

REPUBLIC OF SOUTH AFRICA

ELECTRONIC COMMUNICATIONS SECURITY (PTY) LTD BILL

*(As amended by the Ad Hoc Committee on Intelligence Legislation (National Assembly))
(The English text is the official text of the Bill)*

(MINISTER OF INTELLIGENCE)

[B 59B—2002]

ISBN 0 621 33067 1

No. of copies printed 1 800

BILL

To provide for the establishment of a company that will provide electronic communications security products and services to organs of state; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

CHAPTER 1

Definitions

1. In this Act, unless the context otherwise indicates— 5
- “Board” means the Board of Directors of Comsec contemplated in section 8;
 - “Chief Executive Officer” means the Chief Executive Officer contemplated in section 13;
 - “communication” means communication as defined in an Act of Parliament providing for the regulation of interception of communications; 10
 - “Companies Act” means the Companies Act, 1973 (Act No. 61 of 1973);
 - “Comsec” means Electronic Communications Security (Pty) Ltd established by section 2;
 - “critical electronic communications” means electronic communications held by organs of state which are necessary for the protection of the national security of the Republic; 15
 - “critical electronic communications infrastructure” means electronic communications products or systems used to transmit and store or transmit or store critical electronic communications;
 - “Intelligence Services” means the Intelligence Services as contemplated in an Act of Parliament providing therefor; 20
 - “joint standing committee” means the Joint Standing Committee on Intelligence established by section 2 of the Intelligence Services Control Act, 1994 (Act No. 40 of 1994);
 - “Minister” means the Minister of Intelligence; 25
 - “organ of state” means an organ of state as defined in section 239 of the Constitution;
 - “prescribe” means prescribe by regulation;
 - “telecommunication service provider” means a telecommunication service provider as defined in an Act of Parliament providing for the regulation of interception of communications; 30
 - “this Act” includes the regulations.

Establishment of Comsec

2. There is hereby established a juristic person to be known as Electronic Communications Security (Pty) Ltd. 35

Principal objective of Comsec

3. The principal objective of Comsec is to ensure that critical electronic communications are protected and secure.

Incorporation of Comsec

4. (1) The Minister must effect the incorporation of Comsec in terms of the Companies Act. 5

(2) Notwithstanding the Companies Act or any other law, the State is the sole shareholder of Comsec.

(3) Notwithstanding the Companies Act, the Minister or a person designated by him or her must, on behalf of the State, sign the memorandum and articles of association and all other documents necessary for the incorporation of the company. 10

(4) The Registrar of Companies must—

(a) register the memorandum and articles of association as signed in terms of subsection (3);

(b) incorporate the company as a private company under the name “Electronic Communications Security (Pty) Ltd”; and 15

(c) issue to the company a certificate to commence business with effect from the date of the company’s incorporation.

Provision of Companies Act not applicable to Comsec under certain circumstance

5. A provision of the Companies Act does not apply to Comsec where the Minister of Trade and Industry has issued a declaration under section 6. 20

Request for exemption from application of provision of Companies Act

6. (1) The Minister may, on the recommendation of Comsec, request the Minister of Trade and Industry to declare a provision of the Companies Act, or a part of such provision, not applicable to Comsec. 25

(2) The request contemplated in subsection (1) must be fully motivated, and the Registrar of Companies must publish particulars about the request and motivation by notice in the *Gazette*.

(3) The Minister of Trade and Industry may, by notice in the *Gazette*, after having considered the request contemplated in subsection (1) and if satisfied on reasonable grounds that the non-application of the provision of the Companies Act to Comsec will— 30

(a) contribute to the efficiency of Comsec and reduce its operating costs;

(b) not reduce or limit the accountability of Comsec as a public institution or detract from the requirements of transparency regarding its functioning and operations; and 35

(c) not be detrimental to the interests of the State, employees of Comsec or claims of creditors of Comsec,

declare, with effect from the date stated in the notice, the whole or part of a provision of the Companies Act not applicable to Comsec. 40

Functions

7. (1) The functions of Comsec are to—

(a) protect and secure critical electronic communications against unauthorised access or technical, electronic or any other related threats;

(b) provide, with the concurrence of the National Intelligence Agency defined in section 1 of the Intelligence Services Act, 1994 (Act No. 38 of 1994), verification services for electronic communications security systems, products and services used by organs of state; 45

(c) provide and co-ordinate research and development with regard to electronic communications security systems, products, services and any other related services; 50

(d) perform any other function not inconsistent with this Act that is necessary for the effective functioning of Comsec.

(2) For purposes of the functions contemplated in subsection (1), Comsec must—

- (a) develop, design, procure, invent, install or maintain secure electronic communications systems or products and do research in this regard;
 - (b) provide secure electronic communications services, systems and products;
 - (c) provide cryptographic services;
 - (d) train and support users of the electronic communications systems, products and related services; and 5
 - (e) provide consultancy services on the security and protection of electronic communications services, systems and products.
- (3) Subject to applicable labour law, Comsec may, with the approval of the Minister acting with the concurrence of the Minister responsible for an entity or establishment of the State which performs duties similar to those referred to in subsection (2), integrate such an entity or establishment into Comsec. 10
- (4) Comsec may cooperate with any organisation in the Republic or elsewhere to achieve its objectives.
- (5) Comsec, the members of its Board and its employees must, in the performance of their functions in terms of this Act, comply with the policies and regulations relating to security of communications made in terms of the National Strategic Intelligence Act, 1994 (Act No. 39 of 1994). 15
- (6) The head of a telecommunication service provider must, at the request of Comsec and at Comsec's expense, render such assistance as may be necessary for the execution of the functions of Comsec contemplated in this section. 20
- (7) Comsec is exempted from the licensing requirements contemplated in—
- (a) the Broadcasting Act, 1999 (Act No. 4 of 1999); and
 - (b) the Telecommunications Act, 1996 (Act No. 103 of 1996).

CHAPTER 2

25

GOVERNANCE OF COMSEC

Board of Directors

- 8.** (1) Comsec must be managed and controlled in accordance with this Act by a Board of Directors appointed by the Minister after consultation with Cabinet.
- (2) The business and operational plans of Comsec must be approved by the Board with the approval of the Minister. 30
- (3) The Board represents Comsec.

Composition of Board

- 9.** (1) The Board is made up of not more than nine members of whom—
- (a) one is the non-executive chairperson; 35
 - (b) not more than four are executive directors, one of whom must be designated by the Minister as the Chief Executive Officer; and
 - (c) the rest are additional non-executive members, consisting of persons approved by the Minister on the basis of relevant expertise.
- (2) A majority of the members of the Board forms a quorum at any meeting of the Board. 40
- (3) On an equality of votes in any meeting of the Board, the chairperson has a casting vote in addition to a deliberative vote.

Terms of office of members of Board

- 10.** (1) A non-executive member of the Board— 45
- (a) holds office for a period of three years which the Minister may extend for further periods of three years each or such shorter periods as the Minister may determine;
 - (b) serves on the terms and conditions determined by the Minister and specified in the letter of appointment of the member; and 50
 - (c) may resign by giving three months' written notice to the Minister or as stipulated in the letter of appointment.
- (2) An executive member of the Board—
- (a) holds office for a period determined by the Minister in the letter of appointment; and 55

- (b) may resign by giving three months' written notice to the Minister or as stipulated in the letter of appointment.
- (3) The names of the Board members may be kept confidential.

Remuneration of members of Board

11. A member of the Board, except the executive directors and any appointed member who holds a post or office in the Public Service or any institution, organisation or body established by or under any other law and funded wholly or partly by the State, may be remunerated on a daily basis at a rate determined by the Minister with the concurrence of the Minister of Finance. 5

Removal from office 10

12. The Minister may in the prescribed manner remove any member of the Board from office on the grounds of misconduct, incompetence or incapacity or failure to obtain the necessary security clearance.

CHAPTER 3

CHIEF EXECUTIVE OFFICER 15

Functions of the Chief Executive Officer

13. The Chief Executive Officer is responsible for the administration and the general management and control of the day-to-day functioning of Comsec, subject to the directions and instructions issued by the Board.

Employment of personnel 20

14. (1) The Chief Executive Officer must appoint the employees of Comsec, subject to such remuneration, allowances and service benefits as the Board may determine.

(2) In filling posts, the evaluation of persons must be based on training, skills, competence, knowledge and the need to redress the imbalances of the past, so as to achieve a staff complement broadly representative of the South African population, according to race, gender and disability. 25

(3) The Minister or any other Minister may, at the request of Comsec, second an employee to Comsec in accordance with an Act of Parliament providing for the Intelligence Services or section 15(3) of the Public Service Act, 1994 (Proclamation No. 103 of 1994), as the case may be. 30

(4) For as long as an employee is seconded to Comsec, Comsec must reimburse the relevant department for the remuneration and allowances paid by such department to the employee, and for any other expenditure arising from the secondment of that employee.

Employment of employees of Security Services

15. (1) Any employee involved in an electronic communications security function in the security services contemplated in Chapter 11 of the Constitution, or in any establishment or entity contemplated in section 7(3), may be made an employment offer by Comsec. 35

(2) (a) The remuneration, benefits and privileges offered by Comsec may not be less than those payable to the employee by the previous employer immediately prior to his or her transfer. 40

(b) Prior to the transfer of an employee, an agreement must have been reached between the employer, Comsec and the Minister, and with the concurrence of the Minister of Finance, where applicable—

- (i) as to whether accrued leave and sick leave should be wholly or partially carried over to Comsec; 45
- (ii) as to whether the monetary value of such benefits should be payable wholly or partially to the employee prior to transfer; and
- (iii) as to which portion of the costs of the transferred benefits is to be carried by the employer and which portion by Comsec. 50

- (3) The agreement contemplated in subsection (2)(b) must also deal with any other existing contractual obligation between the employer and the employee.
- (4) An offer contemplated in subsection (1) may only be made to employees who are in the service of the respective employers when the offer is made.
- (5) An employee who accepts the offer contemplated in subsection (1) is not entitled to any voluntary severance package. 5
- (6) An officer who is a member of Government Employees Pension Fund and who is employed by Comsec may—
- (a) choose to become a dormant member of such Fund, and from the date of exercising such choice the officer must, despite the provisions of any other law, be regarded to be a dormant member of the Fund; 10
 - (b) choose to remain a member of the Fund, in which case Comsec is responsible for the employer's contribution to the Fund;
 - (c) request to become a member of any other registered pension fund, and withdraw from the Government Employees Pension Fund in accordance with the Government Employees Pension Law, 1996 (Proclamation No. 21 of 1996). 15

CHAPTER 4

SECURITY MATTERS

Security clearance 20

16. No person may be appointed as a member of the Board or as an employee of Comsec without a security clearance certificate issued by the National Intelligence Agency in accordance with the National Strategic Intelligence Act, 1994 (Act No. 39 of 1994).

CHAPTER 5 25

SERVICE DELIVERY

Analysis of electronic communications security needs, and business agreement

- 17.** (1) The head of an organ of state must ensure that the organ of state under his or her administration procures and accesses electronic communications products with the verification and approval of Comsec. 30
- (2) The head of an organ of state must, at the request of the Board and in the prescribed manner, submit to the Board an analysis of the electronic communications security needs of the organ of state under his or her administration.
- (3) The Board must make its request six months after Comsec's incorporation, and thereafter in every second year. 35
- (4) Expenditure on the procurement or accessing of electronic communications products by an organ of state which has not complied with a request contemplated in subsection (2) must be regarded as unauthorised expenditure for the purposes of the Public Finance Management Act, 1999 (Act No. 1 of 1999).
- (5) The Board must, after having considered an analysis contemplated in subsection (2) and if satisfied that Comsec should attend to the electronic communications security needs, enter into a business agreement with the relevant organ of state for the provisioning of the necessary services. 40
- (6) Comsec may enter into business agreements to regulate its relationship with organs of state. 45

CHAPTER 6

FINANCIAL MATTERS

Funding of Comsec

- 18.** (1) Funding and capital to start operating Comsec must be obtained from funds agreed to between the Minister and the Minister of Finance. 50
- (2) The funds of Comsec consist of—

- (a) monies received from Parliament as part of the Vote of the Intelligence Services in terms of the Security Services Special Account Act, 1969 (Act No. 81 of 1969);
- (b) monies received for services provided as stipulated in the business agreements entered into with organs of state; 5
- (c) funds, finances and grants contemplated in subsection (7);
- (d) donations contemplated in subsection (8).
- (3) The rates used for determining the cost of service must be reasonably market related and periodically approved by the Minister of Finance.
- (4) Comsec must perform its functions in an efficient and cost-effective manner. 10
- (5) The Board must prepare a strategic plan which it must use as a basis for recommending to the Minister how excess funds may be retained and used by the Board.
- (6) Payment for services provided by Comsec to an organ of state must be made in accordance with the business agreement between the parties.
- (7) The Minister may, after a request from Comsec, request special funding or any other special financial arrangement, including government grants, for the effective functioning of Comsec from the Minister of Finance. 15
- (8) Comsec may, with the approval of the Minister, accept donations and bequests, subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999).
- (9) The books and records of accounts and financial statements of Comsec must be audited annually by the Auditor-General in accordance with the Security Services Special Account Act, 1969 (Act No. 81 of 1969). 20
- (10) The Chief Executive Officer must, at the end of each financial year, submit the report of the Auditor-General and the annual report compiled in accordance with the Public Finance Management Act, 1999 (Act No. 1 of 1999), to the Minister and the Joint Standing Committee on Intelligence for consideration. 25
- (11) Comsec may acquire shares in any other company registered in the Republic in terms of the Companies Act.

CHAPTER 7

GENERAL 30

Intellectual property

- 19.** (1) Notwithstanding the provisions of any other law, all intellectual property rights in any product, service, item, method or any other thing of any nature relating to secure communications technology or systems developed, designed or invented as contemplated in section 7(2) by Comsec or its employees, vest in Comsec. 35
- (2) The Board must direct how the product, service, item, method or any other thing of any nature contemplated in subsection (1) is to be utilised by Comsec in the achievement of its objective.

Exemption from application of this Act

- 20.** (1) The Minister may, at the request of an organ of state, exempt such organ of state from the application of this Act if the exemption will not compromise national security. 40
- (2) The request contemplated in subsection (1) must be fully motivated.

Critical electronic communications infrastructure

- 21.** (1) Comsec must for its own account provide protection to critical electronic communications infrastructure, such as computer systems and programmes of organs of state. 45
- (2) Comsec must coordinate research and development regarding any security risk that may arise in relation to critical electronic communications infrastructure.
- (3) The Minister may, on the recommendation of Comsec, identify critical communications infrastructure and request Comsec to provide the necessary protection. 50

Regulations

- 22.** (1) The Minister may, after consultation with the joint standing committee, make regulations regarding—
- (a) functions consistent with this Act to be performed by Comsec;
 - (b) the conditions for the appointment of directors to the Board; 5
 - (c) security requirements with regard to electronic communications of the different organs of state;
 - (d) conditions of employment and any other benefits of employees of Comsec, on the advice of the Board;
 - (e) labour relations of the employees of Comsec; 10
 - (f) transitional arrangements consistent with this Act with regard to the implementation of this Act; and
 - (g) any other matter that the Minister may consider necessary to prescribe in order to achieve the objects of this Act.
- (2) A regulation made under this Act may provide that any person who contravenes a provision thereof, or fails to comply therewith, is guilty of an offence and on conviction liable to a fine or to imprisonment for a period not exceeding five years. 15

Offences and penalties

- 23.** (1) Any person is guilty of an offence if he or she—
- (a) interferes or tampers with any electronic communications system or product of an organ of state; 20
 - (b) contravenes section 17(1) or (2);
 - (c) not being a director or employee of Comsec, by word, conduct or demeanour pretends that he or she is a director or employee of Comsec;
 - (d) being a director or employee of Comsec, omits to carry out his or her duty or performs an act in conflict with his or her duty. 25
- (2) Any person convicted of an offence in terms of this Act is liable, in the case of contravention of—
- (a) subsection (1)(a), to a fine or to imprisonment for a period not exceeding 10 years; and 30
 - (b) subsection (1)(b), (c) or (d), to a fine or to imprisonment for a period not exceeding one year.

Limitation of liability

- 24.** The Minister, Comsec or any of its employees is not liable for anything done in good faith in terms of furthering the objectives of this Act, unless that act constituted gross negligence. 35

Savings and liabilities

- 25.** (1) All assets, liabilities, rights and duties, including funds, resources and administrative records, of an entity or establishment of the State which ceases to exist by virtue of an integration contemplated in section 7(3) vest upon such integration in Comsec, and must be regarded to have been acquired or incurred by Comsec in terms of this Act. 40
- (2) The registrar of deeds must, upon production to him or her of a certificate by the Minister that immovable property described in the certificate vests in Comsec by virtue of subsection (1), make the necessary entries and endorsements in or on any relevant register, title deed or other document in his or her office, so as to give effect to that subsection. 45
- (3) No duty, office fee or any other charge is payable in respect of any entry or endorsement made in terms of subsection (2).
- (4) Disciplinary proceedings instituted prior to the commencement of this Act and not yet completed when this Act took effect, must be concluded in terms of the law under which the proceedings were instituted. 50

Amendment of laws

26. The laws mentioned in the first column of Schedule 1 are hereby amended to the extent set out in the third column of that Schedule.

Short title and commencement

27. This Act is called the Electronic Communications Security (Pty) Ltd Act, 2002, and comes into operation on a date determined by the President by proclamation in the *Gazette*. 5

SCHEDULE 1

(Section 26)

LAWS AMENDED

No. and year of Act	Short title	Extent of repeal or amendment
Act No. 81 of 1969	Security Services Special Account Act, 1969	<p>1. The amendment of section 2 by the substitution for paragraph (a) of the following paragraph:</p> <p>“(a) the performance of the function and the duty of the National Intelligence Agency and the South African Secret Service as referred to in the National Strategic Intelligence Act, 1994, and of Comsec as referred to in the <u>Electronic Communications Security (Pty) Ltd Act, 2002</u>; and”.</p> <p>2. The substitution for section 5 of the following section:</p> <p>“Investment of balances</p> <p>5. Moneys standing to the credit of the account which are not required for immediate use or as a reasonable working balance, may be invested in such manner as may be determined by the President [Executive Deputy President] or Minister responsible for the National Intelligence Agency, [or] the South African Secret Service or Comsec with the concurrence of the Minister of Finance.”.</p>
Act No. 84 of 1982	Protection of Information Act, 1982	<p>1. The amendment of section 1 by the substitution for the definition of “security matter” of the following definition:</p> <p>“ ‘security matter’ includes any matter which is dealt with by <u>Comsec as defined in section 1 of the Electronic Communications Security (Pty) Ltd Act, 2002</u>, or the Agency or the Service as defined in section 1 of the Intelligence Services Act, 1994, or which relates to the functions of <u>Comsec</u> or that Agency or Service or to the relationship existing between any person and <u>Comsec</u> or that Agency or Service.”.</p>
Act No. 66 of 1995	Labour Relations Act, 1995	<p>1. The amendment of section 2 by the deletion in paragraph (b) of the word “and”, and by the addition of the following paragraph:</p> <p>“(d) <u>Comsec</u>.”.</p>

No. and year of Act	Short title	Extent of repeal or amendment
Act No. 75 of 1997	Basic Conditions of Employment Act, 1997	<p>1. The amendment of the definition of “public service” in section 1 by the deletion in paragraph (b) of the word “and”, and by the addition of the following paragraph: “(d) Comsec.”.</p> <p>2. The amendment of subsection (1)(a) in section 3 by the deletion of the second “and”, and by the addition of the following paragraph: “(c) the directors and staff of Comsec.”.</p>
Act No. 55 of 1998	Employment Equity Act, 1998	<p>1. The amendment of the definition of “public service” in section 1 by the deletion in paragraph (b) of the word “and”, and by the addition of the following paragraph: “(d) Comsec.”.</p> <p>2. The amendment of section 4 by the substitution for subsection (3) of the following subsection: “(3) This Act does not apply to members of the National Defence Force, the National Intelligence Agency or the South African Secret Service <u>or to the directors and staff of Comsec.</u>”.</p>

MEMORANDUM ON THE OBJECTS OF THE ELECTRONIC COMMUNICATIONS SECURITY (PTY) LTD BILL, 2002

1. CONTENTS OF BILL

This Bill seeks to establish Electronic Communications Security (Pty) Ltd (“Comsec”) as a private company in terms of the Companies Act, 1973, with the State as the sole shareholder. The objective of Comsec is to protect and secure certain electronic communications of organs of state against unauthorised access or other related technical or electronic threats.

In terms of the Bill, Comsec may be exempted from certain provisions of the Companies Act by a declaration made by the Minister of Trade and Industry in the *Gazette* after a recommendation from Comsec and a request from the Minister of Intelligence. Such request must be fully motivated.

The Bill also seeks to authorise Comsec to integrate agencies of the State which provide services similar to those of Comsec into Comsec. All organs of state will have to procure and access electronic communications products and systems with the verification and approval of Comsec. However, organs of state may be exempted from the application of this Act.

The affairs of Comsec will be managed by a Board of nine Directors, one of whom will be the Chief Executive Officer.

2. FINANCIAL IMPLICATIONS FOR STATE

The financial implications for the establishment of Comsec will be as follows:

Capital expenditure	R129 000 000,00
Operational costs	R98 000 000,00
Total	R227 000 000,00

3. DEPARTMENTS/BODIES CONSULTED

Presidential Intelligence Budget Advisory Committee
 Department of Safety and Security
 Department of Labour
 Department of Justice and Constitutional Development
 Department of Defence
 Department of Communications
 National Treasury

4. PARLIAMENTARY PROCEDURE

The State Law Advisers are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.