Importantly, in terms of section 35(2) of the Telecommunications Act, once ICASA has made a recommendation to the Minister, the Minister may accept or reject the recommendation or may request further information from ICASA or may refer the recommendation back to ICASA for further information. It is clear that the statutory regime does not, in fact, allow the Minister to substitute her or his decision for that of ICASA. However, this provision has not been observed and in respect of the licensing of the Second National Operator ("the SNO") to provide PSTS it appears that the Minister is to proceed with the granting of a PSTS licence despite ICASA having twice recommended that the awarding of a 51% stake therein not be granted, as is more fully set out below.

It is also important to have regard to the provisions of section 35A of the Telecommunications Act, a section introduced by the Telecommunications Amendment Act, 2001[150]. Section 35A gives the Minister sweeping powers to ignore the existing regulatory regime with regard to licensing altogether. In this regard section 35A(1)(a) provides that "[n]otwithstanding the provisions of sections 34 and 35 (those sections that set out the telecommunications licensing regime summarised in brief above), in the case of the major licences[151], the Minister may in specific instances[152] determine the manner in which applications may be made, such as by way of auction or tender, or both, and the licensing process and the licensing conditions that will apply." This section has yet to be tested in the courts. Clearly on its face it grants the Minister extremely wide powers, arguably wide enough to entirely circumvent ICASA's participation in the licensing process altogether. Questions have been raised regarding the constitutionality of section 35A(1)(a). This is because the Ministers discretion as to when to make use of section 35A(1)(a) is unbounded and because the powers given to the Minister in terms of the section are so broad that the section appears to give the Minister the discretion to do away with the statutory scheme for licensing the major telecommunication services which is set out in sections 34 and 35 of the Telecommunications Act. The constitutionality issue arises not from section 192 of the Constitution, which applies only in respect of broadcasting, but from section 44 of the Constitution which vests national legislative authority in Parliament. In an analogous case[153] the Constitutional Court made certain *obiter dicta* about Parliament giving a member of the Executive (in that case the President) the power to amend the Local Government Transition Act. It held: "[a]n unrestricted power to amend the Transition Act cannot be justified on the grounds of necessity...". Section 35A of the Telecommunications Act does not expressly grant the Minister the power to amend sections 34 and 35 of the Telecommunications Act. However, she has an unfettered discretion to determine not only the applications process, the licensing process and the licensing

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[150] Act 64 of 2001.
[151] These are as set out in footnote 144
[152] Note that these "specific instances" are not defined anywhere in the legislation.
[153] *Executive Council, Western Cape Legislature v President of the RSA* 1995 (4) SA 877 (CC) at para 62.

conditions that will apply, notwithstanding the provisions of sections 34 and 35, that is, the general licensing scheme enacted by Parliament in the Telecommunications Act.

An instructive example of Ministerial intervention in the licensing process has been the 2002-5 licensing of the SNO to bring about a duopoly in the PSTS market. The South African PSTS market has been dominated by Telkom. Telkom's PSTS monopoly officially ended on 7 March 2002[154]. However the licensing of the SNO has been fraught and at the time of writing we have yet to see the licensing of a competitor to Telkom. In brief, invoking her licensing powers in terms of section 35A of the Telecommunications Act the Minister set out a three stage licensing process:

- 30% of the SNO would be set aside for the electricity and transport para-statal companies which had their own telecommunication networks.
- 19% of the SNO would be set aside for a Black economic empowerment shareholder and issued an invitation to apply for that stake. ICASA engaged in an evaluation process and made a recommendation as to which of the applicants ought to be granted the 19% stake that was accepted by the Minister.
- An invitation to apply for the remaining 51% stake was issued by the Minister. The criteria made it clear that an international operator with capital and extensive experience was sought. Unfortunately, given the depressed international telecommunications market and (no doubt) the convoluted SNO licensing process, no such operator applied. ICASA evaluated both of the applicants and recommended that neither be granted the 51% stake in the SNO. The Minister then again invoked s35A and announced that the 51% stake would be awarded by the Minister following a non-public process that entirely excluded ICASA. Again, invitations to apply where issued. After finding that two of the applicants who responded to the second invitation to apply had "qualified" for the 51% stake, the Minister then announced that ICASA would be involved in evaluating the applicants. However, ICASA once again found that neither met the qualification criteria and again recommended that the 51% stake not be granted but that it be warehoused and invitations reissued when the global telecommunications market had recovered sufficiently. The Minister took some months to consider ICASA's recommendation, and then, contrary to the provisions of section 35(2) of the Telecommunications Act which do not allow her to substitute her own decision for that of ICASA's, announced that each of the applicants would be given 13% in the SNO and that the remaining 25% would be warehoused until a future date. In fact what actually happened is that each of the applicants was given 12% in the SNO it appears[155] that the remaining 26% is to be given to a consortium of foreign telecommunications operators.

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[154] Section 36(3) of the Telecommunications Act.

[155] At the time of writing, the licence has yet to be granted and the final corporate arrangements, including the final shareholdings have yet to be finalised.

The Minister is also responsible for determining when the telecommunication facilities provisioning market is to be opened up to competition. One of the key features of the current telecommunications regulatory environment is the fact that Telkom, whose largest shareholder remains the South African government as represented by the Minister, is the exclusive provider of certain telecommunications facilities. For example, only Telkom and/or the SNO may provide telecommunication facilities used by VANS licensees[156] and only Telkom and/or the SNO may provide the fixed lines used by mobile cellular service licensees.[157] This facilities-based exclusivity is entirely in the hands of the Minister as she or he decides when each of these exclusivity periods is to end. The precise wording used is "until a date to be fixed by the Minister by notice in the Gazette". Similarly, the Minister is responsible for determining when the provision of voice services will be opened up to competition. Section 40(3)(a) of the Telecommunications Act provides that no person who provides a VANS "shall permit that service to be used for the carrying of voice until a date to be fixed by the Minister by notice in Gazette". On 3 September 2004, the Minister made series of determinations[158] ("the Ministerial Determinations") in regard to the above, including setting 1 February 2005 as the date upon which, *inter alia*:

- mobile cellular telecommunications service licensees may utilise "any fixed lines which may be required for the provision of the service..."[159];
- VANS "may carry voice using any protocol"[160]; and
- VANS "may also be provided by telecommunications facilities other than those provided by Telkom and the SNO or any of them"[161].

ICASA then undertook a series of public stake-holder discussions and released a media statement[162] giving its legal interpretation of the Ministerial Determinations, including, in particular, that the effect of section 4(a) of the Ministerial Determinations was that from 1 February 2005, VANS "may self-provide facilities". ICASA then set about engaging in a regulation-making exercise to ensure that appropriate VANS licence conditions would be in place before 1 February 2005. Unfortunately, on 25 January 2005, the Minister issued a media statement (which obviously cannot alter the legal status of the Ministerial Determinations made in terms of the provisions of the Telecommunications Act) in which she said, *inter alia*, "[t]he issue of self provisioning was issued in the government's policy determination only in relation to mobile cellular operators in terms of fixed links...it is the intention that value-added operators may obtain facilities from any licensed operator and as specified in the determinations".[163] From a legal point of view, the Telecommunications Act

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[156] Section 40(2) of the Telecommunications Act.
[157] Section 37(2) of the Telecommunications Act.
[158] Notice 1924 published in Government Gazette 26763 dated 3 September 2004.
[159] Op Cit. Note 158 section 1.
[160] Op Cit. Note 158 section 3.
[161] Op Cit. Note 158 section 4(a).
[162] ICASA Media Release dated 22 November 2004.
[163] Available at the website of the Department of Communications: www.doc.gov.za

does not empower the Minister to substitute the facilities provisioning restrictions found in the Telecommunications Act with her own facilities provisioning restrictions. The Telecommunications Act allows the Minister only to determine when the particular facilities provisioning restrictions set out in the Telecommunications will come to an end. This she has done in the Ministerial Determinations. However, the issue is still vexed as (as has been set out above) at the time of writing, the Minister has refused to approve and publish ICASA's VANS regulations because of disputes between them regarding the self-provisioning issue, leaving the entire VANS sector in a state of flux.

ICASA: The Challenge of Convergence

This bifurcated nature of ICASA's independence *viz a viz* broadcasting and telecommunications regulation, respectively, will be especially difficult to manage given the fact that convergence of technologies means that the boundaries between telecommunications and broadcasting are becoming meaningless: it is increasingly difficult to say whether a particular technological innovation should be classified as falling under broadcasting or telecommunications, as is clear from the discussion on multi-media services above. Indeed, convergence was the rationale for the merger of SATRA and the IBA and the establishment of ICASA in the first place.

Parliament has recently released the Convergence Bill[164] which aims to "promote convergence in the broadcasting, broadcasting signal distribution and telecommunications sectors"[165]. The Convergence Bill repeals the IBA and Telecommunications Acts[166] and makes significant amendments to the Broadcasting Act which will become, essentially although not entirely, an SABC Act. The Convergence Bill will undoubtedly go through many iterations before it is passed but there are some key issues that warrant particular mention at this stage. First, the Convergence Bill tries to do away with the bifurcated nature of ICASA's powers and makes the position of the regulator far more coherent than is currently the case in terms of the Telecommunications Act and the broadcasting legislation[167]. Second, the Convergence Bill, in a number of respects, ensures that ICASA's level of institutional independence in respect of regulating convergence is that required by section 192 of the Constitution in respect of the regulation of broadcasting. In brief, examples of this include:

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[164] B9 – 2005. Explanatory summary of the Bill published in Government Gazette No. 27294 dated 16 February 2005.
[165] Preamble to the Convergence Bill.
[166] Schedule to the Convergence Bill.
[167] Thus the Convergence Bill contains provisions on policy directions (section 3) and on ICASA's regulation-making functions (section 4) that apply to the electronic communications sector as a whole and do not, for example, differentiate between broadcasting and telecommunications.

- ICASA is under an obligation only to "consider policies made by the Minister... and policy directions issued by the Minister"[168]. Thus unlike the Telecommunications Act, ICASA is not required to act in accordance with Ministerial policy and policy directions.
- ICASA is free to make regulations with regard to its powers and functions in terms of the Convergence Bill and in terms of the Broadcasting and ICASA Acts without the Minister's approval being required, unlike the current situation that pertains to telecommunications[169].
- ICASA is responsible for the granting of all licences[170].

However, there are certain key instances where ICASA's level of institutional independence in respect of convergence does not meet that required by section 192 of the Constitution with respect to broadcasting. Thus certain provisions of the Convergence Bill fall foul of the Constitution and will, if the Convergence Bill is passed as it, be therefore illegal. In brief, examples of this include:

- The Minister determines the date when and the geographical area within which communications network services licences[171] may be granted[172] and ICASA may only accept and consider such licences from a date to be fixed by the Minister by notice in the Gazette[173]. This is problematic given that what are currently known as broadcasting signal distribution services would fall within this category of licences. Broadcasting signal distribution has a significant impact on broadcasting and therefore the regulation thereof is required to be carried out by an independent authority in terms of section 192 of the Constitution, without the involvement by the Minister as is currently envisaged in the Convergence Bill.
- ICASA is required to submit to the Minister for approval proposed licence conditions in respect of individual licences[174]. This is extremely problematic as broadcasting licences fall within the category of individual licences[175]. The crafting of licence conditions is a quintessential regulatory function and section 192 of the Constitution requires that this be done by an independent authority.
- The Minister has a significant role in relation to the frequency spectrum. In particular, ICASA is required to submit any frequency band plans to the Minister for approval[176]. This is extremely problematic as regulating the frequency spectrum is a vital aspect of the regulation of broadcasting and section 192 of the Constitution requires that this be done by an independent authority.

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[168] Section 3(3) of the Convergence Bill.
[169] Section 4 of the Convergence Bill.
[170] Sections 5(1), (2) and (3) read with section 9 of the Convergence Bill.
[171] A particular type of individually licensed services.
[172] Section 5(5) of the Convergence Bill
[173] Section 5(4) of the Convergence Bill.
[174] Section 9(2)(a) of the Convergence Bill.
[175] Section 5(2)(c) of the Convergence Bill.
[176] Section 34(7) of the Convergence Bill.

The Convergence Bill constitutes an important movement forward in South Africa's communications law history. If passed it will go some way towards meeting the urgent need for a single electronic communications statute that grants ICASA a single set of powers and duties in respect of the electronic communications industry, irrespective of whether the function falls within what was traditionally telecommunications or broadcasting.

However, given the constitutional imperative of an independent regulator to regulate broadcasting in the public interest, ICASA should be empowered to regulate the entire electronic communications sector in accordance with the constitutionally-required level of independence for broadcasting as specified in section 192 of the Constitution and not the lesser level of independence that currently exists in terms of the Telecommunications Act.

Briefly, the respective roles of the Legislature, the Executive and ICASA should be as follows: Parliament should bear ultimate responsibility for the development of macro-policy in respect of communications issues, including broadcasting and telecommunications. The issues dealt with in such macro-policy should include: the empowerment of historically disadvantaged groups within the communications industry; universal access to communications services; ensuring the availability of a wide range of services; developing skills and ensuring proper training within the communications industry; ensuring that foreign content does not dominate broadcasting services through the dissemination of local ideas and culture and, more broadly, of African ideas and culture; ensuring that the communications industry, as a whole, is controlled by South Africans; encouraging investment in the communications industry; ensuring fair competition; ensuring that communications services comply with international technical standards, and providing for the broad categories of communications licences that can be granted by the regulator.

ICASA, for its part, should be responsible for micro-policy formulation and implementation of the macro-policy developed by Parliament. Thus ICASA should, for example, be responsible for conducting enquiries as to how best to implement the macro-policy goals determined by Parliament; making regulations; issuing invitations for applications for licences (where appropriate) and granting licences on conditions imposed by it and regulating the frequency spectrum, including the allocation and assignment of frequencies.

It is clear that the Minister, as the Cabinet member responsible for Communications, is accountable to government for ensuring the smooth running of the communications sector. In this regard, macro-policy formulation is also an important aspect of the Minister's function. The Minister should play a leading role in making macro-policy proposals in the form of Green and White Papers and in the Bills that are presented to Parliament. This macro policy formulation must, however, be mediated by Parliament as Parliament will be the body to pass

the laws arising from the Minister's suggested macro policy. It is also submitted that the Minister is entitled to formulate other kinds of policy in respect of electronic communications. The Minister cannot, however, do this in a manner that interferes with the independence of ICASA. While there can be no objection to a requirement that micro policy formulated by the Minister must be taken into account by ICASA, ICASA should remain sufficiently independent to choose a different micro policy should it believe this to be in the public interest.

Conclusion

South Africa has embarked on the right path by setting up regulators, outside of the Executive, to regulate the broadcasting and telecommunications sectors. There have been many notable successes by SATRA and, particularly, the IBA. It was also correct to merge the two regulators into ICASA and to have begun the legislative process in respect of the Convergence Bill given the increasing convergence of telecommunications, broadcasting and broadcasting signal distribution technologies. Both the Legislature and the Executive have, however, much more to do before they can be said to have ensured the independence of ICASA as is required by section 192 of the Constitution.