30 January 2015

Department of Telecommunications and Postal Services

For attention: Ms Tsholofelo Mooketsi

Head; ICT Policy Review Project Management Office

Per email: tmooketsi@dtps.gov.za & DiscussionPaper@dtps.gov.za

Dear Madam

ISPA SUBMISSION ON THE NATIONAL INTEGRATED ICT POLICY DISCUSSION PAPER (OPTIONS PAPER)

1. We refer to the publication of the National Integrated ICT Policy Discussion Paper (Options Paper) ("the Discussion Paper") and the invitation from the Department of Telecommunications and Postal Services ("the DTPS") to make written submissions in response thereto.

2. ISPA congratulates the Minister, the Department on what ISPA regards as being an excellent document which does a fine job of laying out a comprehensive set of options for future communications policy. The Discussion Paper has the potential to provide a practical platform for reform is a tangible first step in opening up the robust debate required to inform a new policy regime and the reform of the institutional framework governing communications.

3. ISPA is excited to be participating. While we continue to seek effective solutions to the core challenge of affordable communications for all, we in particular appreciate that for the first time South Africa will be debating critical Internet-related issues such as convergence to Internet Protocol, net neutrality, user security and peering.

Structure of ISPA's submission

4. As far as possible ISPA have set out submissions in a manner which follows the structure of the Discussion Paper. Where relevant we have attempted to speak directly to the options presented.

5. ISPA's submissions relate in the main to telecommunications and the applicable institutional framework.

6. The scope of the Discussion Paper is extremely wide and it is difficult to do it justice in terms of providing constructive input within the timeframes provided. ISPA will gladly engage further to clarify any submission or to provide further assistance.

Contents

General Submissions

7. **Craft policy with regard to external and practical constraints**

    7.1. There are a number of instances in the Discussion Paper which reveal external and practical constraints on ICT policy. These include capacity and expertise challenges across local government and broader issues relating to the ongoing transformation of the public sector. The structural weakness of the communications regulator is currently a practical constraint on policy implementation and – even in a best case scenario – will continue to be for the short-to-medium-term.

    7.2. The White Paper should recognise these constraints and seek as far as possible to work within them. Policy must be drafted with reference to how it will be implemented.

    7.3. South Africa cannot afford to stand still while these issues are addressed.

8. **Without a functioning regulator there can be no implementation**

    8.1. This is beyond debate. Neither South Africa Connect nor a future White Paper will be translated into practise unless ICASA is reformed and universal access and service will remain an ideal rather than a reality.

    8.2. There is a great deal of debate in the Discussion Paper regarding structure and funding of the regulator, but the single biggest intervention required is political recognition of the need for a strong ICASA. Increased budgets and the required resources will only stem from a belief that investment in communications creates cross-cutting socio-economic benefits and that a return on this investment means empowering a regulator to implement policy.

    8.3. An important element of a functioning regulator is a functioning institutional framework with particular reference to the role of the policy-maker. ISPA is hopeful that this process will assist to create a stable policy environment in which the regulator can operate.

9. **Keep the scope of the policy manageable**

    9.1. In many instances the Discussion Paper touches on issues which are not core to ICTs or which are already being led by other Government Departments or institutions. There are also a number of areas in which there is an implicit assumption that just because something is happening online, it is automatically different from the same thing happening offline. This is very rarely the case: the same principles generally apply.

    9.2. Policy would do policy implementation a substantial disservice were it to be too broad and saddle the institutional framework with matters more properly within its remit.

    9.3. A path to reform of the regulator should not involve giving it additional mandates and duties. Policy situated within the current reality must recognise that – in the short term at least – the regulator's burden should be diminished, not increased.

Chapter 2: Regulatory Principles, Net Neutrality, Green ICTs

Regulatory Principles

10. ISPA supports the expression of regulatory principles set out in paragraph 2.2 of the Discussion Paper in the sense that these principles constitute a statement of a set of ideals to be strived for. Dramatic institutional reform and capacity-building is the critical intervention required before they can be meaningfully applied.

Net Neutrality

11. ISPA has previously made submissions to the Panel in this regard. ISPA has briefly restated its position before commenting on the policy options presented.

12. There is currently no uniform definition of the term "net neutrality". ISPA has stressed transparency in offerings to customers, and the industry should support choice for consumers as being key elements of Internet access provision. Shaping bandwidth is a normal part of network operations at different levels, and is to a significant extent a normal day-to-day part of running Internet networks.

13. The key is that this is done transparently so that it is clear to the consumer what is being purchased.

14. To this end ISPA has developed a terminology guideline document which seeks to clear up terms used to describe services[1].

15. ISPA's position can be summarised as follows:

    15.1. There must be fair and open competition in the provision of Internet access and content services. Rules should primarily relate to a prohibition on unfairly prioritising your own network traffic over those of other network operators. Existing competition law in SA and the fundamentals of the ECA can be used to deal with anti-competitive practices.

    15.2. Customers should always be in a position to make an informed choice. Customers should always be aware of the specification of the service they are being provided.

    15.3. If a customer wants an ISP to provide services which are prioritised in some way, there should not be regulations which prevent an ISP from offering that as a service.

    15.4. If a content distributor wants to allow an ISP to offer better access to their services, with the customer's permission, then the market should also support that. Some content providers take steps to move content close to consumers, and this can be very useful in terms of quality of service experienced by users.

    15.5. A service provider needs to have some flexibility when it comes to building a network.

    15.6. Prioritising of certain content is less of an issue if it isn't happening at the expense of deprioritising other content.

    15.7. There is already an increasing trend towards zero-rating certain services and – to the extent that the benefits to consumers of doing so outweigh potential anti-competitive effects – this should be accommodated.

[1] http://ispa.org.za/code-of-conduct/terminology-guidelines/

16. ISPA acknowledges the relationship between the end-to-end-principle the emerging issues of net neutrality, IP convergence and OTT services.

17. Given its own views and the fact that new ICT legislation must provide for the type of problems encapsulated in the net neutrality debate, ISPA prefers the approach taken by Ofcom in the United Kingdom, with new ICT legislation creating the framework for a regulatory response, such response to be finalised and implemented as and when demonstrated to be appropriate to do so. It may be that both the communications regulator and the competition authorities have a jurisdictional interest in monitoring industry practises.

18. It follows that ISPA's preference is for the first option – "Wait and see". While the issues set out in the second option should then be considered in greater detail at the time that a regulatory response is prepared, ISPA offers the following comments:

    18.1. ISPA supports the White Paper setting out broad principles supporting net neutrality. Ensuing legislation should then – subject to the below – provide a framework for the monitoring of industry practise and the development and implementation of a regulatory circumstances (shown to be necessary under the regulatory principles set out in paragraph 2.2 of the Discussion Paper).

    18.2. ISPA believes that the communications regulator should have primary responsibility for monitoring industry and developing, implementing and enforcing a regulatory response. This would be subject to the formal relationship between the communications regulator and the competition authorities and in accordance with the general *ex ante* / *ex post* distinction currently applied.

    18.3. The different approaches to net neutrality applied to different categories of access provider (fixed vs wireless).are, in ISPA's understanding, a function of differing bandwidth constraints applicable to these categories. This would be a factor to be considered at the time a regulatory response is being formulated.

19. ISPA does not believe that it is necessary for the White Paper to deal with net neutrality in a detailed manner. It may also be the case that net neutrality issues are resolved through competition issues arising from OTT services and the manner in which they are handled by network operators.

Green ICTs

20. ISPA supports option three. The communications regulator should not go beyond its scope and address climate change. There are areas within the ICT sector that demand the attention of the ICT regulator and the regulator should concentrate on those areas. Climate change and any regulation or guidelines around this should be addressed by the appropriate ministry, namely, the Department of Environmental Affairs.

Chapter 3: Infrastructure and Services

Regulating for converged networks

21. Perhaps the greatest challenge of drafting a policy document on ICT at this time is in deciding how to regulate for trends such as IP convergence which are changing fundamental aspects of the value chain in the provision of communications services.

22. ISPA submits that the current approach to drafting objectives in legislation involve a "grab bag" which do not provide clear direction. A clear strategic intent (vision) can be supported by the numerous objectives. But having twenty objectives does not clarify intent.

23. Convergence – at whatever level it is occurring - is a process and the policy, legislation and regulation around it must reflect this. While we can try put a framework in place for regulating in a converged environment - we are not there yet. Until we have fully converged networks, we absolutely need LLU, voice interconnect regulation, facilities leasing regulation and the like. Ex post regulation simply does not move quickly enough.

24. International experience should be heavily leaned upon as jurisdictions are at different stages of this process. Even in territories that are more advanced - those ex ante protections are still needed. Unified licensing does not mean equal access and opportunities still abound for abuse.

25. Against this is a need for greater flexibility, better market information and lighter regulation to promote innovation and remove ex ante regulation which is no longer apposite. Self- and co-regulatory models are suited to such an environment.

26. Regulation for technology neutrality should be seen in the same way as a process which mirrors convergence. Rigid application of this rule at a time when there are different platforms with different characteristics produces anomalies. Even under full IP convergence it may be necessary to distinguish between wired and wireless services in terms of their performance profile.

Market structure and Competition

27. ISPA agrees with the statements in the Discussion Paper that a competitive market will be increasingly important for the development of converged services and the provision of a wide choice of content, applications and services.

28. The status quo is that an efficient level of competition is not present in all markets. While this is in part due to legacies and the acknowledged difficulty of the task at hand, it must be noted that there are already a large number of provisions in the ECA and elsewhere which were included with the specific intention of promoting competition as a strategy for the reduction of the cost to communicate. Ironically it is the unintended consequences of the licence-conversion process – actively opposed by both the policy-maker and the communications regulator – which has spurred competition alongside the class licensing framework created by the ECA (and unfortunately broken in the ECAA 2014) which has facilitated growth in the SMME and WISP sectors.

Market Reviews

29. The Discussion Paper correctly identifies the intended application of Chapter 10 of the ECA and the processes to be followed by the communications regulator in pursuing a review of a market or set of markets.

30. It should be clear that the communications regulator is unable to apply Chapter 10 or to follow the processes necessary to define a market, let alone impose appropriate pro-competitive conditions.

31. At the same time it is important to recognise that the 2010 CTR intervention was highly successful in introducing price competition in the market for the provision of mobile voice services, leading to a substantial and measurable reduction in the cost to communicate for the majority of South Africans. This emphatically illustrates the potential of interventions of this nature and underscores the need for such measures to be introduced. This was regulation completely in accordance with the core principle of regulating in the public interest (even though it fell well short of conforming to the regulatory principles set out in paragraph 2.3 of the Discussion Paper).

32. It is also correct that there are deficiencies in the market data required on which to base regulatory decisions (as per the regulatory principles set out in paragraph 2.3 of the Discussion Paper). This is notwithstanding:

    32.1. A great deal of information being submitted to the communications regulator, including four quarterly market reports each year by each licensee and responses to ad hoc requests for information required to meet SA's ITU reporting obligations. There is no evidence that ICASA has the capacity to analyse this information or to retain it in a coherent fashion.

    32.2. Existing formal mechanisms for requesting information e.g. in Chapter 10 and section 4B of the ICASA Act.

33. Policy and future legislation should set out clear provisions regarding provision of information required for SA to comply with international obligations and refine policy and regulation. ISPA understands that it is the task of the National Broadband Council to set baseline data and benchmarks and to ensure required information is collated.

34. ISPA strongly agrees with those submissions to the Green Paper pointing to a need – in the face of this regulatory failure - for policy to speak to competition issues as a direct function of the structure of the market. Regular market analysis and review should therefore be compulsory.

35. ISPA supports Option One – retaining the current provisions in the ECA and focusing on adequately resourcing ICASA so that it can fulfil its mandates on promoting fair competition, but notes the following:

    35.1. Resourcing the communications regulator is not an option – it is a *sine qua non* of any actual policy implementation and regulation of the sector in according with the core principle and regulatory principles.

    35.2. Bearing in mind that Chapter 10 of the ECA has just been comprehensively amended through the ECAA 2014, if it is found that further revisions are desirable in order to assist in its implementation – but also while remaining true to the regulatory principles – then this should be done (i.e. Option Three). As noted above, ISPA believes that an element of pragmatism should run through policy in the short-term in recognition of the massive effort required to create an effective and efficient institutional framework, so simplification of ICASA's task in this highly-complex area is to be recommended.

    35.3. As regards Option Two ISPA is not convinced of the utility of setting timelines against which the communications regulator is required to complete and review market reviews at this time. The focus instead should be on ensuring that those market reviews which are undertaken:

        35.3.1. Are done in accordance with the regulatory principles.

        35.3.2. Are prioritised in the sense that they maximise return on the investment of the time and budget of the regulator and other stakeholders in furthering the public interest. The intervention on call termination rates in 2010 was so effective precisely because it targeted a service used by almost all South Africans – voice services. Reductions in mobile call termination rates have resulted in lower prepaid mobile voice rates – effectively providing relief where it is needed most.

    35.4. This is not to say that there should not be a set of clear definitions of markets and a public plan for the timelines within which they will be prioritised and reviewed.

    35.5. Option Four – allowing the Competition Commission to define markets while the communications regulator then performs the balance of the review procedure – has significant merit, particularly in the short-term while ICASA does not have the capacity to perform this function. The Commission has experience in dealing with detailed market definitions within the telecommunications industry.

Understanding the market-gap in support of Universal Service provision

36. ISPA does not support the continued existence of USAASA, believing instead that this function should be housed within the DTPS in conjunction with ICASA. ICASA has the powers necessary to require this information from licensees and reporting on universal service and access obligations is already a requirement.

37. Given that information is required from a variety of stakeholders, including local government and community groupings, it may be preferable to provide the power of collection to the Minister. This can be largely delegated to the National Broadband Council.

38. There is no magic to identifying and monitoring the market gap: the majority of this information is already available in the form of licensee reports, analysts' documents and research commissioned by the DTPS, USAASA and others. There is also a wealth of comparative

learnings which can guide the formulation of an appropriate and consistently-applied set of indicators.

39. History of implementation of universal service and access obligations shows clearly the dangers of acting on incomplete data and the impact of a lack of information and capacity as regards enforcement of the obligations.

Consistent application of competition rules and their enforcement

40. The Discussion Paper highlights that there were consistent complaints around the lack of enforcement of competition rules and the time it takes for the communications regulator to act in cases of infringements that delay access to rival's infrastructure. It can be added that approaching the competition authorities – while far better equipped to deal with the ICT competition matters falling within their jurisdiction – also do not offer accessible avenues for redress given the time and cost involved.

Ex-Ante and ex-Post regulation

41. The Discussion Paper queries whether it is still necessary to maintain ex-ante and sector-specific regulations given the level of development of and competition in the "broadband market".

42. ISPA does not support this argument. ISPA agrees that effective ex ante regulation in the telecommunications sector "*will support coordination of infrastructure rollout; encourage private sector investment; avoids duplication of efforts and promotes general sector efficiencies. Ex-ante regulation will also ensure that the most marginalised communities are prioritised in the license obligations of sector players and the national policies.*"

43. As set out above there has been no regulatory intervention to stimulate competition in the broadband market outside of the unintended outcomes of the licence conversion process in 2009. It is ISPA's position – also set out above – that there are still a number of critical markets within the telecommunications sector which remain inefficient.

44. ISPA therefore supports Option Two: *Current ex-ante regulations especially those governing access, interconnection and sharing would be implemented more rigorously. Additional ex-ante regulations would be considered based on the outcome of the broadband value chain analysis currently envisaged by the regulator.*

45. Noting that the provisions of the ECA relating to interconnection, facilities leasing, essential facilities and competition have just been reviewed through the ECAA 2014, any further revisions to increase the likelihood of them being effectively implemented can be undertaken against the background of creating an effective communications regulator.

46. Effective ex-ante competition regulation specific to the sector is critical. The existing provisions of the ECA regarding interconnection and facilities leasing have been implemented into regulations with some positive effect but once again the inability of the communications regulator to enforce them has limited the utility of these interventions.

47. Nine years after the commencement of the ECA there remains no progress in harnessing the powerful provisions of that Act – made, perhaps simpler to invoke by the ECAA 2014 - relating to essential facilities.

48. As regards Option Three ISPA notes that undertaking a cost / benefit analysis of existing ex ante regulation in order to assess whether such should be retained, amended or withdrawn is not a

limitation of ex ante regulation: rather this is an application of the general principles set out in paragraph 2.3 of the Discussion Paper.

Consolidation of market activities: Mergers and acquisitions

49. ISPA's view is that policy should create a framework for the promotion of competition but it should not explicitly serve to limit commercial activity. Subject to institutional reform of the communications regulator, the status quo in terms of the Competition Act, the ECA and the relationship between the competition authorities and the communications regulator. This latter should be comprehensively reviewed to take into account lessons learned to date, including the manner in which the Vodacom acquisition of control of Neotel is being processed by both bodies.

50. ISPA does not support a greater role for the policy maker or other line Ministers. As far as ISPA is aware, this is not the norm in any other industry and ISPA is uncertain as to why it should apply in the ICT / telecommunications sector.

Facilities-based and service-based competition regulations

51. The debate between the desirability of facilities-based competition as opposed to services-based competition is often presented as a duality. This is counterintuitive and not helpful: what is required is an assessment of the desirable mix between the two taking into account:
    51.1. The current market reality
    51.2. Markets which need to be prioritised for competitive reform

52. ISPA accordingly supports a hybrid approach.

53. While both forms of competition are important, ISPA notes the increasing commodification of communications networks which suggests that the future focus should lean towards promoting service-based competition to a relatively greater degree.

54. Service-based competition should be applied as a rule in areas where there is insufficient market demand to justify facilities-based competition or otherwise as the market determines in line with commercial realities.

55. ISPA strongly supports policy setting out guidelines for state aid/intervention and competition and submits that these should be based on the black / grey / white areas concept adopted in the EU.

Interconnection

56. ISPA does not believe that the provisions of Chapter 7 of the ECA relating to interconnection require further revision. It is difficult to assess the effectiveness of many of these provisions given that they have not been implemented or have been ineffectively implemented, monitored and/or enforced by the communications regulator.

57. Most unfortunate is the inability of ICASA or the CCC to process and hear complaints and to thereby create a body of precedent regarding disputes which will serve to clarify the application of the law and Interconnection Regulations.

58. ISPA does not believe it is necessary to alter the position in the ECA regarding exemption from the obligation to interconnect on the basis that the regulator has the power to exempt should it be determine this is desirable. Interconnection which promotes competition is in any event going to be beneficial for smaller operators.

59. ISPA does not support the regulator regulating interconnection pricing directly in the absence of a Chapter 10 process being followed and submits that to do so would be contrary to the regulatory principles set out in paragraph 2.3 of the Discussion Paper. ISPA does support the statement in the Discussion Paper that "*Interconnection regulations cannot be enough without the full implementation of the competition sections of the EC Act, which can impose pro-competitive remedies in case of unfair discrimination or abuse of dominance*".

60. In response to some of the comments received in this regard, ISPA submits that:

    60.1. There may be merit in asymmetry in voice interconnection applied to promote development of services and infrastructure in underserviced area, although the focus now is on broadband, not voice.

    60.2. Telkom's submission that that the points of interconnection of the fixed networks and the mobile networks should be at the same physical location is also worth further consideration. ISPA regards this as an application of the interconnection provisions in the ECA requiring licensees to establish interconnection at feasible points on their network: interconnection arrangements must be such as to facilitate rather than hinder interconnection given that interconnection is in the public interest and the cost of inefficient interconnection is passed on to consumers.

61. ISPA submits that interconnection regulation should explicitly define interconnection as including transit and onward routing. These are services which hinge on or are directly related to the provision of interconnection services and which require regulation in the same manner (including pricing regulation).

Broadband and internet infrastructure & rapid deployment

62. ISPA agrees with the problem statement as set out in paragraph 3.4.5 of the Discussion Paper:

    The broadband market structure is characterised by a large number of market players which do not effectively compete against the dominant market players as a result of constrained access to funding or regulated resources. Previous and current government policies and market interventions by the regulator have failed to promote effective competition, particularly in rural areas which to a large extent remain underserved or unserved.

63. When reviewing policy and legislation within this context, however, it must be borne in mind that it is not necessarily a failure of policy and legislation which has led to this situation. Rather it is primarily a failure of implementation of policy and legislation due to the inadequacies of the institutional framework. Care should be taken not to vary or remove policy elements and legislative provisions which are sound but which have not been implemented.

International Infrastructure

Are there any further policy measures which are needed to ensure that optimal use of undersea cables continues to promote affordable local access?

64. ISPA's view is that no further policy measures are required at this stage but that policy should explicitly support the aim of establishing better fibre-based connectivity in the SADC region and beyond and recognise the benefits to South Africa of doing so. It would be useful to clarify the South African position regarding cross border connections and the need for a party to be licensed in both territories. Obviously this cannot be imposed by legislation on our neighbours, but adopting a policy position will help persuade (through CRASA and the ITU Communications Ministers working group and similar institutions) the adoption of similar policies across the region.

65. The White Paper should, however, set out provisions relating to the landing of international bandwidth in order to ensure that local operators do no inflate the price of this connectivity and hinder access thereto through the charging of exorbitant cross-connect fees inside landing stations.

66. The international satellite connectivity market is highly-competitive and it is ISPA's experience that the cost of such connectivity has been falling over the last few years.

67. ISPA supports the maintenance of the status quo in this regard. There is a great deal of satellite capacity launched or planned and a number of initiatives which are targeting low cost satellite-based communications as a vehicle for meeting global universal access and service goals.

68. ISPA agrees that satellite connectivity is a viable option to address connectivity requirements where terrestrial options are not available or commercially unsustainable.

69. ISPA does not believe there is a need or a commercial case for South Africa to develop its own satellite systems for communications purposes, while acknowledging that there may be strategic or security motivations for doing so. The time periods and cost involved in such an initiative are, in ISPA's view, substantial obstacles to such an initiative.

70. Consideration should be given to the regulation of satellite connectivity, with particular reference to the radio frequency spectrum licence fees payable and the current fee of ZAR50 000 per annum in respect of earth stations as a means to reducing the price of this form of connectivity, particularly where it is utilised in line with the policy objective of facilitating universal access and service in rural areas.

National Backbone Infrastructure

71. ISPA agrees that policy should seek to promote the deployment of Points of Presence (PoPs) throughout South Africa so as to facilitate access to existing and future infrastructure and services.

72. This would not be a new initiative and the lessons from the abortive USAL intervention and the licence terms and conditions imposed on Broadband Infraco SOC Ltd ("Infraco") must be taken into account. As regards the latter it is an explicit condition of Infraco's licence that it establish PoPs in under-serviced areas and the reasons for its failure to do so and it failure to offer affordable and suitable services at such PoPs it has established must be properly investigated.

73. The deployment of PoPs should form an element of the strategy to be employed in meeting universal service and access targets and the decision as to the policy mix which will be optimal to make this happen. This will inform which stakeholders are involved and how funding will be sourced and applied.

74. ISPA is uncertain as to whether it is necessary to deploy PoPs in all local municipalities: it may, for example, make more sense from a technical and value-for-money perspective to target district and metropolitan municipalities. Smaller municipalities could be adequately served by one or more nodes and do not necessarily need a full scale PoP. The danger of over-specifying a PoP is that if not adequately used, it quickly can fall into disrepair.

75. As regards the option of creating a single National Broadband Network (NBN), ISPA notes that policy in this regard was settled as recently as December 2013 and that South Africa Connect is quite explicit in this regard. As noted in the Discussion Paper, the consideration of this option must be informed by the current study being undertaken with regards to market structure and open access, as well as work related to Digital Readiness in terms of the South Africa Connect.

76. ISPA agrees that there are substantial obstacles to the implementation of a single NBN, the weakness of the institutional framework being the primary such obstacle.

77. In general ISPA's preference is for option four possibly bolstered by elements of option three in respect of hard-to-connect-areas:

    Option Four: Allow market forces to provide national broadband infrastructure

    Market forces would provide national broadband infrastructure through the multiple fixed and wireless networks of the public and private sectors. This market-led approach would rely on effective regulatory tools and mechanisms to extend the network to reach all South Africans and address gaps and bottlenecks in the rollout of broadband. This would include the restructuring of the market into an open access regime in which all players with significant market power (SMP) would be required to offer services in line with open access principles and to interconnect with other networks.

    This would require a more proactive regulator capable of regulating all aspects of the market to vigorously develop and enforce competition regulations where necessary taking into account new open access market regulatory demands. The market would lead roll-out of broadband services with public resources plugging the gaps in areas where the market cannot offer services profitably.

    Option Three: Public outsourcing

    This option would involve the use of private and public sector assets to increase efficiency and would be heavily dependent on public funding. It would focus on aggregating public demand and

maximising the use of public sector funding. Government would award a contract to a private sector firm to construct and operate a broadband network on its behalf. In this option, government would fund the entire network and the infrastructure would remains in government ownership.

77.1. Reducing the cost of deploying and operating networks through pro-competitive and efficiency-based regulation and releasing resources such as spectrum into the market will reduce the general cost to communicate and lower the commercial tipping point for network deployment in rural areas.

77.2. PPPs and other incentives targeted at cooperative infrastructure sharing and open access will complement this.

Metro Infrastructure aggregation

78. ISPA supports the development of a rapid deployment policy but notes that this will remain difficult to achieve given disparities in capacity of local government and the need to co-ordinate between multiple Government departments in finalising the policy. This is an illustrative example of a failure of implementation, primarily on the part of the policy-maker.

79. The White Paper should retain this policy and it must be pursued to the greatest extent possible on the basis and timelines set out in the ECA as amended by the ECAA 2014. Inefficiencies in network deployment in the sense of delays and costs occasioned in obtaining permissions internalise a higher base cost to communicate which will remain with use for decades and which frustrate attaining the South Africa Connect broadband targets.

80. The benefits of having a co-ordinated approach to network infrastructure deployment are obvious and the White Paper should stress the need for legislation and regulation of the sector to create mechanisms to ensure this. In this regard both the public and private sectors must get their houses in order and coordination between these two sectors is – as discussed elsewhere – a major challenge.

81. The need to address the current lack of coordination is urgent. Duplicated fibre network deployment internalises inefficiency and results in a higher base to the cost to communicate.

82. In the absence of any regulation or meaningful Government programme the deployment of metro fibre networks is being driven by the market and is targeting commercially-viable areas. The universal service and access component of South Africa Connect and the White Paper strategy on universal access and service will need to address network deployment in non-viable areas (noting that the definition of viability will be dynamic as a function of the reform of the institutional and competitive landscapes).

83. ISPA supports the use of Government facilities as sites for the deployment of wireless network infrastructure and PoPs. Care will need to be taken to balance commercial exploitation of these sites by Government against national policy objectives relating to universal service and access and the cost to communicate. It will also be necessary for policy to be clear about the roles of local government in providing communications services.

84. Where Government is involved in the deployment of metro fibre networks this must be on an open access basis.

Last mile Infrastructure: Access networks

85. ISPA agrees with the outcomes of the research presented in the Discussion Paper relating to the challenges in meeting access network availability and affordability targets which underpin the South Africa Connect targets.

86. ISPA submits that the White Paper should explicitly recognise that:

    86.1. Wireless broadband is the key to meeting short-term access challenges and the primary obstacle to uptake is affordability.

    86.2. Releasing spectrum suitable for the provision of access services and effective regulation of open access at the network and services layers (i.e. on a wholesale basis analogous to that provided by Telkom for its ADSL wholesale customers) are in turn the key to meeting coverage and affordability challenges. This involves implementation of functional separation to split wholesale and retail divisions and allow enforcement of the non-discrimination component of open access at the network and services layers. There is a great deal of accumulated learning in this regard held by the competition authorities as a result of their actions against Telkom and consideration of various mergers and acquisitions, including that proposed between Neotel and Vodacom.

    86.3. High costs of network deployment and the difficulties in getting permissions are forcing operators to share infrastructure in order to reduce costs. This is a desirable outcome for the public interest and policy should incentivise this trend as one in which operator interest and the public interest converge. In particular models of sharing adopted by vertical incumbents that are reluctant to share their communications networks are non-optimal and should be challenged.

    86.4. Open access policies will provide further opportunities to reduce cost by promoting wholesale access to network infrastructure or services.

    86.5. Policy should promote open access to all platforms and services.

87. ISPA specifically notes the suitability of the 700MHz range for rural communications.

88. ISPA regards LLU as nothing more than a sub-set of facilities leasing and sees little value in such a process being pursued in respect of Telkom's copper network alone. Any regulatory impact assessment should therefore have a broader focus to include access to essential facilities and should be undertaken on a technology neutral basis. It may be that there remains a need to deal with access networks in a differentiated manner, but we have yet to see such need.

89. With specific reference to the options presented, ISPA submits as follows:

    89.1. ICASA should continue with its impact assessment as is required by the regulatory principles. In this regard ISPA notes the following set out in ICASA Strategic Plan for 2015-2019:

Infrastructure sharing and open access

Strategic Objective: Facilitate universal access to broadband services at fair retail prices by 2020

	Key output	**Indicator**	**Baseline 2013/4**	**Target 2014/5**	**Target 2015/6**
Support development of Broadband to reduce input costs for	Regulatory Impact Assessment (RIA) on open access	Draft internal report on the costs and benefits of open access	Industry workshop on the way forward regarding	Draft internal report on the costs and benefits of open access	Implementation of recommendations as per the RIA report on open access network

operators	regulation for copper, fibre and wireless access networks.	regulation.	Local Loop Unbundling (LLU) in South Africa.	regulation of copper, fibre and wireless access networks.	regulation.

89.2. ISPA is not certain as to the meaning of option 2 and assumes it refers to designating the local loop as an essential facility. This too should be pursued: provisions relating to essential facilities and access to them on reasonable and non-discriminatory terms have not been implemented. Amendments to Chapter 8 effected by the ECAA 2014 should make this a more powerful and easier-to-implement regulatory intervention.

89.3. In order to maintain consistency with the regulatory principles it is likely that a regulatory impact assessment would in any event be required before these provisions can be implemented.

89.4. Policy should therefore explicitly support the doctrine of essential facilities.

89.5. As stated above, policy should also explicitly support mandated open access (as defined) across all technology platforms.

89.6. Unbundling and the implementation of open access should be undertaken on a phased basis which recognises that the further into an incumbent network regulation is targeted, the more complex and opposed such regulation will be. ISPA strongly supports simple wholesale access and pricing regulation as the “low-hanging regulatory fruit” whereafter consideration can be given to other forms of unbundling and facilities leasing.

Measures to fast track Rapid Deployment of Infrastructure

90. ISPA supports the establishment of a national co-ordination structure which can facilitate applications and co-ordinate infrastructure roll-out, particularly between the public and private sector. ISPA has argued elsewhere in this submission for the provision of information regarding fibre deployments to be compulsory so that national database resource can be established and maintained on a transparent basis.

91. This information and database could also be used for benchmarking wayleave and associated costs.

92. ISPA, as noted above, supports the development and implementation of a rapid deployment policy as contemplated in the ECA as amended.

93. Indirect funding by Government in the form of funded trench digging via the Public Works Fund to assist with fibre laying and making high sites available for broadband equipment installation would obviously be a boon to deployment.

94. Training of local government personnel and ensuring they have sufficient resources and expertise to handle applications efficiently should also be recognised as critical in future policy.

Infrastructure Sharing and Open Access

Open Access System

95. South Africa Connect is correct in highlighting that access to critical and essential infrastructure will determine the failure or success of achieving broadband targets and in seeking to create "a fair and competitive environment, particularly enabling service-based competition through the enforcement of the wholesale access regulation to dominant market players' networks and mandatory open access to infrastructure rolled out through public investment".

96. ISPA strongly supports the argument that a predictable and technology neutral competitive environment premised on open access principles can deliver better results. By contrast: the lack of effective regulation of open access is a primary reason for the failure to achieve public policy objectives in the communications sector.

97. ISPA supports option three:

Implement an open access regime, as per the current broadband policy
The third option would be to implement an open access regime, as per the current broadband policy. This would entail providing a definition of open access in legislation based on the criteria described above.

98. It is critical that a definition is set out in the White Paper and in the ensuing legislation. There are currently a variety of definitions often applied in a misleading manner[2]: if this concept is to a centrepiece of policy then it needs to be spelt out.

98.1. The definition should specify the elements of the value chain which will be subject to open access principles. ISPA supports open access applying to the network layer and services layer referencing the OSI model. Referencing the current licensing framework – which ISPA believes is and expression of open access principles – open access would apply to the provision of electronic communications network services and electronic communications services provided on a wholesale level.

98.2. ISPA notes that the definition of open access set out in South Africa Connect was settled only in December 2013 and submits that it should be retained as a core expression subject to the White Paper and legislation setting out more detailed definitions.

98.3. With regard to the research undertaken by the Department, ISPA is in broad alignment with the three aspects of open access set out on page 66 of the Discussion Paper but is concerned that there is confusion between the terms "open access" and "facilities leasing" and that these points relate to facilities leasing as one aspect of open access without indicating that there are other aspects such as wholesale access which are critical.

99. Arguments to the effect that policy should be balanced and cautious due to the need to balance the requirements for an open access regime with the reality that more investments are needed in the last mile for connectivity need to be considered against the nature of the returns which are sought against investment.

[2] See, for example: Fibre in SA: are we headed for regional monopolies http://mybroadband.co.za/news/telecoms/115855-fibre-in-sa-are-we-headed-for-regional-monopolies.html (accessed 29 January 2015)

100. ISPA believes that we need to move away decisively from a market dominated by vertically-integrated incumbents which are allowed to restrict competition in the provision of services over their networks. Telkom has been forced to do this to an extent by regulatory action and the competition authorities: the MNOs have not.

Strategic Objective: Facilitate universal access to broadband services at fair retail prices by 2020

	Key output	**Indicator**	**Baseline 2013/4**	**Target 2014/5**	**Target 2015/6**
Support development of Broadband to reduce input costs for operators	Draft infrastructure sharing Regulations.	Draft infrastructure sharing Regulations published in Government Gazette for public consultation.	Facilities leasing Regulations.	Draft infrastructure sharing Regulations approved by ICASA Council and published in Government Gazette for public consultation.	Implementation of rapid deployment guidelines for infrastructure sharing Regulations.

Infrastructure Sharing

101. ISPA submits that policy should clearly articulate the need for an effective infrastructure sharing and deployment coordination regime and lay down applicable principles.

102. Policy must seek to provide for the efficient use of electronic communications facilities through infrastructure sharing. Implementation of this policy should promote an environment of open, fair and non-discriminatory access to broadcasting services, electronic communication networks and to electronic communications services.

103. Sharing should be compulsory for that infrastructure paid for by the State (either in the current environment, such as USAASA funded projects), state-owned assets transferred to state-owned corporations and assets constructed by those SOCs using a mix of state funds. This would apply to infrastructure belonging to provincial and local government and other SOCs such as SANRAL.).

104. ISPA notes the following entry in ICASA's Strategic Plan for 2015-2019:

Infrastructure sharing and open access

Strategic Objective: Facilitate universal access to broadband services at fair retail prices by 2020

	Key output	**Indicator**	**Baseline 2013/4**	**Target 2014/5**	**Target 2015/6**
Support development of Broadband to reduce input costs for operators	Draft infrastructure sharing Regulations.	Draft infrastructure sharing Regulations published in Government	Facilities leasing Regulations.	Draft infrastructure sharing Regulations approved by ICASA	Implementation of rapid deployment guidelines for infrastructure sharing

		Gazette for public consultation.		Council and published in Government Gazette for public consultation.	Regulations.

105. ISPA notes that infrastructure sharing is an accepted practise regarding undersea fibre optic cables which are generally financed and operated by consortia of operators and others who share in the capacity made available over the cable. Increasingly this model is being utilised in national long distance levels at both a passive and an active infrastructure level.

106. ISPA submits that policy should recognise the potential for this structure and approach to be applied to fibre access network developments.

107. ISPA agrees that the vertical incumbent mentality of exclusivity of network elements has led to a significant growth in local networks. This was initially seen in the wireless Internet service provider market but is increasingly evident in the number of fibre access deployments in suburbs, business parks and gated communities. As a result of this mentality – embodied in Telkom's refusal to entertain LLU – and the weakness of the communications regulator it is often expensive and difficult (if not impossible) to compete using facilities leasing alone.

108. Policy should therefore encourage or require infrastructure sharing at all technically and economically feasible levels of the network.

109. As regards the options presented:

109.1. Irrespective of other measures taken, the capacity of ICASA to enforce existing facilities leasing – including economic aspects thereof - and future infrastructure sharing provisions must be strengthened. Currently there is extremely limited and ineffectual enforcement of the existing law.

109.2. ISPA supports Option Two:

Option Two: Regulate infrastructure sharing at various levels of the network

Infrastructure sharing would be regulated at specific levels of the network as required. This would include the infrastructure layer of the network, through enabling sharing of passive infrastructure such as masts and ducts, and the transmission media layer, through enabling the sharing of copper (LLU) and fibre infrastructure. A thorough market analysis into the behaviour of incumbent operators would be essential to determine policy and regulatory interventions.

109.3. ISPA supports Option Three:

Option Three: Local loop unbundling

Local loop unbundling is a specific application of open access and facilities leasing. Technological developments are changing the landscape of "essential facilities". For example, technology has introduced the wireless local loop (WLL). Policy would thus make provision for other access technology platforms of the local loop, including unbundling of copper, fibre and wireless infrastructure to allow access to other licensees, based on open access principles.

109.4. ISPA supports Option Four

Option Four: Encourage active network sharing

This option would include core network sharing or national roaming based on market competition analysis. An appropriate legal and regulatory framework would be developed to ensure smooth roaming arrangements between operators without any uncertainty. This option thus relates to the creation of policy promoting competition in the active infrastructure segment of the market.

- *A strong argument has been made in submissions for the promotion of network sharing.*
- *Which combination of the above options will in your view most effectively support the objective of the NDP of ensuring affordable access to ICT services?*

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Universal Access and Service

Universal Access and Service (UAS) in the era of convergence

110. ISPA regards trends such as IP convergence as potentially facilitating attainment of universal access and service goals by simplifying delivery of content and services to consumers across a single platform.
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111. Policy should explicitly recognise the potential for convergence trends to impact positively on the delivery of essential communications services and seek to harness this potential. The mindset should be one of “how can we use innovation in technology and the delivery of services and content” to further UAS objectives?”

Definitions

112. ISPA supports Option One. Policy should also stipulate that these definitions may be amended or augmented – for example to include broadcasting services delivered over IP networks– pursuant to a periodical review. There should be sufficient flexibility to allow periodical reviews as well as a review in response to a significant market shift. ISPA submits that there is a role for the National Broadband Council to play in this regard.

113. The concepts of awareness and ability are already adequately dealt with in the South Africa Connect Policy.

Meeting the access gap

114. ISPA has raised issues relevant to how this can be done throughout its submissions. In short ISPA submits that an effective regulator and competitive market which values sharing of infrastructure is the key.

115. Addressing the market gap for broadband has been comprehensively dealt with in South Africa Connect. The White Paper should take its lead from SA Connect and seek to supplement it with a clear statement of the implementation framework which clearly delineates the roles of different parties.

116. ISPA supports the proposals and suggestions listed in paragraph 3.6.3 of the Discussion Paper.

Universal Service Obligations

117. ISPA does not believe that USOs are an effective mechanism for achieving UAS goals or that there is experience which supports such a view that they are.

118. ISPA supports Option Three. In the event that USOs are retained as a mechanism then policy should allow for differentiation between licensees on the basis of their licence-type, size and the nature of services provided. This aligns with ISPA’s argument that we are moving towards convergence and technology neutrality, but we are not there yet.

Obligations for Wi-Fi hotspots

119. ISPA supports Option One: market forces should be left to continue the rapid expansion in the availability of Wi-Fi services.

120. It must be noted that, while this technology is ideally suited to low-cost access networks, it will only work in conjunction with other network elements such as backhaul services. Enabling a hotspot is a small fraction of the total cost of providing connectivity to users of that hotspot.

Universal Service and Access Fund

121. ISPA supports the retention of the USAF subject to reform of governance, oversight and its mandate for disbursement. ISPA does not support the subsuming of the USAF into a general ICT-Development Fund, unless it retains a specific mandate to apply funds received to UAS projects related to electronic communications network services and electronic communications services.

122. Policy should stipulate the purposes for which funds can be disbursed, and this should be captured in new legislation. Application of funds in the USAF could also be limited to attaining UAS objectives set out in South Africa Connect – i.e. linked to broadband penetration, digital readiness and other components – which in future will be the mechanism for delivery for services, applications and content.

123. ISPA submits that the management of the USAF should become the responsibility of National Treasury while ICASA retains responsibility for collection of funds. Policy should accommodate variance in the contribution payable by licensees.

124. Transparency of the funds held and their application is critical and must be explicitly enshrined in policy.

125. Merging of the USAF and the MDDA should be considered at the appropriate stage in the transition to IP convergence, i.e. when it makes sense for traditional broadcasters and telecommunications operators to contribute to the same UAS objectives.

The e-Rate

What form should the e-rate take in the future?

126. ISPA does not support the retention of the e-rate in its current form. The principle of ICTs facilitating education is sound, but the e-rate is not and ISPA doubts that it will ever be meaningfully implemented.

127. The e-rate cannot currently be implemented in accordance with section 73 of the ECA due to the failure of ICASA to prescribe regulations. Currently there is no way to claim the discount from an upstream provider and the e-rate is therefore a disincentive to provide services to schools to all licensees other than the vertically-integrated incumbents who can continue to do so profitably.

128. The e-rate – if it is to be retained - must be completely overhauled so that it is aligned with the reality of service provision to educational and other institutions.

Should the e-rate be extended to additional beneficiaries, and, if so, which ones?

129. ISPA sees no need to further extend the list of beneficiaries beyond the recent amendments to section 73 effected by the ECAA 2014.

130. This extension remains to be bedded down: in particular it must be recognised that private schools have a very different set of requirements from public schools.

Should the e-rate be increased above the current 50% minimum?

131. This can only be considered if the e-rate is properly implemented. As noted above the current rate coupled with the inability to obtain reciprocal discounts from upstream providers and the

vagueness around what exactly the e-rate applies to means it acts as a disincentive to service provision to qualifying institutions.

Should the e-rate be claimable from the USAF?

132. The mandate of the USAF should allow it to disburse funds to support the provision of connectivity and services to qualifying institutions. It would be prudent to cap this given the demands made by some qualifying institutions and to limit it to "needy" qualifying entities.

Should educational content and websites be zero-rated (i.e. free), and, if so, how can this be reconciled with the principle of net neutrality (discussed elsewhere in this document)?

133. Where possible this is desirable and it illustrates of developing regulation around zero-rating within the scope of open Internet regulation. In this instance the utility of the zero-rating would probably outweigh any negative consequences in terms of competition.

134. More relevant is that zero-rated content should be available across platforms and providers so as to be as widely accessible as possible. Arrangements which require, for example, all staff and students at a school to be subscribers of a single provider in order to access zero-rated content should not be countenanced.

Consumer protection and quality of service

What changes, if any, should be made to strengthen ICASA's powers and competence to regulate, monitor, enforce and publicise consumer protection and quality of service codes and standards?

135. ISPA does not support ICASA retaining its current powers and jurisdiction in respect of consumer protection. ICASA should have an *ex ante* role in this regard but not a complaints or dispute resolution role.

Are the current provisions in the EC Act covering type approvals and labelling adequate?

136. ISPA notes the recent amendment of the ECA and regards the current provisions as adequate. The regulator is, however, not capable of effectively implementing these provisions.

137. The White Paper should recognise the role of type approval in regional and international harmonisation and seek to eliminate barriers to entry into other markets for SA businesses by stipulating the need to work towards a reciprocal recognition framework and simplification of the process for acquiring certification where equipment has been previously certified.

Spectrum management [3]

138. ISPA agrees with the statement that "the optimum and effective utilisation of spectrum from social, economic and technical perspectives to enable the achievement of the developmental goals in the NDP Vision 2030" should be the first point of departure for the policy options herein. In addition, the options presented are in support of the National Broadband Policy and its positions regarding broadband for all.

139. There should be explicit recognition in policy of the fundamental role of wireless service provision in meeting the short-to-medium-term goals set out in South Africa Connect.

140. Notwithstanding that it is a cornerstone of existing policy and accepted without question in the Discussion Paper, ISPA does not agree that spectrum can automatically be assumed to be a scarce resource.

    140.1. Spectrum is multi-dimensional: traditionally the range of available spectrum is seen by what is printed on the band plan – a linear list of frequencies each allocated for specified applications for a geographic area at all times. But spectrum is not one-dimensional – rather spectrum availability is a function of an array of factors including time, geographic area, topology and polarity. Recent advances mean that the availability of spectrum as a function of time or topology etc. can be decoupled from its traditional uses, dramatically increasing potential availability.

    140.2. Demand varies across bands and it is not correct to refer to spectrum generically as being scarce. In many bands there is more than enough spectrum to meet demand.

    140.3. In the absence of a proper spectrum audit having been undertaken there is no hard data on which to base a statement that spectrum for any one set of applications is scarce.

    140.4. As noted in the Discussion Paper, ICASA has indicated that there is "450MHz of spectrum below 3.5 GHz" which could be freed up but has not been due to an ineffective regulator and policy indecision.

141. This is not a theoretical issue: a scarcity mindset dictates a different set of policy options from a mindset which recognises that there is in fact an abundance of spectrum. This difference can be profound.

142. ISPA realises that the likelihood of a conceptual shift of this nature is small but nevertheless submits that the White Paper should take a more nuanced approach as opposed to a bland restatement of the accepted wisdom and unsupported generalisation that "spectrum is a scarce resource".

Spectrum Policy Objectives

143. ISPA aligns itself with the call for effective and efficient management of radio frequency spectrum to ensure agility, flexibility and adaptability in spectrum administration.

144. ISPA has no explicit objection to the eleven policy objectives set out in the National Radio Frequency Spectrum Policy 2010 but agrees with the proposal that these should be reviewed and supplemented by detailed spectrum management principles. The latter should be the primary point of reference in respect of guiding spectrum management.

[3] These submissions were jointly developed with the Wireless Access Providers' Association (WAPA)

145. The starting point for a review of the existing objectives is aligning them with the core regulatory rationale of regulating in the public interest and the regulatory principles. Spectrum planning and management is a component of regulation of the market and must be situated within the broader policy context.

146. Thereafter there must be alignment with other applicable policy instruments such as the NDP and South Africa Connect.

147. ISPA submits that spectrum policy should have the explicit objective of enabling service providers.

    147.1. Technology changes have served to reduce the cost of access technology to within the commercial reach of SMMEs, led by reductions in the cost of bandwidth and customer premises equipment, reform of the spectrum licence fee regime and increased deployment of fibre for backhaul service provision. Emerging technologies such as dynamic spectrum access together with the continuing utility of licence-exempt spectrum will bolster this trend in future.

    147.2. This creates an ideal environment for empowering SMMEs to create smaller access networks and spectrum policy objectives should speak to this opportunity and the need to ensure that spectrum allocation and assignment enables it. Policy should dictate that access to this spectrum should be affordable for SMMEs and fees should reflect the size of the provider. Spectrum-sharing rules should also seek to incentivise sharing between incumbents and SMMEs on a mutually-beneficial basis where the SMME provides an access extension to the incumbent's network. This should also be a key strategy in addressing underserviced areas.

148. Spectrum policy objectives relating to universal access and service should explicitly highlight and foreground the suitability of sub 1 GHz spectrum for this purpose.

149. ISPA further submits the following for consideration in this regard:

    149.1. Policy is by definition broad and this broadness should accommodate a forward-looking component which seeks to embrace innovation in underlying technologies and ensure that spectrum planning and regulation facilitates rather than hinders such innovation and its adoption.

    149.2. ISPA believes that the White Paper should set out priorities but steer clear of hard deadlines. These are at best estimates and if they are not adhered to – even for valid reasons – it makes for bad policy. Spectrum policy objectives set out in the White Paper must be aligned with the targets set out in South Africa Connect in respect of broadband penetration.

    149.3. It should be explicitly stated that spectrum planning and management which targets efficient use of spectrum set against national policy objectives constitutes regulating in the public interest.

    149.4. An objective of policy should be to facilitate the implementation of policy.

Principles underlying spectrum management

150. ISPA agrees with the proposed principles underlying spectrum management, subject to the notes below:

150.1. Regular spectrum audits with the results made publicly available – subject to necessary exclusions in respect of the security services - should be foregrounded and prioritised. This is critical because currently there is no clear baseline on which to base detailed policy and spectrum management. Once established this baseline must be regularly reviewed as the basic benchmark for measuring efficiency and appropriateness of use. It should be made clear that this applies to public and private use of licensed spectrum.

150.2. The principle relating to "Managing unused licensed spectrum" should rather be couched around ensuring efficient utilisation of spectrum. It is not just a matter of hoarding of spectrum but about ensuring that spectrum which has been assigned is being efficiently used. Efficiency also relates to encouraging innovation.

Spectrum allocation

151. ISPA supports the retention of the status quo in terms of process and alignment with international bodies.

152. The right accorded to the policy maker to issue guidelines on spectrum fees has not been utilised and its purpose is not clear to ISPA.

Spectrum allocation principles

153. ISPA supports open-access type obligations being imposed on holders of spectrum licences for "high-demand" spectrum. Such obligations would need to be taken into account in valuing spectrum to be assigned. ISPA notes, however, that not all high-demand spectrum should be treated in the same manner.

154. It is evident, for example, from high demand spectrum auctions recently concluded in the USA that 700MHz is less desirable for operators than 800MHz and higher access ranges because it is less suited to urban deployment (and requires more base stations to be deployed by the holder). Policy should therefore recognise the need to incentivise the uptake of certain bands to promote universal service.

155. As noted above, policy should explicitly link universal access and service goals to the suitability of spectrum below 1 GHz in achieving them.

156. Open access is applicable to wireless technologies in the licence-exempt bands and in broadband access and backhaul services (wireless local loop). In these cases, regulations or economic incentives - including public private partnerships, tax incentives and the like – are required to shift behaviour. As regards licensed spectrum, regulations to encourage sharing of territory for dynamic access spectrum or small cells would help to redirect attention from the mobile operators in acquiring exclusive access to territory and competing based on coverage, and onto items such as improved service delivery or new products and services.

157. ISPA submits that networks can be open access in name only, if direct or indirect costs are prohibitive or if there is unfair competition between the owner of a network or provider of open access services and its retail arm, and service providers offering services over the network. In order to ensure that open access does indeed enable fair and open competition, quality of service (QoS) must either be consistent between downstream service providers, or transparently and fairly priced to enable certain service providers to differentiate fairly based on quality. ISPA advocates clear guidance as to what constitutes reasonable open access, including price and QoS considerations to enable fair competition whereby downstream service

providers are not facing discriminatory pricing or quality considerations compared to any other service provider.

158. ISPA supports spectrum and infrastructure sharing to reduce the cost of network deployment in marginal areas.

159. If these interventions are successful the case for a separate open access network is weakened and it would constitute an inefficient use of funding compared to such interventions.

160. ISPA supports spectrum band harmonisation as a principle.

161. ISPA notes that the "true value of spectrum" is not necessarily that determined by the market alone as this ignores its social utility. Nevertheless competitive mechanisms such as auctions remain a widely-used mechanism for assignment.

162. ISPA supports an approach which includes consideration of allocation as licence-exempt or some variation thereof (e.g. light-licensed, managed) as part of a strategic allocation mix. Massive growth in the use of Wi-Fi by consumers and operators speaks directly to the utility of an internationally-harmonised licence-exempt band. Policy provisions would highlight the value of licence-exempt spectrum usage and seek to promote it through directing that suitable further bands be allocated to the licence-exempt on a secondary basis or that the transmission restrictions on existing licence-exempt bands be relaxed.

Spectrum Licensing Regimes

163. There is no single regime to be applied. First-come-first-served remains suitable for many bands allocated for fixed point-to-point (PtP) deployments while market-based approaches – modified to take into account policy objectives such as universal service, broadband access targets and transformation – are to be applied to high-demand spectrum.

164. This is the hybrid model set out as option four and which is largely what is currently in place. There are, however, a number of other complementary management models such as licensed shared access (LSA), Authorised Shared Access (ASA) and Dynamic Spectrum Access (DSA) which bridge the gap between command-and-control and unlicensed and which should be added to the spectrum management toolkit to form a continuum of management approaches.

165. The suitability of different models must be assessed with reference to the band in question, usage, policy objectives and the level of risk associated with a particular band or application.

    165.1. Developing bands such as those allocated to IMT – involving national deployments and high levels of investment and opportunity cost - and deploying networks therein carries a far greater level of risk in terms of failure than applies to licence-exempt or upper GHz bands. This should be reflected in the licensing regime applied: the greater the risk the more detailed the process.

166. As noted above ISPA supports policy explicitly promoting increased allocation of spectrum as licence-exempt or "light-licensed" to facilitate innovation and economic growth. The benefits of such allocations have been extensively canvassed in earlier submissions.

167. It is difficult to assess whether the current spectrum licensing regime has met Government objectives given the lack of implementation of many aspects of such regime. While the framework requires revision, the failure to meet objectives has been a function of a failure to act and to put spectral resources to work.

Who should pay annual licence fees?

168. ISPA submits that the AIP model should be maintained and refined and that the current position that all entities should pay fees unless exempted by the Minister should continue to apply. This will – in effect – be based on the distinction drawn between commercial and non-commercial spectrum users. The AIP model has proved to be flexible in valuing a wide range of applications across diverse spectrum bands.

169. Broad guidance as to qualifying categories can be set out in policy and amplified upon, if required, through a policy direction.

Spectrum pricing for government services

170. ISPA supports the maintenance of the status quo: all users pay unless exempted. This is in line with the principle of ensuring efficient use of spectrum.

171. The issue of whether municipalities should be involved in service provision is dealt with elsewhere but it is ISPA's strongly-held view that the state in this form should not have preferential access to spectrum or access on preferential terms.

172. It is further critical that there is a mechanism in place for measuring and ensuring that spectrum utilised by public services is being efficiently used.

Compensation for the cost of migration

173. ISPA notes that currently users are responsible for the cost of migration and that this is based on the fact that spectrum licences are issued from year-to-year. ISPA has no general difficulty with the principle set out in the Frequency Migration Regulations 2013 that "the cost of migration should be minimised by considering, amongst other things, the duration of the licence and economic life time of the equipment". ISPA further understands that this approach would be subject to the requirements for fair administrative action set out in the Promotion of Administrative Justice Act (PAJA).

174. ISPA strongly supports the approach undertaken by the New Zealand government in respect of digital migration in that the cost of analogue-to-digital and digital-to-digital migration was used as a base for the setting of reserve prices for lots of the spectrum made available through migration. By analogy policy could dictate that a reasonable cost of compensation may be payable to a licensee required to migrate out of a particular band and that this reasonable cost could be recovered as a cost of access from the incoming user.

Spectrum trading

175. ISPA supports the introduction of spectrum trading on the basis that this has the potential to underpin many of the spectrum management principles set out above, with particular reference to efficiency, appropriateness and flexibility of use. ISPA agrees that spectrum trading – properly introduced – is complementary to other market-orientated mechanisms for allocating spectrum.

176. The communications regulator already has a legislative framework for considering the assignment, cession, sharing or transfer of control of a spectrum licence but has not as yet translated this into regulation.

177. For the most part spectrum trading will be practically limited to certain bands – mostly suitable for access services.

Spectrum Sharing

178. ISPA agrees that spectrum sharing will become more and more important to promote efficient use of available spectrum and that adoption of one form of spectrum-sharing may preclude other sharing possibilities.

179. Policy in this regard should explicitly adopt the “use-it-or-share-it” principle which is emerging internationally as a response to unlocking more spectrum. This should be seen together with the concept of spectrum as being multidimensional – sharing can take place across a variety of factors such as time and coverage area.

180. ISPA supports the hybrid model set out as option 3 which takes into account the need to distinguish between different spectrum bands and applications when considering spectrum sharing.

181. Spectrum sharing has far greater potential for enabling SMMEs and communities than spectrum trading in that the latter requires a transfer of control which makes it more expensive and less likely to occur in practise.

Emerging issues

182. The White Paper will need to be cognisant of emerging issues and how they might impact on users and ensure that policy is an enabler rather than inhibitor of innovation. .

183. ISPA further agrees with the assessment that policy and regulation in some instances – particularly relating to broadcasting-type applications such as IPTV – currently inhibits rather than promotes the provision of emerging IP-based applications and services. This is directly contrary to the role which regulation should play.

IP based technologies

Issue 1: Universal access/service provisions

Should access to IP-based networks, in particular via high-speed links, also be subject to universal access/service provisions?

184. In principle there is no reason why universal service provisions should not apply. This will, however, also be dependent on the nature of the service provided.

Issue 2: Consumer protection

A key policy question is whether, and if so to what extent and how, provisions relevant to consumer protection should apply to the use of IP-based networks or the provision of IP-based applications, taking into account the traditional differences in the treatment of public and private networks.

185. ISPA cannot see why consumer protection provisions – adapted as necessary to take into account the different nature of the services – should not apply to IP-based applications irrespective of whether they are provided over public or private networks.

Issue 3: Supervision of dominant market players

To what extent and how, should the regulator be tasked with supervising suppliers of IP-based networks or IP-based applications, taking into account the traditional differences in the treatment of public and private networks?

186. International and emerging local experience indicates that incumbents will be opposed to the introduction of OTT and other IP-based services. This should be monitored by the regulator in terms of anti-competitive behaviour on the part of such incumbents, primarily through regulation of data traffic tariffs applied to IP-based services.

187. Policy should also provide for appropriate quality of service regulation taking into account the dependence of OTT applications on the underlying network over which they are transmitted.

Issue 4: Emergency services

To what extent and how, should emergency service provisions apply to IP-based networks or IP-based applications?

188. To the greatest extent possible taking into account the underlying limitations in the technology.

Issue 5: Access for persons with disabilities

To what extent and how should access provisions for persons with disabilities apply to IP-based networks or IP-based applications, taking into account the traditional differences in the treatment of public and private networks?

189. To the greatest extent possible taking into account the underlying limitations in the technology.

Issue 6: Security (e.g. law enforcement, cybercrime, legal intercept) and privacy protection

Whether, and if so, to what extent and how, provisions related to security and privacy should apply to IP-based networks or IP-based applications, taking into account the traditional differences in the treatment of public and private networks?

190. To the greatest extent possible taking into account the underlying limitations in the technology.

Over-the-top (OTT) services

191. ISPA's view on the emerging issue of OTT services is as follows:

191.1. This trend is to be welcomed as being in the public interest in terms of increasing utility and lowering costs for consumers.

191.2. To the extent that there is disruption, the benefits will ultimately outweigh the costs from a public interest perspective.

191.3. The non-discrimination element of open access and the current access regime is directly applicable.

191.4. The argument that investment in networks will be disincentivised if OTTs are not regulated – presumably in some economic sense – should be treated with caution and with due regard to the imperatives driving operators to continue investing in their networks.

191.5. IP convergence and emergence of OTTs is inevitable and cannot and should not be held back by regulation.

191.6. Policy should remain as flexible as possible and provide principles which allow the regulator to reach a balance during the transition to IP convergence between innovation, investment and competition.

191.7. Regulation must support innovation – OTTs are an expression of innovation.

191.8. The onus is on incumbents to adapt. Offering rival services and expanding service offering is a common response.

191.9. Policy and regulation should recognise that OTTs mean greater data consumption by customers of the underlying connectivity provider.

191.10. Embracing new business models based on utility-type returns rather than the kind of returns reaped from a vertically-integrated business is a paradigm shift which is being resisted by operators but which will eventually have to be embraced.

191.11. Regulators generally support innovation. They prevent fixed and mobile operators from blocking or degrading competing services.

192. The concerns expressed by incumbents are to be expected as a reaction to the disruption caused by convergence of voice to Internet Protocol and other advances. And it does indeed engender a sense of déjà vu.

193. ISPA suggests that the Panel review the comments on the various Techcentral articles[4] relating to this topic in order to get an unequivocal view of consumer opinion on whether disintermediation is in their interests or not. This can be summed up as: I pay the network for the bandwidth which is used when I utilise an OTT service and there is nothing special about voice, it is just data.

194. This – indeed – seems to be the view of the Telecommunications Regulatory Authority of India (TRAI).

195. It is not at all clear to ISPA how exactly the Authority is expected to heed the various calls for it to regulate these services or to introduce an "interconnection surcharge" as suggested by Telkom, given that OTT providers are not and are not required to be holders of licences or licence exemptions issued under the ECA, even where they are locally based.

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[4] http://www.techcentral.co.za/now-vodacom-warns-of-ott-risk/51458/, http://www.techcentral.co.za/mtn-boss-derides-ott-free-riders/51167/, http://www.techcentral.co.za/otts-must-pay-their-way-telkom/51432/

Chapter 4: The Digital Society

Internet Governance

International institutions

196. ISPA agrees with the submission of Research ICT Africa to the effect that South Africa needs to adopt a "clear policy" on Internet Governance that will allow the country to "defend its interests, its constitutional values and more actively influence global governance outcomes".

197. The development of such a policy should be a separate exercise from this policy review process.

198. ISPA's position can – in essence – be summarised as follows: Governments have enormous powers at home to influence and constrain their citizens and inhabitants. Let the global Internet and its DNS remain free from control by the already powerful.

South African institutions

199. ISPA supports the accreditation model because of its greater flexibility, provided that ZADNA retains control of the charging models that registries may apply, especially in non-competitive situations.

200. ISPA supports a position in terms of which The policy and law could give responsibility for accreditation of .ZA registrars to licensed/accredited registries (see above).

Domain names and mandate of zaDNA

201. ISPA supports an option in terms of which ZADNA acts as an authority that controls the .ZA domain (and perhaps other geographic names that may be delegated to it) but that it not be assigned developmental mandates as well.

Domain name security

202. ISPA agrees that policy should identify DNSSec as a value-adding security measure for the .ZA namespace.

Dispute resolution

203. While the ECT Act names ZADNA as "the Authority" it is also clear that it is heavily constrained in the execution of its mandate by requirements that it obtain the prior permission of the Minister: it is the Minister which is the ultimate authority.

204. ISPA submits that policy should emphasise that ZADNA has rights to act without restriction in most regards subject to an annual review by the Minister.

205. Consideration of the need for and substance of definitions of prohibited practises should be undertaken by ZADNA.

Ensuring trust and confidence in the Internet

Cybersecurity

206. It is difficult for ISPA to make meaningful comment as little detail provided on the Government's existing cybersecurity plans, no substantive proposals are put forward, and the questions put forward as discussion points are vague.

207. This makes sense given that this debate is more properly placed within the context of general security and crime policy and legislation as is occurring in the form of the Cybercrime Policy currently being developed by the SAPS together with the JCPS Cluster.

208. Where general ICT policy attempts to include cybersecurity issues there is an inherent tendency towards dealing with cybersecurity by regulating the communications sector. Any such regulation is correctly to be led by criminal policy and legislation as is currently the case.

209. Dealing with cybercrime as part of a national security policy instead places the focus on addressing key issues such as how to develop cyber skills in SA's existing law enforcement agencies, how to increase public awareness of online safety and how to prioritise cybercrimes relative to other crimes

210. ISPA is therefore in agreement with the submissions of the NCAC and Intel and submits that the White Paper should not deal with these issues further than acknowledging their existence and the need to promote awareness and education amongst consumers in their use of electronic communications as discussed in paragraph 4.9 of the Discussion Paper.

Cybersecurity hub

Is the mandate for the Cybersecurity Hub provided for in the ECT Amendment Bill appropriate? How, if at all, could provisions be strengthened?

211. The background in this section is confusing. It says that the National Cybersecurity Policy Framework mandates DTPS to establish a National Cybersecurity Hub, and says that this is "in the process of being implemented". The document then goes on to detail provisions to achieve this which are part of the ECT Amendment *Bill* (so not yet law). Finally, the section concludes that the "DPTS has established the Cybersecurity Hub in line with the National Framework".

212. The mandate proposed for the Hub in the ECT Amendment Bill – which describes a communications hub dealing with all the parties involved in dealing with cybercrime, and operating as a central point of contact - seems a useful function for a hub to play.

213. ISPA submits that it is critical to clarify whether the Hub is supposed to provide public support or only support at a sector or industry level, as this is an important consideration in determining what resources the Hub will need to be effective.

How do you propose policy and legislation address the issue of liability for cyber breaches?

214. ISPA submits that ICT policy and legislation shouldn't deal with issues relating to liability for cyber-breaches. South Africa already has legislation dealing with the handling of personal information (POPI), and established standards for governance of information technology (Chapter 5 of the King III Report is devoted to this topic.).

215. Notwithstanding existing legal frameworks dealing with liability, the portion of the proposal suggesting a code of conduct for good cybersecurity practices is a fair one. ISPA already has its own iCode initiative along these lines[5], but other sectors would likely benefit from similar Codes.

216. The Discussion Paper also implies that adoption of these codes might need to be "incentivised" in some way. ISPA's experience is that voluntary codes should be preferred over enforced codes. Usually, those voluntarily complying with codes do so in the spirit of the code, while those complying with an enforced code may well be incentivised to look for compliance loop-holes.

Critical databases/critical information infrastructure

217. ISPA is in wholehearted agreement with the various submissions raising red flags about the proposed "critical information infrastructure" amendment. In ISPA's view this proposal is evidently so broad as to be unlikely to pass Constitutional muster.

218. ISPA supports Intel's suggested limit on the scope as a good place to start.

Which options do you prefer in relation to the above policy proposals?

219. ISPA supports this function being led by the JCPS cluster.

220. ISPA supports Option Two regarding ambit – Limit to state-owned critical information and infrastructure.

How could self-regulation and the development of voluntary codes be supported in policy and legislation?

221. To put it succinctly, by not getting in the way. Self-regulation is effective when it is, in fact self-regulation, and not subject to burdensome regulation. Providing support for the development of industry codes by facilitating workshops, template codes and advice for industry bodies could be a good way to support self-regulation.

Cybercrime

222. This section contains no specific questions. The submissions summarised in this section raise good points about the lack of skills in law enforcement. Building capacity within existing law enforcement bodies must be a high priority whether addressed in cybercrime policy or in cybersecurity policy.

223. Priorities should relate to:

    223.1. Addressing the shortage of cyber skills in existing law enforcement agencies, and build capacity in SA's existing institutions.

    223.2. Investing in public awareness of on-line safety. A significant proportion of cybercrime relies on victims who don't realise they are being tricked. An educated public is a safer public.

    223.3. Clear chains of communications for everyone involved. Members of the public must know who to report cybercrimes to and where to go for help. Business must know

[5] www.icode.org.za

exactly how and when they should report an incident to a national CERT. Law enforcement agencies must have clear mechanisms for collecting information from service providers and clear channels if they need to seek technical assistance from industry experts.

Cyber Inspectors

224. ISPA does not support the idea of separate cyber inspectors, particular operating under a completely different Department to other law enforcement bodies. The DTPS's failure to implement these provisions does not inspire confidence in it performing such a role and there are sound reasons why this function should be housed within existing law enforcement authorities.

225. If separate cyber inspectors are needed at all, these should be experts located within existing law enforcement structures, working within the already clearly defined powers and responsibilities of those structures.

226. South Africa does not need a parallel cyber police force.

Data protection and privacy

227. ISPA submits that the White Paper should not entertain this topic in any detail as it has been recently and comprehensively addressed through POPI.

228. Furthermore it is not clear to ISPA why the provisions of the ECT Act should be amended to align them with the provisions of POPI. POPI has primary jurisdiction over data protection and privacy as an extension of the fundamental right to privacy. To the extent that ICTs have raised new challenges for data protection and privacy these are already dealt with in POPI and there is no need to duplicate this or seek to vary it.

229. To the extent that provisions in the ECT Act are in conflict with POPI they should be repealed.

The right to be forgotten

Is there a need to provide for the right to be forgotten in South Africa? If so, is there any role that ICASA and/or the DTPS should play in entrenching this?

230. Under section 76 of the ECT Act a service provider will not be liable where it provides links to a web page containing a data message or activity which infringes on the rights of a person, as long as the service provider does not have knowledge of the infringing data or facts or circumstances which make its infringing nature apparent and does not receive a direct commercial benefit from the infringing data[6].

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[6] ***Information location tools***

76.A service provider is not liable for damages incurred by a person if the service provider refers or links users to a web page containing an infringing data message or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hyperlink, where the service provider—-

(a) does not have actual knowledge that the data message or an activity relating to the data message is infringing the rights of that person;

(b) is not aware of facts or circumstances from which the infringing activity or the infringing nature of the data message is apparent;

(c) does not receive a financial benefit directly attributable to the infringing activity; and

231. The service provider must also be a member of an Industry Representative Body ("IRB") recognised by the Minister of Communications and must have adopted and implemented the code of conduct of the IRB.

232. Further the service provider must – in order to obtain limited liability – remove or disable access to the link or reference to the infringing data message within a reasonable time of being informed that it infringes on the rights of a person.

233. In other words there is already a mechanism in South African law for the exercise of right to have a search engine remove links to infringing content. The key consideration in SA in determining the scope of this right is how the courts or a future Information Commissioner will seek to strike the balance between the rights to access information and freedom of speech on the one hand and the right to privacy on the other.

234. Search engines and other Internet intermediaries must operate in a neutral and transparent manner if we as users are to be able to trust the decisions that we make based on the information we are able to gather. Critical thinking is the domain of the user, not the intermediary or the State (at least for now).

235. The ECJ's decision compromises this neutrality and the impact on the freedom of speech and the free flow of information will – as a direct result - be chilling for some in the short term. The Internet will, as ever, reroute and it is unclear whether the "right to forget" will be of practical application given the plethora of search engines and the borderless nature of the Internet.

236. The indirect consequences are more concerning; in the hands of a less benign body than the ECJ, a circumscribed discretion awarded to Internet intermediaries is a mechanism for the control of those intermediaries and, through them, the curtailment of online freedom of speech and, ironically, privacy.

237. ISPA does not support a role for the DTPS or ICASA in this regard (or any expansion of the current role of the DoC through the recognition of industry representative bodies).

Data trails

238. ISPA submits that POPI already covers this matter and does not support any role for the DTPS or ICASA. As submitted above there is no case for special provisions for online privacy in the ECT Act as they are already set out in POPI. Amendments to POPI and the processes of the Information Commissioner are the appropriate vehicles for appropriate responses required to the impact of new technologies on data protection and privacy rights.

Online gambling

239. ISPA has no direct interest in online gambling and only wishes to raise the relationship between this issue and Internet intermediary liability, discussed below.

240. ISPA does not believe that DTPS or ICASA or any other state institution in the sector should play a direct role in the regulation of online gambling. This is a specialised area closely tied to gambling in general and best left to the institutional structures and legislation set up to manage it.

(d) removes, or disables access to, the reference or link to the data message or activity within a reasonable time after being informed that the data message or the activity relating to such data message, infringes the rights of a person.

241. To the extent that the concern raised in the Discussion Paper relates to consumer protection and confidence in the use of e-commerce and the Internet, this should be a function of general consumer protection regulation together with consumer protection regulation specific to the gambling sector.

Internet intermediary liability

242. As regards the proposals set out in the Electronic Communications and Transactions Amendment Bill 2012 (ECT Bill 2012), ISPA's response to the publication of proposed revisions to the take-down notice procedure can be summarised as follows:

242.1. The Memorandum to the Objects of the ECT Bill 2012 notes that the Minister considers that the take-down procedure should allow for a right of reply so as to ensure that such procedure conforms to the principle of administrative justice and the audi alteram partem rule.

242.2. ISPA supports this view and submits that an effective mechanism that allows for a person who is the ultimate recipient of a take-down notice (referred to below as "the respondent") to be heard prior to the take-down being effected would assist in redressing the apparent unconstitutionality of the current procedure.

242.3. The mechanism proposed in the Bill was, however, flawed in that it confuses the role of the creator or owner of the content and the ISP or hosting service provider:

> *7. The proposed process can be summarised as follows:*
>
> *7.1. A complainant must lodge a first notice addressed to the service provider or its designated agent which conforms with the requirements of section 77(1)(a)-(h).*
>
> *7.2. The service provider is required to respond to this first notice. This must be done within ten working days or such reduced period as may be justified where irreparable or substantial harm is anticipated if the complaint is not resolved within a shorter period as set out in the proposed section 77A. It is presumably within the discretion of the complainant to decide whether or not circumstances exist justifying a reduced time period and, if so, what such reduced period should be. The service provider is further as a minimum response required to respond to the aversions in the first notice relating to the identification of the right allegedly infringed, the identification of the material or activity that is claimed to be the subject of unlawful activity and the remedial action required to be taken the service provider. The service provider is to have a discretion as to whether to include any further material in its response which is relevant to the complaint and the first notice.*
>
> *7.3. The complainant is thereafter required to give "due consideration" to the service providers' response.*
>
> *7.4. If the complainant, notwithstanding such response, regards the complaint as remaining unresolved, or if no response is received from the service provider, then the complainant may proceed to lodge a final take-down notice with the*

service provider. This must be done within ten business days of the response being received or at the expiry of the ten day period allowed for the service provider's response where no such response is forthcoming from the service provider, or in accordance with the reduced time periods set out in the first notice.

7.5. The service provider is required to comply with this final notice within ten business days or in such reduced period as may be set out in the first notice.

7.6. A failure to so comply may result in the service provider being "liable for a related offence".

8. ISPA submits that the proposed amendments are incorrect in seeking to focus on the service provider as the respondent to take-down notices.

8.1. The service provider is an intermediary which by definition has no direct involvement in the unlawful activity or infringement of rights alleged by the complainant. It is involved in the take-down process due to the fact that a correctly-identified service provider will itself be in a position to affect the resolution required by the complainant.

8.2. The respondent is the party which has published or made available the allegedly infringing material or which is undertaking the allegedly infringing activity.

8.3. The respondent is accordingly the party whose rights may potentially be impacted upon by the take down of the allegedly infringing material or the cessation of the allegedly infringing activity.

8.4. It follows that it is the respondent to which an opportunity must be afforded to be heard if the audi alteram partem rule is to be observed.

8.5. The proper role of the service provider is to act as a conduit for the communication of a take-down notice to its subscriber and to otherwise act in accordance with the provisions of Chapter XI.

8.6. *ISPA therefore requests that the Minister review the proposed amendments to the take-procedure with a view to ensuring that the correct roles of the service provider and respondent are identified and provided for.*

243. ISPA supports Option One – the retention of the existing framework subject to review to address concerns regarding fairness and constitutionality.

244. ISPA is not certain as to why there would need to be "specific guidelines" to "clarify the process to be followed in accrediting of self-regulatory providers" unless this relates to a need for the current Guidelines for the Recognition of Industry Representative Bodies to be expanded to cover categories of Internet intermediaries other than Internet access providers.

245. ISPA submits that policy relating to Internet intermediary liability should be governed by the following:

245.1. Explicit recognition of the competing fundamental rights which must be balanced;

245.2. Explicit recognition of the principles of natural justice;

245.3. Explicit recognition of the continuous development of communications and social platforms and the manner in which this impacts on the balancing of fundamental rights;

245.4. Explicit recognition that the fundamental rights to freedom of expression and privacy rest directly on preserving the neutrality of Internet intermediaries.

246. This policy framework could then be used to determine a regulatory framework and to decide on issues raised such as whether or not only a court should be allowed to issue a take-down notice[7].

247. Option Two relates to the introduction of a so-called "three-strikes rule". ISPA does not believe that ICT policy is the appropriate vehicle for the advancement of the interests of copyright holders and this competence should remain within the dTi and the Copyright Review Commission.

248. ISPA submits that enforcement of the rights of commercial interests in a manner which limits access to communications is antithetical to the rights-based approach adopted throughout the policy review process.

Do you think these provisions should be retained in the ECT Act or rather be moved to a cybercrime law?

249. ISPA submits that the take-down notice procedure and the framework for Internet intermediary liability should be retained in the ECT Act, subject to appropriate revisions to the former.

250. Intermediary liability and take-down notices should be viewed as civil not criminal matters, dealing with unlawful rather than illegal content and activities. For example: where the Film and Publications Board or SAPS or an ISP is alerted to the presence of child pornography on a network there are procedures set out in the Film and Publications Act and the Sexual Offences Amendment Act for co-operation between law enforcement and an ISP relating to investigating and removing access to such content. This is a criminal activity which follows a specified criminal procedure and does not involve the take-down notice procedure.

Intellectual Property Protection and copyright

What if any measures and mechanisms could be put in place to strengthen online intellectual property protection?

251. ISPA submits that this is more properly the concern of dTi and the courts and should not form an element of the White Paper.

Are there any policy provisions that should be introduced in an ICT White Paper and/or related legislation (such as the EC Act, the ECT Act and/or the ICASA Act?

252. Access to communications is an element of the right to freedom of expression and an enabler of the ability of individuals and groups to exercise other rights.

253. A central component of communications policy should be about how to get people connected: not disconnected.

[7] For the record, ISPA does not support this position.

Consumer Protection

254. ISPA has commented elsewhere on consumer protection but wishes to express its agreement with MTN's submission that the focus should be on "properly resourcing regulatory bodies such as the National Consumer Commission to effectively address matters affecting consumers in the e-commerce environment". ISPA agrees that related provisions should be removed from ICT laws.

255. This is not to say that the communications regulator should not have input into consumer protection specific to communications services. It should be consulted as an expert body in the development of rules and the adjudication of complaints.

256. The argument that "there is a need to make provision for specific protection from unsolicited marketing" on the basis that the provisions in the Consumer Protection Act (including the do-not call registry) have not yet been fully implemented" are flawed. Giving greater responsibility to one underperforming regulator because another regulator is underperforming is neither constructive nor sustainable.

257. ISPA agrees that the White Paper recognise the value of self-regulatory and co-regulatory codes to protect consumers.

Protection of children

258. ISPA believes that the White Paper should include specific reference to section 28 of the Bill of Rights in the South African Constitution relating to the rights of children.

259. ISPA is aware that the South African Law Reform Commission (SALRC) is reviewing the need for legislation relating to minors and exposure to pornography. The findings of this process[8] will no doubt also guide the approach to be taken to exposure to other forms of inappropriate content or services.

260. ISPA believes that the policy review process should be guided by the SALRC process and that the implications of the findings of the latter will need to be considered in the White Paper or future revisions thereof.

261. ISPA does not support ICASA having a specific role with regard to the protection of children when using e-commerce and e-services. ISPA notes that many of the concerns relate to classification matters more properly dealt with by the Film and Publications Board (FPB) under the Film and Publications Act.

262. The role of self-regulatory and co-regulatory bodies as well as NGOs in ensuring greater protection for children online should be explicitly recognised in the White Paper.

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[8] An Issue Paper is to be published by the end of March 2015.

Chapter 7: Institutional Frameworks

263. ISPA notes from paragraph 7.1 of the Discussion Paper that the Minister and Department have established a Committee to look at rationalisation of entities in line with the South Africa Connect Broadband Policy. Presumably the White Paper will take its lead in this regard from the findings of the Committee.

Overarching challenges

264. ISPA has previously argued and maintains its position that without reform of the institutional framework governing the ICT sector. There is no doubt that the current reality - a lack of capacity and resources, a lack of coordination between different institutions, duplication of resources and ineffective oversight and accountability - does not serve the public interest in the narrow sense or in the broader sense of the economic upliftment of South Africa.

265. As noted in the Discussion Paper, these are issues which are found across Government and the public service.

266. The policy review process should recognise such external constraints on implementation. Is there a case for a far simpler approach which – in the short-term at least – roots policy within the bounds of practical limitations on implementation? A xase in point is the disparity in capacity and expertise existing between different levels of government and between different provincial and local government structures.

Framework for assessing institutions and the institutional framework

267. ISPA supports the framework proposed in paragraph 7.3.1. of the Discussion Paper for interrogating the utility of state institutions Noting that this framework is derived in the main from existing laws and obligations it may be useful to perform a gap analysis to identify – against the framework – the areas in which the current set of institutions fall short. ISPA supports the list of considerations set out in the same paragraph which are to be taken in performing this analysis.

When should state aid be provided to a company or sector?

268. ISPA supports the EU position as set out in paragraph 7.3.1 of the Discussion Paper: the correct focus should be on ensuring that state aid does not inhibit fair competition and such aid should be addressed at market failures inhibiting the attainment of policy objectives. The four cumulative to be taken into consideration in assessing the desirability of state aid align with the regulatory principles set out in Chapter 2 of the Discussion Paper.

269. ISPA accordingly submits that the suggested questions and criteria are useful tools to incorporate into policy (notwithstanding how aspirational they are when contrasted with current reality). The application of this toolset in respect of the SABC may prove to be politically problematic but there is a clearer case for it to be applied to the funding by the state of institutions such as Sentech and Broadband Infraco.

The role of government

270. It is unfortunate that developments in the political institutional framework appear to be antagonistic to the direction of the ICT policy review process. ISPA has placed on record its opposition to the decision to split the communications portfolio into two separate ministries and departments and believes that this decision – which we regard as unimplementable – has substantially damaged the case for reform of the institutional framework. It is an unfortunate perception – widely-held – that decisions of this nature point towards the ICT policy review process being regarded as irrelevant by government decision-makers.

271. ISPA's view is therefore that the ability of Government to play a constructive role is being weakened rather than strengthened.

272. It is a recurring theme of ISPA's submission that the strengthening of Government to play the role it identifies for itself in the ICT sector is a first and most critical intervention to be undertaken. As noted above underperformance of state institutions is a more general malaise and is not specific to the ICT sector. It is unclear what can be done to remedy this state of affairs but – rather obviously – there must at the least be:

    272.1. Sufficient qualified personnel with directly-relevant experience

    272.2. A rigorous application of the interrogatory framework set out in paragraph 7.3 of the Discussion Paper

    272.3. An assessment of the reality of performance of institutions as against the regulatory principles set out in paragraph 2.3 of the Discussion Paper.

Role of National Government

273. ISPA agrees that there is weakness in policy formulation and implementation at national government level as well as an apparent failure to recognise the potential of ICTs as a cross-cutting engine for economic growth. There is ample evidence to support these contentions.

274. As stated above, ISPA believes that unless the current schizophrenia in political responsibility is resolved and until the chronic lack of capacity and expertise at national government is addressed there will be no progress towards creating a facilitating environment for ICTs in the public interest and South Africa will continue its current paradigm of underperformance.

National Fibre Map

Do you agree with the suggestion that the DTPS take charge of mapping fibre installations? If so, are there any security or confidentiality issues that would need to be addressed?

275. ISPA supports in principle the proposal from SALGA that the "DTPS should require in policy and related regulations that all entities holding information on fibre deployments must submit this to the Department within one month of promulgation of the rules and that any changes should be submitted within three months of fibre being laid/changed. The Department should then be responsible for providing detailed maps of all existing and planned fibre networks (including current used and dark fibre). Information and detailed maps should be made readily available to all stakeholders, including municipalities."[9]

276. ISPA submits that:
    276.1. There are clearly concerns around commercially-sensitive information being provided under such an initiative. These relate both to the possibility of the confidentiality of such information being compromised as well as the fact that government is itself a player in the provision of fibre networks and fibre-based services through its shareholdings in Broadband Infraco, Telkom and others. Government is also a player at local government level in the metropolitan municipalities

    276.2. It may be preferable for this function to be performed outside of the DTPS, through, perhaps, a co-operative industry effort along the lines of the Number Portability Company or through the Fibre to the Home Council Africa.

[9] Discussion Paper pp269-270

276.3. ISPA understands that some incumbent operators have resisted providing this information to the communications regulator but is unaware of their reasons for doing so. As sharing of information is a sine qua non for facilitating infrastructure sharing there should be an engagement about accommodating their concerns with an framework obliging the provision of this information.

Role of local government

277. ISPA's members have direct experience of the disparities in approach and capacity as between local government. ISPA agrees that these entities – through a representative association such as SALGA – need to be included in the development of laws, policies and implementation plans relevant to infrastructure deployment and service provision. To the extent that policy can clearly delineate the roles and responsibilities of local government it should do so.

278. ISPA notes that the difficulties experienced by holders of electronic communications network services (ECNS) in interacting with local municipalities and the resulting judicial precedent as embodied in the decision of the Supreme Court of Appeal (SCA) in Msunduzi Municipality v Dark Fibre Africa[10] and the North Gauteng High Court in City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others[11].

279. It is now settled law that section 22 of the ECA does not amount to an infringement of constitutional principles, that it applies to both private and public land and that the prior consent of the affected party is unnecessary. Stated differently: an ECNS licensee does not need the permission of a municipality or other authority before exercising its rights to enter upon land and deploy an electronic communications network. It must be noted that the rights afforded to ECNS licensees are not absolute but rather subject to the checks and balances found in existing legislation, principally those contained within the Promotion of Administrative Justice Act, 3 of 2000, ("PAJA") with the SCA holding that a decision by an ECNS licensee to exercise its section 22(1) powers amounts to administrative action under PAJA. It is thus subject to review by the party affected by it.

280. Similar considerations apply with regard to rights set out in section 24 of the ECA to deploy pipes, tunnels or tubes required for electronic communications network facilities under any street, road or footpath.

What mechanisms can be introduced to ensure work together more effectively?

281. Realistically these can only be assessed when institutional entities function effectively within an effective institutional framework.

Oversight and accountability

282. ISPA has many years of experience of working with Parliament and its processes and does not regard these as constituting effective oversight of the Executive and state institutions in the sector. Much of the activity which takes place is formalistic and without any depth of understanding of the issues being addressed. Furthermore there seems to be a lack of institutional memory in holding entities to account against their past performance with the same issues and deficiencies being entertained year after year.

[10] (20119/14) [2014] ZASCA 165 (01 October 2011) http://www.justice.gov.za/sca/judgments/sca_2014/sca2014-165.pdf
[11] (6859/2014) [2014] ZAGPPHC 166; [2014] 2 All SA 559 (GP) (27 March 2014) http://www.saflii.org/za/cases/ZAGPPHC/2014/166.html

283. As noted this is evident across the interaction of Parliament with the Executive and industry and it is therefore an external constraint on effective ICT policy implementation.

284. ISPA submits that policy should seek to mitigate this by:

284.1. Explicitly recognising the importance of the quality of oversight exercised and the role of Parliament in representing the public interest.

284.2. Providing for mechanisms such as training to improve the quality.

284.3. Providing for mechanisms for portfolio committees to receive regular updates on industry trends and developments, potentially through the offices of the National Broadband Council.

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ICASA

Status and independence

How can policy and/or legislation address perceptions of non-compliance by the regulator with the objectives of law and with national policy, while still ensuring its autonomy?

285. It is ISPA's view - based on its interactions with ICASA since its establishment - that perceptions that the regulator is "non-compliant" with the objectives of law and with national policy owe more to its ineffectiveness than to any intention to follow an "agenda of independence". ICASA is unable to implement: this includes policy alongside a large number of the pro-competitive provisions of the ECA.

286. It is possible to go further and state that there are instances where ICASA is non-compliant with the law. Its failure to publish the minutes of meetings of its Council in clear contravention of section of the ECA indicates an inability to follow the law applicable to it and the High Court has found – and may find again – that it is unable to follow the provisions of the ECA and administrative justice.

287. ISPA notes, however, that there are appreciable difficulties presented to ICASA by a stagnant policy environment and the high-turnover of Ministers. These have been exacerbated, in ISPA's view, by the decision to create two Ministries to which ICASA is accountable. It appears that there have also been instances where operators have successfully lobbied the policy-maker in respect of regulatory processes.

288. ISPA is unable to identify compelling evidence for submissions to the Green Paper that ICASA has demonstrably asserted its independence nor can it understand the purported link between such alleged assertions and its "failure to take its statutory and constitutional duties seriously enough".

289. The truth is that ICASA is a failed institution. It may take its duties seriously but it is not capable of performing many of them.

290. Regulatory capture is largely a product of the weakness of the regulator.

291. ISPA supports the proposal that the regulator should be provide reasons for any decision to deviate from policy objectives or to explain how it has balanced competing policy objectives.

Option One: Status quo

Provisions on independence and those outlining the Minister's powers in relation to policy and policy directions would remain as is. Other mechanisms, such as parliamentary oversight, would be used to address accountability (see below).

292. ISPA has previously acknowledged the need for ICASA to regulate within a stable policy environment. This is currently adequately expressed in the ECA although ISPA has severe reservations about the power accorded to the Minister through the ECAA 2014 to acquire a copy of regulations to be made by the regulator not less than 30 days before publication.

Option Two: Amend the Constitution to reinforce independence further

The Constitution would be amended to include ICASA in section 181 which lists state institutions that strengthen constitutional democracy.

Note that the Constitution sets out an appropriate and particularly laborious process for its amendment. Only Parliament can amend the Constitution, moreover, and therefore a final determination on this would not be finalised in a White Paper. If this is your preferred

option, please also address the different nature and function of ICASA and the other institutions included in section which all perform some sort of watchdog role over Government and other public institutions/processes, unlike the Authority. ICASA is a sector regulator while others are not.

293. ISPA does not believe such a measure is necessary.

Option Three: Requirements on fulfilling policy objectives are strengthened

As per the Intel recommendation, the Act would require that the regulator implements national policy objectives and legislation. ICASA's discretion in how it addresses Ministerial policy directions is retained, but policy and law require the regulator to give reasons if it decides not to implement a direction or varies its approach to deal with the identified issue.

294. ISPA supports this position. It should be explicitly recognised that national policy objectives may not always be complementary and may require some objectives to be prioritised above others. The idea should not be to adopt a legalistic approach which effectively paralyses the regulator: the requirement should be that the exercise of its discretion is rationally undertaken and administratively sound.

Oversight and accountability

295. ISPA agrees that Parliament's oversight capacity must be enhanced – as an element of the required reform of the institutional framework - so that it can effectively measure the impact of activities of the regulator against national policy objectives. This is currently not the case.

Should the policy introduce additional reporting requirements for ICASA to enable Parliament to proper fulfil its responsibility to hold the regulator to account in terms of its mandate? If so, what provisions should be included?

296. ISPA does not believe there is any need for additional reporting requirements – the ineffectiveness of the current arrangement is due to the lack of capacity to engage on the part of the Parliament and a lack of capacity to regulate on the part of ICASA.

Are the current performance management provisions for ICASA implementable?

297. It would appear not. ISPA has no insight into the reasons for this.

Do the performance management provisions assist in increasing accountability of the regulator? If so how could they be strengthened?

298. ISPA's view is that performance management of ICASA councillors should not be undertaken on an individual basis: in such a scenario any potential gains in terms of accountability will be outweighed by the potential for the blurring of the lines between the policy-maker and the regulator.

299. ICASA should be accountable to:

299.1. The Minister in respect of the implementation of policy. Implicit in this is that room exists for the regulator and the Minister to have different views regarding such implementation. Where the regulator takes a different view this must, as discussed above, be done in a rational manner and with reasons.

299.2. The public in that its core regulatory function is to regulate in the public interest.

299.3. Licensees in that its activities impact upon their commercial activities.

Responsibilities

Should policy and law require ICASA to publish regular reports? If so, what reports should it be compelled to publish?

300. ICASA is already required to submit annual and strategic reports to Parliament and to account there for its performance. This is, however, in reality a largely meaningless exercise due to the lack of institutional memory and understanding of the subject matter in the portfolio committees and the manner in which reports are structured and presented.

301. Reporting by itself achieves little unless it is done in a meaningful and easy-to-understand matter to an audience which is able to interrogate such reports against historical reports, policy objectives and information from other sources.

302. It is unfortunate that ICASA is not observing its statutory obligation to publish the minutes of Council meetings as this would constitute a form of transparency and reporting available to industry and the public which is currently lacking.

303. Policy should provide for a means for ICASA to report on its activities to the public in whose name and interests it regulates.

Should it be required to conduct regulatory impact assessments and publish reasons for all regulatory decisions?

304. It should be required to do so but there should be a different set of requirements in this regard as a function of the importance of or risk attached to the decision in question. At base there are the requirements of PAJA which ICASA is required to comply with in respect of all administrative action which it undertakes. A more exacting assessment would be required in respect of competition matters and there is a continuum in this regard.
305. Care should be taken not to impede the regulator from acting effectively or responding to urgent matters.

Is there a need to strengthen ICASA's powers to require licensees and other stakeholders to submit information to it?

306. There is above all a need to strengthen ICASA's ability to exercise its existing powers and thereafter analyse and act upon information received.

307. Policy should speak directly to information asymmetries and the requirement for legislative and regulatory responses to address these.

Spectrum management

308. ISPA supports "Option One: Status quo but strengthened".

Complaints and compliance

309. ISPA experience is that the Complaints and Compliance Committee (CCC) as currently constituted is not discharging its mandate.

310. The CCC is as much a casualty of the resource asymmetries evident in the market as the communications regulator in which it is housed. CCC members hearing disputes between licensees are frequently faced with senior counsel and their accoutrement a situation which simply creates review opportunities and positions the CCC as a stepping stone towards the courts.

311. The CCC is reliant on the communications regulator for the investigation and prosecution of breaches of regulations and other disputes. ICASA is not, however, able to perform this function.

312. As such – and with reference to the options presented – ISPA makes the following submissions:

312.1. Policy should set out the desirable attributes of a body charged with resolving disputes raised between or involving licensees or products and services falling within the ambit of the ECA. These should include:

312.1.1. The relationship between this body and the balance of the institutional framework. If an element of independence from such framework is required – and it should be given government's structural conflict – then this should govern appointment procedures, budgeting and operations of the body.

312.1.2. The body must be capable of resolving matters on an expedited basis, i.e. at the very least faster than a direct appeal to the courts. ISPA strongly supports the proposal that this body have an enforceable alternative dispute resolution framework in an effort to cut the cost of and time taken to resolve matters before it.

312.2. The current approach of the CCC making recommendations to ICASA's Council regarding sanction and enforcement is objectionable in terms of lacking transparency and effectively emasculating the CCC.

Reviewing ICASA decisions

313. ISPA supports the retention of the status quo in this regard. Reforming ICASA so that it is able comply with the regulatory principles set out in paragraph 2.3 of the Discussion Paper will improve the quality of its decision-making and make litigation and review proceedings less likely. There is a certain level of acceptable litigation in the sector given competitive tensions, but over time challenges designed to delay or frustrate should diminish. Once we have an effective communications regulator it should be recognised that it should be supported in addressing entrenched imbalances and in regulating for the public good.

314. The creation of an effective dispute resolution body as discussed in the previous section could also result in less recourse being had to the courts.

315. ISPA does not support the establishment of a specialist court to resolve litigation around ICT regulation but sees the dispute resolution body discussed in the previous section promoting access to alternative dispute resolution mechanisms.

Appointment Process

316. ISPA has no comments on the appointment process to be followed in appointing ICASA councillors and notes that this is to an extent a function of decisions taken with regard to the restructuring of the regulator. Currently the process is an overtly political one. With ICASA retaining oversight of the SABC as a licensee it seems unlikely that this will change.

317. ISPA submits that policy should set out the applicable considerations for appointments to Council, including the following:

317.1. That the primary requirement be expertise in a relevant field, taking into account expertise already represented on Council or otherwise available to it.

317.2. That the process should be transparent.

317.3. That applicants should be thoroughly vetted for conflicts and to ensure their probity.

318. Policy should also provide for input into the appointment process by other relevant stakeholders such as the communications regulator itself (in terms of its requirements in respect of expertise) and the National Broadband Council.

Structure of Board / Council

319. ISPA recommends that policy provide for the implementation of an Integrated Board to replace the current ICASA Council. An Integrated Board comprises a mixed Board of executives and non-executives, with the former comprising the chief executive officer and chief operations officer of the regulatory authority and one or two other executives, and the latter comprising people drawn from other walks of life, for example economists or consumer champions or academia, all under an independent Chairman of stature in the community.

320. ISPA recommends that this Board be supplemented by additional consultative / advisory committees to expand its access to expertise.

Funding

321. The question of how is not as important as the question of how much? ISPA believes that there must be a radical rethink of the extent to which the communications regulator must be funded – whatever the source – before it will be an effective regulator. Given that this involves an application of public funds – whether derived from tax-payers or licensees – the communications regulator would need to apply this funding transparently and within the existing requirements of the PFMA and other applicable instruments.

322. The fact that ICASA has not fully-utilised its budget in recent years despite the enormity of the task facing it speaks directly to the regulator's paralysis.

323. ISPA recommends that policy and legislation provide for ICASA to be funded through a hybrid model in terms of which it is funded by both the government and through retention of a portion of the fees that it collects.

324. To the extent that funding constitutes an element of the matrix of factors going together to form ICASA's "independence" this has to be balanced against the need for accountability in the application of funding. ICASA is a state institution and must contest with other institutions and programmes for funding. Some form of debate regarding budget and some form of approval thereof is always going to be required.

325. This funding model will:

325.1. Ensure predictable funding for critical public interest objectives which are to be borne by government directly rather than recovered from licensees.

325.2. Require those regulated to "pay" for services provided and

325.3. Promote efficient, effective and accountable regulation through the requirement that fees payable by licensees are duly costed.

326. ISPA agrees that – if this funding model is adopted - it will need to be phased in to ensure that the regulator has the capacity to cost all its activities so that fees are cost-based.

327. Fees to be retained would be those of an administrative nature – licence applications, registrations, transfers, amendments etc – as set out in annexures to the Radio Regulations and the General Licence Fee Regulations.

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Self- regulation and co-regulation

328. ISPA supports increased use of self-regulation and co-regulation mechanisms and that the utility of these should be recognised in the White Paper.

329. There is already a workable model for accreditation of self-regulatory and co-regulatory bodies under Chapter XI of the ECT Act which can be employed to expand accreditation programmes. The essential elements of this are as set out in section 71 of the ECT Act:

    329.1. The body's members are subject to a code of conduct;

    329.2. Membership is subject to adequate criteria;

    329.3. The code of conduct of the body requires continued adherence to adequate standards of conduct (which can be set out in a supplementary guideline); and

    329.4. The body is capable of monitoring and enforcing its code of conduct adequately.

330. Self- and co-regulatory approaches should be utilised wherever possible in order to enhance the flexibility of regulation and reduce the load on the Regulator.

331. Specific areas in which such an approach should be adopted include content regulation and consumer protection while there is also scope for co-operative efforts in settling technical standards and other matters in the communications industry.

Universal service

332. ISPA supports the disbanding of USAASA and the subsuming of its functions with the Department of Telecommunications and Postal Services and the communications regulator. The DTPS would be responsible for policy issues and co-ordination of universal service and access programmes both within its portfolio and in other government departments. It would also manage the USAF and funds collected therefor from licensees by the communications regulator.

333. In the alternative the USAF could be managed by National Treasury.

334. ISPA submits that this will:

    334.1. Simplify the institutional framework.

    334.2. Recognise that both the DTPS and regulator already perform a number of functions relating to universal access and service and ensure that this most critical of interventions is a clear factor in their decision-making and prioritisation of tasks.

    334.3. Ensure a clearer distinction between policy, regulation and implementation.

Competition

335. ISPA submits that the current split between ex ante and ex post competition regulation is clear and submits that it should be retained. ISPA therefore supports Option One with the legislative provisions governing cooperation between the two bodies being strengthened.

336. The MoU between the competition commission and ICASA as is currently provided for should be reviewed more regularly to refine it in the light of difficulties experienced.

337. ISPA submits that the White Paper should providing clearer guidance on how the communications regulator should prioritise the markets in which ex ante competition regulation should be applied.

338. In the event that ICASA is not going to be empowered to act as an effective economic regulator then the option of amending the Competition Act to allow for the competition authorities to undertake ex ante competition regulation has merit.

Consumer protection

339. In short, ISPA does not support ICASA retaining its current consumer protection oversight function and would agree that a substantial portion of this function should rest with the National Consumer Commission (NCC). This view is based on the consideration that the NCC has primary jurisdiction over consumer protection matters in South Africa as well as the need to reduce the regulatory burden on ICASA.

340. The Consumer Protection Act seeks to promote a fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection. The NCC has jurisdiction throughout the Republic of South Africa and has the core responsibility of enforcing and carrying out the functions assigned to it in terms of the Consumer Protection Act ("the CPA").

341. ISPA submits that – given that the dti is the custodian of consumer protection policy in South Africa – it is this Department which should have direct and overall responsibility for consumer protection across all industries.

342. The White Paper should provide for ICASA to have a role in consumer protection which is limited to ex ante regulation in the form of quality of service standards, monitoring and enforcement. ICASA should also be available to the NCC for consultation in respect of the activities of the latter relevant to communications and with regard to the resolution of communications-related complaints.

343. The White Paper should further recognise the value of self-regulatory and co-regulatory codes to in protecting consumers and resolving their complaints.

Privacy

344. ISPA submits that the White Paper should recognise the relationship between privacy and privacy of communications being carried from one point to another and that there may be a need for cooperation of some form or other between the communications regulator and the information regulator once the latter has been established.

345. It is likely that POPI will still take a number of years to implement fully and this issue can be revisited in a future policy review.

Protection of children, content standards and classification

346. ISPA recognises that IP convergence and the emergence of new media forms is disrupting old models of content classification and control of distribution of "inappropriate" content.

347. ISPA refers to its comments above relating to the work being undertaken by the South African Law Reform Commission regarding, inter alia, the exposure of children to pornography through online media. ISPA believes that this process should take the lead in developing recommendations for an appropriate policy, legislative and regulatory response to this issue

and is aware that the relevant SALRC Advisory Committee has communicated with the Minister of Telecommunications and Postal Services and the Minister of Communications in this regard.

348. ISPA notes the apparently competing broadcasting policy review process launched by the Minister of Communications in November 2014 as well as the fact that a process to amend the Film and Publications Act to provide for the FPB to play a more meaningful role in the regulation of online content has been commenced.

349. It is critical that these processes be aligned with each other and the SALRC process.

350. ISPA does not support ICASA having a content regulation or classification function on the basis that it is responsible for implementing the ECA which by the very definition of “electronic communications” applies only to the movement of communications and content from one point to another as opposed to the content itself.

351. As set out in elsewhere in these submissions, ISPA believes that the reform of ICASA is in part dependent on the restriction of its mandate and not the expansion thereof. ICASA must be allowed to focus on core economic and technical regulation.
