



10 January 2012

Department of Communications

Attention: Ms M Mphahlele

The Chief Director: Economic Policy Development

Per email: lerato@doc.gov.za

Dear Madam

**ISPA SUBMISSIONS ON THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA
AMENDMENT BILL, 2012**

1. ISPA refers to the Independent Communications Authority of South Africa Amendment Bill, 2012, published for comment in Government Gazette 35821 on 26 October 2012 ("the Bill") together with the Memorandum on the Objects of the Bill ("the Memorandum") and sets out below its response thereto.

ISPA Management Committee:

Graham Beneke, Ant Brooks*, Marc Furman, David Gentleman, Wilmari Hannie*, Rob Hunter, Jenny King,
Mike Silber, Jaap Scholten, Elaine Zinn* (*ex officio)

GENERAL COMMENTS

2. ISPA welcomes, in principle, the publication of the Bill. It is evident that there are aspects of the ICASA Act 13 of 2000 as amended (“the Act”) which should be reviewed and revisited given the chronic and continuing underperformance of the Authority.
3. As a general comment ISPA wishes to commend the drafters on:
 - 3.1. The inclusion of a number of provisions which seek to remedy practical difficulties experienced in the implementation of the Act to date.
 - 3.2. The detailed nature of the Memorandum, which is extremely helpful in explaining the rationale for some of the proposed amendments.
4. It is regrettable, however, that the Department elected to release the document for comment by the 8th January of the new year. As ISPA is a representative body which must consult with its members to determine its response to the Bill, the timing of the public comment period is not optimal.

INCORPORATION OF POLICY DECISIONS INTO THE BILL

5. ISPA appreciates and agrees with the rationale raised in the Memorandum that certain changes are necessary from a practical perspective while awaiting the outcomes of the policy review process proposed by the Department (“the Policy Review Process”).
6. Examples of such changes are:
 - 6.1. The introduction of a requirement that the minutes of the meetings of ICASA’s Council (“Council”) are made publicly available.
 - 6.2. The creation of registers.
 - 6.3. The requirement that ICASA be accountable to its own annual business plan.
7. The scope of the Bill is, however, wider than this.
8. ISPA has reservations around the inclusion of proposed amendments which effectively represent the making of policy decisions. The primary instances of this in the Bill relate to:
 - 8.1. The proposal to replace the Complaints and Compliance Committee with a Complaints and Compliance Commission falling accountable to the Minister.
 - 8.2. The reiteration of the proposal in the Electronic Communications Amendment Bill, 2012 (“the EC Amendment Bill, 2012”) to create a Spectrum Management Agency which is implied by the proposed amendment to section 4(3)(c) of the Act.
 - 8.3. Matters which touch on ICASA’s independence and its relationship with the policy maker, including those relating to the appointment process of ICASA councillors. The Memorandum itself recognises this:

“Finally although the Minister considers that the issues of (i) ICASAs independence and (ii) content regulation deserve more attention, the Minister has decided that these important matters should be dealt with in the context of the general sector review and as part of the Green Paper and White Paper processes (“Policy Review process”).”
9. These proposals should be subjected to more rigorous public consultation and debate and the involvement of the Policy Review Panel attendant on the Policy Review Process, rather than being introduced in the Bill.

10. As a final general comment ISPA is constrained to submit that:
 - 10.1. The amendments and new mechanisms proposed will not address the central malaise of an under-funded, under-resourced regulator unable to discharge its core mandate. If anything the expansion of ICASA's remit and the requirement that it undertake Regulatory Impact Assessments (which ISPA supports) will aggravate current underperformance.
 - 10.2. If Vision 20/20 is to be realised the attitude towards ICASA needs to be one of constructive enablement.
 - 10.3. The communications regulator has been weak since inception. For almost two decades it has been bullied by industry while simultaneously attracting strong criticism from the portfolio committee and other stakeholders.
 - 10.4. If this is to change it is critical that there is an appreciation for the role of a strong and independent regulator in achieving policy objectives around universal access and service and the cost to communicate. The State's heavy involvement in the communications sector dictates that the imposition of pro-competitive remedies, such as price controls, can only be achieved through a regulator which is both legally independent from the State and perceived to be exercising its powers without undue influence.
 - 10.5. ISPA understands that the regulator must have a relationship with the policy-maker and that it needs to make decisions which take into account applicable policy. It is to be hoped that the finalisation of outstanding policy directions and the Policy Review Process and the continued strengthening of the Department will assist ICASA going forward.

PROPOSAL TO EXTEND ICASA'S JURISDICTION TO INCLUDE ELECTRONIC TRANSACTIONS

11. The Memorandum sets out proposals to create explicit links between the regulation of electronic communications and broadcasting and the regulation of electronic commerce. The Bill proposes to give ICASA additional roles in relation to electronic transactions.
12. The proposed amendment to the Preamble asserts that "the success of electronic commerce must be underpinned by appropriate regulation of broadcasting, electronic communications and electronic communications networks", while the Memorandum sets out the following justification¹:

"If there are legal, statutory or non-statutory barriers to conducting business electronically as compared to traditional means, development of e-commerce is stunted. These matters which are interlinked practically should be interlinked in law too."

13. ISPA has no objection in principle to this linking, subject to continued recognition of the critical distinction between the carriage of communications and the content of communications.
 - 13.1. The carriage of communications is regulated by the Electronic Communications Act 36 of 2005 ("the ECA"). This covers electronic communications networks and the dynamic services available over them. In a converged IP network it is the movement of packets from one point to another.
 - 13.2. Content is regulated by various pieces of legislation and regulation, including the Electronic Communications and Transactions Act 25 of 2002 ("the ECT Act").
 - 13.3. ISPA is concerned that the interlinking of definitions and the introduction of terms relating to carriage into the ECT Amendment Bill, 2012 will serve only to confuse the regulation of carriage and the regulation of content.
14. It bears emphasising that, given the inability of ICASA to discharge its current mandate effectively, any further expansion of such mandate must be accompanied by an expansion in the capacity of and resources available to ICASA.
15. The Bill proposes to insert a definition for the term "electronic transaction" as follows:

"electronic transaction" shall include both commercial and non-commercial electronic transactions as defined in the Electronic Communications and Transactions Act;

- 15.1. ISPA, in its submission on the ECT Amendment Bill, 2012, noted that the terms "commercial electronic transactions"² and "non-commercial electronic transactions" were defined in the ECT

¹ Para 10.1

² "commercial electronic transaction" means the sale or purchase of goods or services for consideration, whether between businesses, households, individuals, governments and/or other public or private organisations that are conducted over electronic communications networks and/or electronic

Amendment Bill, 2012 but not actually used. ISPA submits that this would not be acceptable drafting.

- 15.2. ISPA is particularly concerned about the term “non-commercial electronic transaction”, the definition of which is difficult to understand. This is not a common term – ISPA was not able to find (using Google) any usage of this term outside of the context of the ECT Amendment Bill, 2012.

communications facilities, and include the ordering, payment of consideration for and/or delivery of the goods or service in the same way.

"non-commercial electronic transaction" means an electronic transaction that does not involve the exchange or payment of consideration.

THE PROPOSED COMPLAINTS AND COMPLIANCE COMMISSION

16. ISPA agrees that there is a need to reform the Complaints and Compliance Committee (“the Committee”) in order to:
 - 16.1. Ensure that it is properly staffed with persons with the necessary legal and technical expertise to adjudicate the matters which come before it.
 - 16.2. Ensure that it has sufficient capacity and institutional support required to meet the increasing number of complaints and disputes coming before it.
 - 16.3. Ensure that it has the legal power to determine and enforce the sanctions and other outcomes flowing from its judgements.
17. ISPA has noted above its position that it would be preferable for the debate around the proposed Complaints and Compliance Commission (“the Commission”) to occur within the context of the Policy Review Process.
 - 17.1. The view that the Commission would not fall under Chapter 9 of the Constitution is contentious and the constitutionality of the proposed amendments is open to question. If this proposal is taken up in a final amending Act it may well lead to a constitutional challenge which may delay the implementation of other aspects of the Bill.
 - 17.2. The Memorandum indicates that the Minister proposes to include content regulation as an issue to be determined in the Policy Review Process. It is conceivable that the Commission would play a role in such content regulation. If so then its design should take this into account.
 - 17.3. The objectives set out in paragraphs 16.1 to 16.3 above can be achieved without resorting to the creation of an entirely new body with fundamentally different underpinnings. ISPA submits that there are interim steps which can be taken which will be broadly welcomed.

CONCLUSION

18. ISPA thanks the Minister and the Department for their consideration of these submissions and trusts they will prove to be of assistance.

Regards

INTERNET SERVICE PROVIDERS' ASSOCIATION

Per:

ISPA Joint Chairs

(the above intended as an electronic signature)