

REPUBLIC OF SOUTH AFRICA

**INDEPENDENT COMMUNICATIONS
AUTHORITY OF SOUTH AFRICA
AMENDMENT BILL**

*(As introduced in the National Assembly (proposed section 75); explanatory summary of Bill published in
Government Gazette No. XXX of XXX 2012)
(The English text is the official text of the Bill)*

(Minister of Communications)

[B -2012]

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To provide for further clarity on the powers and duties of the Authority; to provide for the establishment of the Complaints and Compliance Commission to replace the Complaints and Compliance Committee; to confirm the use of electronic communications networks and services for the purpose of electronic transactions; to introduce mechanisms to ensure the accountability of committees and the Authority including of councillors; and to provide for matters connected therewith.

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

Amendment of the Preamble to Act 13 of 2000

1. The following Preamble is hereby substituted for the Preamble to the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000) (hereinafter referred to as the principal Act):

“PREAMBLE

Recognising that technological and other developments in the fields of broadcasting and electronic communications are causing a rapid convergence of these fields;

Recognising that the success of electronic commerce must be underpinned by appropriate regulation of broadcasting, electronic communications and electronic communications networks;

Acknowledging that the establishment of an independent body to regulate broadcasting, postal services and electronic communications is required.”

Amendment of section 1 of Act 13 of 2000

2. Section 1 of the principal Act is hereby amended-

(a) by the insertion of the following definitions after the definition of “Broadcasting Act”:

“Competition Commission” means the Commission of that name established under section 19 of the Competition Act;

“Competition Act” means the Competition Act, 1998 (Act 89 of 1998);”

(b) by the substitution of the definition of “Complaints and Compliance Committee” by the following definition:

“Complaints and Compliance [**Committee**] Commission” or “the Commission” means the [**committee**] Commission established [by the Authority] in terms of section 17A;”

- (c) by the insertion of a new definition after the definition of “Complaints and Compliance Commission” as follows:

“concurrent jurisdiction agreement” means the agreement of that name concluded between the Authority and the Competition Commission in terms of sections 3(1A), 21(1) and 82 of the Competition Act;”

- (d) by the substitution of the definition of “Electronic Communications Act” by the following paragraph:

“Electronic Communications Act” means [an Act of Parliament providing for convergence in the broadcasting, broadcasting signal distribution and telecommunications sectors] the Electronic Communications Act, 2005 (Act 36 of 2005);”

- (e) by the insertion of two new definitions after the definition of “Electronic Communications Act” as follows:

“Electronic Communications and Transactions Act” means the Electronic Communications and Transactions Act, 2002 (Act 25 of 2002) as amended;

“electronic transaction” shall include both commercial and non-commercial electronic transactions as defined in the Electronic Communications and Transactions Act;”

- (f) by the deletion of the definition of “former authorities”;

- (g) by the insertion of a new definition after the definition of “family member” as follows:

“inquiry” means an investigation by ICASA and not a committee, undertaken in terms of section 4B, into any matter (other than a dispute or complaint which shall be referred to the Commission);”

- (h) by the insertion of a new definition after “National Revenue Fund” as follows:

“policy directions” means those directions referred to in section 3(2) and section 81 of the Electronic Communications Act and those directions referred to in section 3(4) of the Postal Services Act;” and

- (i) by the deletion of the definition of “Telecommunications Act”.

Amendment of section 4 of Act 13 of 2000

3. Section 4 of the principal Act is hereby amended –

- (a) by the substitution for subsection (1) of section 4 of the following paragraph:

“(1) The Authority -

(a) must exercise the powers and perform the duties conferred and imposed upon it by this Act, the underlying statutes, **[and by any other law]** and any other applicable law;"

(b) by the substitution for subsections (3)(a), (b), (c), (d) and (e) of the following paragraphs:

"(3) Without derogating from the generality of subsections (1) and (2), the Authority –
(a) may make recommendations to the Minister on policy matters and amendments to the Act and the underlying statutes which accord with the objects of this Act and the underlying statutes to promote development in the postal, broadcasting, electronic communications and electronic transactions sectors;
(b) must monitor the electronic communications, postal and broadcasting sectors to ensure compliance with this Act and the underlying statutes;
(c) must **[manage]** assign the radio frequency spectrum for non-government use in accordance with **[bilateral agreements or international treaties entered into by the Republic]** the provisions of the Electronic Communications Act;
(d) must develop, monitor and enforce compliance with licence conditions and regulations consistent with the objects of the Act and the underlying statutes;
(e) **[must]** may, in its discretion, grant, renew, amend, transfer and revoke licences;"

(c) by the substitution for paragraph (3)(h) of the following:

"(h) may conduct research on all matters affecting the postal, broadcasting and electronic communications and electronic transactions sectors in order to exercise its power and perform its duties;"

(d) by the addition after subsection (3)(j) of the following paragraphs:

"(k) may make regulations on empowerment requirements in order to give effect to or promote the terms of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003), subject also to the underlying statutes;
(l) may inspect **[transmitters or other]** electronic communications [apparatus] facilities used for electronic communications;
(m) may undertake enquiries on any matter within its jurisdiction provided these do not constitute complaints or disputes that are to be investigated and adjudicated by the Commission;
(n) must refer to the Commission to investigate and adjudicate, any complaints submitted to the Authority in terms of the Act, the underlying statutes, and licence conditions where these complaints are between the Authority and a licensee, or where these complaints are between more than one licensee;
(o) may make recommendations to the Minister on matters dealt with or to be dealt with in the Electronic Transactions and Communications Act;
(p) must determine for each contravention of a regulation, the penalty or remedy appropriate to the contravention as the case may be, which may include a fine or a term of imprisonment;
(q) must exercise its functions in respect of the reserved and unreserved postal services;
(r) must ensure that the provisions of the Postal Services Act and the terms and conditions of any licence for postal services are complied with;
(s) must promote the interests of users of postal and other service provided through postal infrastructure in respect of the cost of reserved services, continuity of those services, and the quality of them;

(t) must ensure that all reasonable requests for postal services are satisfied;
(u) must promote and encourage the expansion of postal services and infrastructure;
(v) must promote universal access to postal services so as to facilitate equal access for all citizens to a service-

(i) reasonably accessible to all people in the country regardless of physical location, with special attention to the needs of persons with disabilities;

(ii) at a uniform rate of postage;

(iii) at an affordable price; and

(iv) that is reliable; and

(w) must regulate the issue of postal stamps including definitive, commemorative and special issues of such stamps and any other philatelic items."

(e) by the insertion of a new subsection (4) as follows:

"(4) The Authority shall perform its functions:

(a) in accordance with sector policy and policy directions;

(b) where regulatory intervention is required, in a way that is evidence-based, proportionate, consistent, accountable and transparent; and

(c) carry out, prior to any act that would constitute a regulatory intervention, an assessment of its likely regulatory impact."

(f) by the substitution for subsection (4) of the following as subsection (5) of section 4:

"[(4)] (5)(a) Subject to subsection (2), the Council must exercise general control over the performance of the Authority's functions but may in writing delegate any power, function or duty of the Authority in terms of this Act or the underlying statutes to –

[(i) any councilor;]

[(ii) (i) any committee of the Council established in terms of section 17; or

[(iii) (ii) the chief executive officer appointed in terms of section 14.

(b) The power to make regulations may not be delegated in terms of paragraph (a).

(c) A power, function or duty delegated to the chief executive officer may be performed by any other staff member of the Authority authorised by the chief executive officer, except where precluded by the terms of such delegation.

(d) Subject to paragraph (e), a delegation in terms of paragraph (a) or (c) –

(i) is subject to such conditions as may be determined by the Council or chief executive officer, as the case may be; and

(ii) may at any time be amended or revoked.

(e) The Council or chief executive officer, as the case may be, is not divested of any power, function or duty or relieved of any duty which it may have delegated in terms of paragraph (a) or (c) and may amend or revoke any decision made in terms of such delegation except where any licence will be affected by the revocation or the amendments of the decision.

(f) The power to grant, renew, amend, revoke or transfer any **[individual]** licence may **[only] not** be delegated to a councilor or to a committee of the Council."

(g) By the insertion of a new subsection (6) of section 4 as follows:

“(6) The Authority shall conclude a concurrent jurisdiction agreement with the Competition Commission which shall be reviewed and revised where necessary and by agreement, at least once every 3 years.”

Amendment of section 4B of Act 13 of 2000

4. Section 4B of the principal Act is hereby amended:

(a) by the substitution for the first sentence of subsection (1) of the following:

“(1) Except where specified in subsection (7) below or where a matter is a dispute or complaint that falls within the jurisdiction of the Commission as set out in section 17C, [T] the Authority may conduct an inquiry into any matter with regard to – “

(b) by the substitution of subsection (2) with the following:

“(2) The Authority must, in the Gazette, give notice of its intention to conduct an inquiry and such notice must indicate the purpose of the inquiry and invite interested persons to –

(a) submit written representations [within 60 days from the date of publication] on or before a date specified in the notice which date may not be earlier than 30 days from the date of publication of the notice but which may be a lengthier period as determined by the Authority in its discretion in the case of inquiries of a complex nature or where substantial research or analysis is likely to be required by interested persons; and

(b) indicate in their written representations whether they require an opportunity to make oral representation to the Authority.”

(c) By the insertion of a new subsection (7) as follows:

“(7) Before exercising any of its powers under Chapter 10 of the Electronic Communications Act the Authority shall-

(a) consider whether, under the terms of the concurrent jurisdiction agreement, it would be appropriate to refer an inquiry to the Competition Commission in terms of the Competition Act. In doing so, the Authority shall consider whether the matter is primarily of the nature of a postal service, electronic communications service or broadcasting service where the likely effect on competition in the Republic is a secondary, subordinate issue or ex post issue; and

(b) not take any action where the matter has already been notified to and is being dealt with by the Competition Commission, unless agreed otherwise by the parties.”

Amendment of section 4C of Act 13 of 2000

5. Section 4C of the principal Act is hereby amended:

(a) by the substitution for the first sentence of subsection (2) of the following paragraph:

“(2) The Authority may, subject to section 4D and to any law governing privilege, for the purpose of an inquiry –“

(b) by the substitution for subsection (6) of the following paragraph:

“(6) The Authority must, within [180] 90 days from the date of conclusion of the inquiry -
(a) make a finding on the subject matter of the inquiry which it shall, in the case where an inquiry has resulted in or as a matter of fact, constitutes a complaint or dispute, convey to the Commission for determination; and”

Amendment of section 5 of Act 13 of 2000

6. Section 5 of the principal Act is hereby amended:

(a) by the substitution of subsections (1) and (1A) by the following paragraphs:

(1) The Council consists of a chairperson and 8 other councilors appointed by the Minister after consultation with and upon the [approval by] recommendation of the National Assembly, according to the following principles, namely -
(a) participation by the public in the nomination process;
(b) transparency and openness; and
(c) the publication of a shortlist of candidates for appointment, with due regard to subsection (3) and section 6.”

(b) by the substitution for subsection (3)(b)(ii) of the following paragraph:

“(ii) possess suitable qualifications, expertise and experience in the fields of, amongst others, broadcasting, electronic communications and postal policy or operations, public policy development, electronic engineering, law, [marketing, journalism, entertainment,] information technology, content in any form, consumer protection, education, economics, finance or any other relevant expertise or qualifications.”

Amendment of section 6A of Act 13 of 2000

7. Section 6A of the principal Act is hereby amended by the substitution for that section of the following paragraphs:

“6A. (1) The Minister must, in consultation with the National Assembly, establish a collective performance management system to monitor and evaluate the performance of the [chairperson and other councilors] Council which shall be reviewed at least once per year.

(2) The performance management system must -
(a) set appropriate key performance indicators as a yardstick for measuring performance, among them, the matters including time periods that are set out in sections 4(4), 4B(2)(a), 4C(6), 12(6) and 16(1).
(b) set measurable performance targets; and
(c) set a procedure to measure and review performance at least once a year.

(3) As soon as is practicable after the appointment of the chairperson or other councillors a performance agreement must be concluded between the chairperson, other councillors and the Minister.

The evaluation of the performance of the [chairperson or other councillor] Council must be conducted by a panel constituted by the Minister in consultation with the National Assembly for that purpose.

(5) The panel contemplated in subsection (4) must, after an evaluation of the [chairperson or other councillor] Council, submit a report to the National Assembly for consideration.”

Amendment of section 7 of Act 13 of 2000

8. Section 7 of the principal Act is hereby amended by the substitution of that section with the following paragraphs:

“7. (1) (a) The chairperson holds office for a period of 5 years as from the date of his or her appointment.
(b) The chairperson may at the end of his or her term of office be reappointed in terms of section 5 for one further term.

(2) The other councillors hold office for a period of 4 years as from the date of their appointment.

(3) A councillor may at any time, upon at least 3 months' written notice tendered to the Minister, resign from office.

(4) Despite subsections (1) and (2), the councillors remain in office after expiry of their term of office until the commencement of the term of office of their successors, but the extended term of office may not exceed 45 days.

(5) A councillor may at the end of his or her term of office be reappointed in terms of section 5 for one additional term.

(6) **[Every councillor serves in a full-time capacity to the exclusion of any other remunerative employment, occupation or office which is likely to -
(a) interfere with the exercise by any such councillor of his or her functions in terms of this Act or the underlying statutes; or
(b) create a conflict of interests between such employment, occupation or office and his or her office as councillor.]**

Every councillor shall serve in a full-time capacity to the exclusion of any other remunerative employment, occupation or office.

(7) The provisions of subsection (6) shall not apply to part-time academic or public sector appointments, public tasks for which an honorarium is paid and incidental gifts for attendance at conferences and public lectures, or other work which reasonably may be perceived as advancing the work of the Authority, provided any such associated benefits are disclosed in writing as provided for in section 12(5).

(8) The Authority shall keep a register of all declarations by councillors of any gift, benefit or gratuity received or derived as a result of the activities set out in subsection (7) or in any way whatsoever, and shall furthermore deal with the register in the manner set out in section 12(5).

Amendment of section 11 of Act 13 of 2000

9. Section 11 of the principal Act is hereby amended by the substitution for that section, of the following paragraphs:

“11. (1)~~[(a)]~~ Meetings of the Council must be held at such times and places as the Council may determine but no less than once per month.

[(b) However, the first meeting must be held at such time and place as the chairperson determines.]

(2)(a) The chairperson may at any time convene a special meeting of the Council, which must be held at such time and place as the chairperson determines.

(b) If at least two councillors request a special meeting in writing, the chairperson must convene such a meeting within 7 days after receiving the request.

(c) If the chairperson fails to convene a special meeting within 7 days after receiving the request, the councillors concerned may convene a special meeting.

(3) The quorum for any meeting of the Council is a majority of the councillors in office at the time including the chairperson or an acting chairperson who shall be a councillor appointed by the chairperson to chair a meeting in his or her absence.

(4)(a) Subject to subsection (3), a decision of the Council is taken by resolution agreed to by the majority of councillors at any meeting of the Council.

(b) In the event of an equality of votes regarding any matter the chairperson has a casting vote in addition to his or her deliberative vote.

(5) The chief executive officer of the Authority shall be invited to attend every meeting of the Council and may speak at that meeting on any matter which shall be minuted, but shall have no right to vote.”

Amendment of section 11A of Act 13 of 2000

10. Section 11A of the principal Act is hereby amended by the insertion of a new subsection (3) as follows:

“(3) The decisions of meetings of the Council regarding any licensing and regulatory matters must be published in the ICASA library and made available on the ICASA website within 14 days of such minutes being signed by the person presiding at the meeting, provided that any information determined to be confidential under section 4D may be removed prior to publication.”

Amendment of section 12 of Act 13 of 2000

11. Section 12 of the principal Act is hereby amended:

(a) by the substitution for subsection (4) of the following paragraph:

“(4) A councillor is guilty of an offence and liable on conviction to a fine not exceeding [R250,000] R1 million or to imprisonment for a period not exceeding [5] 3 years, or to both such fine and imprisonment, if he or she -

(a) contravenes subsection (1); or

(b) fails to disclose any interest or fails to leave the meeting or hearing as required by subsection (2).”

(b) By the insertion of new subsections (5) and (6) as follows:

“(5) All councillors and the chief executive officer must disclose in writing to the Council, any interests, whether financial or otherwise, direct or indirect, in directorships, partnerships, or consultancies in a service provider capacity or otherwise, which must be retained in the register referred to in section 7(8) which is open to inspection and contained in the annual report to Parliament.

(6) The Authority must, within 180 days of the date of commencement of this section, make publicly available on its website and in the Authority’s library, a Code of Ethics, which addresses among other things, the processes for such disclosures and which specifies the governance principles according to which the Authority and the Council shall function which shall, among other things, include:

(a) the principles of mutual respect and collective responsibility;

(b) the requirement that the Council shall have all information necessary to make an informed decision, taking account of all relevant facts at its disposal; and

(c) a commitment by members of the Council to the highest level of professionalism and corporate governance. ”

Amendment of section 14 of Act 13 of 2000

12. Section 14 of the principal Act is hereby amended:

(a) by the substitution for subsection (1) of the following paragraph:

“(1) The Council must establish the staffing that it requires to support its own administration and to assist the Authority in the performance of its functions and to this end the Council must appoint -

(a) a suitably qualified and experienced person as chief executive officer of the Authority for the purpose of assisting the Authority, subject to the Council's direction and supervision, in the performance of all financial and administrative functions in terms of the Act and the underlying statutes work arising from the administration of this Act and the underlying statutes and to exercise any power delegated by the Council to him or her; and

(b) such other staff as the Council may deem necessary to assist the Authority and the chief executive officer, as the case may be, with all such work as may arise through the performance of its functions, which shall include research, regulatory impact assessments, reports, the giving of reasons, preparing public consultation documents and preparing recommendations on this Act, the Electronic Communications and Transactions Act, or the underlying statutes.”

(b) by the insertion of a new subsection (4) as follows:

“(4) The staff of the Authority shall carry out the day to day operations of the Authority as directed by the chief executive officer in accordance with the annual plan described in section 16.”

Amendment of section 14A of Act 13 of 2000

13. Section 14A of the principal Act is hereby amended by the substitution of it by the following paragraphs:

“14A (1) The Authority may appoint as many experts as may be necessary with a view to assisting the Authority in the performance of its functions, within its budget or if outside its budget, with the approval of the Minister.”

(2) **[Where an expert contemplated in subsection (1) is not a citizen or permanent resident of the Republic, the Minister must approve the appointment before such expert is appointed.]**

The Authority and an expert must enter into a written agreement setting out the expert's terms and conditions of employment. “

Deletion of section 14B of Act 13 of 2000

14. Section 14B of the principal Act is hereby deleted.

Amendment of section 14C of Act 13 of 2000

15. Section 14C of the principal Act is hereby amended by the substitution of subsection (1) by the following paragraphs:

“14C. (1) No councillor or person in the employ of the Authority may disclose any information with regard to any matter which **may** come to his or her knowledge in the performance of any function in terms of this Act or the underlying statutes or by virtue of the office held by him or her, except –

(a) in so far as the Constitution, this Act, the underlying statutes or any other law require or provide for the access to information relating to such matter;

(b) subject to paragraph (a), in so far as may be necessary for the due and proper performance of any function in terms of this Act or the underlying statutes;
[or]

(c) when so ordered by a competent court of law[.]; or

(d) where required to do so under section 12.”

Deletion of section 14D of Act 13 of 2000

16. Section 14D of the principal Act is hereby deleted.

Amendment of section 15 of Act 13 of 2000

17. Section 15 of the principal Act is hereby amended by the substitution for subsection (4) of the following paragraph:

“(4) Cheques drawn by the Authority must be regarded to have been duly issued and signed on its behalf if issued under the joint signatures of the accounting officer and another member of the staff of the Authority designated by the Council who may be a councillor.”

Amendment of section 16 of Act 13 of 2000

18. Section 15 of the principal Act is hereby amended:

(a) by the substitution for the heading of section 15 of the following heading:

“Annual plan and report”

(b) by the substitution of section 16 with the following paragraphs:

“16.(1) The Council shall, at least once per year, publish an annual plan which describes its proposed activities for the year with indicative timeframes.

(2) The Council must, in addition, -

(a) supply the Minister with such information and particulars as he or she may in writing require in connection with the activities of the Authority; and

(b) as soon as may be reasonably practicable after the end of each financial year but in any event within three months of the end of the financial year, supply the Minister with a copy of [-

(i) the annual report of the Authority which shall refer to the annual plan and note what has and what has not been achieved.];]

(3) [(ii) The chief executive officer shall, as soon as reasonably practicable after the end of each financial year but in any event within three months of the end of the financial year, supply the Minister and National Treasury with-

(i) the financial statements of the Authority referred to in section 40(1)(e) of the Public Finance Management Act, 1999 (Act No. 1 of 1999); and

(iii) the Auditor-General's report on those statements.

[(2)](4) For purposes of this section, the annual report referred to in subsection [(1)](2)(b)(i) must include, amongst others -

(a) information regarding licences granted, renewed, amended, transferred, suspended or revoked; and

(b) such other information as the Minister may in writing require.

[(3)] (5) The [Minister] chief executive officer of the Authority must table a copy of the Authority's annual report and financial statements and the Auditor-General's report on those financial statements in Parliament within 30 days after it has been received by him or her if Parliament is then sitting and, if Parliament is not in sitting, within 14 days after the next ensuing sitting of Parliament or otherwise as required under section 40 of the Public Finance Management Act, 1999 (Act No. 1 of 1999).”

Insertion of new section 16B in Act 13 of 2000

19. A new section 16B is hereby inserted in the principal Act as follows:

“Review of or appeal against decisions of the Authority

16B. A person affected by any action, finding or decision by the Authority may appeal against or apply to the High Court for review of that action, finding or decision.”

Amendment of section 17 of Act 13 of 2000

20. Section 17 of the principal Act is hereby amended:

(a) by the substitution for subsection (1) to (4) of the following paragraphs:

“(1)The Council may establish standing committees or special committees for such purposes as the Council may deem necessary with a view to assisting it in the effective exercise and performance of its powers and duties who shall report to it as required on their activities.

- (2) Each committee established in terms of this section must consist of -
- (a) **[one or more] a councillor[s or any member of staff]** designated by the Council; and
 - (b) such additional members as the Council may determine.
- (3) The additional members referred to in subsection (2)(b) must be persons who -
- (a) are not subject to any disqualification contemplated in section 6(1)(d) to (i); and
 - (b) on account of their expertise, qualifications and experience are suited to serve on the relevant committee.
- (4) The Council must appoint the chairperson of each committee **[from the councillors designated in terms of subsection (2)(a).]**”

Amendment of section 17A of Act 13 of 2000

21. The heading of section 17A of the principal Act is hereby amended:

- (a) by the substitution of the heading by the following heading:

“Establishment of Complaints and Compliance [Committee] Commission”

- (b) by the substitution for section 17A of the following paragraphs:

“17A. (1) The **[Authority] Minister** must establish a Complaints and Compliance **[Committee] Commission** which consists of not more than **[7] 5** members, **[one of whom must be a councillor] and must appoint a chairperson from these persons.**

(2) The **[chairperson] members** of the Complaints and Compliance **[Committee] Commission** must each be –

- (a) a judge of the High Court of South Africa, whether in active service or not; or
- (b) an advocate or attorney with at least 10 years’ appropriate experience; or
- (c) a magistrate with at least 10 years’ appropriate experience, whether in active service or not.

(3) The **[chairperson] members** of the Complaints and Compliance **[Committee] Commission** must be appointed on a part-time basis, other than the chairperson who shall be appointed on a full-time basis. [-

- (a) **manage the work of the Complaints and Compliance Committee; and**
- (b) **preside at hearings of the Complaints and Compliance Committee.]**

(4) **[A] Each** member of the Complaints and Compliance **[Committee] Commission** must be a fit and proper person and must -

- (a) **[have suitable qualifications and experience in communications, economics, electronic engineering, broadcasting, law, commerce, technology or public policy;]**
- [[b)]** be committed to the objects of this Act and the underlying statutes and must not undermine the integrity of them or of the Commission;
- [[c)]** **(b)** not be an office-bearer or an employee of any party, movement or organisation of a party-political nature;
- [[d)]** **(c)** not be an unreliable insolvent;

[(e)] (d) not be mentally ill or disordered;
[(f)] (e) not have been convicted of an offence after the commencement of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) and sentenced to imprisonment without the option of a fine; [and]
[(g)] (f) not be subject to any disqualification contemplated in section 6 and be subject to the provisions of section 12(1) to (5) with the necessary changes; and
(g) be appointed for a period of 3 years and eligible for re-appointment for one further term of 3 years.

(5) The Commission and its members and advisors shall not be subject to the performance management system described in section 6A.

(6) The Commission must establish the staffing that it requires to support its own administration and to assist the Commission in the performance of its functions. The Commission shall determine the benefits, remuneration and other conditions applicable to the appointment and employment of staff subject to the budget referred to in section 17B."

Insertion of a new section 17B of Act 13 of 2000

22. A new section 17B is hereby inserted in the principal Act as follows:

"Financing of the Complaints and Compliance Commission, and related matters

"17B. (1) The Commission is financed from money that is appropriated by Parliament for the Commission.

(2) The financial year of the Commission shall be the same as that of the Authority except that the first year that the Commission comes into operation, the financial year of the Commission shall commence on the date that this Act comes into operation and shall end on the 31 March next following that date.

(3) Each year, at a time determined by the Minister, the chairperson of the Commission shall submit to the Minister a budget for the next financial year to enable the Minister to make the necessary request to Parliament for appropriation of funds.

(4) The chairperson of the Commission is the accounting authority for the Commission for purposes of the Public Finance Management Act, 1999 (Act 1 of 1999).

(5) Within 6 months after the end of each financial year the chairperson shall cause financial statements of the Commission to be prepared in accordance with established accounting practise, principles and procedures.

(6) The Auditor-General shall audit the Commission's financial records each year.

(7) Within 6 months after the end of the Commission's financial year, the chairperson must prepare and must submit to the Minister an annual report in the prescribed form including-

- (a) the audited financial statements prepared in terms of section 17B(5);
- (b) a report of the activities undertaken in terms of the Commission's functions as set out in this Act;
- (c) any other information that the Minister, by notice in the Gazette, may require.

(8) The Minister must table in the National Assembly each annual report submitted in terms of subsection (7)-

- (a) within 10 business days after receiving that report from the Commission; or
(b) if Parliament is not sitting, then within 10 business days after the commencement of the next sitting.”

Amendment of sections 17B and 17C of Act 13 of 2000

23. Sections 17B and 17C of the principal Act are hereby amended as follows:

(a) by the renumbering of section 17B as section 17C;

(b) by the substitution of the heading of new section 17C by the following heading:

“Functions and proceedings of the Complaints and Compliance [Committee] Commission”

(c) by the substitution of section 17B, now renumbered as section 17C, by the following paragraphs:

“[17B] 17C(1) The [Complaints and Compliance Committee] Commission must [-

(a)], through the panel referred to in subsection (4), investigate, and hear if appropriate, and make a finding on –

[(i)] (a) all matters referred to it by the [Authority] Council, or any matters referred to it by the Complaints and Compliance Committee under section 17(1), as the case may be;

[(ii)] (b) complaints or disputes received by it under section 17I, except where it determines the complaint or dispute to be frivolous in nature; and

[(iii)] (c) allegations of non-compliance by any person with this Act or the underlying statutes that are received by it under section 17I [; and
(b) may make any recommendations to the Authority necessary or incidental to –

(i) the performance of the functions of the Authority in terms of this Act or the underlying statutes; or

(ii) achieving the objects of the Act and the underlying statutes].

(2) The Commission may, in the discharge of its functions, be assisted by one or more advisors to be appointed by the Commission from time to time.

(3) The Authority shall identify 6 persons as possible advisors to the Commission, who shall have suitable qualifications and experience in electronic communications, economics, electronic engineering, broadcasting, law, commerce, technology and public policy or any one or more of these areas.

(4) On the termination of the appointment of any advisor for any reason (as determined by the Commission) the Authority shall identify an alternate advisor within 30 days. If the Authority fails or refuses to identify an alternate advisor within the period set out in subsection (a), the Commission may itself identify and appoint an alternate advisor.

(5) The first 6 advisors shall be identified by the Authority within 60 days of the commencement date of this section, failing which the Commission may identify its own advisors.

(6) The Commission shall determine the benefits, remuneration and other conditions applicable to the appointment and employment of advisors, subject to the budget referred to in section 17B. The advisors may be full-time or part-time appointments, depending on the needs of the Commission.

(7) The chairperson of the Commission shall appoint a panel to hear each complaint or dispute that is referred to the Commission, which panel shall consist of at least 2 members of the Commission, 1 of whom shall be designated chairperson for that panel.

(8) If a panel is not able to hear a complaint or dispute for any reason, the chairperson of the Commission shall constitute another panel for that purpose which panel may appoint the same or other advisors.

(9) The same panel constituted under either subsection (4) or subsection (5) shall preside over the hearing of a complaint or dispute and make any determination that it is entitled to make under this Act."

(d) by the deletion of the heading of section 17C;

(e) by the sequential numbering of subsections formerly numbered 17C(1) to (7) as part of new section 17C and the substitution of those subsections by the following paragraphs as a continuation of section 17C:

"[17C (1)(a) A person who has reason to believe that a licensee is guilty of any non-compliance with the terms and conditions of its licence or with this Act or the underlying statutes may lodge a complaint with the Authority within 60 days of becoming aware of the alleged non-compliance.

(b) The Authority may direct the complaint to the Complaints and Compliance Committee for consideration.]

[(2) Before the Complaints and Compliance Committee hears a matter it must-

(a) provide the licensee to the dispute with -

(i) a copy of the complaint where a complaint has been lodged; and

(ii) a notice setting out the range of the alleged non-compliance

(b) afford the licensee a reasonable opportunity to respond to the allegations in writing; and

(c) afford the complainant a reasonable opportunity to reply to such response in writing where a complaint has been lodged.]

(10) A panel constituted by the Commission must conduct a hearing, subject to the rules determined by the Commission, into every matter referred to it by the Authority or brought to it in terms of section 17I of this Act.

(11) The Commission shall prepare and publish rules describing the procedure to be followed by it and by every panel constituted by it which shall include provisions to enable the disclosure of documents by all parties to the dispute or complaint as the case may be, the formulation of a response to any complaint or dispute, the form in which a complaint or dispute must be lodged with the Commission, and the types of matters that will be adjudicated and decided upon by the Commission subject to the provisions of this

Act.

[(3)] (12) The [Complaints and Compliance Committee] panel must-
 (a) commence the hearing contemplated in section 17B within 45 days from the date the complaint is lodged as contemplated in section 17I or from the date on which the Authority refers a complaint or dispute to the Commission, and make a finding within 90 days from the date of conclusion by it of that hearing; and
 (b) hear oral representations made by the parties [referred to in subsection (2)] to the complaint or dispute and must permit such parties to be assisted by a legal representative or other adviser.

[(4) The Complaints and Compliance Committee may hold a pre-hearing conference for the purpose of giving direction to the parties regarding the procedure to be followed at a hearing and other relevant matters determined by the Complaints and Compliance Committee.

(5) Notwithstanding this section, the Authority may prescribe procedures for the handling of urgent complaints and non-compliance matters.]

[(6)] (13) Sections 4C(2), (4) and (5) and 4D apply with the necessary changes required by the context to a hearing conducted by [the Complaints and Compliance Committee] a panel of the Commission.

[(7)] (14)(a) The [Complaints and Compliance Committee] Commission must keep a record of all complaints received by it, all notices contemplated in subsection (2) issued by it and a record of all [its] panel proceedings and findings.
 (b) Such record must be open to inspection by the public at the premises and during the normal office hours of the Authority.
 (c) The [Authority] chairperson of the Commission must, when so requested by any person and upon payment of the prescribed fee, provide such person with a copy of or extract from such record."

Amendment of sections 17D and 17E of Act 13 of 2000

24. Sections 17D and 17E of the principal Act are amended in the following way:

(a) by the insertion of a new section 17D in the principal Act as follows:

"Powers of the Complaints and Compliance Commission and of a panel

17D (1) The Commission shall have the power to enforce any finding made by a panel as set out in sections 17E to 17H.

(2) The panel constituted to hear a complaint or dispute may-

- (a) subject to the Commission's rules, determine procedure for a particular hearing having regard to the circumstances of the matter and the requirements of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000);
- (b) direct or summon any person to appear at any specified time and place and allow any witnesses appearing for either party to participate in the hearing;
- (c) question any person either informally or in any inquisitorial manner;
- (d) require any person to produce any document or item necessary for the purposes of the hearing;
- (e) accept oral or written submissions or both from any person participating in the

hearing;

- (f) condone any irregularities arising in the course of a hearing;
- (g) investigate any matter as provided for in subsection (4);
- (h) appoint any one or more advisors to assist it as it may require;
- (i) make any finding as is provided for in section 17E; and
- (j) make any ruling as to costs as it may deem fit, having regard to the matters set out in section 17E(4).

(3) The Commission and a panel of the Commission are not bound by any finding of an inspector under section 17F but is bound to consider any dispute or complaint referred to it by an inspector under section 17F or section 17G.

(4) The Commission and any panel of the Commission may request an inspector to furnish it with any information or any thing that the inspector has in his possession in relation to an investigation carried out under section 17F or section 17G."

- (b) by the deletion of the heading of the previous section 17D;
- (c) by the renumbering of the previous section 17D as section 17E;
- (d) by the insertion of a new heading for the new section 17E as follows:

"Findings and decisions of Complaints and Compliance [Committee] Commission"

- (e) by the substitution for section 17D of a new section 17E as follows:

"[17D (1) The Complaints and Compliance Committee must make a finding within 90 days from the date of conclusion of a hearing contemplated in section 17B.]

[(2)] 17E(1) The panel of the Commission [Complaints and Compliance Committee] must decide [recommend to the Authority] what action [by the Authority] should be taken against [a licensee] the person against whom a complaint has been brought, or the parties to a dispute, as the case may be, if any.

(2) Where a matter concerns a person who is not a licensee, the Commission shall instruct the Authority to take action under the Act.

[(3) The Complaints and Compliance Committee must submit its finding and recommendations contemplated in subsections (1) and (2) and a record of such proceedings to the Authority for a decision regarding the action to be taken by the Authority.]"

- (f) by the deletion of the heading of the existing section 17E;
- (g) by the sequential numbering of subsections formerly numbered 17E(1) to (4) and the substitution of those subsections by the following paragraphs as a continuation of the new section 17E:

“**[17E (1)] (3)** When making a decision contemplated in this section [17D], the **[Authority]** panel must take all relevant matters into account, including-

- [(a)]** the recommendations of the Complaints and Compliance Committee;
- [(b)]** (a) the nature and gravity of the non-compliance with any regulation or Act or previous finding of the Commission or the Authority, as the case may be, or of any disputed matter or complaint, each referred to for convenience as “the non-compliance” in this section 17E;
- [(c)]** (b) the consequences of the non-compliance;
- [(d)]** (c) the circumstances under which the non-compliance occurred;
- [(e)]** (d) the steps taken by [the licensee] that person to remedy the [complaint] non-compliance;
- (e) the facts of the non-compliance as they are presented by each party;
- (f) any other matters of a similar nature placed before the panel for a decision;
- and
- (g) the steps taken by [the licensee] that person in the case of a complaint, to ensure that similar complaints will not be lodged in the future.

[(2)] (4) The **[Complaints and Compliance Committee]** panel may **[recommend that issue]** one or more of the following orders **[be issued by the Authority]**, namely-

- (a) direct [the licensee] that person to desist from any further [contravention] non-compliance;
- (b) direct [the licensee] that person to pay as a fine the amount prescribed by [the Authority] regulation in respect of such non-compliance [or non-adherence] and if no fine has been prescribed then a fine not greater than the amount set out in section 17H(2)(e);
- (c) direct [the licensee] that person to take such remedial or other steps not in conflict with this Act or the underlying statutes as may be [recommended] required by the [Complaints and Compliance Committee] panel;
- (d) where [the licensee] that person has repeatedly been found guilty of material [violation] non-compliance -
 - (i) Prohibit the [licensee] person, where that person is a licensee, from providing the licensed service for [such] a specified period as may be decided [recommended] by the [Complaints and Compliance Committee] panel, subject to the proviso that a postal, broadcasting or electronic communications service or electronic communications network service, as applicable, must not be suspended in terms of this subsection for a period in excess of 30 days; or
 - (ii) require the Authority to amend his or her licence under section 10 of the Electronic Communications Act for any of the reasons set out in that section; or
 - (iii) require the Authority to revoke his or her licence under section 14 of the Electronic Communications Act and for this purpose, the reference to the Authority in subsection (1)(b) shall be deemed to include the Commission or any panel of the Commission; or
 - (iv) where the person is not a licensee, bar that person from applying for or being awarded a licence whether directly or indirectly; [and] or
- (e) in the case of a dispute, direct [the licensee] any person to that dispute or more than one person to comply with any settlement order which may include an order as to payment of money by one person to another person, or the carrying out or ceasing to carry out any action as may be directed by the panel which may be-

- (i) contemplated in any commercial agreement between the parties; or
- (ii) reasonable and necessary in all the circumstances; or
- (iii) foreseen, contemplated or required by any regulation or this Act or the underlying statutes; or
- (iv) any one or more of (i) to (iii).

[(3)] (5) The **[Complaints and Compliance Committee]** panel must submit its finding **[recommendations]** and decisions [in subsections (1) and (2)] and a record of its proceedings to the **[Authority for a decision regarding the action to be taken by the Authority]** Commission within **[60]** 30 days of making its decision.

[(4)] (6) The **[Authority must make a decision permitted by this Act or the underlying statutes and]** Commission must provide persons affected by such decision with written reasons therefor within the same period as set out in subsection (5).

(7) A decision of the majority of the panel shall be deemed to be a decision of them all and a decision of the panel shall be deemed to be a decision of the Commission.

(8) Any decision or finding or order of a panel of the Commission may be served, executed and enforced as if it were an order of the High Court and the Commission may institute proceedings in the High Court for enforcement of any penalty imposed by it for a period of up to 3 years following the imposition of the penalty.

(9) A person affected by a finding or decision by a panel of the Commission may appeal against, or apply to the High Court to review, that decision."

Amendment of section 17F of Act 13 of 2000

25. Section 17F of the principal Act is amended in the following way:

(a) By the substitution for subsection (1) of the following paragraph:

"(1) The Authority must appoint suitably qualified inspectors to perform the functions provided for in this Act and may terminate their appointment."

(b) by the substitution of subsection (5) with the following paragraph:

"(5) An inspector must, when instructed to do so by the Council-

- (a) monitor compliance by licensees of licence terms and conditions;
- (b) monitor compliance by licensees with the provisions of this Act and the underlying statutes;
- (c) investigate and evaluate any alleged or suspected-
 - (i) non-compliance by a licensee with its licence terms and conditions and provisions of this Act or the underlying statutes;
 - (ii) breach by a licensee of an agreement between such licensee and its subscriber;
 - (iii) failure to provide an electronic communications service that the licensee is required to provide under the terms of its licence or in terms of this Act or the underlying statutes; or
 - (iv) non-compliance with the Act or the underlying statutes;
- (d) refer all non-compliance matters to the [Complaints and Compliance Committee] Commission for consideration where an inspector determines that a

licensee has not complied with the terms and conditions of its licence, the provisions of this Act or the underlying statutes of failed to provide broadcasting or electronic communications services;
 (e) refer all complaints to the [**Complaints and Compliance Committee**] Commission for consideration [**after an investigation into the complaint has been carried out**];
 (f) appear before [**the Complaints and Compliance Committee**] a panel of the Commission when requested by such panel of the [committee] Commission or the chairperson of the Commission; and
 (g) co-operate with law enforcement officials when performing his or her functions."

Amendment of section 17G of Act 13 of 2000

26. Section 17G of the principal Act is amended in the following way:

(a) By the substitution for subsections (1) and (2) of the following paragraphs:

"(1) The Criminal Procedure Act, 1977 (Act No. 51 of 1977), applies with the necessary changes required by the context to entries, searches and seizures by inspectors in terms of this Act.

(2) An inspector appointed in terms of section 17F may, in order to carry out his or her functions under this Act or the underlying statutes, at any reasonable time without prior notice and on the authority of a warrant issued under subsection(4) enter any premises and, without the use of force or coercion-

(a) demand the production of a licence issued in terms of the underlying statutes for inspection;

(b) search such premises or the owner or person in control of such premises;

(c) inspect any book, record or other document found on such premises and make copies thereof;

(d) inspect any radio apparatus, studio, plant, transmitters, apparatus, other equipment or other broadcasting, electronic communications or postal service facilities on the premises;

(e) inspect anything referred to in paragraph (c) which is in the possession of or used by, or suspected of being in the possession of or being used by, any person in contravention of this Act, the underlying statutes or an applicable licence;

(f) request the owner or person in control of such premises or any person on such premises who may reasonably be expected to have the necessary information to furnish information regarding a document or thing; and

(g) seize for further examination or safe custody any document or thing which has a direct bearing on the alleged non-compliance or other act referred to in section 17F on such premises."

(b) by the substitution of subsection (4) with the following paragraph:

"(4) (a) A magistrate or judge may, upon request by an inspector but subject to subsection (b) issue a warrant to such inspector.

(b) A magistrate or judge must issue a warrant if it appears to him or her, from information on oath or affirmation, that there are reasonable grounds for believing that a document or thing which has a bearing on the alleged non-compliance or other act referred to in section 17F -

- (i) is or will be in the possession or under the control of any person or on or in any premises within the area of jurisdiction of that magistrate or judge; and
- (ii) cannot reasonably be obtained otherwise; and
- (iii) is material to the investigation by the inspector.

(c) By the insertion of a new subsection (8) as follows:

“(8) The inspector shall, on request by the Commission or a panel of the Commission, and in the course of hearing a complaint or dispute, provide to the Commission or a panel of the Commission, any documents or other thing submitted to the magistrate or judge referred to in this section 17G, as the case may be, in support of the warrant.”

Amendment of section 17H of Act 13 of 2000

27. Section 17H of the principal Act is hereby amended by the substitution for it of the following paragraphs:

- “17H(1) A person is guilty of an offence if that person -
- (a) fails to comply with a notice issued under section 4(3)(g) or 4C(2)(a) or (b);
 - (b) fails to answer a question put to him or her in terms of section 4C(2)(c);
 - (c) makes a false statement before the Authority or the Commission on any matter, knowing such statement to be false;
 - (d) contravenes section 14C;
 - (e) contravenes section 16A;
 - (f) fails to comply with [a decision] an order made by the [Authority] Commission or a panel of the Commission in terms of section 17E; [or]
 - (g) (i) fails to comply with a demand of an inspector appointed in terms of section 17F;
 - (ii) hinders or obstructs such inspector in the exercise of his or her powers; [or]
 - (iii) falsely holds himself or herself out as an inspector; or
 - (h) is found to have been non-compliant as this term is used in section 17E, by a panel of the Commission in the exercise of its powers in section 17D or section 17E, or to have committed an offence as determined by the Authority under section 17E(2).
- (2) A person convicted of an offence in terms of subsection (1) is liable, in the case of a contravention of-
- (a) subsection (1)(a),(b) and (c), to a fine not exceeding [R250,000] R5,000,000;
 - (b) subsection (1)(d), to a fine not exceeding [R50,000] R2,000,000 or to imprisonment not exceeding [3] 2 years;
 - (c) subsection (1)(e) and (f), to a fine not exceeding R1 000 000 or to imprisonment not exceeding [5] 1 year[s]; [and]
 - (d) subsection (1)(g), to a fine not exceeding [R15,000] R1,000,000; and
 - (e) subsection (1)(h), to a fine not exceeding R10,000,000 or imprisonment not exceeding 3 years.
- (3) Any person who-
- (a) in applying for a licence in terms of this Act or the underlying statutes or for the renewal, amendment or transfer of such licence, in his or her application furnishes any false or misleading information or particulars or makes any statement which is false or misleading in any material respect, or who wilfully fails to disclose any information or particulars material to his or her application;

(b) provides a service without a licence or registering as required by this Act or the underlying statutes or fails to obtain the prior written permission of the Authority before transferring a licence;

(c) fails to keep records as required by this Act or the underlying statutes;

(d) fails to comply with any order made by the Authority in terms of this Act or the underlying statutes;

(e) acts in disregard of any prohibition imposed by order of the Authority in terms of this Act or the underlying statutes;

(f) [fails to produce any licence issued to him or her under this Act or the underlying statutes on the demand of any authorized person, or who hinders or obstructs any authorised person in the exercise or performance by the latter of his or her powers, functions or duties in terms of this Act or the underlying statutes;]

has been required in terms of this Act or the underlying statutes to attend and make a statement or to produce any document or object before the Authority or the Commission who, without sufficient cause, fails to attend at the time and the place specified in the notice, or to remain in attendance until the conclusion of the inquiry or hearing for the purpose he or she is required or until he or she is excused by the chairperson to do so or fails to answer fully and satisfactorily any question lawfully put to him or her, or fails to produce any document or object in his or her possession or custody or under his or her control, which he or she has been required to produce;

[(f)] (g) wilfully interrupts the proceedings at any such inquiry or hearing or wilfully hinders or obstruct the Authority or the Commission or any member [thereof] of either or, in the case of the Commission, any panel, in the performance of its or his or her functions at the inquiry or hearing, is guilty of an offence and liable on conviction-

(i) in the case of an offence contemplated in paragraph (a) to a maximum fine of **[R250,000] R5,000,000;**

(ii) in the case of an offence contemplated in paragraph (b) to a fine not exceeding the greater of **[R1,000,000] R10 000 000** or 10% of the person or licensee's annual turnover for everyday or part thereof during which the offence continued;

(iii) in the case of an offence contemplated in paragraph (c),(d), and (e) of this subsection, to a fine not exceeding **[R1,000,000] R10,000 000;** and

(iv) in the case of an offence contemplated in paragraph (g) and (h) of this subsection, to a maximum fine of **[R250,000] R1,000,000.**

(4) [The court convicting a person of any offence referred to in subsection (3)(b) of this section may, in addition to any transmitters, apparatus and other equipment and any article, object or thing by means of which such offence was committed, to be forfeited to the Authority: Provide that such declaration must not be so made upon proof to the satisfaction of the court that such transmitter, apparatus, equipment, article, object or thing is not the property of the person so convicted and that, as regards such article, object or thing, the owner thereof was unable to prevent it from being used as a means to commit such offence.]

Revenue constituting any fine imposed by the Commission or any panel of the Commission on any person (other than a settlement or payment contemplated in section 17E(2)(e)) shall be paid to the National Revenue Fund within 30 days of receipt of such revenue.

Insertion of a new section 17I in Act 13 of 2000

28. A new section 17I is hereby inserted in the principal Act as follows:

“Filing a complaint with or giving notice of a dispute to the Authority or the Commission”

17I (1) A person who has reason to believe that a licensee is guilty of any non-compliance with the terms and conditions of its licence or with this Act or the underlying statutes may lodge a complaint with the Authority or the Commission within 60 days of becoming aware of the alleged non-compliance.

(2) The complaint must be in the prescribed form.

(3) Any person-

(a) who is in dispute with a licensee which dispute cannot be resolved despite the good faith efforts of both parties, and provided that any dispute resolution mechanism otherwise provided for has been exhausted, may refer a dispute to the Commission;

(b) who has requested interconnection or facilities-leasing from a licensee and been refused or who is unable to agree on the terms of interconnection or facilities-leasing may refer the dispute to the Commission, regardless of the provisions of any other Act, the underlying statutes, or the provisions of any commercial agreement.

(4) The notice of a dispute must be in the prescribed form.

(5) Any complaints or disputes that are brought to the Authority must be referred to the Commission without delay.”

Insertion of a new section 17J in Act 13 of 2000

29. A new section 17J is hereby inserted in the principal Act as follows:

“Transitional provisions”

“(1) The Council shall retain the services of the Complaints and Compliance Committee until such time as the Commission has been established, provided that the Minister shall establish the Commission in terms of section 17A within 6 months of the date of commencement of this section to enable the Complaints and Compliance Committee to complete the hearing and determination of any matter before it at the date of commencement of this Act.

(2) The Council shall require the Complaints and Compliance Committee to conduct a handover of those matters before it which it has not yet heard or to which it has not yet allocated a date for hearing, to the Commission on establishment, provided that any person whose matter is currently before the Complaints and Compliance Committee at the date of commencement of this section may, by agreement with the other parties to that matter, withdraw such matter from the Complaints and Compliance Committee and place it before the Commission at any time.

(3) Subsections (1) and (2) shall not operate so as to frustrate or delay the hearing and resolution of or decision by the Complaints and Compliance Committee of any matter properly before it at the date of commencement of this section.

Deletion of Chapter IV of Act 13 of 2000

30. Chapter IV of the principal Act is hereby deleted.

Insertion of new section 18 in Act 13 of 2000

31. A new section 18 is hereby inserted in the principal Act by the insertion of the following paragraph as the first section in Chapter V:

Liability

18 (1) The State Liability Act, 1957 (Act 20 of 1957), read with the changes required by the context, applies to the Authority and to the Commission, but a reference in the Act to "the Minister of the Department concerned" must be interpreted to refer to the chairperson of the Authority or the Commission, as the case may be.

(2) No councillor of the Authority or member of the Commission, staff person or advisor or contractor is liable for any report, finding, point of view or recommendation that is given in good faith and that is submitted to Parliament or made known under the Constitution or this Act."

Amendment of Chapter V of Act 13 of 2000

32. Chapter V of the principal Act is amended as follows:

(a) by the renumbering of sections 23, 24 and 25 as sections 19, 20, and 21;

(b) by the substitution for new numbered section 20 of the following paragraph:

"[24] 20. In the event of any conflict between the provisions of this Act and any other [prior] other law relating to the regulation of broadcasting, postal services, and [telecommunications] electronic communications, the provisions of this Act prevail."

(c) by the substitution for section 25 with the following paragraph as section 21:

"[25] 21. (a) This Act is called the Independent Communications Authority of South Africa Amendment Act, 2012 and comes into operation on a date determined by the Minister by Notice in the Gazette.
(b) Different dates may be fixed for the coming into operation of different sections of this Act by Notice in the Gazette.

MEMORANDUM ON THE OBJECTS OF THE ICASA AMENDMENT BILL, 2012**1. Background and objects**

- 1.1 The Minister has decided that in the intervening period prior to the development of a comprehensive ICT sector policy, certain amendments are necessary and appropriate in relation to both the Electronic Communications Act, 2005 ("ECA") and ICASA Act. The Minister does not intend to return to many of the changes proposed in the Amendment Bill of 25 June 2010 because of the number of adverse comments, having taken into account the need for change at that time, and issues that were relevant in the circumstances. The Minister thanks stakeholders for the comments submitted at that time, which have nonetheless been taken into consideration. The Minister has also revisited submissions made in 2005 ahead of the 2006 Amendment Act.
- 1.2 The changes now proposed are underpinned by the need for some institutional improvements to strengthen ICASA, clarify certain aspects of its powers, improve its efficiency, to conform the Act (and therefore ICASA) more closely to the requirements of the Public Finance Management Act, 1999 ("PFMA"), and to create the Complaints and Compliance Commission (the "Commission") to replace the Complaints and Compliance Committee (the "CCC"), following investigation into the workings of the Committee and the general impressions gained from the public and ICASA itself. Greater accountability and transparency is likely to result and we are certain that improved governance will also result in part from legislative changes but as much because of closer working between the Department and ICASA at policy level, and co-ordination of effort. This should not be read to suggest any limitation on ICASA's independence, which we canvass in more detail below.
- 1.3 We have revisited the Asmal report ("Report of the ad hoc committee on the review of Chapter 9 and associated institutions"). This report deals in detail with suggestions on funding of ICASA as well as other issues. The 6 criteria that ICASA suggested should define the funding and the models it proposed are sensible, but need oversight.
- 1.4 The Minister is also grateful to the South African Law Reform Commission ("SALRC") for certain suggestions in key areas affecting communications sector, namely, the institutional framework, the regulation of electronic communications, broadcasting, e-commerce, interception and monitoring and postal services, so as to provide a framework for the recommendations for repeal or amendments set out in subsequent paragraphs.
- 1.5 The Minister notes that some amendments are also proposed to the ICASA Act to clarify provisions, describe functions and powers in more detail, or avoid duplication or vagueness. In particular, since ICASA occupies an important place in the electronic communications sector, it will be useful and necessary to receive ICASA's views on electronic transactions and the interface between the use of electronic communications networks and services in electronic transactions. Accordingly we will be introducing

provisions to link the Electronic Communications and Transactions Act, 2002 ("ECT Act") more closely to the ECA and the ICASA Act.

1.6 The changes have been made focussing on 2 areas – structural and substantial.

1.6.1 Structural:

1.6.1.1 ICASA Council

1.6.1.2 ICASA's independence

1.6.1.3 Policy directions

1.6.1.4 The CCC

1.6.2 Substantial:

1.6.2.1 Sanctions and penalties

1.6.2.2 Regulatory Impact Assessments ("RIA")

1.6.2.3 Competition

1.6.2.4 Postal services

1.6.2.5 Liability

1.7 Finally although the Minister considers that the issues of (i) ICASA's independence and (ii) content regulation deserve more attention, the Minister has decided that these important matters should be dealt with in the context of the general sector review and as part of the Green Paper and White Paper processes ("Policy Review process").

2. Structure of ICASA Council, functions and powers, and staffing (sections 4, 5, 7, 11 and 12)

2.1 The size of the Council has given rise to difficulties in the past, in part because of the collective decision-making manner in which the Council operates. However, section 11(4)(a) provides that decisions should be taken by majority vote of councillors in office (and at meetings that are quorate) and section 11(4)(b) provides that the chairperson has a casting vote in the event of equal votes. Therefore the size of the council itself should not be a delaying factor.

2.2 There is no rule of thumb as to the appropriate size of the Council or any similar body. The number of councillors was increased so as to be able to better address the complexity of matters brought before ICASA. However significant efficiencies and enhanced performance has not been noticeable in the intervening period. The Minister proposes to reconsider this issue as part of the Policy Review.

- 2.3 Several changes have been suggested to the way in which the councillors are appointed and may be removed, and the requirements in relation to their qualifications, reporting, performance and meetings:
- 2.3.1 A new subsection 4(4) requires the council to have regard to policy directions from the Minister when any are given. The Authority is also required to implement an approach to regulation that can formally be recognised as a type of regulatory impact assessment (this is addressed in more detail below). The section also requires the Authority to act in a way that is evidence-based, proportionate, consistent, accountable and transparent.
 - 2.3.2 The Authority may conduct inquiries itself in terms of section 4B and it may establish committees for this or other purposes, but it must refer complaints and disputes under the Act, ECA and ECT Act, to the Complaints and Compliance Commission established in terms of the new provisions of section 17A. Inquiries may be conducted into any matter except where the matter may be or is one that is primarily of a competition-related nature, in which case subsection (7) will apply and ICASA is required to liaise with the Competition Commission in terms of its concurrent jurisdiction agreement. We deal in more detail with the regulation of competition-related matters below.
 - 2.3.3 Inquiries can be conducted by ICASA as previously under section 4C but the time periods within which they must be carried out and concluded have been shortened to accommodate concerns that such inquiries should render results more quickly in the interests of all involved. The types of issues that can be canvassed in an inquiry by the Council (as opposed to the Commission) are dealt with in more detail below.
 - 2.3.4 Having regard to the recommendations of the SALRC, and the formation of other Chapter 9 Institutions including the Auditor General and the Public Protector, we have noted that the President has in other cases, appointed members of a council after receiving recommendation from the National Assembly. However in the case of the electronic communications and broadcasting sectors, the ICASA Act empowers the Minister to appoint the councillors. In pursuance of the goal of institutional independence but in order to accommodate the concerns of stakeholders, we have proposed that the Minister should appoint councillors on the recommendation of and in consultation with, the National Assembly.
 - 2.3.5 The qualifications of councillors have been amended to include expertise and experience in the fields of, amongst others, broadcasting, electronic communications and postal policy or operations, public policy development, electronic engineering, law, information technology, content in any form, consumer protection, education, economics, finance or any other relevant expertise or qualifications.
 - 2.3.6 The Minister will appoint a chairperson. Councillors are required to serve full-time unless they are involved with academic pursuits or public sector tasks, which are not

remunerated other than by the transfer of honoraria. This is to ensure that councillors are first and foremost focussed on their role at ICASA.

- 2.3.7 The Minister may remove a councillor on one of several stipulated grounds. This is primarily to save time, whilst ensuring that strict and objective criteria are applied in the removal of any councillor.
- 2.3.8 Meetings of councillors must be held no less than once a month, but can be held more frequently.
- 2.3.9 Minutes of the meetings must be made public. This has been a source of some disquiet for stakeholders for some time and will ensure more transparency in the workings of ICASA, and therefore more administrative comfort for licensees. Confidential information that has been determined to be confidential because ICASA has followed the section 4D process, will be excluded from any minutes. ICASA must now keep a register of gifts and benefits received for public appearances, and must also keep a register of disclosures of any interest of a councillor in the private (ICT) sector or related industries and associations that must be open to inspection and on request, submitted to Parliament.
- 2.3.10 The CEO of ICASA may attend at any Council meeting although he or she may not vote. This is so that the administrative arm of ICASA (CEO and staff) and the operational or regulatory arm (the Council) can be more closely aligned by the flow of knowledge between them, and so that strategy can be co-ordinated. Insofar as the CEO is the accounting officer of ICASA in terms of the PFMA (section 36), the CEO should also be aware of any issues that may have an effect on the budget of ICASA.
- 2.4 The CEO must remain the accounting officer of ICASA because this is a PFMA requirement. ICASA is a "constitutional institution" under Schedule 1 of the PFMA. The CEO's roles are clearly set out in this Act and do not need to be duplicated in the ICASA Act. However, the role of the CEO in producing financial statements, having them audited by the Auditor-General and presenting them to Parliament has been restated to make it clear that this remains the role of the CEO, not the Minister or the Council, as some confusion has developed around this area in the past. The CEO must, however, present the same documents to the Minister at the same time.
- 2.5 The general powers of ICASA in relation to decisions about licensing are critically important and may not now be delegated to a councillor or committee of ICASA.
- 2.6 Section 14A has been amended to allow ICASA to appoint such experts as it may deem appropriate and necessary without consulting the Minister. We recognise that this was seen as encroaching on ICASA's ability to act independently and that it also constrained its ability to act quickly and within its own sphere of influence. Insofar as the ICASA budget is insufficient for the costs of a necessary expert(s), ICASA may approach the Minister for assistance.

2.7 ICASA is required to prepare a business plan for the year ahead at least once per year and to provide this to the Minister in terms of the amendments to section 16. This will enable more accurate forecasting of funding requirements, and better planning and liaison with the office of the Department of Communications. It will also enable more transparency and certainty in relation to stakeholders. The business plan must be published. If amendments are required to the business plan during the year they may be made provided they are explainable and justified.

3. Financing ICASA (sections 15 and 16)

3.1 Recognising the difficulties that have been experienced by ICASA in the past in appointing and retaining skilled resources and in carrying out the necessary regulatory impact assessments, research and inquiries, the Minister appointed external consultants to advise her on an appropriate funding mechanism for ICASA.

3.2 The report on the development of alternative funding model for ICASA will be considered in relation to the sector-wide Policy Review process as any changes to the current funding model must be underpinned by evidence, best-practice and potential impact on the National Revenue Fund.

3.3 No changes to the mechanisms set out in the Act are proposed at this time although the Minister will reconsider this issue during the course of the Policy Review process.

4. ICASA's independence (sections 3, 4, 5, 7, 8, 11A, 12, 14A and 16)

4.1 The importance of an independent and impartial regulator for the communications sector cannot be overstated. There are dicta on the importance and bounds of independence in state institutions.¹ Moreover, impartiality is a critical aspect of natural justice, now protected by the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

4.2 The independent Broadcasting Authority ("IBA") was established in 1993 to inter alia, oversee free and fair broadcasting election coverage for the 1994 elections. The importance of an open and democratic broadcasting environment is critical to the support of the rights enshrined in section 16 of the Constitution which guarantees the right to freedom of speech and expression; and section 32 which guarantees the right of access to information (specifically section 32(1)(b), information required for the exercise and protection of any rights). Content-related issues are inherent in broadcasting as are the concepts of diversity and broad representation of views. For all of these reasons, the role of an independent broadcasting authority was enshrined in Chapter 9 of the Constitution of the Republic of South Africa ("the Constitution"). This Chapter provides for "State Institutions supporting Constitutional Democracy". Noticeably absent from this Chapter however, is a reference specifically to ICASA, and moreover, the other Chapter

¹ See for example, *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC); *New National Party v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC); *R v Valente* (1985) 24 DLR (4th) 162 (SCC); and *Financial Services Board and Another v Pepkor Pension Fund and Another* 1999 (1) SA 167 (C).

9 institutions do not fall within any specific department, whereas ICASA does – in the same way that other regulatory authorities in other countries fall within state departments.

- 4.3 The Constitutional Court of South Africa has stated that an institution will only be considered to be “independent” if it enjoys a certain degree of protection from government control. In order to determine whether an institution is independent, regard must be had to provisions regarding the appointment of officers of the institution; provisions regarding the tenure and removal of officers in the institution; and provisions concerning institutional independence.²
- 4.4 While there is no closed list of factors to determine independence and impartiality, the Constitutional Court has stated that the correct standard is an objective one, involving an enquiry into how the reasonable observer would perceive the independence of the institution in question.³ Taking this into account, we have made several amendments to the ICASA structure in sections 5 to 12 whilst more significant amendments, if required, will be left to the Policy Review process.
- 4.5 The Minister also agrees that it is inconsistent with the constitutional guarantee of independence for ICASA or individual councilors to be accountable to any institution or group of persons other than the National Assembly but at the same time, the Minister has a crucial role to play in the sector and must remain involved, particularly in the period during which the sector review will take place. The Act provides that the evaluation of the performance of the Chairperson or other councilor must be conducted by a panel constituted by the Minister, in consultation with the National Assembly. The Performance Management System for the Chairperson of ICASA and other councilors, as adopted by the National Assembly, presents Government, the National Assembly as well as ICASA with a robust mechanism that evaluates and measures performance. This Performance Management System provides an opportunity for all parties to engage constructively and provide for more rationality in respect of the resource allocation process so that funds are allocated where they are most likely to assist in the achievement of goals.
- 4.6 Given the importance of independence and impartiality and the constitutional imperatives, several other amendments have been made to the appointment of and service by councilors, their remuneration, and performance tracking mechanisms. The Minister has noted the suggestions of the SALRC in relation to performance contracts

² See *First Certification Judgment – Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC); *Second Certification Judgment – Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa* 1997 2 SA 97 (CC).

³ *Van Rooyen and Others v the State and Others* 2002 (5) SA 246 (CC) at paras 32-34. See also *South African National Defence Union And Another v Minister of Defence and Others* 2004 (4) SA 10 (T) and *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC).

with councilors, namely that performance should not be measured individually but rather against the Council as a whole, who in turn may measure the performance of the management of ICASA as a whole. Amendments have been proposed to section 6A in this regard, to refer to a "collective" performance management system. Specific sections have been referenced to introduce more certainty concerning the criteria for performance.

- 4.7 The Constitutional Court has referred to two elements of independence that are also relevant to ICASA. The first is "financial independence" which implies the ability to have access to funds reasonably required to enable the discharge of the functions the institution is obliged to perform in law. The second factor is "administrative independence", which implies that there will be control over those matters directly connected with the functions the institution has to perform under the Constitution and relevant legislation.⁴
- 4.8 Several provisions in the ICASA Act may appear to enable the Minister to have influence over the administration of ICASA which may suggest a lack of independence. For example, the appointment of foreign experts in this field. We agree that the requirement in law that the Minister must approve these appointments could be seen to create a potential barrier to the effective and efficient functioning of the Authority, which may serve to also limit the discretion, independence, and impartiality of ICASA. Amendments have been made to address these concerns.
- 4.9 At the same time the Minister has considered other ways in which the impartiality and accountability of ICASA can be improved. In this regard, the Minister has proposed an amendment to section 12 to require that any directorships, partnerships and consultancies of councilors and senior officials in ICASA to be disclosed in the annual report to Parliament.⁵ In accordance with the requirements of the Asmal Report, the Minister will also require that a register be kept for declaration of any gift, benefit or gratuity received or derived by a councilor as a result of his or her actions or omissions under the Act, under section 7, which as indicated above, must be open for inspection in terms of the amendments to section 12.
- 4.10 Under section 11A, minutes of Council meetings must be published in the ICASA library and on the ICASA website within 14 days of the minutes having been signed. This proposal is aimed at ensuring the free flow of information in the interest of transparency. Confidential information will not be included in the publication provided that it has been determined to be confidential under section 4D. At this point we wish to note that the provisions of this section should not be used in circumstances where information is not truly "confidential" as described. ICASA is entitled to information to assist it in the carrying out of its functions and

⁴ See *New National Party v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC).

⁵ This recommendation was a direct finding of the report of the Asmal Committee, at p217.

the application of its powers, and insofar as that information is in any event required to be published (for example in a reference interconnection offer), the information may not be classified as "confidential" by licensees.

- 4.11 Under section 12, the Minister has required ICASA to publish its Code of Ethics which must contain ICASA's commitment to certain principles including the highest standard of professionalism, and principles of corporate governance generally applicable to commercial and administrative bodies. ICASA's performance can be measured against this Code. This Code also echoes the kind of principles that Chapter 9 institutions are expected to uphold. Specifically, section 12(6) requires the Code to include the governance principles according to which the Authority or the Council, as the case may be, shall function which shall, among other things, include the principles of mutual respect and collective responsibility; the requirement that the Council shall have all information necessary to make an informed decision, taking account of all relevant facts at its disposal; and a commitment by members of the Council to the highest level of professionalism and corporate governance. In this regard we have considered the sort of codes and principles that govern other regulatory authorities in South Africa and elsewhere.
- 4.12 Finally in terms of section 16 and as set out above, ICASA is required to present its own annual reports to the National Assembly and at the same time, to the Minister. This is in line with the reporting requirements of other Chapter 9 institutions.

5. Policy directions (sections 3 and 4)

- 5.1 In order to clarify the way in which policy directions may be issued by the Minister in relation to each of ICASA and USAASA, additional provisions have been included in the ICASA Act in this regard in section 3.
- 5.2 There are new provisions on regulatory action included in section 4, which, taken together, are intended to support and extend ICASA's authority, within the requirements of accountability and transparency. ICASA may be independent but as an administrative authority, it should not act alone or outside of national and sector policy.
- 5.3 The Minister has considered numerous laws in other countries including Malaysia, Uganda, Kenya, Namibia, and the United Kingdom which make use of policy directions or similar types of instrument as part of the law. Whilst recognising that these regimes are not dealing with the same issues, or governed by the same Constitution, it is nonetheless instructive to have regard to the approach taken. The general trend is to allow the relevant Minister to give policy guidelines to the national regulatory authority (an "NRA") which the NRA "shall have regard to" and in practice, the directions are applied by the NRA as far as practically possible.

- 5.3.1 In Malaysia, the Minister is empowered to give directions to the Commission which is the NRA, under the Communications and Multimedia Act, 1998, and “*The Commission shall exercise its powers conferred under this Act in a manner which is consistent with a Ministerial direction*”. In addition, “*the Minister may give to the Commission directions of a general character not inconsistent with the provisions of this Act relating to the performance of the functions and powers of the Commission and the Commission shall give effect to such directions.*” Also noteworthy is “*The Commission shall exercise its powers conferred under this Act in a manner which is consistent with the determination*”.
- 5.3.2 In Uganda, “*The Minister may, after consultation with the Commission, give to the Commission guidelines on sector policy as may be appropriate*” and one of the functions of the Commission is “*to comply with policy guidelines on sector policy given by the Minister, in accordance with section 12 of this Act*”. We note for completeness that the Commission is nonetheless required to “*exercise its functions independent of any person or body.*”
- 5.3.3 In Namibia, “*the Minister may issue general policy guidelines to the Authority, not inconsistent with the provisions of this Act, subject to which the Authority must exercise the powers vested in it by virtue of the provisions of this Act. ...The policy guidelines referred to in subsection (1) must be prepared after consultation with the Authority.*”
- 5.3.4 In the United Kingdom, there are a host of matters in which the Secretary of State may instruct, order or direct OFCOM, the NRA, to do or refrain from doing something. Specifically these are:
- 5.3.4.1 s5: powers to give directions in relation to the promptness standard;
- 5.3.4.2 s109: powers to give directions regarding the application of the Code powers by OFCOM which may have effect subject to restrictions and conditions determined in regulations published by the Secretary of State;
- 5.3.4.3 s132: powers to require the suspension or restriction of a provider’s entitlement to do certain things if there are reasonable grounds to believe that it is necessary to do so in order to protect the public from any threat to public safety or health, or in the interests of national security – and OFCOM must comply;
- 5.3.4.4 s156: directions may be given regarding spectrum by order whether general or specific, regarding OFCOM’s carrying out of functions in relation to spectrum management; and
- 5.3.4.5 Schedule 8: although not specifically related to the point, there are a number of decisions and orders that are not subject to appeal.
- 5.3.5 We note, finally, that the ITU’s ICT Regulation Toolkit⁶ has this to say regarding institutional independence and the regulatory authority: “*Although complete “independence” is nearly impossible to attain, the regulator should have sufficient*

⁶ <http://www.ictregulationtoolkit.org/en/Section.2045.html>

independence to implement regulations and policies without undue interference from interested parties such as politicians or other government agencies (functional independence). The institutional regulations put in place by laws and regulations as well as the administrative structure of the regulatory authority are critical to ensure such independence. The degree of independence differs considerably from country to country... As stated in the 2000 OECD Working Party Paper on Institutional Structures and Responsibilities,¹ the ultimate objective of the administrative structure of regulation is not to have an independent regulatory body, but rather an effective regulatory framework. This framework and its implementation determine the ability of a country to achieve policy objectives such as making the market more competitive, stimulating technological diffusion and enhancing efficiency, and ensuring that consumers benefit from these developments.

The regulator is, in fact, a stakeholder in this process of market development. This makes transparent, practical cooperation and communication between the regulator and the policy-maker (as well as with other stakeholders) essential to ensuring that regulation is responsive to government policy decisions and the realities of the market.

Although functionally independent, the regulatory authority will have relationships with various other entities as described in the paragraphs below... [which include the Minister of Communications].”

- 5.4 The Minister has determined that the provisions of Chapter 14 of the ECA should be amended to permit policy directions to be given directly to the Universal Service and Access Agency (USAASA) on any matters in relation to the achievement of the objects of the ECA in relation to universal service and access. This is to ensure that an apparent lacuna in this regard is corrected. The Minister has oversight of USAASA and has published a universal service and access policy, and must accordingly have the ability under law to issue directions to USAASA from time to time in the same way as she issues directions to ICASA.
- 5.5 The Minister is committed to discussing policy directions with ICASA and USAASA prior to issuing them to avoid any confusion and to ensure that they are in fact capable of implementation. Policy directions are not intended to encroach on the independence of ICASA, but to ensure co-ordinated and co-operative working between the Minister and ICASA in the public interest.
- 5.6 Policy directions may also be given to the South African Post Office, and the provisions of the Postal Services Act, 1998 and the Post Office Act, 1958, as amended, have been transposed to the ICASA Act for consistency with the other Acts in which policy directions are addressed.
- 5.7 As indicated above, the Minister has also carefully considered the Department of Justice’s guidelines for administrators.
- 5.8 The Minister will consider the issue of whether or not ICASA should be required to *implement* policy directions, during the course of the further review of the sector.

6. The Complaints and Compliance Commission (sections 1, 4, 15A, and 17A to F)

- 6.1 The ICASA Act was first amended by the Independent Communications Authority of South Africa Amendment Act 3 of 2006. One of the most significant changes introduced by the that Amendment Act was the establishment of the Complaints and Compliance Committee ("CCC") to investigate violations of the Independent Communications Authority of South Africa Act and of the underlying statutes, namely the Broadcasting Act, Act 4 of 1999, the Postal Services Act 124 of 1998, and the ECA.
- 6.2 Unfortunately, the efficacy of the Act and of the CCC itself has been undermined because, as it is currently worded, there are significant lacunae in the Act as regards breaches of the Act or the underlying statutes by persons other than licensees. Throughout section 17A to 17I we have therefore replaced the word "licensee" with the word "person" in certain cases in order to ensure that persons who are not licensees but who are in breach of the Act or the underlying statutes can bring a complaint or a dispute to the Commission (its new name) in terms of this section.
- 6.3 It has also become clear that changes are required to the constitution of the CCC within ICASA and their respective roles and responsibilities. As ICASA may itself be a complainant, it is important to separate the powers and functions of the CCC in relation to making a finding and determining a sanction, from those of ICASA. Although decisions of both bodies should be capable of review or appeal, as the case may be, it is not appropriate for the CCC to recommend sanctions to ICASA to take a final decision on them, when ICASA may itself be acting in this case as judge and jury, and complainant.
- 6.4 It has also, through the passage of time, become clear that the procedural nature of the CCC and the types of issues that it is being asked to consider require legal knowledge of a specialized kind.
- 6.5 The Minister has concluded that it would be appropriate to constitute the CCC as an entirely separate body from ICASA. After debate regarding whether or not the strengthening of the CCC as a committee would assist, the problem remained that the committee would nonetheless fall within the purview and subject to the Authority of ICASA without amendments to the provisions on committees in general. Since it is useful to be able to constitute committees, for example, in relation to electronic transactions, it was decided to retain the provisions regarding the establishment of other committees but to establish the Complaints and Compliance Commission separately from the establishment of committees.
- 6.6 Having regard to legislation already on the statute books that deals, for example, in one Act with the establishment of the Competition Commission and the Competition Tribunal, or with the National Consumer Commission and the Consumer Tribunal, the Minister has decided that it is not inappropriate or impossible legally to deal with a commission within the ambit of the ICASA Act, particularly as the issues with which the Commission will be concerned will be those that the ICASA Act is also dealing with.

- 6.7 The inclusion of the Commission within the Act enables easy cross-referencing and until the review of the sector legislation that is taking place now is completed, creating any additional legislation is not warranted.
- 6.8 We also had regard to the situation of bodies like the CCC in other jurisdictions and it is a mixed bag. Malaysia, for example, deals with disputes and complaints within the NRA, although they may be taken on appeal or review to a Tribunal which is also constituted under the same Act.
- 6.9 We also considered the position in the United Kingdom and Namibia.
- 6.9.1 In these other jurisdictions, dispute resolution and complaints notices are heard and dealt with by the regulatory authority itself. It may delegate any of its responsibilities including this one. The legislation deals with all of these matters in one law. Most jurisdictions provide that the regulatory authority may do anything that appears to it to be reasonable and necessary to fulfil its mandate.
- 6.9.2 There is no material difference between the construction and powers and functions of the CCC and the other industry bodies we have considered in South Africa in relation to decisions, disputes and complaints.
- 6.9.3 There is therefore nothing untoward therefore in having created and continuing to keep the CCC as a committee of ICASA, to hear disputes and resolve them and to receive complaints and decide them.
- 6.10 However, in taking a decision on the creation of the Commission to replace the CCC, the Minister also took into account the number and type of complaints currently being brought to the CCC, the time to consider, and issues faced by the CCC since its constitution in 2007, and its own recommendations. The views of ICASA were also sought in this regard. The information that was presented to the Minister was the following:
- 6.10.1 The CCC has received in excess of 150 complaints since 2007. In the past 2 years the number of complaints has exponentially increased. This trend is likely to continue at least in the short to medium term as the market increases in size and sophistication and as additional regulatory changes come online to facilitate broadband rollout and local loop unbundling.
- 6.10.2 Of those complaints received, has rejected approximately half for reasons of jurisdiction, for example, complaints regarding labour issues and consumer complaints that do not fall within regulations published by ICASA.
- 6.10.3 Of the complaints considered, the CCC has resolved 51 complaints, and this year had another 13 pending when this document was drafted.

- 6.10.4 The CCC considers that its mandate cannot be properly fulfilled because of a lack of enforcement powers, the fact that it must recommend to ICASA a course of action for ICASA to decide on, and its lack of resources.
- 6.10.5 The CCC's view is that ICASA should not be permitted to act as investigator, complainant, prosecutor and judge, which in some of the matters before the CCC is currently the case and has been the case in the past.
- 6.10.6 A number of the matters brought before the CCC, on analysis, require in-depth knowledge of the legislation that governs the sector, legal proceedings in general, and the relevance or otherwise of legal argument. Technical and economic knowledge is also becoming more important to a fair and informed decision.
- 6.11 Having regard to many of the submissions on the 2006 amendments, we have introduced a separate body within the ambit of the Act but separate from ICASA, with a right of appeal or review to the courts. We have extended this right of appeal and review specifically (although review is covered under PAJA) to ICASA and new sections have been inserted to deal with appeals and reviews of decisions of the new Commission and ICASA.
- 6.12 Members of the Commission should have a legal background and legal qualifications at a senior level. Building a body of precedent that industry and its stakeholders can rely on is equally important and therefore the Minister considers that a panel should be appointed on a full-time basis and the Minister has considered a panel of the sort anticipated in the Competition Act, 1998, ("Competition Act"), in relation to the appointment of the Tribunal. In other words, it may be appropriate to constitute the panel from a number of candidates from time to time on a rotating basis. The Minister seeks the views of the public in this regard.
- 6.13 In the interim, the Minister has determined that the panel should be assisted by experts on a rotational basis. This proposal has been included for 2 reasons – to emulate the staff section in the Competition Act, and also to enable the Commission to appoint experts to assist it from time to time, where matters are particularly complex. The scope of expertise is taken from the previous section 17A. The Commission's members are therefore appointed on a part-time basis other than the chairperson who will be fulltime.
- 6.14 The provisions of section 17C in regulations to be passed by the Authority are to be deleted. The powers of the CCC which are set out in the ECA should be deleted to avoid confusion as to which law applies, although the ICASA Act is specifically stated to take precedence over any other Act.
- 6.15 The Commission, which is created pursuant to the proposed amendments, will enable the appointment of separate panels to hear complaints or adjudicate

disputes. The Commission will determine its own rules of procedure, in the same way that the Competition Tribunal determines its own rules. The rules of High Court motion proceedings may be a good point of departure.

- 6.16 To ensure that there is an appropriate level of expertise (technical, legal, economic and market), the Commission may be assisted by advisors identified by ICASA. If ICASA fails or refuses to identify advisors, then the Commission may appoint advisors from its own selection. Each panel may use the services of as many advisors as it deems necessary. The reason for asking for ICASA's input here is that it should be cognisant with industry experts and be able to make quick and useful recommendations to the Commission. Advisors will not be decision-makers so they do not need to be selected or appointed by the Minister.
- 6.17 The Commission may, through its panels, determine a complaint or dispute and impose certain remedies, orders, findings and fines in accordance with the fines provided for in regulations, or if none are provided, then in accordance with the revised fines set out in section 17H. In addition, the Commission, through a panel, may determine a dispute and impose a settlement which is based either on the commercial terms of the agreement if any, between the parties, or equity, and in every case, the order or settlement can be enforced as if it was an order of the High Court.
- 6.18 Finally, it is necessary to distinguish certain matters from one another for the sake of absolute clarity:
- 6.18.1 ICASA may still inquire into, review, monitor, investigate and enforce any matter that it is empowered to, under the ICASA Act. It may also establish committees.
- 6.18.2 ICASA may itself (and must in certain cases which are set out in the Act, specifically at new sections 4B(1) and 17C) refer disputes and complaints to the Commission. Consequential changes are required to Chapters 7 and 8 to refer interconnection and facilities-leasing disputes to the Commission.
- 6.18.3 However, where ICASA wishes to investigate a matter that has not come before it as a dispute or complaint, for example, the practice of refilling (as a general practise in the market), or a competition-related matter (for example a concern that a particular market is not competitive), or the principles on rapid deployment of facilities may take place, it may use its powers under section 4B for this purpose. If the matter is later found to form the basis of a complaint or dispute, it must then be referred to the Commission along with any finding made by ICASA.
- 6.18.3.1 The Commission is not bound by this finding.
- 6.18.3.2 ICASA should *not* carry out an inquiry in any matter which is likely to or which is in fact, a complaint or dispute.

- 6.18.4 Research and development may be carried out within or outside the ambit of this section.
- 6.18.5 Hearings in relation to consultation documents and discussion papers may be held under section 4 of the ECA by ICASA, in the ordinary course.

7. ICASA's powers and functions in relation to sanctions, and other sanctions and penalties (sections 4(3), 12 and 17H)

- 7.1 Although section 74 of the ECA provides for limited sanctions in certain respects, and sections 17A to 17E deal (currently) with the powers of the CCC in relation to disputes and complaints, there is no specific power given to ICASA to determine penalties or sanctions as the case may be, even under regulation.
- 7.2 The Minister has remedied this by proposing a new power for ICASA in section 4(3)(p). ICASA must be guided by the principles of administrative justice in this regard.
- 7.3 The powers of the new Commission (which will replace the CCC) and ICASA in this regard have been limited with reference to specific levels of fines and other remedies in section 17H. The fines have been increased significantly. The purpose of the increase is to take account of the change in the value of money since the Act was first passed, and to ensure that activities that are undertaken by the Authority under legislation and regulations can be effectively enforced so as to constitute a disincentive to those licensees and other persons who may wish to operate outside the ambit of the sector legislation.
- 7.4 The Minister believes that a threat to civil liberty should outweigh the payment of a financial penalty and therefore sanctions may include imprisonment for certain offences, in the alternative. Penalties may be imposed up to a maximum fine or maximum term of imprisonment.
- 7.5 Some consequential changes to section 74 of the ECA may also be proposed.

8. ICASA's powers and duties to carry out a regulatory impact assessment (section 4(4))

- 8.1 It is an important aspect of any regulatory change proposed that its potential impact be determined in advance to ascertain if the change is required and appropriate. In many countries this is referred to as an "evidence-based approach to policy-making" or "regulatory impact assessment" ("RIA"). This is not an easy or a simple process but the Minister believes it is a necessary and important one and one which unfortunately has not been a standard or even a common approach by ICASA.
- 8.2 Significant research has been undertaken elsewhere on an appropriate model. Although in 2005 research was also conducted in South Africa as to whether or not RIA were required given the specific provisions of certain laws in South Africa and the report concluded that sufficient safeguards existed in legislation to not warrant RIA on the

whole, the pace of technological change, market needs, and the application of competition law principles and economics within the electronic communications industry suggests that this conclusion is no longer valid.

8.3 Accordingly the Minister has required ICASA to introduce a RIA to its regulatory toolbox. The Minister approves of the OECD guidelines in this regard, attached to this document.

8.4 The Minister notes, for the avoidance of doubt, that section 4B of the ICASA Act which deals with inquiries by ICASA, is not and never was intended to constitute a regulatory impact assessment or any form of research and development. Section 4B applies to general inquiries by ICASA for purposes of monitoring, enforcing and investigating.

9. ICASA's powers and functions in relation to competition (sections 1, 4(6), and 4B(7))

9.1 The Competition Amendment Act, 2009, made adjustments to each of sections 3, 21 and 82 of the Competition Act in relation to concurrent jurisdiction between the Competition Commission and regulatory authorities in other sectors. In fact, ICASA concluded a concurrent jurisdiction agreement with the Competition Commission which was gazetted in 2002 as GG23857.

9.2 Although amendments may be required to this agreement, no further amendments are required to the ICASA Act other than to recognise the existence of these provisions in the Competition Act. The Minister recommends that this agreement be reviewed at least once every 3 years – and prudence dictates that this be reviewed as soon as possible given the long period of time since it was concluded.

9.3 The purpose of this agreement is to avoid forum-shopping which the sector has experienced in the recent past, by determining which authority is best-placed to hear a particular matter; and also to clarify that ICASA's powers and functions should primarily be used to regulate this sector *ex ante* (in anticipation), whereas the Competition Commission's powers and functions may be used to impose *ex post* (after the fact) liability.

10. ICASA's powers and functions in relation to electronic communications and electronic transactions (sections 1, 4 and 4(3)(o))

10.1 If there are legal, statutory or non-statutory barriers to conducting business electronically as compared to traditional means, development of e-commerce is stunted. These matters which are interlinked practically should be interlinked in law too.

10.2 The Minister therefore proposes to allow for the introduction of additional roles for ICASA in relation to electronic transactions. Specifically if ICASA wishes to

make recommendations to the Minister on any matter falling (strictly speaking) within the ambit of the ECT Act, then it should be free to do so.

- 10.3 It may be appropriate in due course, to introduce a new committee within ICASA for this purpose. This will not however, be legislated at this point.
- 10.4 Additional changes will be made to the ECT Act to facilitate the changes to the ICASA Act. In particular a new definition of "electronic transaction" has been inserted in the ICASA Act which will replace the definition of "electronic communication" and other related definitions in the ECT Act. In creating this definition we have had regard to the generally accepted definition proposed by the OECD.

11. ICASA and its powers and duties in relation to postal services (sections 1, 3 and 4)

- 11.1 Although separate legislation exists for the regulation of postal services which describes the role of ICASA in the regulation of postal services, the Minister considers that it is more appropriate in the context of a multi-functional regulatory authority to place all the functions of ICASA in relation to its broad powers in the same section.
- 11.2 Accordingly unless and until the Postal Services Act is amended subsequent to the general sector review, the powers and functions of ICASA in relation to postal services will be encapsulated in section 4 of the ICASA Act.
- 11.3 Consequential amendments will be made to the Postal Services Act.

12. Liability (section 19A)

The Act has been amended by the deletion of section 14D and a new section has been introduced to refer more completely and accurately to the State Liability Act as section 19A.

The Minister seeks your submissions in writing on the proposed changes to the Act.

The OECD Reference Checklist for Regulatory Decision-Making

1. Is the problem correctly defined?

The problem to be solved should be precisely stated, giving evidence of its nature and magnitude, and explaining why it has arisen (identifying the incentives of affected entities).

2. Is government action justified?

Government intervention should be based on explicit evidence that government action is justified, given the nature of the problem, the likely benefits and costs of action (based on a realistic assessment of government effectiveness), and alternative mechanisms for addressing the problem.

3. Is regulation the best form of government action?

Regulators should carry out, early in the regulatory process, an informed comparison of a variety of regulatory and non-regulatory policy instruments, considering relevant issues such as costs, benefits, distributional effects and administrative requirements.

4. Is there a legal basis for regulation?

Regulatory processes should be structured so that all regulatory decisions rigorously respect the "rule of law"; that is, responsibility should be explicit for ensuring that all regulations are authorised by higher-level regulations and consistent with treaty obligations, and comply with relevant legal principles such as certainty, proportionality and applicable procedural requirements.

5. What is the appropriate level (or levels) of government for this action?

Regulators should choose the most appropriate level of government to take action, or if multiple levels are involved, should design effective systems of co-ordination between levels of government.

6. Do the benefits of regulation justify the costs?

Regulators should estimate the total expected costs and benefits of each regulatory proposal and of feasible alternatives, and should make the estimates available in accessible format to decision-makers. The costs of government action should be justified by its benefits before action is taken.

7. Is the distribution of effects across society transparent?

To the extent that distributive and equity values are affected by government intervention, regulators should make transparent the distribution of regulatory costs and benefits across social groups.

8. Is the regulation clear, consistent, comprehensible and accessible to users?

Regulators should assess whether rules will be understood by likely users, and to that end should take steps to ensure that the text and structure of rules are as clear as possible.

9. Have all interested parties had the opportunity to present their views?

Regulations should be developed in an open and transparent fashion, with appropriate procedures for effective and timely input from interested parties such as affected businesses and trade unions, other interest groups, or other levels of government.

10. How will compliance be achieved?

Regulators should assess the incentives and institutions through which the regulation will take effect, and should design responsive implementation strategies that make the best use of them.
