or her business partner or associate) holds an office in or with, or is employed by, any person or body, whether corporate or unincorporated, which has a direct or indirect financial interest in the telecommunications or broadcasting industry; is an unrehabilitated insolvent; has been declared by a court to be mentally ill or disordered; has been convicted of theft, fraud, forgery or uttering a forged document, perjury, an office in terms of the Corruption Act or any other offence involving dishonesty or an offence under the ICASA Act or the underlying statutes; has been sentenced after the commencement of the Interim Constitution to a period of imprisonment for not less than one year without the option of a fine, or has been removed from an office of trust on account of misconduct.

In terms of section 7 of the ICASA Act, the terms of office of the councillors are five years for the Chairperson and four years for the other councillors. Section 7(2) provides for the staggering of terms of office of the ICASA council members.

In my view, the current appointment provisions contained in section 5 of the ICASA Act would meet the constitutionally required standard of independence laid down in section 192 of the Constitution because these provisions are similar to and comply with those contained in section 193(5)(b)(ii) of the Constitution relating to the appointment the members of the Commissions established by Chapter 9 of the Constitution. Note that these are slightly different[88] to section 193(5)(b)(i) of the Constitution which provides for the appointment of the Auditor General and the Public Protector and which the Constitutional Court in *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996*[89] has specifically held meets the degree of independence required by Constitutional Principle XXIX in the Interim Constitution[90].

Section 8 of the ICASA Act provides for the removal of ICASA councillors. A councillor may be removed from office of the grounds of: misconduct[91]; inability to perform the duties of office efficiently[92]; absence from three consecutive Council meetings without Council permission and without good cause[93]; having other remunerative employment or holding another remunerative office which is likely to interfere with the exercise of the Councillor's duties or which creates a conflict between such employment/office and his or her office as a Councillor[94]; failure to disclose an interest in an application for a licence in which a Councillor, or a family member of business partner or associate has interests in the business of the

---

[88] There is a difference in the voting majorities required by the Nationally Assembly as more fully set out above.
[89] 1997 (1) BCLR 1 (CC).
[90] Op Cit. Note 89 at para 134.
[91] Section 8(1)(a) of the ICASA Act.
[92] Section 8(1)(b) of the ICASA Act.
[93] Section 8(1)(c) of the ICASA Act.
[94] Section 8(1)(d) read with section 7(6) of the ICASA Act.

applicant or participating in Council proceedings while having such an interest[95] and becoming disqualified as contemplated in terms of section 6(1)[96] (discussed above). Before a Councillor can be removed on these grounds, the National Assembly has to have made a finding to that effect and must have adopted a resolution calling for that Councillor's removal from office[97]. The President must remove a Councillor from office upon the adoption of such a resolution by the National Assembly and may suspend a Councillor from office upon the start of the proceedings by the National Assembly for the removal of the Councillor[98].

In my view, the current removal provisions contained in section 8 of the ICASA Act would meet the constitutionally required standard of independence laid down in section 192 of the Constitution because these provisions are similar to and comply with those contained in section 194 of the Constitution relating to the removal of the members of the Commissions established by Chapter 9 of the Constitution. Note that these are slightly different[99] to section 193(5)(b)(i) of the Constitution which provides for the appointment of the Auditor General and the Public Protector and which the Constitutional Court in *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996*[100] has specifically held meets the degree of independence required by Constitutional Principle XXIX in the Interim Constitution[101].

A key regulatory challenge facing ICASA is that despite sections 3(3) and 3(4) of the ICASA Act which provide, respectively, that ICASA "is independent, and subject only to the Constitution and the law, and must be impartial and must perform its functions without fear, favour or prejudice" and "must function without any political or commercial interference", its actual powers and levels of institutional independence granted to ICASA in terms of the underlying statutes differ greatly with respect to broadcasting and telecommunications. As a result, ICASA finds itself in a schizophrenic legal position; a single body whose independence is constitutionally protected in respect of the regulation of broadcasting only yet which is also required to regulate telecommunications in terms of legislation which falls far short of the type of independence articulated by the Constitutional Court in the cases cited above.

Legislative Provisions Regard the Powers, Duties and Independence of ICASA in the Regulation of Broadcasting

---

[95] Section 8(1)(e) read with sections 12(2)(a) and (1) of the ICASA Act.
[96] Section 8(1)(f) of the ICASA Act.
[97] Section 8(2) of the ICASA Act.
[98] Section 8(3) of the ICASA Act.
[99] There is a difference in the voting majorities required by the Nationally Assembly as more fully set out above.
[100] Op Cit. Note 89.
[101] Op Cit. Note 89 at para 134.

As set out above, the IBA Act constituted a decisive break from the past[102] and contained an explicit statement on the nature of the independence of the then IBA:

"The Authority shall function without any political or other bias or interference and shall be wholly independent and separate from the State, the government and its administration or any political party, or from any other functionary or body directly or indirectly representing the interests of the State, the government or any political party."[103]

Clearly this statement on the nature of the IBA's independence from political interference is far more fulsome and categorical than the provisions of section 3(3) and 3(4) of the ICASA in this regard.

Before the IBA Act was amended by the Broadcasting Act in 1999, it was clear that the IBA was free to formulate broadcasting policy within the broad objectives for the broadcasting sector set out in section 2 of the IBA Act. Thus the IBA was responsible for both the formulation and implementation of broadcasting policy. The IBA Act empowers ICASA (then the IBA) to hold public enquiries[104] in respect of broadcasting matters and the IBA and later ICASA held many such enquiries which have resulted in the formulation of a number of important policy documents such as the Triple Enquiry Report 1995[105] and numerous Position Papers on a range of broadcasting issues, including in respect of Private Sound and Television Broadcasting, Community Broadcasting and the Revised Code of Conduct for Broadcasters[106]. The Triple Enquiry Report was perhaps the most ground breaking because it resulted in the privatisation of six of the SABC's regional radio stations and also contained important proposals on local content quotas and cross media control (that is control of both broadcasting and print media) that have shaped the broadcasting landscape since.

Certain of the IBA's the policy formulations have in turn resulted in regulations governing the operations of broadcasters such as those relating to the imposition of local content quotas[107] and the definition of advertising and the regulation of infomercials and programme sponsorship in respect of broadcasting activities.[108]

In respect of policy formulation and implementation, the member of the Executive responsible for broadcasting, the Minister of Communications ("the Minister"), had no stated role in the

---

[102] To use the late Mahomed DP's (as he then was) memorable phrase on the nature of the interim Constitution in *S v. Makwanyane and Another* 1995 (3) SA 391 (CC) at para 262.
[103] Section 3(3) of the IBA Act which was repealed by Schedule 1 of the ICASA Act.
[104] Section 28 of the IBA Act.
[105] This report dealt with the protection and viability of public broadcasting services, cross media control of broadcasting services and local television content and South African music.
[106] These are all available at the ICASA website: www.icasa.org.za
[107] Notice 245 in Government Gazette 23135 dated 22 February 2002 and Notice 2247 in Government Gazette 25378 dated 22 August 2003.
[108] R 426 in Government Gazette 19922 dated 1 April 1999.

original IBA Act. Major inroads into the independence of the IBA occurred with the coming into force in 1999 of the Broadcasting Act. The Broadcasting Act was primarily intended to deal with the corporatisation and restructuring of the SABC and to provide a legislative framework for the regulation of satellite broadcasting. The Schedule to the Broadcasting Act, however, contained numerous amendments to the IBA Act, and tucked away in the amendments were important changes to how broadcasting was regulated reflecting a resurgence of the power of the Executive over broadcasting regulation.

Section 13A is headed 'General role and powers of the Minister'. Section 13A(2) empowers the Minister to direct ICASA (then the IBA):

"(a) to undertake any special investigation and inquiry on any matter within its jurisdiction and to report to the Minister thereon;

(b) to determine priorities for the development of broadcasting services;

(c) to consider any matter within its jurisdiction placed before it by the Minister for urgent consideration."

While the Minister is required to consult ICASA before issuing such a direction,[109] there is no provision for ICASA to refuse to comply with a direction where, for example, it believes that the public interest requires it not to undertake such a special enquiry or to consider urgently a particular matter.

In my view section it is arguable that 13A(2) is a violation of section 192 of the Constitution because it impacts upon the administrative independence which a Chapter 9 body must have if it is to exercise control over the those matters directly connected with the functions which it has to perform under the Constitution. By being able to determine priorities and to dictate which matters are to be investigated or considered, the Minister can, theoretically, effectively dictate to ICASA what its agenda should be. This denies ICASA the administrative independence which the Constitutional Court has found is critical to the proper functioning of the Chapter 9 bodies.

Section 13A(5)(a) empowers the Minister to issue "policy directions of general application on matters of broad national policy consistent with the objects mentioned in section 2 of the Broadcasting Act" in relation to various matters, including: the radio frequency spectrum, for the purposes of planning broadcasting and other services[110], universal service coverage targets of the public broadcasting services[111] and the application of new technologies that interface with broadcasting[112].

---

[109] Section 13A(4) of the IBA Act.
[110] Section 13A(5)(a)(i) of the IBA Act.
[111] Section 13A(5)(a)(ii) of the IBA Act.
[112] Section 13A(5)(a)(iv) of the IBA Act.

Before a policy direction is made the Minister must consult ICASA, engage in a notice and comment procedure in the Government Gazette and refer the proposed direction to the Parliamentary Portfolio Committee for comment.[113] In terms of section 13A(5)(b), ICASA "must consider" a policy direction issued by the Minister in performing its functions.

The Minister's power to make such policy directions is limited by the fact that the Minister cannot issue a policy direction that deals with the granting, amendment, revocation or suspension of a licence[114] or which "interferes with the independence of... [ICASA] or which affects the powers and functions of... ICASA]".[115] What is the effect of the latter limitation? This wording was absent from earlier drafts of the Broadcasting Bill and appears to have been included to allay fears that the introduction of section 13A violated section 192 of the Constitution. This will undoubtedly be a useful section for ICASA and others trying to prevent possible heavy-handed government interference. It is nevertheless a difficult section to interpret given that section 13A(5)(b) provides only that ICASA must consider a policy direction, which does not, of course, mean that it has to act in accordance therewith. Given that the Minister can make policy on new technologies that interface with broadcasting, and that convergence was the rationale behind the merger of SATRA and the IBA into ICASA, it is likely that this policy-making function of the Minister, provided for in the IBA Act, might have a significant impact in future. However, it is also important to note that as at the time of writing this section, the Minister has yet to use any of the powers granted to her in terms of section 13A of the IBA Act.

Since the coming into force of the Broadcasting Act, the Minister has not taken an taken an entirely hands-off approach to broadcasting. The Department of Communications has engaged in a number of broadcasting-related policy development exercises in respect of broadcast languages and digital migration of broadcasting systems. However, to date these have remained at the level of obtaining the views of industry and other stakeholders to policy discussion documents and have yet to be translated into policy directives as envisaged in the IBA Act. Thus it is fair to say that the Minister has not interfered in the regulation of broadcasting by ICASA, something that is, of course, appropriate given the constitutional requirement that broadcasting be regulated by an independent authority.

Government interference, of course, is not confined to actions by the Executive. In respect of broadcasting, there has been an undermining of ICASA's authority to regulate broadcasting by the Legislature on at least two occasions. First, the Telecommunications Amendment Act[116] introduced section 32C to the Telecommunications Act. Section 32C(1)(b) provides that

---

[113] Section 13A(6) of the IBA Act.
[114] Section 13A(5)(c) of the IBA Act.
[115] Section 13A(5)(d) of the IBA Act.
[116] Act 64 of 2001.

with effect from 7 May 2002, "Sentech Limited[117]... shall be granted a licence to provide multimedia services to anyone who requests such service." While this provision appears in the Telecommunications Act, it is clear that a multi-media service, being a quintessentially converged service, involves broadcasting. The broadcasting features in the definition of a multi-media service contained in section 1 of the Telecommunications Act are as follows: "a telecommunication service that integrates and synchronises various forms of media to communicate information or content in an interactive format, including....

.....

(i) audio;

(j) visual content".

There are a number of constitutionally problematic aspects about the legislative provisions regarding multi-media services. First the licence to Sentech Limited is granted by Parliament and not by ICASA. This obviously undermines the independence of the broadcasting regulator because multi-media services by definition involve broadcasting and therefore ought to be regulated by a statutorily-established independent authority to regulate broadcasting in the public interest, as is required in terms of section 192 of the Constitution. Licensing is a basic function of broadcasting regulators and Parliament ought not to step into this arena because in so doing, it takes away ICASA's administrative independence, what the Constitutional Court has described as "control over those matters directly connected with the functions which the [Authority]...has to perform under the Constitution"[118]. Second, any future competition in respect of multi-media services is to be introduced not by the regulator, but by the Minister. In terms of section 32C(3)(a) of the Telecommunications Act, it is the Minister who shall invite applications for other multi-media services on a date to be fixed by the Minister by notice in the Government Gazette and in terms of the process outlined in section 32C(3)(b) read with section 34 of the Telecommunications Act, it will be the Minister that in fact grants additional multi-media licences. Here then is the Legislature making provision for the Executive to grant licences that involve broadcasting, again this is a violation of section 192 of the Constitution which requires regulation of broadcasting to be undertaken by an independent authority. More recently, and more directly, Parliament has undermined ICASA's regulatory authority with respect to broadcasting in the Broadcasting Amendment Act, 2002[119] which essentially granted two additional regional television licences to the SABC. ICASA's regulating role was undermined in that was not free to determine whether the public interest in ensuring programming in all official languages was best served by the granting of such licences. ICASA's role in this regard was reduced to drafting licence conditions and

---

[117] A 100% state-owned company which engages in a variety of broadcasting, broadcasting signal distribution and telecommunications activities, but which is primarily a broadcasting signal distributor.

[118] *New National Party of South Africa*, Op Cit Note 59 at para 99.

[119] Act 64 of 2002.

determining whether or not these regional services were entitled to draw revenues from advertising[120].

With two notable exceptions as set out immediately above, South Africa's broadcasting legislation gives ICASA a wide range of powers in respect to the regulation of broadcasting and these include the ability to:

- determine important policy issues in a range of Position Papers. Besides those specifically referred to above, ICASA has also determined policies relating to, *inter alia*, the broadcast of national sporting events, regional and local television, ownership and control of commercial broadcasting and subscription broadcasting.
- invite applications for licences, evaluate these and proceed to grant and issue licences to the successful applicants. Note that this includes the important policy function of deciding when to introduce additional competition in market by licensing new entrants. For example, ICASA has been responsible for licensing dozens of community broadcasters and has licensed nine so-called greenfields[121] commercial broadcasters[122]. ICASA has also invited applications for four new commercial sound broadcasting licences in secondary markets in the Northern Cape, North West Province, Limpopo Province and Mpumalanga[123] and is expected to begin a licensing process in respect of additional subscription broadcasters shortly. ICASA has been praised for its licensing decisions which have been generally been seen as being impartial and appropriate;
- impose licence conditions[124] upon broadcasting licenses and deal with other licensing related issues such as the amendment[125], transfer[126] and renewal[127] of broadcasting and signal distribution[128] licences; and
- make regulations on a range of broadcasting-related matters without requiring the assistance of any other person or body[129].

Legislative Provisions Regard the Powers, Duties and Independence of ICASA in the Regulation of Telecommunications[130]

---

[120] Section 22A(3) of the Broadcasting Act.
[121] These are stations established upon the licensing thereof, as opposed to the licences granted in respect of the former SABC regional stations such as Highveld Stereo, O-FM, Radio Algoa and others.
[122] These are: Classic FM, the two P4 radio stations, Cape Talk, Y-FM, Kaya FM, the two Punt stations (which subsequently collapsed) and e-tv.
[123] Notice 575 published in Government Gazette27474 dated 8 April 2005.
[124] Section 43(2) of the IBA Act.
[125] Section 52 of the IBA Act.
[126] Section 74 of the IBA Act.
[127] Section 44 of the IBA Act.
[128] Section 34 of the IBA Act.
[129] Section 78 of the IBA Act.

It is clear that section 192 of the Constitution does not require all electronic communications to be independently regulated, the requirement of independent regulation applies only to broadcasting. As a result, the regulation of telecommunications is characterised by a lack of institutional independence accorded to ICASA in terms of the Telecommunications Act.

After the 1994 elections, the first democratically-elected government set to work re-regulating the telecommunications sector. Traditionally, this sector had been controlled by the Post-Master General and, following the incorporation of Telkom SA Limited (Telkom), by Telkom, in terms of the Post Office Act.[131] Telkom was the exclusive provider of telecommunication services except for mobile cellular telecommunication services and certain others. As was the case with the IBA Act in regard to broadcasting, the Telecommunications Act introduced far-reaching changes in regard to telecommunications, notably:

- establishing SATRA,[132] an independent body to regulate telecommunications in the public interest;
- establishing competitive licensing procedures for certain telecommunications services such as Value-Added Network Services ("VANS") and Private Telecommunications Networks ("PTNs")[133] and
- providing for a period of exclusivity during which no-one other than Telkom could provide certain Public Switched Telecommunication Services[134] (PSTS) or certain telecommunication facilities.[135]

The Telecommunications Act provides that the Executive, particularly, the Minister, plays a critical role in all key aspects of the regulation of telecommunications, as is more fully set out below, leading one commentator to describe ICASA, in respect of telecommunications regulation, has having suffered "agency capture... by government"[136]. I shall highlight only a number of these, those that best illustrate the different powers of ICASA *viz a viz* telecommunications and broadcasting.

Policy Formation

In regard to policy formulation, section 5(4)(a) of the Telecommunications Act provides that the Minister may "from time to time by notice in the Gazette issue to... [ICASA] policy directions consistent with the objects mentioned in section 2". Unlike in respect of broadcasting, the Telecommunications Act does not circumscribe the actual content of these

---

[130] A number of the ideas contained in this section were first published in the chapter entitled "South Africa", *Global Telecommunications Law and Practice*. Revision Service 6. Colin Long Ed. Sweet and Maxwell.
[131] Act 44 of 1958.
[132] Section 5 of the Telecommunications Act.
[133] Sections 40 and 41 of the Telecommunications Act.
[134] Section 36(3) of the Telecommunications Act.
[135] See sections 37(2)(d) and 40(2) of the Telecommunications Act.

policy directions except in so far as these must be "consistent with the objects" of the Telecommunications Act.

As is the case in respect of broadcasting, before a telecommunications policy direction is made the Minister must consult ICASA, engage in a notice and comment procedure in the Government Gazette and refer the proposed direction to the Parliamentary Portfolio Committee for comment[137].

The most significant difference in regard to ICASA's position *viz a viz* broadcasting and telecommunications policy directions issued by the Minister is that section 5(4)(d) of the Telecommunications Act provides that ICASA "shall perform its functions in accordance with a policy direction issued under this section". Clearly ICASA is not free to act independently of the Ministerial policy directions in respect of telecommunications even if it is of the view that the public interest requires this.

It is important to note that ICASA has the authority to develop telecommunications policy in that section 27 of the Telecommunications Act entitles it to conduct enquiries of any matter relevant to the objects of the Telecommunications Act[138] or the performance of ICASA's functions in terms of the Telecommunications Act[139]. Nevertheless, the Telecommunications Act creates a situation in which ICASA's own policy development is subject to policy directions given to it by the Minister.

Regulation Making

In regard to the making of regulations, whether ordinary telecommunication regulations or radio regulations, the Telecommunications Act does not empower ICASA to make its own regulations. Every regulation made by ICASA has to be approved and published by the Minister[140] before it takes legal effect.

This is very different from the situation that pertains in respect of broadcasting. The ability of a regulator to make regulations is central to its functionality and is a critical aspect of institutional independence.

This lack of institutional independence in regard to telecommunications is not simply a problem in theory. It has resulted in tensions between ICASA and the Minister as regulations passed ICASA can remain unapproved or unpublished for months. At the time of writing this, the Minister has failed to approve and publish ICASA's regulations with regard to VANS (see

---

[136] Op Cit. Note 45 at pg 83.
[137] Section 6 of the Telecommunications Act.
[138] Section 27(1)(a) of the Telecommunications Act.
[139] Section 27(1)(b) of the Telecommunications Act.
[140] Section 96(6) read with 95(3) of the Telecommunications Act.

below) creating numerous licensing and other delays in a supposedly competitive sector of the telecommunications market.

Perhaps the clearest example of the lack of institutional independence that ICASA enjoys in respect of telecommunications regulations is the example of ICASA's Facilities Leasing and Interconnection Guidelines. Sections 43(3) and 44(5) of the Telecommunications Act provide that ICASA is to prescribe interconnection and facilities leasing guidelines. ICASA duly prescribed such guidelines which were approved and published by the Minister in the Government Gazette[141]. However, shortly thereafter and entirely unilaterally, the Minister withdrew them. The matter went to court and the High Court[142] set aside the Minister's withdrawal of the guidelines saying "the function of the Minister in respect of an amendment or withdrawal is confined to approving and publishing it. In other words the amendment or withdrawal cannot emanate from her. It must come from [ICASA]...It would be ludicrous for the Minister to approve a withdrawal of which she is the author... The Minister cannot unilaterally withdraw regulations."[143]

Licensing and Pro-Competitive Determinations

Perhaps the most troublesome aspect of ICASA's lack of independence with regard to telecommunications is to be found in the licensing regime established by the Telecommunications Act. International norms for independent regulation particularly require that licences be awarded without government interference. South Africa's telecommunications regulatory regime, however, requires Ministerial intervention in all aspect of the awarding of the major telecommunication licences[144]. In this regard, the Minister determines the telecommunications market structure in respect of major licences by deciding when invitations to apply for such licences will be issued[145]. Further, while ICASA evaluates the different applications[146], makes recommendations to the Minister[147] and issues the licences[148], it is the Minister who actually grants these licences[149].

---

[141] The Interconnection Guidelines are contained in Notice 1259 published in Government Gazette 20993 dated 15 March 2000 as amended by Notice 3457 published in Government Gazette 24203 dated 19 December 2002. The Facilities Leasing Guidelines are contained in Notice 12560 published in Government Gazette 20993 dated 15 March 2000.

[142] *Telkom SA Limited v The Independent Communications Authority in South Africa and Others* (unreported: Transvaal Provincial Division - Case No: 1904/2000)

[143] Op Cit. Note 142 at page 19.

[144] In terms of section 34(2)(a), these are: a public switched telecommunications service licence, a mobile cellular telecommunications service licence, a national long-distance service licence, an international telecommunication service licence, a multi-media service or any other telecommunication service as prescribed.

[145] Section 34(2)(a) of the Telecommunications Act.

[146] Section 35(1) read with section 34 of the Telecommunications Act.

[147] Section 35(1)(a) of the Telecommunications Act.

[148] Section 35(6) of the Telecommunications Act.

[149] Section 35(2) read with section 35(5) of the Telecommunications Act.