

SUMMARY OF SUBMISSIONS ON THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA AMENDMENT BILL, 2013 (AS INTRODUCED) AND THE DEPARTMENT'S RESPONSE THERETO

Issues raised

- Amendment of section 1 of the Act 13 of 2000*
 - Section 1(e): Reference to Electronic Transactions*
 - ICASA, ISPA, WAPA: Not necessary to include this as an object of the Bill since its not in the Bill any longer, the ECT Amendment Bill is not before Parliament and there is no definition of "electronic transaction" in the ECT Act at present so the reference to this Act is incorrect.
 - Department's Response to the issue

The Department view that it is necessary to empower ICASA to regulate e-commerce. ECT Amendment Bill will be coming to Parliament in its next session as the intention is to allocate certain responsibilities to ICASA in relation to electronic transactions (as is the case in other jurisdictions). We propose to retain a full definition.
 - Amendment of section 1 of the Act 13 of 2000*
 - Department's Response to the issue
 - The Review is intended to address this aspect of ICASA's powers and deal with all aspects of ICT including electronic transactions so this is going to be addressed.
 - We recommend that Parliament retain the definition because when the ECT Act is amended we won't need to re-amend the ICASA Act, but extend the definition to read:
"electronic transaction" means the sale or purchase of goods or services, whether between businesses, households, individuals, governments, and other public or private organisations, conducted over computer-mediated networks. The goods and services are ordered over those networks, but the payment and the ultimate delivery of the good or service may be conducted on or off-line. The definition is necessary.
- Amendment of section 3 of the Act 13 of 2000*
 - Section 3(5): PAJA rights to review or appeal a finding or decisions of the Authority*
 - Mnet/Multichoice, Telkom, NAB: No need for this subsection because the PAJA already deals with this and confirms this right
 - Department's Response to the issue

- ❑ The Department’s view is that the primary intention is to bring comfort that there was a right specifically in the sector legislation to take the regulator on review and to include this specifically in the primary sector law.
- ❑ We this section is not in conflict with PAJA and is aligned. Where such conflict arise, PAJA will take precedent in any case.
- ❑ *Amendment of section 4(3)(c) of the Act 13 of 2000*
 - ❑ *Section 4(3)(c): ICASA powers relating to the management of the radio spectrum*
 - ❑ Link Centre, Neotel, Vodacom: Why replace “manage” with “assign”? Drop this amendment as the change from manage to “allocate” in relation to spectrum will undermine ICASA’s role in relation to spectrum. Because the SMA has been deferred to the Policy Review, the word “manage” should be left as is until all functions and powers regarding spectrum are determined by policy.
 - ❑ This section should be aligned with Section 30 of the ECA, which confers on the Authority the power to “control, plan, administer and manage” the use and licensing of the radio frequency spectrum”.
 - ❑ *Amendment of section 4(3)(c) of the Act 13 of 2000*
 - ❑ *Section 4(3)(c): ICASA powers relating to the management of the radio spectrum*
 - ❑ Department’s Response to the issue
 - ❑ The Department agrees in principle with their submission, but is of the view that the concern at the time was to ensure that this section is in line with international guidelines of the ITU where the policy role of the Minister and that of the regulator is separated. The allocation and planning function must be carried out by the custodian of spectrum, namely the Minister. ICASA performs an assignment function. ICASA separation of these functions can be dealt with in the review process.
 - ❑ *Amendment of section 4(3)(c) of the Act 13 of 2000*
 - ❑ *Section 4(3)(c): ICASA powers relating to the management of the radio spectrum*
 - ❑ Department’s Response to the issue
 - ❑ The new clause can read as follows,

4(3)(c) “must “control, plan, administer and manage” the use and licensing (assigning) of the radio frequency spectrum in accordance with bilateral agreements or international treaties entered into by the Republic”;
 - ❑ *Amendment of section 4(3)(k) of the Act 13 of 2000*

- Section 4(3)(k): Giving Effect and Promotion of BBBEE Act*
- Vodacom, Neotel: Needs to be more consistency in the Act – the BBBEE Act should trump the ECA. Section 23 should state this specifically. Streamline this with the BBBEE Act.
- Department’s Response to the issue
- The Department agrees in principle with the submissions, by including a definition of broad based black economic empowerment in the ECA “as defined in the BBBEE Act”. This takes into consideration that the purpose of amending this legislation is to align it with broad-based black economic empowerment legislation.
- Amendment of section 4(3)(k) of the Act 13 of 2000*
- Section 4(3)(k): Giving Effect and Promotion of BBBEE Act*
- Department’s Response to the issue
- the Act does in fact refer to broad-based black economic empowerment but without defining it. Include a new definition –

“broad based black economic empowerment” shall have the same meaning as that given to it in the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);
- The new clause will read as follows:

4(3)(k): may make regulations on empowerment requirements to promote broad-based black economic empowerment.
- Amendment of section 4(3)(p) of the Act 13 of 2000*
- Section 4(3)(k): power for ICASA to determine penalties*
- Etv: Do not only take account of section 17H but change this so that penalties are in line with section 17H and in terms of regulations
- Department’s Response to the issue
- The Department disagrees with the submission, it will be sufficient to retain current wording
- Amendment of section 4(3A) of the Act 13 of 2000*
- Section 4(3A)(b): concurrent jurisdiction*
- ICASA: This contradicts the Competition Act

- ❑ Department's Response to the issue
- ❑ The Department notes the submission. The contradictions are not spelt out by ICASA. The DOC consulted and obtain supporting input from the Competition Commission. DOC proposes to retain the provision believes that it will be sufficient to retain current wording as it was agreed to and approved by
- ❑ *Amendment of section 4B of the Act 13 of 2000*
 - ❑ *Section 4B: Inquiries*
 - ❑ NAB, MTN, Cell C: Increase period for consultation from 30 to 60 days, keep the 60-day period for inquiries.
 - ❑ SACF says 45-day period for inquiries
 - ❑ Department's Response to the issue
 - ❑ The Department agrees in principle with the submissions, but is of the view that it will remove the 30 working days and revert to 60 ordinary days to increase efficiency and turn-around times for ICASA
 - ❑ *Amendment of section 4B (8) of the Act 13 of 2000*
 - ❑ *Section 4B (8): Concurrent Jurisdiction*
 - ❑ Telkom: Telkom suggests this be deleted as it does not believe law can create this power through an agreement
 - ❑ Etv: Omit as this suggests that ICASA can never deal with something if its in front of another entity, rather leave out and leave to concurrent jurisdiction agreements
 - ❑ Department's Response to the issue
 - ❑ The Department is of the view that the law can stipulate what can be agreed and the Competition Act did just this in section 21 which is how the 2002 MOU was concluded between ICASA and CompCom in the first place
 - ❑ Section 4(9) specifically allows ICASA to agree to have jurisdiction with that other entity
- ❑ *Amendment of section 4C of the Act 13 of 2000*
 - ❑ *Section 4C: performance management*
 - ❑ Neotel: Link this section to performance bonuses
 - ❑ Department's Response to the issue

- The Department is of the view that the concern raised, ICASA's remuneration and performance, will be covered and is also the subject of the ICT Policy Review Panel and will be addressed in this (also Parliament already approved the performance management system for ICASA)

- Amendment of section 5 of the Act 13 of 2000*
 - Section 5(3)(b)(ii): qualifications of councillors*
 - MTN/SACF: Queries why marketing, journalism and entertainment were removed from qualifications
 - Department's Response to the issue
 - The changes are in line with the new convergence requirements and will allow for the modernisation and broadening the skills required to make ICASA more relevant to the industry it regulates.
 - We recommend that the current additions as drafted be retained

- Amendment of section 6A of the Act 13 of 2000*
 - Section 6A (1) – (3): collective performance management agreements and system*
 - Neotel: Review councillors bi-annually by the National Assembly and they should decide on appropriate action to be taken after the review
 - MTN: Make this performance management collective and individual
 - E-TV: Individual incompetence may result in collective poor performance so make this individual rather than collective
 - Telkom/SACF: Propose amendment to include both individual and collective performance management system
 - SOS: ICASA is meant to be independent and it cannot be independent if the Minister is in charge of performance management contracts – delete the Minister and leave reference only to Parliament

- Amendment of section 6A of the Act 13 of 2000*
 - Section 6A (1) – (3): collective performance management agreements and system*
 - ICASA: Role of the Minister and the form of review is not appropriate, needs reform. The Minister should not play any part in this, restore to National Assembly only. Call the councillors Commissioners

- ❑ LINK Centre: The Minister should not be involved in performance management per the Kader Commission and other reports. Parliament should deal with this
- ❑ Department's Response to the issue
- ❑ The Department is proposes note the proposals to include individual and collective. The drafting can be refined. Indeed the PMS has to look at Individual contribution to the collective work of council.
- ❑ *Amendment of section 7 of the Act 13 of 2000*
 - ❑ *Section 7: Council of ICASAs*
 - ❑ NAB: Councillors should not accept other work
 - ❑ ICASA: Include a right for councillors to leave early if they want to. Also suggests that the Council should follow King III (corporate governance)
 - ❑ SACF: Review structure and nature of councillors – some should be executive and others non-executive and the number should be reduced
 - ❑ Department's Response to the issue
 - ❑ The Department has deferred this matter to the ICT Review Panel which will consider structure of ICASA
- ❑ *Amendment of section 11 of the Act 13 of 2000*
 - ❑ Section 11: CEO meetings
 - ❑ SACF and Cell C: CEO should be given the right to vote and capacitate management to avoid bottlenecks and empower operational decisions
 - ❑ Department's Response to the issue
 - ❑ The Department is of the view that this would not ordinarily be the case in other jurisdictions
 - ❑ CEO does not always get a vote in other countries, must be allowed to sit in the interests of transparency. The proposed drafting is sufficient.
- ❑ *Amendment of section 11A of the Act 13 of 2000*
 - ❑ *Section 11A: Minutes of meetings*
 - ❑ Vodacom: the section should be amended to record that minutes be signed, confirmed, published and made available in the website and library within 14 days of the meeting

- Neotel: The chairperson should be required to sign them within 5 working days from the meeting
- ICASA: Corporate Governance matter, follow King III on council meetings and minutes
- MNet and Multichoice: Question whether its feasible to publish minutes but if it is then the minutes must also include minutes of a licensing matter except if confidentiality prevails
- NAB: Information in minutes regarding licensing should not be public
- Amendment of section 11A of the Act 13 of 2000*
- Section 11A: Minutes of meetings*
- Department's Response to the issue
- The Department supports the submissions by stakeholders and proposes to amend the drafting as follows:

“(3) The minutes contemplated in subsection (2) must be signed, confirmed, published and made available on the Authority’s website and in its library within 30 days of the conclusion of the meeting but any information determined to be confidential under section 4D may be removed prior to publication”.
- Amendment of section 11B of the Act 13 of 2000*
 - No comments here
- Amendment of section 12 of the Act 13 of 2000*
 - Section 12 : Councillor Penalties*
 - SACF: Penalty should be set at R500,000 as they are very large
 - Department's Response to the issue
 - The Department is of the view that all fines must be increased since we have not done so in the past 10 years and this is generally a norm.
 - The input by SACF is sensible and can be accommodated with the guidance of the PCC.
- Amendment of section 14A of the Act 13 of 2000*
 - Section 14A: appointment of experts*
 - NAB: Minister’s approval should not be required as it will cause delays

- MTN: National Assembly should be involved in appointment of experts outside the budget
- ICASA: Why should the appointment of experts not within budget require Ministerial approval? Extends this to all (foreign and local)
- Department's Response to the issue
- The Department is of the view that some control of budget is required on materiality limits - the approval is not of the expert but of the overrun in budget – budgets must be more accurately defined upfront
- Amendment of section 14D of the Act 13 of 2000*
 - Section 14D: limitation on liability*
 - ETV: Why removed – reinstate
 - Department's Response to the issue
 - The Department is of the view that the concern raised is already covered (not removed), just changed to section 23A
- Amendment of section 15A of the Act 13 of 2000*
 - Section 15A: Annual Plan*
 - ICASA: Why should the CEO do this?
 - SOS: This document should be publicly available so this should be on the ICASA website and in the library within 14 days
 - LINK Centre: Approves of the amendment but suggests this be published
 - Telkom: The previous wording required the Council to prepare an annual plan – this should be reinstated
 - Department's Response to the issue
 - This provision is aligned as per the PFMA because the CEO is the Accounting Officer of ICASA.
- Amendment of section 16 of the Act 13 of 2000*
 - Section 16: presentation of annual report to Parliament*
 - MTN: Councillors and chairperson to go to Parliament with the CEO when presenting the annual report and financials to save time

- ❑ ICASA: Does not support the tabling of the annual report by the CEO – should be Chairman of ICASA
- ❑ Department’s Response to the issue
- ❑ The Department is of the view that the PFMA specifically requires tabling by the Accounting Officer. The article referred to is dated 2003.
- ❑ *Amendment of section 17 of the Act 13 of 2000*
 - ❑ ICASA: Why no councillor on Committee
 - ❑ Department’s Response to the issue
 - ❑ The Department agrees in principle with their submission, but is of the view that it must include a councillor but not more than one.
 - ❑ Section 17A: appointment of the complaints and compliance commission (CCC)
 - ❑ MTN: The Minister should appoint the CCC not the Authority
 - ❑ ICASA: Disappointed that its suggestion to rename the CCC the Tribunal was ignored and that it is not an appeals body. Why must all members be legal practitioners under (2)? Many disputes are highly technical in nature, need a multi-disciplinary approach
 - ❑ Department’s Response to the issue
 - ❑ The Department has deferred this matter to the ICT Review Panel. Option could be “Minister in consultation with National Assembly appoint the CCC”. People with Technical skills can be appointed.
- ❑ *Amendment of section 17C of the Act 13 of 2000*
 - ❑ *Section 17C: complaints and investigations*
 - ❑ ETV: New section 17C(b)(ii) is too narrow, limits ICASA from referring complaints to investigators
 - ❑ ICASA: A 30-days timeline is not practical as members of the CCC serve on a part-time basis
 - ❑ Department’s Response to the issue
 - ❑ The Department is of the view that the concern raised is of interpretation, but it is not intended to operate in this manner – all matters can be investigated including where the person is not a licensee

- This is a misunderstanding – the complaint must be forwarded to the CCC within 30 days of receipt, not dealt with in 30 days
- Amendment of section 17F of the Act 13 of 2000*
 - Section 17F(5)(e): investigators*
 - ETV: All complaints should be investigated before being lodged with the CCC
 - Department’s Response to the issue
 - The Department is of the view that all complaints must wait for direction by the CCC – to prevent investigators going off on a frolic without authority
- Amendment of section 17G of the Act 13 of 2000*
 - Section 17G(2)(c): inspection of books and records*
 - MTN: If the records or books are legally privileged they should be excluded from the inspection
 - SACF: Insert clause to dispose responsibly
 - Department’s Response to the issue
 - The Department is of the view that if this is the case, the privilege will apply without the Act referring to it specifically
 - Already included in section 17G
- Amendment of section 17H of the Act 13 of 2000*
 - Section 17H: fines and penalties*
 - Vodacom/MTN: Increases in fines are significant – choose another model such as “accommodative model” and seek compliance by co-operation rather than coercion. The level of fines is too high and should be reduced substantially
 - Department’s Response to the issue
 - The Department is of the view that the fines to date have small and did not constitute a sufficient deterrent. The Department is following the Competition authorities’ model and RICA (Regulation of Interception of Communications and Provision of Communications-Related Information Act). The increases are the first since 2003 – and it is therefore appropriate that they be substantial. This can be further considered if necessary in the ICT Policy Review.