



**Submission to the Parliamentary Portfolio Committee on Communications  
on the 2005 Convergence Bill  
(Notice 27294 of 2005) by the Wits LINK Centre.  
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## **1. Introduction**

The Learning Information Networking and Knowledge (LINK) Centre at the Graduate School of Public and Development Management, Witwatersrand University, is an independent training and research centre specialising in the areas of Information and Communication Technology (ICT) policy and regulation.

The Centre is committed to informing public interest debates and outcomes for ICT policy in South Africa, and the continent, through the provision of rigorous research and analysis that contextualises developing countries in a global economy.

The Centre is grateful for the opportunity to comment on this important piece of proposed legislation, which has significant implications for the development of the telecommunications, broadcasting and IT sectors.

The Centre welcomes the acknowledgement of the dynamic nature of the Information Communication Technology sector and the potential the sector has to contribute to growth and development that has prompted this review of the existing, fragmented telecommunications and broadcasting law.

While the Centre realises that the legislative process is already far advanced, it wishes to note, from the perspective of good public policy practice, that some of the ambiguity in the proposed legislation results from the inability to draw on an overall guiding policy document in order to reflect the spirit and to direct the interpretation of the legislation. The absence of such an overarching policy framework reflects in a lack of clarity about the purpose in embarking of such a major legislative reform. As a result, the current policy process appears to be motivated by many different and contradictory interests. This is likely to make its outcome more difficult to implement and more open to contestation.

In the same vein and as a matter of administrative justice, the absence of a full consultative process in the build up to the law coming to Parliament and the short period provided to respond to the Bill, are very problematic and are likely to impact negatively on the ability of the public to provide informed comment.

## **2. Naming the Bill**

In examining the extensive objectives of the act, the Centre also proposes that the legislation simply be termed the *Communications Act*, in that convergence is only one of many other objectives addressed in the Bill.

## **3. Harmonisation of legislation and clarification of policy and regulatory framework**

That being said the opportunities offered by convergence to overcome and reduce duplication within historically distinct sectors, together with the introduction of less regulated class licences and exemptions, should allow certain regulatory functions to be streamlined. However, in practice, the nature of regulation is likely to become more

complex. If regulation is to create an enabling environment for the efficient delivery of multiple services in this mainstay sector of a modern economy, it is likely to require not only more human and financial resources than ever, but greater sophistication.

Most taxing in this regard appears to be the transitional arrangements (Chapter 13 in conjunction with such requirements as the preparation of a new radio frequency plan in Chapter 34) which, while bringing more clarity to this process than the previous draft, will be onerous for the regulator to complete in the time specified. In addition, the categorisation of licences in practice may not be as clear as it might seem and some discretion on the part of the regulator to classify services may avoid delays and contestation (S85 (3) e and f).

The importance of this Bill being accompanied by the proposed *ICASA Amendment Bill*, or for it to be treated as omnibus legislation, cannot be overemphasised. It currently erroneously refers to the ICASA Act as the 2000 Act though the section referred to do not appear in the current ICASA Act. It appears that this draft of the Bill has removed the improved regulatory governance framework proposed in the last draft into what would appear to be another act, the currently unpublished *ICASA Amendment Bill*. This is not in itself a problem, if the legal vision is for all ICT regulatory matters to be contained in a self-standing piece of legislation. However, it remains essential that the current regulatory constraints - which result from structural conflicts of interest faced by the Ministry of Communications, who is at the same time the significant shareholder in the incumbent, as well as the formulator of broader ICT industry policy (under which the incumbent competes) and ultimate arbiter of market structure an approver of major licences (against which the incumbent competes) - are lifted.

Technically, references to both the Complaints and Compliance Committee, presumably to be established in terms of the *ICASA Amendment Bill*, and the Investigation Unit are presumably *ultra vires* without the Amendment Bill even being tabled and without its contents being made available at the time of the debate and passing of the Convergence Bill.

Likewise sections of the Broadcasting Act have been repealed with large sections being lifted into the Bill. Crucial levers in the broadcasting model have however been repealed in the process such as the licensing mechanism for the public broadcaster but not been substituted with any other funding arrangement. Not only do the repealed sections of the broadcasting and telecommunications require closer examination but it is not clear that the substitution of certain aspects of the *Broadcasting Act* with new sections in the Bill would withstand constitutional scrutiny. The intention to harmonise the treatment of telecommunications and broadcasting signal distribution networks proposed in objectives of the Bill needs to be closely examined in relation to the far more complex issue of content harmonisation across historically distinct platforms.

The Centre also welcomes the removal of the veto powers of the Ministry of Communications on regulations prescribed by ICASA. Ministerial approval of regulations has created regulatory bottlenecks in the past that have undermined the effectiveness of the regulator to create a fair competitive environment. They also remove some of the asymmetry between the regulation of broadcasting and telecommunications as would be required by legislations with convergence as one of its objectives. However, with the retention of certain regulatory and licensing powers by the Ministry, together with some of the necessary provisions of the *ICASA Amendment Bill* not being in place, the

constitutionally required independence required for the broadcasting regulator in Section 192 of the Constitution of the Republic of South Africa is probably not met.

Examination of the reasons for the remaining co-jurisdictional issues with regard to regulations and licensing is urged, in order to limit avenues for delays and the legal contestation and hence to avert the damaging impact this has had on investor confidence and on market growth.

Specifically, the continued blurring of policy and regulatory functions with regard to radio spectrum and the Ministerial veto of regulations in that regard needs to be clarified if the protracted and messy licensing situation is not to be perpetuated (S34 (8)). In this regard, the Ministerial policy prerogative to determine spectrum policy and to be responsible for international undertakings is made clear in S 3 (1) (a) and (c). The proposed band plan and other regulations must be compliant with national policy as determined by the Ministry and international undertakings. The possibility of the Ministry intervening in spectrum allocation and assignment, through the exercise of her veto powers, particularly as a significant shareholder of a dominant market player, will increase the regulatory risk for investors and operators, national and global.

#### **4. Licensing framework**

The relinquishing of Ministerial powers over some aspects of licensing is also to be welcomed. This will streamline the current convoluted processes of licensing with responsibility for different stages in the process residing sometimes with the Ministry and at others with the Regulator. The reasons, therefore, for the retention of the powers by the Minister over infrastructure licensing seem unclear. The approach to infrastructure (network services) licensing should be a clear outcome of public policy and market design for which the Ministry is responsible. If and when necessary, this can and should be adjusted through Ministerial policy directives rather than through intervention in the licensing process. The actual licensing process (implementation of policy) should occur principally through the Regulator. This will allow it to fulfil its public mandate of transparent, fair and accountable regulation, which is necessary to stimulate universal access, market entry and fair competition.

The co-jurisdiction approach to licensing that persists in this legislation with regard to network service licensing has not served South Africa well in the past. Legislators would therefore be advised to consider the negative impact it has had on the investment environment, as well as the machinations and past licensing debacles this approach has produced. If the policy directive process is transparent and, in the case of major issues affecting the market structure, consultative, the Minister could retain clear and overall policy control in relation to such matters without intervention in the licensing process.

This would remove the conflicts of interest faced by the Minister with the current state ownership of so many infrastructure providers, and would instil confidence in the regulator and contribute to a more positive investment climate. As major investors may need to acquire multiple categories of licences in order to offer turnkey solutions, it is important that there is a coherent and streamlined one-stop licensing process with which they are able to deal.

In this regard, while confidence for large scale investors needs to be built, the specification of a 25 year period (S9 a), not only for individual (network) licences, but for applications services and communication services as well (other than when requested by the applicant) is inappropriate. It has the potential to tie the country unnecessarily into long term legal arrangements that have proved the bane of reform initiatives in South Africa and other countries across the globe. Indeed, the protections that current licensees need to be afforded in the transitional arrangements are in themselves evidence of the limitations this places on the ability to restructure markets and adapt policy in response to this dynamically changing and critical economic sector.

The inclusion of an explicit competition regulatory function (on the basis of significant market power) for the sector regulator in setting the terms and conditions for licensees is to be welcomed. It provides praiseworthy recognition of the significance empowering even a sector-specific regulator to deal with anti-competitive behaviour, something that is essential, especially at the early stages of market liberalisation. It is a key regulatory tool required by regulators in newly competitive and highly unequal markets. Dealing with anti-competitive behaviour in the communications market requires specific sectoral knowledge and experience that seldom resides in a general competition agency. The latter is better suited to deal with issues of mergers and acquisitions rather than technical, sector-specific anti-competitive practices.

## **5. Access and Interconnection**

The establishment of a Complaints and Compliance Committee to resolve interconnection disputes provides a welcome alternative dispute resolution solution to the sea of litigation that has swamped the sector. As indicated previously, however, the reference requires clarification as it is not defined or described in the Bill.

More substantively, the interconnection exemption provided by S48 (4) b for communications network services licensees without significant market power or control of essential facilities should be erased, as it is profoundly not in the public interest. It would undermine a fundamental requirement to build the 'infrastructure' required of modern knowledge economies, namely the seamless integration of the networks to optimise efficiency and capacity available to the nation. The utility value of network infrastructures is enhanced by additional calling opportunities and the improved sum of total network capacity. Even new entrant or non-dominant network services licensees must be compelled to interconnect in the broader interest of this key economic infrastructure - although though the terms of that interconnection may be different, as indicated in (4) a.

## **6. Consumer issues**

Chapter 10 on Consumer Issues pays much attention to the development of a consumer code to be approved by the Authority. The inclusion of a remedy for consumers who fail to achieve satisfaction from the proposed complaints procedures by submitting the complaint to an Investigation Unit (in accordance with the unpublished *ICASA Amendment Bill*) improves on the previous draft, but not sufficiently (S60).

The prevailing sense of helplessness and frustration by consumers of fixed and mobile services, despite an apparent process of redress through ICASA, is something on which the integrity of the sector hinges. It is therefore vital to the long-term interests of the sector that the legislation invokes not only the establishment of an effective mechanism of redress for consumers, but a meaningful penalty for operators who infringe consumer rights.

The requirements for provision of information in the code should ensure that such information is widely available to the public. Several sections do not require the public provision of information. These include S60 on consumer issues in quality of service matters and S61 dealing with retail and wholesale tariffs. The public provision of such information not be left to the discretion of the Regulator. Access to information is a national public policy issue.

## **6. Universal Service Agency**

The need to co-ordinate the activities and outputs of both the Universal Service Agency and the Regulator in order to realise the primary objective of universal access, continues to be one of the major institutional challenges for the sector. The collaboration required by S82 between the Agency and Authority is therefore welcome. However the ability of the two entities to fulfil their mandate is dependent on the co-operation and efficiency of their institutions, together with that of the Ministry, who also has a set of responsibilities upon which the two entities performance is dependent. The greater integration of the agency in a well-resourced regulator would better achieve this end.

## **7. General**

While the importance of government communications to its citizenry is critical, especially to a nascent democracy, Section 61 on ICTs for Government and other related services - which requires the Minister of Communications to establish a centre for government departments to communicate with the public - appears to be misplaced in a bill on convergence. ICTs are simply one of several changing tools to fulfil this fundamental governance issue. It would therefore be better addressed in policy and legislation emanating from the Department of Public Service Administration or the Presidency.

Finally, definitions are central to the effective implementation of the law. Without a policy document to guide their interpretation, several unclear (such as 'application service') or missing ('convergence' or 'communication service' referred to in the body of the Bill) definitions continue to raise concerns about unintended consequences. Potentially this opens a door to spoilers to litigate and delay entry to new entrants. In the absence of a policy guide, it will be even more incumbent on the legislature to ensure that the conceptual underpinnings of the Bill contribute to the implementation of the legislation and do not undermine it.

## **17. Enquiries**

The LINK Centre thanks the Parliamentary Committee again for the opportunity to contribute to this consultation process, and is willing to receive any questions relating to this submission.

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