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TECHNOLOGY MEDIA AND TELECOMMUNICATIONS ALERT

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NEW MINISTER, NEW BILLS

Government has listened.

Within days of Minister Carrim stepping into the shoes of his predecessor, the Electronic Communications Amendment Bill, 2013, (Electronic Communications Amendment Bill) and the Independent Communications Authority of South Africa Amendment Bill, 2013 (ICASA Amendment Bill) were been tabled in the National Assembly. These Bills are a considerable improvement on earlier drafts which drew fierce criticism mainly as a due to proposed amendments to existing legislation that would have curtailed the constitutionally protected independence of the Independent Communications Authority of South Africa (ICASA).

Below is a brief analysis of the most significant differences between the draft Amendment Bills published for comment in 2012 and the Bills that are now before the National Assembly.

ICASA's independence preserved

The 2012 draft ICASA Amendment Bill proposed that ICASA's discretion to implement ministerial policy and policy directions be removed and that ICASA be obliged to implement policy and policy directions. This draft Amendment Bill also proposed that the Complaints and Compliance Committee be replaced by a Complaints and Compliance Commission whose members would be appointed by the Minister.

Of great concern to many commentators were provisions in the 2012 draft ICASA Amendment Bill that the Commission would have extensive powers including the power to give directions and instructions to ICASA and licensees.

The 2012 draft Electronic Communications Amendment Bill, contained equally worrying amendments making provision for the introduction of a Spectrum Management Agency with wide-ranging powers that would inevitably have curtailed ICASA's independence in assigning radio frequency spectrum.

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The 2013 Amendment Bills contain no suggestion that ICASA is obliged to follow and implement ministerial policy and policy directions and its discretion remains unfettered. No mention is made of a Complaints and Compliance Commission that is to be constituted by the Minister. Likewise, the Spectrum Management Agency finds no place in either of the Bills.

No individual licences required for national electronic communications services

In terms of the Electronic Communications Act, 2005, as it currently stands, a person providing electronic communication services consisting of voice telephony using numbers from the national numbering plan must hold an individual licence in order to do so. The requirement that a person holds an individual licence is an onerous requirement.

The 2012 Electronic Communications Amendment Bill proposed that the requirement that an electronic communications service licensee hold an individual licence be extended to all electronic communications service licensees providing electronic communication services nationally regardless of whether or not those services consist of voice telephony using numbers from the national numbering plan.

Fortunately, sense has prevailed, and the 2013 Electronic Communications Amendment Bill does not contain this proposed amendment and class electronic communications service licensees who provide national electronic communications services without making use of numbers from the national numbering range may continue to do so in terms of a class licence.

Electronic communications facilities list extended

The list of what constitutes an electronic communications facility (which is not exhaustive) has been extended to include wiring within multitenant buildings, exchange buildings, data centres and carrier neutral hotels.

Limitations on ownership and control of licences

The Electronic Communications Act, as it stands, requires that an individual licence may not be assigned, ceded or transferred to another person without the prior written permission of ICASA. The present wording has been the subject of much debate and in particular debate regarding what is meant by the words "assigned, ceded or transferred".

The 2012 draft Electronic Communications Amendment Bill proposed additional wording to clarify the circumstances in which ICASA's prior consent would be required. The draft Bill proposed wording to the effect that ICASA's prior consent would be required in order for a person to let, sublet, assign, cede or "in any way" transfer a licence or control of a licence.

As an adjunct to the requirements for prior consent to transfer (or part with control of) a licence, the 2012 draft Electronic Communications Amendment Bill also expanded upon provisions already contained in the Electronic Communications Act regarding ICASA's powers to prescribe regulations limiting ownership and control of individual licensees.

The expanded wording contained in the 2012 draft Electronic Communications Amendment Bill has not been retained in the Electronic Communications Amendment Bill and, in addition, those existing conditions contained in the Electronic Communications Act, which permit ICASA to prescribe regulations on ownership and control will be removed if the Electronic Communications Amendment Bill is passed in its current form. The rationale for this is that the issue of ownership and control is a matter that will be held over until such time as the ICT Policy Review process has been concluded.

Electronic communications networks and electronic communications facilities

Chapter 4 of the Electronic Communications Act applies to electronic communications network service licensees and contains provisions dealing with the rights and obligations of these licensees in relation to the use of electronic communications facilities including rights of entry upon land, use of conduit pipes, construction of pipes under streets, the erection of fences, and removal of trees.

Both the 2012 and the 2013 Electronic Communications Amendment Act require ICASA to prescribe much needed regulations within 18 months of coming into operation of the Electronic Communications Amendment Act that specify how licensees must exercise their rights and obligations under Chapter 4.

The Electronic Communications Act presently makes provision for the publication of guidelines by the Minister aimed at specifying procedures for obtaining permits and the like from government authorities and for resolving disputes that may arise between licensees and land owners. Guidelines carry little legal weight and it is probably for this reason that both the 2012 and the 2013 Electronic Communications Amendment Bills propose that ICASA be mandated to pass regulations to deal with these matters. These regulations will however be prescribed only after the Minister has published a policy and policy directions for the rapid deployment and provisioning of electronic communications facilities which he will be required to do within 12 months of coming into operation of the Electronic Communications Amendment Act.

The 2012 Electronic Communications Amendment Bill proposed that the provisions of Chapter 4 should apply to certain electronic communications network service licensees and not to others. The proposed 2012 amendment seemed to suggest that some electronic communications network service licensees would enjoy more rights than others when deploying networks. Thankfully, the proposal that Chapter 4 only apply to certain licensees has not been incorporated into the Electronic Communications Amendment Bill.

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Competition matters

Under the Electronic Communications Act, ICASA enjoys both ex-ante and ex-post regulatory powers when dealing with competition in the industry. The Electronic Communications Act gives ICASA strong market intervention powers by mandating it to prescribe procompetitive regulations and conduct market reviews. Presently, the Electronic Communications Act also affords ICASA ex-post regulatory powers in that it can investigate and sanction certain anti-competitive behaviour. In this regard, ICASA enjoys concurrent jurisdiction with the Competition Commission.

Both the 2012 draft Electronic Communications Amendment Act and the Electronic Communications Amendment Act propose the deletion of those clauses of the Electronic Communications Act that afford ICASA ex-post regulatory powers with the result that ex-ante regulation will be the preserve of ICASA and ex-post regulation will be the domain of the Competition Commission.

The 2012 draft ICASA Amendment Bill requires ICASA to conclude a concurrent jurisdiction agreement with the Competition Commission. The ICASA Amendment Bill however gives ICASA the discretion to conclude concurrent jurisdiction agreements with any relevant authority or institution (including the Competition Commission) in exercising its powers.

Code of Ethics

The 2012 draft ICASA Amendment Bill introduced the concept of a code of ethics which has been expanded upon in the ICASA Amendment Bill. The ICASA Amendment Bill specifically requires all councillors and the Chief Executive officer to adhere to the requirements of the code of ethics and requires that they must disclose in writing any interest, financial or otherwise to ICASA which disclosure will be recorded in a register which must be kept open for inspection and contained in the annual report filed by ICASA.

National Broadband Council

The Electronic Communications Amendment Bill proposes the establishment of a National Broadband Council whose members may be appointed from the public or private sector. The 2012 draft Electronic Communications Amendment Bill proposed the establishment of a Broadband Inter-Governmental Implementation Committee and did not expressly make provision for appointment of members of the public or private sector. It seems that the National Broadband Council will be a more inclusive and representative body than the Inter-Governmental Implementation Committee proposed in the 2012 draft Electronic Communications Amendment Bill.

The new Minister faces a daunting 'to do' list in taking on this portfolio. The tabling of the new and improved Amendment Bills in the National Assembly is a good start.

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