National Association of Broadcasters' submission
on the Department of Communications'
Draft ICASA Amendment Bill

10 January 2013

1. INTRODUCTION

1.1 The National Association of Broadcasters ("the NAB") is the leading representative of South Africa's broadcasting industry. It aims to further the interests of the broadcasting industry in South Africa by contributing to its development. The NAB members include:

(a) Three television public broadcasting services, and eighteen sound public broadcasting services, of the South African Broadcasting Corporation of South Africa ("the SABC");
(b) All the commercial television and sound broadcasting licensees;
(c) Both the major licensed signal distributors (electronic communications network service operators), namely Sentech and Orbicom;
(d) Over thirty community sound broadcasting licensees, and one community television broadcasting licensee, namely, Trinity Broadcasting Network ("TBN").

1.2 On 23 November 2012, the Department of Communications ("DoC") published the draft Independent Communications Authority of South Africa Amendment Bill, 2012 ("the draft Bill") in Notice 569 of 2012, in Government Gazette No. 35901. Interested persons were invited to make representations on the draft Bill within 30 working days of publication of the notice.

1.3 The NAB welcomes the opportunity to submit its written representations. The NAB hereby requests the opportunity to make oral representations in the event that the DoC decides to hold hearings in respect of the draft Bill.

1.4 The NAB wishes to make a general comment that in light of the intention to conduct a comprehensive review of the ICT and broadcasting policy landscape stated by the Minister of Communications, Dina Pule, in January 2012[1], any amendments to the Independent Communications Authority Act 13 of 2000 ("the ICASA Act")

[1] Minister of Communications First Media Briefing, 24 January 2012 (http://www.doc.gov.za/index.php?option=com_content&view=article&id=579:statement-by-the-honourable-minister-of-communications-ms-dina-mp-at-the-&catid=88:press-releases)

should be confined to being technical amendments of a minor nature to avoid the risk of pre-empting the findings of that policy review. It is the view of the NAB that there are a number of proposed amendments, in the current draft Bill, such as the restructuring of Complaints and Compliance Committee, which are of a substantive policy nature, and raise constitutional and legal aspects rather than simply being technical amendments.

1.5 The NAB submission has been set out in the following way:

(a) Independence of ICASA; and
(b) Procedural issues.

2. INDEPENDENCE OF ICASA

2.1 The Constitution and ICASA

2.1.1 The NAB is pleased that the DoC has highlighted the importance of maintaining the independence of ICASA. However, in practice there still appears to be a misunderstanding of Section 192 of the Constitution and how this relates to the independence of ICASA, with the result that there are still proposed amendments that conflict with section 192 in the draft Bill. Section 2 of the Constitution of South Africa provides that the Constitution is "the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled". Furthermore, section 192 of the Constitution mandates that, "national legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and diversity of views broadly representing South African society". Consequently, the ICASA Act provides in s3(3) that ICASA "is independent, and subject only to the Constitution and the law, and must be impartial and must perform its functions without fear, favour or prejudice". However, the fact that s3(3) recognises the independence of ICASA is in our view, not sufficient on its own. All the provisions in the ICASA Act and related legislation such as the Electronic Communications Act (the “EC Act”) must contribute to and support and strengthen ICASA's independence.

2.1.2 The NAB believes that it is important to contextualize s192 of the Constitution. It appears in Chapter 9 which is headed "State Institutions Supporting Constitutional Democracy". Other "Chapter 9 institutions" include, the Public Protector, the South African Human Rights Commission and the Electoral Commission. In this regard, s181(2) provides that these institutions are "independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice". Subsection (3) provides: "Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions". Subsection (4) provides: "No person or organ of state may interfere with the functioning of these institutions".

2.1.3 Although sections 181, 193 and 194 of the Constitution do not refer to ICASA directly, the NAB believes that the characteristics of an independent authority outlined in these sections are applicable to ICASA. Given the importance of these sections in supporting constitutional democracy, it is likely that courts will rely on these sections in any matter relating to the independence of the broadcasting authority as required by s192 of the Constitution.

2.1.4 Furthermore, the courts have had the opportunity to rule on the independence of Chapter 9 institutions. In the case of *De Lange v Smuts* 1998 (3) SA 785 (CC) the Constitutional Court held that factors that may be relevant to independence and impartiality, depending on the nature of the institution concerned, include provisions governing appointment, security of tenure and removal, as well as those concerning institutional independence.

2.1.5 The DoC has made submissions previously on the issue of the ICASA's independence to a parliamentary committee. It was put to the ad hoc Committee on the Review of Chapter 9 and Associated Institutions that, the constitutional provision for the establishment of a regulatory body of this nature is inappropriate. In particular, the DoC presented a number of factors in support of this view, including:

(a) ICASA is not listed in s181 of the Constitution and, consequently, can be distinguished from the other institutions described in Chapter 9 of the Constitution;
(b) The constitutional criteria of fairness, efficiency and diversity were intended to apply to broadcasting, and not to telecommunications or to electronic communications; and
(c) Given the rapid technological developments within the communications sector, it is no longer appropriate to retain the ICASA's constitutional status. Constitutional entrenchment creates the danger that the regulator might be unable to adapt swiftly to an ever-changing technological environment.[2]

2.1.6 It is important to note that the Committee was of the view that this perception of ICASA's legal standing was "a misunderstanding, as the Constitution is not the only place that provides for an independent regulator. In fact, the phraseology of the enabling legislation in s3 of the ICASA Act goes much further than the constitutional provisions. Furthermore, there are other constitutional institutions, not found in Chapter 9 of the Constitution, which are nonetheless independent. The relevant constitutional provisions and the legislation determine their legal status."[3]

2.1.7 In particular, on the issue of what constitutes independence, the Committee pointed to the Constitutional Court judgment in the "Independent Electoral Commission v Langeberg Municipality that, although a Chapter 9 institution such as the Electoral Commission is an organ of state as defined in section 239 of the Constitution, these institutions cannot be said to be a department or an administration within the national sphere of government over which Cabinet exercises authority. These institutions are state institutions and are not part of the government. Independence of the institution refers to independence from the government. The Court could not agree that these institutions would be

[2] Parliament of South Africa (2007). Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions. A report to the National Assembly of the Parliament of South Africa. Cape Town , South Africa. p. 193.
[3] Ibid at . p.193.

subject to the constitutional provisions of co-operative government when they are in fact independent from government. This means that Chapter 9 institutions are not (Committee's emphasis) subject to the co-operative government provisions set out in Chapter 3 of the Constitution. These institutions perform their functions in terms of national legislation, but "are not subject to national executive control". They are part of governance but not part of government. There is a need for these institutions to "manifestly be seen to be outside government" (Committee's emphasis). The judgement lays down that, a very clear and sharp distinction must be drawn between these institutions and the Executive authority and no legislative provision or action by the Executive that would create an impression that the institution is not manifestly outside government would be constitutionally acceptable."[4]

2.1.8 The NAB is in agreement with the views of the ad hoc Committee on the independence of the ICASA, and holds the view that some of the current proposed amendments may have the effect of negatively compromising ICASA's independence from the Executive and commercial and other interests.

2.2 Provisions in the Bill which raise constitutional and independence concerns

2.2.1 When the EC Act was finalised, its drafters were careful to avoid compromising s192 of the Constitution, and the independence granted to ICASA in legislation, when dealing with policy directions made by the Minister. To this end, the EC Act, provides the Minister with the power to make policies and issue policy directions in terms of s3(1) and (2) of the EC Act, whilst at the same time preserving the independence of the regulator, by not making these polices and policy directions binding upon the regulator. In terms of s3(4) of the EC Act, ICASA only has to consider such policies and policy directions in exercising its powers and performing its duties in terms of the Act. Furthermore s3(3) of the EC Act prohibits the Minister from making policy or policy directions that may influence ICASA in terms of granting, amending,

[4]Ibid at p.10.

transferring, renewing, suspending or revoking a licence, except as directly permitted by the Act.

2.2.2 The NAB is of the view that the proposed insertion of s4(4)(a) in the draft Bill, which provides that "The Authority shall perform its functions…in accordance with sector policy and policy directions," directly contradicts s3(4) of the ECA, and in particular, it infringes s181(4) of the Constitution, which provides that "No person or organ of state may interfere with the functioning of" Chapter 9 institutions. This matter has been dealt with previously in court. In the matter of *Altech Autopage Cellular (Pty) Ltd v The Chairperson of the Council of ICASA and Others*[5] the High Court declared invalid and set aside portions of a September 2007 Ministerial Policy Direction on the basis that the direction in question overstepped the line of interference and encroached upon ICASA's independence.

2.2.3 The NAB is further of the view that the proposed amendments to s4(3)(c) in the draft Bill, in respect of the radio frequency spectrum, downgrades ICASA's powers in section 30(1) of the EC Act from controlling, planning, administering and managing the use of the radio frequency spectrum, to simply assigning same, and then only to the extent that this is for non-government use. The constitutionally entrenched right to control and the ability to manage the broadcasting services frequency bands is an essential and inseparable part of regulating broadcasting. Consequently the NAB is of the opinion that it is unconstitutional to downgrade ICASA's power to control and manage the radio frequency spectrum to one of simply assigning spectrum. It is suggested this proposed amendment be deleted.

2.2.4 Another issue of a constitutional nature is the proposed amendment to section 5(1) and (1A) in the draft Bill, which proposes replacing the current process where ICASA's councillors are appointed by the Minister upon approval by the National Assembly, with a process where Councillors are appointed by the

[5] [2008] JOL 22362 (T)

Minister after consultation with and upon the recommendation of the National Assembly. To maintain independence of ICASA, the current process needs to be retained. It should be remembered that all other Chapter 9 institutions of the Constitution are appointed by the President. when the current process was developed, it took into account the need to maintain a similar level of independence from the Minister as other Chapter 9 institutions.

2.3 Complaints and Compliance Committee

2.3.1 In the explanatory memorandum the DoC alleges that the efficacy of the Act and of the Complaints and Compliance Committee ("the CCC") itself has been undermined because, as it is currently worded, there exists significant lacunae in the Act as regards violations of the Act or the underlying statutes by persons other than licensees. In order to rectify this problem and to ensure appropriate enforcement of the legislative requirements of the Act, and of the underlying statutes, the DoC proposes throughout section 17A to 17L to replace the word "licensee" with "person".

2.3.2 The NAB is of the view that this proposed amendments section 17 to 17L regarding the jurisdiction of the CCC are not in line with the intention of the legislature. The fact that the narrower word "licensee" is used instead of "person", that is used in other places in the Act, indicates a definite intention to limit the jurisdiction of the CCC as a quasi-judicial body to dealing with matters of adjudication only in relation to "licensees". If other persons are in breach of the Act, they are committing an offence, which the legislature intended should be placed before a court of law and dealt with in criminal proceedings.

2.3.3 In this regard we refer the DoC to s7, 31(1) and 32(1) of the EC Act and to s15 and 20 of the Postal Services Act, which prohibit persons engaging in activities falling within the scope of the legislation without licences, registration or exemption. In terms s17H(4) of the ICASA Act, it is made clear that it is a court of law that is required to deal with such an offence. Similarly, in the Postal

Services Act, s80(1) and (2) provide that this is the domain of the courts and not the CCC.

2.3.4 There may however be some merit in expanding the scope of the CCC slightly to include persons providing exempt services in terms of s6 of the EC Act. However, this should be carefully worded using the words “licensees and persons providing exempt services in terms of s6 of the EC Act.”

2.3.5 The proposed amendments to shift decision-making powers from the Council to the Complaints and Compliance Commission (“the Commission”) and to establish the CCC as separate statutory body in order to improve functioning, are not supported by the reasons in the explanatory memorandum attached to the Bill. No evidence is led that clearly demonstrates that the CCC is currently not functioning in an effective manner. In fact, from the NAB point of view, the CCC is functioning effectively, and there has been no discord with the manner in which it has been functioning in the sector. Accordingly, the NAB does not see any need to amend the Act in relation to the functions of the CCC at all.

2.3.6 Another concern is that the CCC, deals with licensees on matters directly relating to compliance with legislation, licence conditions and regulations, and the work of this committee would traverse issues relating to compliance with duties regarding transfer of a licence and decisions that can result in suspension or revocation of a licence, the very same areas which section 3(3) of the EC Act has prohibited the Minister from making policy or policy direction on. It is therefore a concern that this proposed Tribunal would be appointed by the Minister. It raises many of the same concerns highlighted around appointment of ICASA Councilors above. The Minister represents the State as shareholder in a number of dominant companies in the electronic communications sector, in the mind of the NAB this creates an opportunity for interference. It is far better to keep the CCC within the ambit of ICASA, so long as it deals with matters directly related to broadcasting. In fact, during the

financial year 2011-2012, out of the 18 complaints the CCC received, 4 of the complaints related to entities in which the Minister is the shareholder.[6]

2.3.7 Consequently, a constitutional concern is that the independent body that is required to regulate broadcasting in the public interest in accordance with s192 of the Constitution is ICASA. A number or problems are raised when a second body is proposed to regulate broadcasting (or aspects thereof) or to dictate to ICASA how to regulate broadcasting. This proposal is a major structural change to ICASA and should be debated within the context of the ICT Policy review first.

3. PROCEDURAL ISSUES

3.1 The draft Bill proposes that the period of comment set out under section 4B be amended in the draft Bill from 60 to 30 days. This would half the amount of time to make written comment, unless ICASA makes use of its discretion to increase the time period for comment. The conducting of s4B inquiry constitutes administrative action and in the interest of reasonable and timeous notice it is proposed that the period of 60 days be retained.

3.2 As there is a lot of synergy between the EC Act and the ICASA Act, it is proposed that from a procedural perspective that the two amendment bills move through Parliament at the same time to ensure that the necessary amendments can be effected in both at the same time.

4. CONCLUDING REMARKS

4.1 The NAB supports the work of the DoC with regard to technical amendments that repeal obsolete or unnecessary provisions, removal of anomalies, and ensuring consistency with the Constitution, until such time that the Act can be reviewed in line with the proposed new overarching ICT and broadcasting policy. However the NAB

[6] Pages 34 to 37 of the ICASA 2011/2012 Annual Report. 12 complaints were finalised, while 6 are still pending.

would caution the DoC from going beyond the technical amendments necessary for a "cleaning-up" of the ICASA Act until the envisaged ICT and broadcasting policy review announced by the Minister in January 2012 has been completed, to avoid duplication of effort or pre-determining of policy outcomes in that process. Furthermore, this is the third draft amendment Bill proposed in the sector in 2012, it is recommended that to ensure consistency that the Bills be tabled in Parliament at the same time.