



Re-shaping the Electronic Communications Regulator in South Africa

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The Independent Communications Authority of South Africa Act (ICASA Act) was promulgated in 2000 to create the Independent Communications Authority of South Africa (ICASA), an independent regulator, to replace the then Independent Broadcasting Authority (IBA) and South African Telecommunications Regulatory Authority (SATRA).

In terms of the ICASA Act, ICASA acts through its Council. It may, however, establish committees to which it may delegate or assign functions. It may also delegate any power or duty (excluding the power to make regulations) to any councillor or to the chief executive officer (CEO).

The Electronic Communications Act (EC Act) came into force in 2006. The driving force behind the legislation was the convergence of networks and services. The EC Act replaced the Telecommunications Act and the Independent Broadcasting Authority Act (IBA Act), which had regulated the broadcasting segment of the industry.

Also in 2006, the ICASA Act was amended. The 2006 amendments changed the ICASA Act in a number of ways, including a change to the appointment procedures for ICASA councillors, resulting in the Minister having more power in that regard, and the establishment of a Complaints and Compliance Committee (CCC), to hear complaints and other matters and thereafter make recommendations to ICASA Council.

Even prior to the coming into force of the ICASA Act, there had been an almost constant struggle between the relative powers of the independent regulators on the one hand and the Minister of Communications on the other. Since the coming into force of the ICASA Act, there has also been a struggle to effectively implement the legislation due to uncertain or unworkable relationships between ICASA Council and the CEO and ICASA Council and the CCC.

New amendment legislation recently released by the Minister of Communications for public comment (Notice 650 of 2010 in Government Gazette 33324 dated 25 June 2010) is a further attempt to get the balance right for enabling of an effective and efficient

regulator. In this article, we look at the specific proposed amendments to see whether they will indeed contribute toward a more effective and efficient regulator.

ICASA Amendment Bill

The [ICASA Amendment Bill, 2010](#) is aimed at clarifying the separate responsibilities of the CEO and Council, improving turn around times for complaints by the CCC and providing for the creation of a Tariff Advisory Council by ICASA, according to the memorandum attached to the draft Bill.

Some further notable proposed changes brought about by the Bill include the following.

- The addition of a provision making it ICASA's obligation to implement policy and policy directions.
- The addition of a provision that the Chairperson of ICASA Council must perform such functions as the Minister may determine from time to time.
- The addition of a provision that empowers the Minister to assign specific responsibilities to councillors (such as with respect to licensing, economic regulation, or postal matters) when appointments are made.
- The addition of a provision that specifies that ICASA is obligated to continue to implement decisions it makes even if a court case is filed, unless a court directs otherwise. Under current legislation, ICASA has been known to halt the implementation of its own decisions once a court case has been filed.
- The addition of the inclusion of a provision that prohibits ICASA Council from delegating the authority to grant individual licences. Currently, it can delegate such authority to a councillor or a committee.
- Provisions setting strict timelines for the conclusion of inquiries held by ICASA.
- The inclusion of provisions clarifying the various roles of Parliament and the Minister in evaluating the performance of ICASA Councillors.

CEO

The notable changes in the Bill concerning the CEO include the following.

- The designation of the CEO is changed to Chief Operations Officer (COO).
- The addition of a provision empowering the COO to appoint staff. Currently, ICASA Council appoints staff.
- The COO's designation of accounting officer in terms of the Public Finance Management Act is deleted.

CCC

The notable changes in the Bill concerning the CCC include the following.

- The members of the CCC are to be nominated by the Minister in consultation with Parliament. Under the current legislation, ICASA must establish the CCC without input by the Minister or Parliament.
- The CCC will no longer make recommendations to Council, but instead will make enforceable decisions. Under the existing legislation, Council ultimately makes decisions on complaints.
- The days required to conclude a complaint are shortened.
- Decisions of the CCC are deemed to be decisions of ICASA.

Minister

There are various notable provisions in the Bill expanding the powers and control by the Minister. In addition to those provisions empowering the Minister with input into the appointment of the CCC, there are two other provisions expanding the Minister's powers in respect of appointments.

- The addition of a provision that the Chairperson of Council must perform such functions as the Minister may determine from time to time. Currently, the Chairperson's functions are fully set out in the legislation.
- The addition of a provision that obligates the Minister to assign specific responsibilities to councilors (such as with respect to licensing, economic regulation, or postal matters) when appointments are made. Currently, ICASA may determine its own internal distribution of authority.

Finally, there is the addition of a provision making it ICASA's obligation to implement policy and policy directions. Currently, because of the Constitutional mandate that the broadcasting regulator must be independent, ICASA is only required to take such policies and policy directions into account when it carries out its independent responsibilities.

CONCLUSION

Many of the amendments set out in the ICASA Amendment Bill will likely contribute to a more efficient regulator. For example, the inclusion of deadlines for inquiries and complaints is a positive step. It is also anticipated that the provisions clarifying the role of the CEO/COO will contribute to a more efficient regulator. Furthermore, the obligation placed on ICASA to continue to implement its decisions even after such decisions have

been taken on review (unless otherwise ordered by a court) will contribute to a more effective regulator.

On the other hand, certain provisions, such as those prohibiting the delegation of authority in respect of individual licensing, will likely have the opposite affect.

In addition, there are a set of amendments that increase the control of the Minister over the functions of the independent regulator. For example, the Minister is to be involved in the establishment of the CCC. The Minister also will have authority over the internal division of duties between ICASA Councillors and may order additional functions in respect of the Chairperson. Finally, ICASA would, if the legislation were promulgated, be obligated to follow policies and policy directions, whatever their nature.

In conclusion, with the proposed amendments, the balance would be tipped again in favour of a more controlled regulator. However, much of the control would not be set out in legislation, but is rather left to the Minister. This is not, history has shown, a good way to ensure an effective and efficient regulator, especially in a market where the state itself holds many interests in those who are to be regulated. This is the case in South Africa.

Therefore, although the bulk of the amendments are welcomed, those increasing the Minister's powers in respect of appointments and controlling how ICASA carries out its independent functions should be eliminated before promulgation.

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