided for in section 1 of the ICASA Bill. This proposed definition defines the Convergence Act as *"an Act of Parliament providing for convergence in the broadcasting, broadcasting signal distribution and telecommunication sectors"*. It would be preferable for the correct Act and year number to be referred to in the definition section and it may be necessary for a final amendment in this regard to be made to the ICASA Bill once there is greater clarity as

¹⁹ Section 42(4) of the Convergence Bill.

²⁰ Section 50(2) of the Convergence Bill.

²¹ Section 52 of the Convergence Bill.

to when the Convergence Bill is to be promulgated. It also appears that the Convergence Act is to be changed to the Electronic Communications Act. If this is the case, then the correct name of the Act must be included in the definition section of the ICASA Bill.

- 20.1.1.2 The definition of "*former authorities*" in section 1(vi) of the ICASA Act should be deleted.
- 20.1.1.3 The definition of "*President*" in section 1(xii) of the ICASA Act must be deleted as all references to the President in the ICASA Act have been removed in the ICASA Bill.
- 20.1.1.4 The definition of "*Telecommunications Act*" in section 1(xiv) of the ICASA Act must be deleted.

20.2 Chapter II – Electronic Communications Authority of South Africa

20.2.1 Section 4 – Functions of Authority and chairperson

- 20.2.1.1 It is noted that the heading to section 4 has been amended to include a reference to the "*chairperson*" and now reads "*Functions of Authority and chairperson*". It is submitted that it is not necessary to refer to the chairperson in the heading to section 4 of the ICASA Bill as any reference to the Authority is deemed to include a reference to the chairperson. Thus, the title of section 4 should merely refer to the "*Functions of Authority*". If this amendment is not made to section 4 of the ICASA Bill, then it will be necessary to ensure that a reference is made to the "*chairperson*" wherever the Authority is referred to in section 4, failing which, the words "*Authority*" could be interpreted to exclude the "*chairperson*".
- 20.2.1.2 Section 4(1)(a) of the ICASA Bill is to be amended to read as follows –

"4(1) *The Authority –*

(a) must exercise the powers and perform the duties conferred and imposed upon them by the underlying statutes and by any other law in terms of which powers and/or duties are specifically conferred on the Authority and/or the chairperson;"

20.2.1.3 A new sub-section to section 4(3) to be numbered (j) is to be inserted to read as follows –

"4(3)(j) may undertake an inquiry on any matter within the jurisdiction of the Authority or as required in terms of the underlying statutes, including without limitation an inquiry into the achievement of the objects of the underlying statutes and the exercise and the performance by the Authority of its powers, functions and duties in terms of the underlying statutes. Where the Authority undertakes an inquiry in terms of this sub-section it shall furnish the Minister with a report in respect of such inquiry."

20.2.1.4 Section 4(3)(e) of the ICASA Bill is to be amended to read as follows –

"must grant, renew, amend and where applicable, suspend or revoke licences."

20.2.1.5 Section 4 is to be amended by the insertion of a new sub-section after section 4(4) to be numbered 4(4A). This section is to read as follows –

"4(4A) (i) Any delegation or authorisation under sub-section (4) may be made subject to such conditions and

restrictions as the Council may determine, and may at any time be amended or revoked by the Council.

(ii) The Council shall not be divested of any power or function or relieved of any duty which it may have delegated under sub-section (4) and may amend or rescind any decision made in terms of such a delegation.

(iii) The power to make regulations shall not be delegated under sub-section(4)."

20.2.2 Section 4A – Register of licences

20.2.2.1 Section 4A(1) must be amended to read as follows –

"The Authority must keep a register in which it must record all licences granted, amended, transferred, renewed, suspended or revoked in terms of this Act and the underlying statutes. The Authority shall also keep a register of all approvals and certificates issued by it in terms of this Act and the underlying statutes as well as a register of all documents which licensees are required to maintain and submit to the Authority on an annual basis in terms of this Act or the underlying legislation."

20.2.2.2 Section 4B(1) is to be amended by the inclusion of a new sub-section (e) to read as follows –

"4B(1)(e) The performance of its functions in terms of this Act or the underlying statutes."

20.2.2.3 Section 4B (1) is to be amended by the inclusion of a new sub-section (f) to read as follows –

"4B(1)(f) Any consumer complaint submitted to the Investigation Unit in terms of section 60(6) of the Convergence Act."

20.2.3 Section 4D – Confidential Information

20.2.3.1 Section 4D (4)(a) is to be amended to read as follows –

"Intellectual property and trade secrets of such person."

20.2.3.2 Section 4D (4)(b) is to be amended to read as follows –

"financial, business, commercial, scientific, marketing or technical information, other than trade secrets and intellectual property, the disclosure of which is likely to cause harm to the commercial or financial interest of such person."

20.2.3.3 Section 4D (5) is to be amended to read as follows –

"A determination of confidentiality may not be made in respect of a document or information that is in the public domain or subsequently becomes lawfully part of the public domain or is required to be disclosed by operation of law, regulation or a court order."

20.2.4 Section 5 – Constitution of and appointment of councillors to Council

20.2.4.1 The heading to section 5 should be amended to include a reference to the chairperson and should be amended to read as follows -

"Constitution of and appointment of councillors and chairperson to Council"

20.2.4.2 Section 5(1A)(a) is to be amended to read as follows –

"at least 60 days prior to the last date of service of a councillor or chairperson invite the public to nominate candidates for appointment to the Council"

20.2.4.3 Section 5(1A)(b) is to be amended to read as follows –

"submit to the Minister a list of names of suitable candidates for the appointment of councillor or chairperson (as the case may be) consisting of"

20.2.4.4 Section 5(1A)(c) is to be amended to read as follows –

"recommend to the Minister, from the list contemplated in paragraph (b), persons who would be most suited to serve on the Council as councillors or chairperson (as the case may be) and provide reasons for such recommendation."

20.2.4.5 Section 5(1C) is to be amended to read as follows –

"If the Minister is satisfied with the recommendations made in terms of sub-section 5(1A)(c), the Minister shall appoint the chairperson and councillors so recommended. If the Minister is not satisfied with the persons recommended by the panel"

20.2.5 Section 7 – Terms of office

A new sub-section 7(4) is to be included to read as follows -

"The chairperson may at any time, upon at least six months written notice tender to the Minister resign from office."

20.2.6 Section 14A – Appointment of experts

Section 14A (3) is to be amended to read as follows -

"The Authority and an expert must enter into a written agreement setting out the expert's terms and conditions of appointment, including any performance metrics applicable to such expert's appointment."

21 CONCLUSION

Sentech would like to thank the Parliamentary Portfolio Committee on Communications for giving it this opportunity to express its views on the ICASA Bill and looks forward to participating in any hearings held by the Parliamentary Portfolio Committee on Communications in respect of the finalisation of the ICASA Bill.