



**National Association of Broadcasters' submission to the  
Parliamentary Portfolio Committee on Communications on the  
Independent Communications Authority of South Africa  
Amendment Bill [B32-2005]**

10 October 2005

**WRITTEN SUBMISSIONS ON THE INDEPENDENT COMMUNICATIONS AUTHORITY OF  
SOUTH AFRICA AMENDMENT BILL [B32-2005] MADE BY THE NATIONAL ASSOCIATION  
OF BROADCASTERS**

**1 INTRODUCTION**

- 1.1 On 26 September 2005, notice of the Independent Communications Authority of South Africa Amendment Bill [B32-2005] ("the Bill") was published in Notice 1783, Government Gazette No. 28050 dated 20 September 2005. The purpose of the Bill is to effect amendments to the Independent Communications Authority of South Africa Act, 2000 ("the ICASA Act"). Interested persons were invited to make representations on the Bill, the closing date for which is 10 October 2005.
- 1.2 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. NAB members include:
- 1.2.1 the three television and the 17 radio stations of the public broadcaster, the South African Broadcasting Corporation;
  - 1.2.2 all licensed commercial free to air radio and television broadcasters;
  - 1.2.3 all licensed commercial subscription radio and television broadcasters;
  - 1.2.4 both the common carrier and the preferential carrier licensed signal distributors; and
  - 1.2.5 over 30 community radio and television broadcasters.
- 1.3 The NAB has a long history of participating in regulatory processes affecting the media and thanks the Parliamentary Portfolio Committee on Communications ("the Committee") for the opportunity of making these written representations on the Bill. In this regard, the NAB wishes to alert the Committee to the importance of the fact that many of its members have decided not to make individual representations on the Bill but to support a single set of written representations by the NAB made on behalf of the broadcasting industry as a whole. Despite this individual broadcasters

might wish to participate in the hearings and deliberations as conducted by the Committee.

## 2 THE BILL PROCESS

2.1 The NAB formally requests that the Committee grant it the opportunity to make oral representations at the public hearings on the Bill.

2.2 In making these representations:

2.2.1 the NAB believes that while certain of the provisions of the Bill are more noteworthy than others, it will be most helpful to the Committee for the NAB to move systematically through the Bill, commenting on the various provisions in the order in which they arise;

2.2.2 the NAB will focus primarily on the broadcasting-related provisions in the Bill, given its particular expertise, although it will comment on other issues as it sees fit; and

2.2.3 the NAB will comment only once on a particular issue, even although, that issue may arise in a number of different respects in the Bill.

## 3 THE NAB'S SUBMISSIONS ON THE PARTICULAR PROVISIONS OF THE BILL

3.1 Ad section 2(b) of the Bill

3.1.1 The NAB is concerned at the change of name of the Independent Communications Authority of South Africa ("the Authority") to the Electronic Communications Authority of South Africa for two reasons:

3.1.1.1 first, the importance of the independence of the Authority is enshrined in the Constitution of the Republic of South Africa Act, 1996 ("the Constitution"), in section 192; and

3.1.1.2 second, the Bill itself makes provision for the Authority to become the regulator of the postal services sector too, so the title of the Authority will become factually incorrect as a result of this proposed amendment given that it will be regulating matters other than electronic communications.

3.1.2 The NAB respectfully suggests leaving the name of the Authority unchanged.

3.2 Ad section 2(g) of the Bill

3.2.1 The NAB respectfully queries how the Electronic Communications and Transactions Act, 2002 ("the ECT Act") can fall within the definition of the underlying statutes given that:

3.2.1.1 it makes no reference to the Authority; and

3.2.1.2 the Authority performs no functions and exercises no powers in terms of the ECT Act.

3.2.2 The NAB respectfully submits that while it might be appropriate for the Authority to have powers and functions with regard to the regulation of electronic communications and transactions, this would require amendments to be made to the ECT Act and until such amendments are effected, the definition of "underlying statutes" should not include the ECT Act.

3.2.3 In particular, the effect of the inclusion of the ECT Act in the definition of the "underlying statutes" means that:

3.2.3.1 it will be impossible for the Authority to achieve the objects contemplated in the ECT Act (as will be required by section 2(c) of the ICASA Act) as it has no powers or functions in regard thereto; and

3.2.3.2 a number of other provisions in the ICASA Act become impossible to fulfill, such as section 4(1)(a).

3.3 Ad Section 6

3.3.1 **Ad proposed section 4(3)**

3.3.1.1 NAB respectfully submits that the introduction of section 4(3) to the ICASA Act is inappropriate for a number of reasons:

- 3.3.1.1.1 the whole structure of the ICASA Act is built on the premise that the Authority's powers and functions are set out in the underlying statutes. It is therefore unnecessary to have another, essentially parallel, set of powers and functions being provided for in the ICASA Act;
- 3.3.1.1.2 besides being unnecessary, the NAB is concerned that the new section 4(3) will be problematic because its terms may well cause confusion given that they overlap with a number of powers granted, for example, in the proposed Convergence Act;
- 3.3.1.1.3 the NAB is also concerned at the particular wording of a number of the sub-sections of the proposed section 4(3) and believes that these are likely to cause problems for the Authority in future, for example:
- 3.3.1.1.3.1 in sub-section (3)(e), the Authority is given the power to grant, renew and amend licences, but the important powers to transfer or revoke licences is not provided for;
- 3.3.1.1.3.2 in subsection (3)(i) the Authority is required to implement any decisions adopted by United Nations specialized agencies. This is problematic as a number of decisions adopted by, for example, the International Telecommunication Union ("the ITU") and the World Summit on the Information Society, are of a recommendatory or guideline nature and set out goals for countries, particularly developing ones, to work towards. The NAB is concerned that there might be a number of unintended consequences for the South African broadcasting industry (and indeed the electronic communications industry as a

whole) should, for example, certain ITU decisions be required to be implemented by the Authority. Further, the NAB queries whether or not this subsection is not unduly limiting as it appears to restrict the Authority to attending conferences only if these are convened by the United Nations Specialised Agencies. The NAB submits that it is important that the Authority be entitled to attend at any conference that it believes it ought to be represented at, in the public interest.

3.3.1.2 The NAB respectfully suggests the deletion of proposed section 4(3) given that its provisions are duplicated elsewhere in the underlying legislation.

**3.3.2 Ad proposed section 4(4)**

The NAB respectfully submits that the proposed delegation provisions are too wide and that the Authority ought not be able to delegate the licensing-related powers. Thus the Council ought not be able to delegate taking a decision regarding the granting, amending, renewing, transferring or revoking of a licence. The NAB suggests that the proposed section 4(4) be amended accordingly.

**3.3.3 Ad proposed section 4(5)**

The NAB respectfully queries the necessity of having proposed section 4(5) of the ICASA Act. The NAB is of the view that the Chairperson of the Authority would perform the functions provided for in very general language in proposed section as a matter of course and that it is unnecessary to provide therefor in legislation.

**3.4 Ad section 7: the proposed section 4B**

3.4.1 The NAB is extremely concerned with the wording of proposed section 4B(1) because it appears that the Authority will be entitled to conduct an inquiry only "for the purpose of improving the performance of its functions". The

NAB respectfully submits that the Authority should be capable of conducting an inquiry into any matter relevant to furthering the objects of the underlying statutes (properly defined) and not for the purpose of improving the performance of its functions. The NAB suggests that this provision be amended accordingly.

3.4.2 The NAB is also concerned at the wording of proposed section 4B(1)(c) and (d) which appears to envisage that the Authority will conduct inquiries into compliance with the ICASA Act, the underlying statutes and licence terms, a function that the NAB believes was intended to be played by the Complaints and Compliance Committee ("the CCC") to be established in terms of the Bill. The NAB suggests that these provisions be amended accordingly.

3.4.3 The NAB is of the view that the provisions regarding inquiries by the Authority ought to distinguish between three broad types of inquiries and that provisions specifically appropriate to each type ought to be provided for in the Bill, namely:

3.4.3.1 licensing inquiries: these would include the grant, amendment, revocation, renewal and transfer of a licence, and these ought to be specifically provided for together with specific procedures, including appropriate time periods;

3.4.3.2 policy development inquiries: these would include Discussion Papers and Position Papers processes and draft regulations etc, and these ought to be specifically provided for together with specific procedures, including appropriate time periods; and

3.4.3.3 compliance or complaints inquiries: these would be the inquiries to be conducted by the CCC, and these ought to be specifically provided for together with specific time procedures, including appropriate time periods.

In this regard, the NAB suggests that while a 60 day time period might well be appropriate for written representations on policy inquiries, that time period might not be as suitable for a licensing inquiry or a compliance inquiry which is likely to require different time periods in the public interest.

### 3.5 Ad section 8

#### 3.5.1 **Ad proposed sections 5(1) and 5(1A)**

3.5.1.1 Of all of the provisions of the Bill, the NAB wishes to place on record that it is most concerned about these. The effect of the proposed amendment of section 5(1) and the introduction of section 5(1A) of the ICASA Act is that the Minister of Communications ("the Minister") effectively appoints the Council members of the Authority, as she appoints the members of the selection panel which in turn recommends the short list of candidates to her for appointment by her.

3.5.1.2 The NAB is of the view that these provisions of the Bill are unlawful because they violate the provisions of section 192 of the Constitution which requires that "[n]ational legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society". The NAB is also of the view that these provisions of the Bill are out of step with South Africa's international commitments, particularly in respect of our obligations to promote the objects of the African Commission on Human and People's Rights. We shall deal with each in turn.

#### 3.5.1.3 The Constitutional Issue

3.5.1.3.1 Section 2 of the Constitution 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".

3.5.1.3.2 The NAB respectfully submits that the Constitution requires that the Committee, indeed Parliament as a whole, is required to comply with the constitutional obligation to ensure that national legislation does indeed provide for an independent authority to regulate broadcasting. The mere fact that the ICASA Bill provides in section 3(3) that the Authority "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" does not mean that the Authority is in fact, independent as other sections of the ICASA Act (for example proposed sections 5(1) and 5(1A)) render its independence nugatory by making the Authority essentially an arm of the Department.

3.5.1.3.3 The NAB believes that it is important to contextualise section 192 of the Constitution. It appears in Chapter 9 which is headed "State Institutions Supporting Constitutional Democracy". Other so-called "Chapter 9 institutions" include, among others, the Public Protector, the South African Human Rights Commission and the Electoral Commission. In this regard:

3.5.1.3.3.1 section 181(2) provides that these institutions are "independent, and subject only to the Constitution and the law, and they 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.";

3.5.1.3.3.2 sections 193 and 194 deal with, respectively, appointment and removal procedures. Section 193(4) requires that the President, on the recommendation of the National Assembly, appoint the Public Protector, the Auditor-General and the members of the South African Human

Rights Commission, the Commission for Gender Equality and of the Independent Electoral Commission. Section 193(5) requires that the National Assembly recommend people nominated by a committee of the Assembly composed of all members of the parties represented in the Assembly<sup>1</sup> and approved by the Assembly by a resolution which must be adopted by with a supporting vote of at least 60% of the members in respect of a resolution regarding the appointment of the Public Protector or the Auditor General<sup>2</sup> and of a majority of the members in respect of a resolution regarding the appointment of a member of a Commission<sup>3</sup>. Similarly, section 194 deals with how the Public Protector, Auditor-General or a member of a Commission established by Chapter 9 may be removed from office, namely, only on the grounds of misconduct, incapacity or incompetence, a finding to this effect by a committee of the National Assembly and the adoption by the National Assembly of a resolution calling for that person's removal from office<sup>4</sup> which must be carried out by the President<sup>5</sup>;

3.5.1.3.3.3 although sections 181, 193 and 194 of the Constitution don't refer to the Authority directly, the NAB submits that given the

---

<sup>1</sup> Section 193(5)(a) of the Constitution.

<sup>2</sup> Section 193(5)(b)(i) of the Constitution.

<sup>3</sup> Section 193(5)(b)(ii) of the Constitution.

<sup>4</sup> Adopted with a supporting vote of at least two thirds of the members of the Assembly in the case of a resolution concerning the removal from office of the Public Protector or the Auditor-General in terms of section 194(2)(a) or of a majority of the members of the Assembly in the case of a resolution concerning the removal from office of the members of a Commission section 194(2)(b) of the Constitution.

<sup>5</sup> Section 194(3)(b) of the Constitution.

importance of these sections in supporting Constitutional democracy it is likely that these sections will be relied on in the any matter relating to the independence of the Broadcasting Authority as required by section 192 of the Constitution.

3.5.1.3.4 The NAB submits that it will be instructive for the Committee to have regard to how the courts have dealt with independence issues with respect of other Chapter 9 bodies. In this regard:

3.5.1.3.4.1 in its so-called First Certification Judgment,<sup>6</sup> the Constitutional Court ruled that the text of the proposed Final Constitution, assented to by the Constitutional Assembly, did not comply with the Constitutional Principles set out in Schedule 4 to the Interim Constitution. This decision is relevant because in the event that the Bill is challenged, a court will be required to engage in a similar process, namely, deciding whether the Bill complies with the guarantee of independence set out in section 192 of the Constitution. The relevant aspects of the First Certification Judgment dealt with the independence of certain bodies which were required to be independent by the Constitutional Principles, namely the Public Service Commission, the Reserve Bank, the Auditor General and the Public Protector. The Constitutional Court held that: "[f]actors that may be relevant to independence and impartiality, depending on the nature of the institution concerned,

---

<sup>6</sup> *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).

include provisions governing appointment, tenure and removal as well as those concerning institutional independence"<sup>7</sup> (our emphasis);

3.5.1.3.4.2 the Constitutional Court has also examined the relationship between the Independent Electoral Commission, a Chapter 9 institution, and the National Government. In *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) the Constitutional Court, in a unanimous judgment by Yacoob J and Madlanga AJ, held that the Independent Electoral Commission is an organ of state which is not within the national sphere of government. It held that "[i]t is a contradiction in terms to regard an independent institution as part of a sphere of government that is functionally interdependent and interrelated in relation to all other spheres of government. Furthermore, independence cannot exist in the air and it is clear that the chapter<sup>8</sup> intends to make a distinction between the State and government, and the independence of the Commission is intended to refer to independence from the government, whether local, provincial or national."<sup>9</sup> The Court went on to make some important dicta on the nature of Chapter 9 bodies more generally holding that "[o]ur Constitution has created institutions such as the Commission that perform their functions in terms of national

---

<sup>7</sup> *First Certification Judgment*, at para 160.

<sup>8</sup> Chapter 9 of the Constitution.

<sup>9</sup> At para 27.

legislation but are not subject to national executive control. The very reason the Constitution created the Commission - and other Chapter 9 bodies - was so that they should be and manifestly be seen to be outside government."<sup>10</sup> (our emphasis). It is noteworthy that the Constitutional Court did not see fit to distinguish between the independent authority to regulate broadcasting and other Chapter 9 institutions in respect of the nature of the independence these institutions enjoy.

3.5.1.3.5 The NAB respectfully submits that the effect of our Constitutional jurisprudence on the issue of independence is that a body that is effectively appointed by the Minister, without the involvement of Parliament, is not an independent one.

#### 3.5.1.4 South Africa's International Obligations

3.5.1.4.1 Africa has begun to make commitments regarding the importance of independent media regulation. In this regard:

3.5.1.4.1.1 in 2001, a number of participants in a UN/UNESCO conference on the broadcast media developed the Windhoek Charter on Broadcasting in Africa. In respect of regulatory independence, the following is a key provision of the Windhoek Charter: "All formal powers in the areas of broadcast and telecommunications regulation should be exercised by public authorities which are protected against interference, particularly of a political or economic nature, by, among others, an appointments

---

<sup>10</sup> At para 31.

process for members which is open, transparent, involves the participation of civil society and is not controlled by any particular political party."<sup>11</sup>;

3.5.1.4.1.2 also in 2001, the heads of state of the Southern African Development Community "SADC", including South Africa, adopted the SADC Declaration on Information and Communications Technology ("the ICT Declaration"). As part of the ICT Declaration, the member countries undertook "to continue to sustain efforts in creating a favourable regulatory environment and accelerated liberalization of the telecommunications sector, which aims at creating a three-tier separation of power, with the Government responsible for a conducive policy framework, independent regulators responsible for licensing, and a multiplicity of providers in a competitive environment responsible for providing services."; and

3.5.1.4.1.3 in 2002 the African Commission on Human and Peoples' Rights, which was established originally under the auspices of the Organisation for African Unity to promote human and peoples' rights and to ensure their protection in Africa, passed a Resolution on the Adoption of the Declaration of Principles of Freedom of Expression in Africa<sup>12</sup>. Clause VII thereof deals with Regulatory Bodies for Broadcasting and Telecommunications and sets out the following key principles:

---

<sup>11</sup> Clause 2 of the Windhoek Declaration. Available at: [www.article19.org/docimages/1019.htm](http://www.article19.org/docimages/1019.htm)

<sup>12</sup> [http://www.achpr.org/english/doc\\_target/documentation.html?../resolutions/resolution67\\_en.html](http://www.achpr.org/english/doc_target/documentation.html?../resolutions/resolution67_en.html) Accessed 24 May 2005.

3.5.1.4.1.3.1 broadcasting and telecommunications must be regulated by a public authority which is independent and protected against interference, particularly of a political or economic nature;

3.5.1.4.1.3.2 the appointment process in respect of such a body shall be open and transparent with participation by civil society and it shall not be controlled by any particular political party; and

3.5.1.4.1.3.3 such a body must be accountable to the public through a multi-party body (our emphasis).

3.5.1.4.2 The NAB is of the view that given South Africa's leading role on the Continent in promoting good governance and human rights, it is extremely important that South Africa not be out of step with commitments to the independent regulation of broadcasting and other forms of electronic communications that have already been made in Africa.

3.5.1.5 As is the case for all Chapter 9 bodies, the NAB respectfully submits that it would be unconstitutional for a member of the executive branch of government to effectively appoint the Authority's council members without the participation of a multi-party body such as Parliament. It is important to stress that the NAB has no problem with the Minister representing the executive branch of government in making the formal appointments provided that this follows a nominations, interviewing and short-listing

process conducted by Parliament. Therefore the NAB respectfully suggests that the existing provisions of section 5(1) of the ICASA Act be amended only to the extent that Minister takes the place of the President as the final appointing authority.

### 3.5.2 **Ad proposed section 5(3)(b)(iii)**

The NAB is concerned about the provisions of the proposed paragraph 5(3)(b)(ii) for the following reasons:

- 3.5.2.1 the provision proposes to delete "technology" from the list of suitable qualifications, experience and expertise that the Authority must possess. The NAB submits that given the challenges of regulating convergence, it will be essential to have technology expertise in the Council. The NAB is concerned at the manner in which South Africa is increasingly lagging behind technological developments in the electronic communications sector and believes it is vital that the Authority has technology expertise;
- 3.5.2.2 the provision proposes to delete "frequency band planning" from the list of suitable qualifications, experience and expertise that the Authority must possess. The NAB submits that frequency band planning is one of the Authority's most important tasks and that this will be heightened as the country moves into the digital migration era. Therefore it will be essential to have frequency band planning expertise in the Council; and
- 3.5.2.3 the provision proposes to delete "business practice" from the list of suitable qualifications, experience and expertise that the Authority must possess. The NAB submits that it is vital for the Authority to have an understanding of the commercial realities facing the communications sector. The NAB submits that the Authority's low level of commercial expertise has been a source of concern in the past and that this ought not be exacerbated by removing it as a criterion for appointment.



### 3.6 Ad section 10

3.6.1 The NAB supports the aims of the provisions of proposed section 6A in the ICASA Act which are obviously to improve the accountability, performance and functionality of the Authority. However the NAB has some concerns about this, namely:

3.6.1.1 the NAB is of the view that the appropriate body to whom the Authority ought to account for its performance and functionality is in fact Parliament, particularly the Committee, and not the Minister;

3.6.1.2 the NAB is of the view that it is important that it is the Authority as a whole that is held to account for its performance and functionality and the NAB is concerned at the individualised nature of these provisions which apply to the Chairperson and to the councilors individually but not to the Authority as a whole; and

3.6.1.3 the NAB is concerned that these provisions may in fact be unconstitutional if what is intended is that the Minister may set "measurable performance targets" that effectively dictate to the Authority how it is to carry out its regulatory mandate. This is particularly so, given how the Constitutional Court has stressed "institutional independence" as a measure of the independence.

3.6.2 The NAB suggests that Parliament consider amending the proposed section to provide for an appropriate method of ensuring the accountability of the Authority as a whole in regard to the performance of its functions to Parliament.

### 3.7 Ad section 12

3.7.1 The NAB is extremely concerned about the provisions of section 12 of the Bill which propose significant amendments to section 8 of the ICASA Act. In this regard:

3.7.1.1 first, the Bill creates a significant *lacuna* in the ICASA Act because it does not specify who has authority to remove a councilor of the Authority. In this regard while the grounds of removal continue to exist (albeit in an amended form) in section 8(1), sections 8(2) and

8(3) which specify, among other things, that a National Assembly resolution is necessary before the President may remove a councilor of the Authority from office, have been repealed. However, they have not been replaced with alternative wording. Thus, the effect of section 12 of the Bill is that the Act will be silent as to who has the power to remove a councilor; and

3.7.1.2 second, given the NAB's submissions above on its concerns regarding the Bill's performance management system, the NAB has serious reservations about the appropriateness, and indeed constitutionality, of the provisions in proposed section 8(1)(g) stipulating that a failure to sign a performance agreement provisions constitutes a ground for removal of a councilor in the absence of any other grounds for removal and suggests that this amendment not be effected by the Committee.

3.7.2 The NAB respectfully submits that sections 8(2) and (3) of the ICASA Act ought not to be repealed but instead ought to be amended to replace the word "President" with the word "Minister". The effect of this would be to ensure the constitutionality of the section by involving Parliament in the process of removal of a councilor and at the same time would recognise the appropriateness of the Minister acting as the representative of the executive branch of government in the removals process.

### 3.8 Ad section 13

Because of the constitutional concerns regarding appointments and removals procedures which have been dealt with fully above, the NAB respectfully suggests that the National Assembly ought to continue to determine whether or not a councilor appointed to fill a vacancy is to serve for longer than the term of office of his or her predecessor in section 9(2)(b) of the ICASA Act.

### 3.9 Ad section 15

The NAB is of the view that the Authority ought to appoint the acting Chief Executive Officer ("the CEO") in the event that the CEO is absent, given that it is the Authority which will be accountable for the acting CEO's lack of performance, if any, and the NAB respectfully suggests that the provisions of proposed section 14(1A) be amended accordingly.

### 3.10 Ad section 16

#### 3.10.1 **Ad proposed section 14A**

3.10.1.1 The NAB is concerned about the provisions of proposed section 14A(2) which require the approval of the Minister should the Authority wish to appoint non-South African experts for the following reasons:

3.10.1.1.1 the NAB is of the view that this provision might well be unconstitutional given its potential negative impact on the institutional independence of the Authority, an issue that is more fully dealt with above; and

3.10.1.1.2 the NAB is of the view that Parliament and particularly the Committee is adequately equipped to hold the Authority to account for any wasting of resources that might possibly occur in the absence of this provision.

3.10.1.2 Consequently, the NAB suggests that proposed section 14A(2) be deleted.

### 3.11 Ad section 17

3.11.1 While the NAB supports any reasonable measure to ensure that the Authority is adequately funded it has a number of concerns regarding the provisions of section 17 of the Bill which proposes a new section 15(1A) of the ICASA Act, namely:

3.11.1.1 that they are not sufficiently detailed and may conflict with the provisions of section 15(1) of the ICASA Act; and

3.11.1.2 that they might result in an unconstitutional situation if it should occur that the authority is not financially independent, that is, is not sufficiently resourced by Parliament to carry out its functions and mandate.

3.11.2 In any event, the NAB is disappointed that the provisions of the Draft Convergence Bill, contained in Notice 3382 published in Government Gazette No 25806 dated 3 December 2003 ("the Draft Convergence Bill), have not been included in the Bill. There was widespread industry support for the amendments to section 15 of the ICASA Act that were proposed in the Schedule to the Draft Convergence Bill to the effect that:

3.11.2.1 the Authority would be financed by licence, administration, spectrum and numbering fees; and

3.11.2.2 the Authority retains a maximum of 50% of all such fees, the balance of which is to be paid into the National Revenue Fund.

3.11.3 The NAB suggests that the Bill be amended to propose the changes to section 15 of the ICASA Act that were initially proposed in the schedule to the Draft Convergence Bill.

### 3.12 Ad section 19

The NAB is concerned about the deletion of a number of administrative provisions regarding the establishment and operation of standing and special committees of the Authority. The NAB is of the view that these provisions are essential to the proper functioning of such committees and suggests that the proposed amendments in section 19 of the Bill not be effected.

### 3.13 Ad section 20

#### 3.13.1 **Ad proposed section 17B**

The NAB respectfully suggests that proposed section 17B(a)(iii) be amended:

3.13.1.1 to include compliance with licence conditions as well as the ICASA Act and the underlying statutes, as an allegation that the CCC must investigate;

3.13.1.2 to make it clear that the CCC is not expected to investigate, hear and make a finding on vexatious and frivolous complaints.

#### 3.13.2 **Ad proposed section 17C**

The NAB is concerned that the provisions of proposed section 17C do not grant the CCC a mechanism for dealing with frivolous or vexatious complaints. The NAB suggests that the proposed section 17C be amended accordingly.

#### 3.13.3 **Ad section 17E**

3.13.3.1 The NAB is concerned about the provisions of proposed section 17E(2) for a number of reasons, namely:

3.13.3.1.1 the proposed subsection empowers the Authority to "make a decision permitted by" the ICASA Act. Unfortunately, the ICASA Act is completely silent on the kinds of decisions that can be made by the Authority in this situation, that is, after obtaining the finding and

recommendations from the CCC. This is a critical *lacuna* in the Bill; and

3.13.3.1.2 while the IBA Act allowed the Authority to take a variety of decisions regarding the Broadcasting Monitoring and Complaints Committee's ("the BMCC") recommendations as to steps to be taken, the proposed subsection does not provide any input as to what the Authority's role is *viz a viz* a finding by the CCC.

3.13.3.2 The NAB is of the view that these provisions ought to more closely follow the provisions regarding the BMCC's relationship to ICASA as currently provided for in Chapter VIII of the IBA Act, particularly, sections 64, 65 and 66 thereof. In this regard, the NAB is of the opinion that the Authority ought not to be able to vary a finding made by the CCC even if it has the discretion not to comply with the CCC's recommendations. The NAB submits that section 17E be amended accordingly.

#### 3.13.4 **Ad proposed section 17H**

The NAB suggests that the section on offences is required to be aligned with the relevant section of the Convergence Bill on offences, as agreed to by the Committee during the Convergence Bill deliberations. Unfortunately, the NAB has yet to see the Convergence Bill draft wording in this regard.

## 4 **IMPORTANT ISSUES NOT COVERED IN THE BILL**

4.1 The NAB is concerned that there are a number of important institutional provisions in the IBA Act which ought to be incorporated into the ICASA Act through the Bill. For the Committee's ease of reference we mention these here:

4.1.1 section 17, which deals with the Authority's ability to open and maintain a bank account;

4.1.2 section 66A, which gives the Authority the power to grant permits or make authorizations in respect of certain equipment and apparatus; and

4.1.3 section 81, which provides against the liquidation of the Authority.

4.2 The NAB suggests that the Committee consider making specific provision for the establishment of a Spectrum Advisory Committee appointed by the Authority to advise it on issues of spectrum management in line with international best practice of industry consultation on this issue to ensure transparency, efficient frequency management and access to scarce expertise.

## 5 **CONCLUSION**

The NAB thanks the Committee for the opportunity of making these written submissions on the Bill and trusts that its views and suggestions will be considered by the Committee in its deliberations on the Bill and related Bills, such as the Convergence Bill.