



CH9S

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

**OFFICE OF THE CHAIRPERSON**  
Tel +2711 321-8215  
Fax +2711 321-8547

Professor Kader Asmal, MP  
Chairperson  
Ad Hoc Committee on the Review of Chapter 9 and Related Institutions  
PO Box 15  
Cape Town  
8000  
Fax: (021) 403 2854

Dear Prof. Asmal,

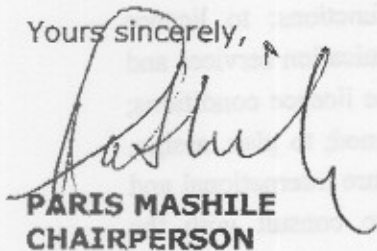
**QUESTIONNAIRE BY AD HOC COMMITTEE ON THE REVIEW OF CHAPTER 9  
AND ASSOCIATED INSTITUTIONS**

Your facsimile dated 27 October 2006 is acknowledged with thanks.

Please find the attached response to the questionnaire as requested by the Committee.

For any further information, please do not hesitate to contact me.

Yours sincerely,



**PARIS MASHILE**  
**CHAIRPERSON**

Date: 09/01/2007

**SUBMISSION OF THE INDEPENDENT COMMUNICATIONS AUTHORITY OF  
SOUTH AFRICA TO THE AD HOC COMMITTEE ON THE REVIEW OF  
CHAPTER 9 AND ASSOCIATED INSTITUTIONS**

**A. Role and Function of Institutions**

**1. How do you view your institution's constitutional/ legal mandate? In other words provide the description of your understanding of your institution's constitutional/ legal mandate**

The Independent Communications Authority of South Africa ("ICASA") was established as an independent electronic communications sector regulator by the Independent Communications Authority of South Africa Act No. 13 of 2000, as amended (hereinafter, the ICASA Act). The substantive regulatory function of ICASA pertaining to broadcasting and electronic communications is effected through the Electronic Communications Act No. 36 of 2005 (ECA 2005) and the Broadcasting Act 4 of 1999 (the BA). The ICASA Amendment Act 2006 has added the duty also to regulate postal matters in the public interest in terms of the Postal Services Act, Act 124 of 1998.

Section 192 of the Constitution of the Republic of South Africa places a duty on Parliament to establish an independent regulatory institution which is required to provide for the regulation of broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society. Parliament has deemed it fit to add the regulation of electronic communications and postal services to this function.

ICASA as an independent regulator, has as its main functions: to licence broadcasters, signal distributors, the providers of telecommunication services and postal services; to make regulations in this sphere; to impose licence conditions; to develop policies as to how these duties should be performed; to plan, assign, control, enforce and manage the frequency spectrum; to ensure international and regional cooperation, including frequency coordination; to consult with the Ministry of Communications on certain regulatory matters, such matters not including the function of licensing, which is not subject to any policy directives by the Minister; to prescribe a code of conduct to protect consumers against unfair business practices, poor quality services and harmful or inferior products; to prescribe and review a code of conduct according to which complaints would be dealt with by a Complaints and Compliance Committee ("CCC") chaired by a

Judge or a senior lawyer and, where justified, to advise the Council which sanction to impose. The CCC also functions as a complaints commission in so far as the sector is concerned.

ICASA must also give effect to the ECA 2005. The primary object of the EC Act is to provide for the regulation of electronic communications in the Republic in the public interest and for that purpose to promote and facilitate the convergence of telecommunications, broadcasting, information technologies and other services contemplated in this Act. The Preamble to the Act states that the aim of the law is to promote convergence in the broadcasting, broadcasting signal distribution and telecommunications sectors within the legal framework of the EC Act; make new provision for the regulation of electronic communications services, electronic communications network services and broadcasting services; provide for the granting of new licenses; and to provide for the control of the new radio frequency spectrum.

**2. What role or function does your institution perform that is not carried out by other institutions, whether in government or civil society?**

The responsibilities pertaining to regulating the broadcasting, postal services and electronic communications sector are solely entrusted to ICASA. There is no other institution entrusted with this mandate. However, in the sphere of general competition the Competitions Commission and the Competition Tribunal play a complementary role. This relationship is governed through Chapter 10 of the ECA 2005 and section 82(1) of the Competition Act No. 89 of 1998.

Chapter 10 of the ECA 2005 empowers the Authority to determine which competition activities between licensees in the sector amount to undue discrimination. Regulations must be made as to when pro-competitive conditions (as defined in the ECA 2005) will be imposed upon licensees having significant market power (as defined). Section 82(1) of the Competition Act 89 of 1998 provides that a regulatory body like ICASA, has jurisdiction in respect of conduct as set out above, but that such a body must negotiate agreements with the Competition Commission. An agreement of this nature has been in effect since 2000 and is currently being reviewed for application under the new legal dispensation created by the EC Act 2005. In terms of this arrangement, ICASA may ask for and receive from the Competition Commission assistance or advice on relevant proceedings of ICASA. The Competition Commission may also ask

for and receive from ICASA assistance or advice on relevant proceedings of the Competition Commission. It depends on the agreement whether concurrent jurisdiction will be exercised in certain or all respects. Currently merger activity is agreed as the sole domain of the Competition Authority, except where licence requirements in respect of a licensee requires merger approval from ICASA.

With respect to content regulation, the National Association of Broadcasters has, in terms of section 54(2) of ECA 2005 set up a disciplinary body that adjudicates complaints concerning broadcasting content in accordance with a Code against its members. The Code and mechanism has been approved by ICASA.<sup>1</sup> Complaints against other broadcasters are dealt with by the CCC of ICASA. In so far as advertisements via broadcasting are concerned, the Advertising Standards Authority of South Africa ("ASA"), which has been set up by the relevant industry, adjudicates complaints in terms of section 55 of the ECA 2005. Where it finds against a licensed broadcaster, the matter must be referred to ICASA for purposes of sanction. Where broadcasters are not members of the ASA, complaints are dealt with by the CCC of ICASA.

In so far as the regulation of postal services is concerned, ICASA must

- (a) exercise regulatory functions in respect of the reserved and unreserved postal services;
- (b) ensure that the provisions of the Postal Services Act and the terms and conditions contained in any licence are complied with;
- (c) promote the interests of users of postal services in respect of the cost of reserved services, the continuity of postal services and the quality thereof;
- (d) ensure that all reasonable requests for postal services are satisfied;
- (e) promote and encourage the expansion of postal services;
- (f) promote a universal postal service that will ensure equal access for all citizens to a basic letter service: (i) that is reasonably accessible to all people in the country regardless of physical location; (ii) at a uniform rate of postage; (iii) at an affordable price; and (iv) that offers a reliable service;
- (g) regulate the issue of postage stamps including definitive, commemorative and special issues of such stamps and any other philatelic items.

---

<sup>1</sup> The IBA (now ICASA) recognized the BCCSA as an industry disciplinary body in 1995 in terms of section 56(2) of the IBA Act 1993.

**3. What outcomes do you strive for in order to realise the constitutional/legal mandate set out in 1 above?**

ICASA strives to create a conducive and predictable regulatory environment to, *inter alia*, achieve the following goals informed by section 2, the objects of the ECA 2005:

- Universal access to services and networks;
- Diversity in service and ownership of telecommunications and broadcasting companies;
- Competition amongst operators;
- Increased research and development;
- Economic empowerment in the sector;
- Local and foreign direct investment

By creating the conditions for growth and stability in the sector, ICASA contributes to the broader national development trajectory, especially given the strategic role of ICT as an enabler of development in other social and economic sectors. Thus, the outcomes of the work of ICASA include employment creation, poverty eradication, skills development and improved quality of life.

The outcomes are generally, determined and driven by the objects of the enabling legislation. The objectives of the ECA 2005 are set out in section 2 and detail the broader policy imperatives which ICASA must attain, encourage or promote. The objectives are couched in alternative forms and include: "promoting and facilitating", or "encouraging" or "ensuring" or "providing assistance" or "facilitating and harmonizing" and "protecting" to, in one instance, "refraining" (from undue interference in the commercial activities of licensees). These objectives are further reflective of the broader national developmental and socio-economic objectives. Section 2 of the Broadcasting Act also sets out several related objectives. ICASA is, in any case, as an organ of state bound by section 8 of the Constitution of the Republic of South Africa which binds all organs of state to the Bill of Rights. Of course, this provision does not permit the ICASA to widen its powers, but provides guidance and the spirit within which the relevant legislation must be applied. The Promotion of Administrative Justice Act 4 of 2000 and common law also bind ICASA in its deciding functions as well as the CCC in the exercise of their administrative and judicial functions. Ultimately, ICASA is responsible for promoting an environment of open, fair and non discriminatory access to broadcasting services, electronic communication networks and to electronic communications services. The authority is also responsible for ensuring that broadcasting services and electronic

communications services, viewed collectively, are provided by persons or groups of persons from a diverse range of communities in the Republic.

In so far as postal services are concerned, the aim is to guide economic activity within the postal industry. The Post Office has an exclusive licence, granted in 2003 which is valid for 25 years. The outcomes set are measured against the licence conditions.

In order to achieve the constitutional/legal mandate with which ICASA has been entrusted, full consultation and transparency are governing principles as prescribed by PAJA and the common law dictates of administrative justice.

A system of minuted, bilateral meetings and consultations with the Minister and the Department of Communications ensure that there is overall coordination between the policy and implementation activities of both, whilst ensuring that the constitutional independence of ICASA is protected.

**4. In what way, if any, does the role and functions of your institution overlap or potentially overlap with other Chapter 9 institutions?**

Section 181 of the Constitution of the Republic establishes the Chapter 9 institutions, the primary purpose of which is to support democracy. Section 181(2) states that these institutions are independent and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice. To the extent that ICASA is a Chapter 9 institution, the only overlap is a general one in which the work of ICASA is aimed, inter alia, at the protection of democracy and ensuring free and open airwaves and access to communications in line with section 16 of the Constitution.

To that end, there are shared values and goals between these institutions and ICASA. For example, the promotion of human rights, particularly freedom of speech and expression and access to information; the promotion of gender equality; children's rights; linguistic and cultural rights through balanced broadcasting rules; and the promotion of democracy through fair access rules on party political advertising and elections.

However, while these values and objectives are shared, the mandates and means of attainment differ and, as such, there is no overlap between any Chapter 9 institution and ICASA. For example, the Commission on Gender Equality is in essence, an institution

which inquires, educates and advises.<sup>2</sup> The Human Rights Commission mediates, conciliates, negotiates so as to resolve disputes and, otherwise, does research, informs, investigates and brings proceedings in competent courts or tribunals. It could for example, lodge a complaint with the CCC or the BCCSA and has in fact, done so.<sup>3</sup> In contrast, ICASA is a body which licences, regulates, adjudicates and issues sanctions. In essence it is a licensing authority, a regulator and a quasi judicial body, which complies with section 34 of the Constitution in its adjudicating function.

**5. Does the empowering legislation governing your institution provide a clear workable and comprehensive legal framework that supports and empowers the institution to successfully fulfill its mandate?**

Yes. The empowering legislation combined with the constitutional protection afforded in section 181 and 192 of the Constitution as well as the ICASA Act, which have included telecommunications and postal services under the ambit of ICASA, provide an overall and effective framework within which to effect the mandates set out in the enabling legislation. Although the legislative framework does provide clear, workable and empowering provisions, it should be noted that industry stakeholders may attach different interpretations to the law. That difference of opinion in this area exists, even amongst courts, is, however, an international phenomenon.<sup>4</sup> The High Court and Constitutional Court have handed down several judgments which guide ICASA in the interpretation of the Act. In terms of section 8 of the Constitution of the RSA, ICASA is bound by the Bill of Rights. ICASA is, however, not permitted to widen its powers in the light of the Constitution. As a creature of statute, it must remain within its mandate in terms of the legislation under which it operates.

**6. What mechanisms do you have in place to measure the outcome set out in 4 above, and how do you assess the effectiveness and impact of your work?**

ICASA has specialised divisions that monitor compliance by licensees with applicable legislation, policies, regulations, licence conditions and ministerial directives. The

---

<sup>2</sup> According to the Gender Commission website, the following functions are listed: Monitor all organs of society to ensure that gender equality is safeguarded and promoted; assess all legislation from a gender perspective; research and make recommendations to Parliament and other authorities; educate and inform the public; investigate complaints on gender-related issues; monitor South Africa's progress towards gender equality in relation to international norms.

<sup>3</sup> See *Human Rights Commission of South Africa v SABC* 2003(1) Butterworths Constitutional Law Reports 92 (BCCSA).

<sup>4</sup> Cf the conflicting judgments in Canadian courts as to whether the use of a smartcard in Canada to access foreign broadcasts is an offence; ultimately the Canadian Supreme Court resolved the issue in *Bell Express Vu Limited Partnership v Rex* [2002] 2 SCR 559; [2002] SCJ No 43.

Medium Term Expenditure Framework (MTEF) guides spending and outcomes in line with project planning in accordance with budgetary constraints and allocations. In addition, various engineering rules and standards ensure that technology can evolve freely in the market to ensure that networks can be rolled out to effect the imperative of access to communications and universal service. For example,

- New technologies and services introduced in South Africa:
  - Industry is given opportunity to conduct tests and trials to evaluate and test new technologies and services by being granted test licences
- Efficient and orderly management of radio frequency spectrum:
  - Radio Spectrum Engineering and Management Planning tools used
- Adoption of communication equipment standards in line with international practices:
  - Technical Committees are in place in which ICASA and Industry are participating (Chaired by ICASA)
  - Participation in International Standards fora
- Ensuring and encouraging optimum usage of the radio frequency spectrum by licensees:
  - Presence of Regional Spectrum Monitoring Team in major South African cities
  - Spectrum Audits are done
- Ensuring that unlicensed equipment is not used:
  - Ongoing contact with Customs and seizure of illegal equipment
- Ensuring that illegal use of spectrum does not occur:
  - Staff do investigations and monitoring
- Issue radio frequency spectrum licences within reasonable time:
  - Streamlining of the Radio Spectrum Licensing process and review

Evaluation for effectiveness and impact is done through annual reporting to Parliament against the MTEF and other mechanisms for setting the workplan of the organization. While regulatory impact assessments are not currently done, there is scope in the law for these to be added as evaluation tools.

7. **Have you carried out any evaluation looking at the success or otherwise of your functions, especially in relation to recommendations sent to government, parliament or other public institutions?**



As outlined above, the performance in terms of the mandate is reported in the ICASA annual reports to Parliament. The ECA 2005 now allows for frequent reviews of policy and implementation with regard to various aspects of the sector – for example, market definitions price regulation and also allows for the Authority to make recommendations to the Minister on policy, where necessary.

In addition, ICASA recently compiled and published a Ten Year Broadcasting Review document that sought to capture all the achievements, shortcomings and challenges experienced in a decade of broadcasting regulation and made recommendation on how ICASA could further improve its mandate.

ICASA renders account of its fiscal status and its regulatory activities each year before the Portfolio Committee on Communications. Each year the Authority provides an appraisal on the objectives and its achievements relating to its regulatory responsibilities and provides a synopsis of the foreseeable challenges and the manner in which the Authority seeks to meet those challenges.

Parliament has reacted well to the proposals made by ICASA in light of new technological developments. The ECA 2005 is a good example of such reaction. More debate is however required as to the manner in which ICASA is funded.

**8. What have been/are the major constraints facing your institution and how have these impacted on its ability to achieve its mandate?**

The Authority faces numerous constraints in different areas of work. Overall, until the recent promulgation of the ECA 2005, the lack of proactive enforcement capabilities has operated as a constraint, particularly with respect to engineering and technology. The organisation as a whole suffers from human resource constraints, mainly in regard to salaries offered which are not market related in a sector which offers lucrative and competitive packages.

ICASA regulates one of the most dynamic sectors of the economy, with wider financial and institutional capacity implications. Experience of the last few years indicate that for ICASA to meet its mandate, more resources are needed than is currently the case. A paradigm shift around resourcing the regulator is needed as presently, the regulator competes with the industry for scarce human resources. The fact that industry pays more competitive salaries means that the regulator is on the receiving end of the ensuing scramble for resources. As a result, the regulator continues to lose its institutional memory at a comparatively high rate.

This links to a general funding concern for ICASA which lacks sufficient resources to enable it to attract human capital, retain staff and achieve its mandate. Recent amendments to the law, notably the promulgation of the ECA 2005, have exacerbated the situation as the mandate has increased without the necessary increase in funding allocation. There are processes to address this deficit, but it requires urgent remedial action to ensure that the mandate of ICASA can be effectively and efficiently fulfilled. At one point, the ability to retain a percentage of fees from licences was mooted as an additional funding mechanism to parliamentary appropriations, but this mechanism – used widely amongst other regulators in the sector – was ultimately abandoned. Re-tableting the proposal for discussion may be a useful way of ensuring better funding for the organization going forward, with the necessary reporting and accounting safeguards in place.

## **B. Relationships with other bodies**

### **9. Competition Commission**

We have explained the role of the Competition Commission above in Question 2 above and refer you to that section.

### **10. Universal Service and Access Agency of South Africa (USAASA)**

ICASA and its predecessor the South African telecommunications Regulatory Authority (SATRA) have had a long-standing association and collegial relationship with the USAASA and its predecessor, the Universal Service Agency (USA). More recently, through the licensing of the Under Served Areas Licence (USALs), ICASA has sustained an ongoing and mutually cooperative and cordial interaction with USAASA as we strive to meet the objectives for affordable and accessible electronic communication services. Section 82 (1) of the ECA 2005 details the functions of the USAASA, while section 82(4)(f) aims at the maintenance of the cooperative relationship between ICASA and the USAASA pertaining to matters of universal access and universal services within the communications market.

### **11. Media Diversity and Development Agency**

The MDDA's mandate entails ensuring that historically disadvantaged communities and persons not adequately served by the media gain access to the