



**NATIONAL ASSOCIATION OF BROADCASTERS' SUBMISSION
TO THE DEPARTMENT OF COMMUNICATIONS ON THE
INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH
AFRICA AMENDMENT BILL, 2010**

26 July 2010

1 INTRODUCTION

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

- 1.1.1 Three television public broadcasting services, and eighteen sound public broadcasting services, of the South African Broadcasting Corporation of South Africa ("the SABC");
- 1.1.2 All the commercial television and sound broadcasting licensees;
- 1.1.3 Both the major licenced signal distributors (electronic communications network service operators), namely Sentech and Orbicom;
- 1.1.4 Over thirty community sound broadcasting licensees, and a single community television broadcasting licensee, namely, Trinity Broadcasting Network ("TBN").

1.2 On 25 June 2010, the Department of Communications ("the DoC") published the Independent Communications Authority of South Africa Amendment Bill, 2010 ("the Bill") in Notice 650, Government Gazette No. 33324. The purpose of the Bill is to effect amendments to the Independent Communications Authority of South Africa Act, 2000 ("the ICASA Act"). Interested persons are invited to make representations on the Bill within 30 days of publication.

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 Bill. There are three principle issues raised by the Bill that the NAB feels need to be addressed. The first is the Ministerial powers and the independence of the Independent Communications Authority of South Africa ("ICASA"), the second is the structure in terms of the functions of the Council and Chief Executive Officer ("CEO") and third is the increase in the powers of the Complaints and Compliance Committee ("CCC").

1.4 Consequently the NAB submission has been set out in the following way:

- 1.4.1 Ministerial Powers and the independence of ICASA;

- 1.4.2 Council and CEO – addressing the structure of Council and Executive management; and
- 1.4.3 The increase in the powers of the CCC.

2 MINISTERIAL POWERS AND THE INDEPENDENCE OF ICASA

2.1 Constitutional Issues

- 2.1.1 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"*.
- 2.1.2 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"*. The Constitution requires the DoC, to comply with the constitutional obligation to ensure that national legislation does indeed provide for an independent authority to regulate broadcasting. Consequently, the ICASA Act provides in section 3(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"*.
- 2.1.3 However, the mere fact that section 3(3) recognises the independence of ICASA does not mean that the Authority is in fact, independent if other sections of the ICASA Act (for example proposed amendments to section 4 by the insertion of subsection 4(3)(o) to compel ICASA to implement policy and policy directions made by the Minister, and the proposed amendment of section 17A to involve the Minister in the appointment of the CCC which is an internal committee of ICASA render ICASA's independence nugatory by making ICASA essentially an arm of the DoC. The NAB will deal in detail with these proposed sections.
- 2.1.4 The NAB believes that it is important to contextualise section 192 of the Constitution. According to Chapter 9 of the Constitution, 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, section 181(2) of the Constitution 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) thereof 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”*. The equivalent provision for the independent regulator for broadcasting is section 3(3) of the ICASA Act.

2.1.5 Sections 193 and 194 of the Constitution deal with, respectively, the appointment and removal procedures of the office bearers of Chapter 9 institutions. Section 193(4) requires that the President, on the recommendation of the National Assembly, appoint the office bearers. 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 Assembly¹ and approved by the Assembly by a resolution which must be adopted by a supporting vote of at least 60% of the members in respect of a resolution regarding the appointment of the office bearers² and of a majority of the members in respect of the resolution regarding the appointment of a member of a Commission³.

2.1.6 Similarly, section 194 of the Constitution deals with how the office bearers 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 office⁴ which must be carried out by the President⁵.

¹ Section 193(5)(a) of the Constitution.

² Section 193(5)(b)(i) of the Constitution.

³ Section 193(5)(b)(ii) of the Constitution.

⁴ 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.

⁵ Section 194(3)(b) of the Constitution.

- 2.1.7 Although sections 181, 193 and 194 of the Constitution do not refer to ICASA directly, the NAB believes that the characteristic of an independent authority outlined in these sections are applicable to ICASA, and given the importance of these sections in supporting Constitutional democracy it is likely that courts will relay on these sections in any matter relating to the independence of the Broadcasting Authority as required by section 192 of the Constitution.
- 2.1.8 Furthermore, courts have had the opportunity to make rulings 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.
- 2.1.9 In light of this decision, it is important to note that, case law and the recommendations emanating from the Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions to the National Assembly of the Parliament of South Africa 31 July 2007 (“the Report of the ad hoc committee”) indicate that the independence of ICASA is sufficiently protected in legislation. Having said that, the proposed amendments of the ICASA amendment Bill, must pass the constitutional test of section 192. It therefore follows that any provision of the ICASA amendment Bill that undermines the independence of ICASA, and does not promote the regulation of broadcasting in the public interest would amount to being unconstitutional, and cannot be inserted in the Bill. Consequently, it must be deleted from the Bill.

2.2 Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions to the National Assembly of the Parliament of South Africa 31 July 2007

- 2.2.1 On the issue of what constitutes independence, the Report of the ad hoc Committee on the review of Chapter 9 and Associated Institutions to the National Assembly (the Asmal report) 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.

2.2.2 *The Court could not agree that these institutions would be 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."*⁶

2.3 Provisions in the Bill which raise constitutional and independence concerns

2.3.1 When the EC Act was finalised, its drafters were careful to avoid compromising section 192 and the independence granted to ICASA in legislation when dealing with policy directions made by the Minister. The EC Act therefore provides the Minister with power to make Policy and issue policy directions in terms of section 3(1) and (2) of the EC Act, whilst at the same time preserving the independence of the regulator by not making these policies and policy directions binding upon the regulator. In terms of section 3(4) of the EC Act, ICASA only has to consider such policy and policy directions in exercising its powers and performing its duties in terms of the Act. Furthermore section 3(3) of the EC Act prohibits the Minister from making policy or policy directions that may influence ICASA in terms of granting, amending, transferring, renewing, suspending or revoking a licence, except as directly permitted by the Act.

⁶Ibid at p.10.

- 2.3.2 It is surprising therefore that the Bill proposes the insertion of a new subsection 4(3)(o) that directs that ICASA: "*must implement policy and policy directions made by the Minister in terms of the Electronic Communications Act and Postal Services Act;*"
- 2.3.3 The NAB is of the view that this proposed amendment should be deleted from the Bill. Alternatively the subsection must be amended by the insertion of the word "consider" after the word "must" as the current drafting falls foul of section 192 of the Constitution and section 3(3) of the ICASA Act, which declares ICASA an independent regulator. The current drafting is also in conflict with section 3(4) of the EC Act, as outlined earlier.
- 2.3.4 Furthermore, the NAB is of the view that the proposed amendments to section 4(c) by the deletion of "manage", and the insertion of "assign" in respect of the radio frequency spectrum, is not practical and removes critical functions in respect of proper frequency planning. "Assignment" refers to a single activity that is the authorisation to use a radio frequency or radio frequency channel. Being able to manage the broadcasting services frequency bands is an essential and inseparable part of regulating broadcasting. The NAB is therefore opposed to the proposed amendment and suggests that the Department amends this to "assign and manage" radio frequency spectrum.

The independence of the CCC

- 2.3.5 Similar independence concerns to the NAB are with regard to the Minister being involved in the appointment processes of internal committees of ICASA, namely the CCC⁷. In any agency the type of committee appointments contemplated by the proposed amendments would be viewed as operational matters not requiring the involvement of a Minister or the National Assembly, and even more so in a Chapter 9 institution. If the purpose is to create transparency in the appointment process, this can be done in the Bill by setting out a clear and fair public process for ICASA to follow in making the appointments or to ensure that ICASA publishes regulations setting out the appointment process.

⁷ Proposed amendments to section 17B of the ICASA amendment Bill.

- 2.3.6 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.

The establishment of the Tariff Advisory Council

- 2.3.7 Other independence concerns arise from the proposed establishment of the Tariff Advisory Council (the TAC) include:

2.3.7.1 The establishment of an additional council to review tariffs is unnecessary since ICASA is mandated by section 17(1) of the EC Act to establish standing committees or special committees for such purposes as the Council may deem necessary, and we believe the issue of tariffs can well be dealt with in this manner.

2.3.7.2 The proposed Ministerial involvement in the *“terms and conditions of allowances, composition and meetings of the TAC”*⁸ would be improper and unconstitutional in respect of broadcasting, for reasons related to the constitutional guarantee of independent regulation which we have already articulated above;

2.3.7.3 Should the Minister require advice on any matters related to tariffs, he would be able to establish such a council and would not require a legislative amendment to do so.

Control over the ICASA chairperson

- 2.3.8 The NAB is opposed to the proposed provisions which determine the functions of the chairperson of ICASA, and those assigning primary responsibilities for operational matters in ICASA to specific councillors when appointing them⁹.

⁸ Proposed Section 16B(2) of the ICASA amendment Bill

⁹ Proposed amendments to section 4(5) of the ICASA amendment Bill

- 2.3.9 The NAB holds the view that the insertion of section 4(5)(d) and (e) to permit the Minister to assign functions to the Chairperson of ICASA, as well as the proposed insertion of section 5(1B)(d) to allow the Minister when making appointments to assign primary responsibilities for an area to the Chairperson and councillors may constitute undue interference in the operations of an independent Chapter 9 institution. Section 3(2) of the EC Act already provides a legal avenue, which does not compromise the independence of the Authority. Consequently, section 3(2) of the EC Act provides for the Minister to request ICASA to undertake an inquiry on any matter within their jurisdiction, to submit reports to the Minister, and to consider matters within ICASA's jurisdiction for urgent consideration. Accordingly, there is no need for the Minister to exercise direct influence on the Chairperson to achieve these objectives, as a result, from the NAB point of view, there is no need for section 5(1B)(d) to be inserted in the Bill, as the ICASA Act already provides in section 4(5)(b) for the chairperson to manage the activities of the councillors.
- 2.3.10 Accordingly, the NAB proposes that provisions in the Bill dealing with the insertion of section 4(5)(d) and (e), as well as section 5(1B)(d) be deleted. In the view of the NAB, the presence of section 192 in the Constitution highlights the importance of an independent regulator for broadcasting as a key institution supporting democracy in South Africa. Furthermore, the perceived independence of ICASA, from government, as a regulator continues to be important in the electronic communications sector where despite liberalisation the state has retained significant shareholdings in the communication sector and the Minister represents the interests of the shareholder.

3 COUNCIL AND THE CEO

- 3.1 The Bill proposes to change the position of the CEO to Chief Operations Officer (COO) and clearly differentiate between the functions of the Council and COO. However, in practice this simply amounts to replacing the term CEO with COO wherever it appears in the Bill. This creates a conflict between the ICASA Act and the Public Finance Management Act 29 of 1999 ("the PFMA Act"), as the ICASA Act would refer to a "COO" while the PFMA refers to a "CEO".
- 3.2 Section 36(1) of the PFMA requires that every department and every constitutional institution must have an accounting officer, and for constitutional institutions, the

accounting officer is the CEO. The NAB urges the Department to consider the implications of such a change in light of the Authority's ongoing obligations in terms of the PFMA.

- 3.4 Furthermore, the NAB is of the view that the proposed change of title is merely a cosmetic change that does not address any inefficiencies resulting from the structure of ICASA. The NAB would recommend that the DoC considers a broader change in structure that would allow Council to function more like a Board, whilst allowing elements of executive management to have an equal seat in Council and decision-making. The benefit of this is that Councillors would be freed up to concentrate on regulation making, rather than engaging in mundane operational matters not directly related to regulation making. In this regard it is useful to consider the Office of Communications (OFCOM) in the United Kingdom as an excellent example of the success of such a model¹⁰.

4 THE INCREASE OF POWERS OF THE CCC.

- 4.1 The proposed amendments to shift decision-making powers from the Council to the CCC in order to improve functioning, are not supported by any reasons in the memorandum attached to the Bill, that demonstrate 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.
- 4.2 The first consequential amendment to section 17A seeks to involve the Minister in the nomination of members of the CCC, the NAB has already indicated above that this would not be constitutional.
- 4.3 The second consequential amendment seeks to remove the role of Council in making decisions and orders pertaining to a complaint against the licensee. The CCC is a Committee of the Authority and it would be ill advised to delegate a function which could result in the suspension or revocation of a licence without the Council having any input into such a decision.

¹⁰ <http://www.ictregulationtoolkit.org/en/PracticeNote.2030.html>

- 4.4 The third consequential amendment is the proposal that the chairperson of the CCC be a full-time appointment.¹¹ According to the Annual Report of ICASA, the CCC heard 9 cases in the 2008-2009 reporting period¹², this caseload does not appear to merit the full-time appointment of a judge, magistrate or lawyer with 10 years experience as required by the Act. The NAB therefore proposes the deletion of this provision in the Bill.
- 4.5 The fourth consequential amendment is the requirement that all complaints be directed to the CCC¹³. The NAB is of the view that such a step will reduce the effective functioning of the CCC as it would then not only have to hear matters, it would also have to investigate complaints. Currently, complaints which are made to ICASA are dealt with by the Complaints and Compliance Department. It receives processes and investigates complaints from the public. In cases of serious non-compliance by a licensee this department refers the complaint to the CCC, the department may also on its own initiative make a complaint against a licensee for non-compliance which would be referred to the CCC. Hence vesting the powers to receive, investigate, and make a ruling on complaints with the CCC would mount to the violation of natural justice principles.
- 4.6 In the 2008-2009 reporting period, the Complaints and Compliance Department received and processed 76 complaints. Of these 44 complaints were resolved by the department and 5 were referred to the CCC for adjudication. The remaining 36 complaints did not fall within the jurisdiction of ICASA or the CCC and were referred to industry self regulatory bodies, such as the Advertising Standards Authority of South Africa ("the ASA") and the Broadcasting Complaints Commission of South Africa.(the BCCSA")¹⁴.The NAB therefore submits that the current system for receiving, processing and investigating complaints is functioning effectively and does not require amendment in this Bill.

5 CONCLUSION

- 5.1 The NAB thanks the DoC for the opportunity of making these written submissions on the Bill and trusts that its views and suggestions will be considered by the DoC in its

¹¹ Section 17A(3) of the Bill

¹² ICASA Annual Report 2008-09, p.14

¹³ Section 17C(1)(a) of the Bill

¹⁴ ICASA, Annual Report 2008-09, pp.24-25

deliberations on the Bill. In summary, the NAB wishes to bring the following salient points to the attention of the DoC:

5.1.1 It is important for the DoC to ensure that any proposed provisions of the Bill that violate the independence of ICASA, hence violating section 192 of the Constitution be deleted from the Bill;

5.1.2 The provisions governing the CEO of ICASA must be aligned with the PFMA;

5.1.3 The establishment of a TAC is an unnecessary duplication of functions, since the Authority is already mandated to deal with tariff issues by way of section 17 of the ICASA Act.

5.2 The NAB once again would like to thank the DoC for the opportunity to make its written representations. The NAB is available to provide further input and clarity should the DoC require us to do so.