



**Submission to the Department of Communication on the Draft Convergence Bill
(Notice 3382 of 2003) by the Wits LINK Centre.
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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 specializing 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 contextualizes developing countries in a global economy.

The Centre is grateful for the opportunity to comment in this important piece of proposed legislation, which has significant implications for the development of the telecommunications, broadcasting and IT sectors. The Centre welcomes the opportunity seized in the new legislation to improve the independence of the regulator by establishing a funding model that will allow for the retention of a significant portion of the regulator's licence fee collections in order to fund the fulfilment of its extensive mandate. The converging environment will allow for the streamlining of certain regulatory functions but will require more human and financial resources than ever if it is to effectively regulate and create a fair competitive environment for the increasing numbers of players in this mainstay sector of a modern economy. The Centre also welcomes the removal of the veto powers of the Minister on regulations prescribed by ICASA. Ministerial approval of regulations has created regulatory bottlenecks in the past that have undermined the effectiveness of the regulator.

The relinquishing of Ministerial powers over some aspects of licensing is welcomed, as it will streamline the current convoluted processes of licensing with responsibility for different stages in the process residing with the Ministry and other with the Regulator. The reason therefore for the retention of the powers by the Minister for infrastructure licensing seems unclear. The approach to infrastructure licensing should be a clear outcome of the public policy process and if necessary, can be adjusted through Ministerial policy directives. The actual licensing process (implementation of policy) should occur principally through the Authority, for it to fulfil its public mandate of transparent, fair and accountable regulation.

The licensing regime as proposed in the draft Bill appears to prioritise the distribution of spoils which accrue from licences rather than promoting network roll out and competition, which would like reduce excessive profits to the benefit of the consumers. While the protection of existing rights and issues of redress need to be highlighted, in every instance the consideration of the impact on current and potential consumers should be required by the Authority.

The Bill appears to have created ambiguity on the question of jurisdiction with regards to competition issues in the communications sectors by the removal of specified minimal procedures for ICASA to deal with competition disputes, and by implication, of the regulator to deal with anti-competitive behaviour. This is a key regulatory tool required

by regulators in newly competitive and highly unequal markets. Anti-competitive behaviour requires sectoral knowledge and experience that seldom resides in a general competition agency, who are better suited to deal with issues of mergers and acquisitions than technical sector specific anti-competitive practices. The Centre therefore urges that the implications of the removal of these powers be carefully considered before any reallocation of functions between institutions is implemented.

Finally, while the Centre realises that the legislative process is already far advanced, it wishes to note from a good public policy practice perspective that some of the confusion in the proposed legislation results from the inability to draw on a guiding policy document in order to reflect its spirit and to direct the interpretation of the legislation, which as it stands is likely to be highly contested.

Although there was some public consultation in the Convergence Colloquium this was limited and resulted only in a number of bullet point observations from a set number of breakaway groups with no cross-cutting themes addressing core issues, such as the market structure or arising regulatory framework. The outputs of the various groups should have been drawn together into a coherent policy document that could provide rationales for decisions and indications of intended outcomes, rather than into draft legislation.

In this regard the hurried time frames will not serve South Africa well especially if they are persistently to be challenged, as they are likely to be in their current form. Despite the schedule of repeals at the back of the Bill, it is not at all times clear on the interplay between this Convergence Bill, and the existing ICASA, Broadcasting and Telecommunications Acts, and without clearer consideration they are likely to conflict.

While the urgency in creating an enabling environment in the light of the current policy and regulatory constraints on the development of the sector is understood, it may well be in the longer term interests of the country, to take the time and resources required to develop omnibus legislation that will incorporate the various pieces of legislation into a single, integrated statute.

In the meantime, negative outcomes resulting from such a delay in the overhaul of the legislation could be mitigated using the current Telecommunications and Amendment Acts, and the guiding White Paper. This could be accomplished by the Minister of Communications setting dates that would remove some of the existing constraints on market development such as resale, self provisioning of facilities and the inhibiting restrictions on VOIP.

2. General observations of the Bill

There are several errors in the drafting of the Bill, including reference to erroneous clauses, tautological definitions and definitions that are listed but do not appear in the body of the Bill. It is assumed that drafting errors and unclear referencing will be

corrected and this short submission will therefore only highlight some of the substantive concerns.

3. Definitions

There are several understandings in different jurisdictions of “class licences”, and already multiple conflicting interpretations of what is meant by such a licence in the Bill. It would be useful to provide greater clarity to this definition for the public to assess the implications of such a potentially significant development in terms of removing the regulatory burden within the system.

This has implications for several of the categories of licence, which could require class licences for example, Communications Content Licences. While the definition in the Bill suggests this may be a relaxation in terms of various categories of broadcast licences, this would be a new and potentially inhibiting burden to “online publishers and information services” which presumably include websites, even if class licences were to be automatically issued on application,

The licence definitions are central to the effective implementation of the law and as they are currently drafted, they ferment confusion and make the task of ICASA to place existing licences in these categories daunting, if not impossible.

In particular the definitions of “communications content **applications** service” seems is not referred to the body of the Bill. It is possible that it refers to “communications content service” as there is reference higher up in the definitions to “communications applications service”. However, that definition refers also to that service not including a “communication content **application** service”. This set of definitions will require redrafting if they are to be effectively used to categorise services.

The inclusion of public communications networks, used in the definition of interconnection is also likely to result in confusion in the light of previous controversies around what constitutes a public communications network. Indicating what is meant by this in this draft legislation may reduce future contestations around this issue. The rights and obligations associated with operating a public communications network could then still be prescribed in relation to various activities, such as interconnection, by ICASA.

4. Object of the Act

As indicated above, the first object of the Act to promote and facilitate the convergence of telecommunications broadcasting and broadcasting signal distribution” may well have been better served by integrated, omnibus legislation. The piecemeal nature of the proposed legislation does not adequately address this central objective.

Item 3 (o) which allows for the Authority to make “recommendations to the Minister on policy matters in line with the objects of the Act to promote developments in the

industry”, provides an important conduit for responsiveness and flexibility to rapid industry developments. It would be strengthened with some transparency being built into the process, which would allow the Authority to make major policy recommendations through a public mechanism, through which the Minister would also respond; for example a notice in the government gazette.

5. Regulations by the Authority

Section 6 would also benefit from a distinction between what the Authority may, and what it must, prescribe. While it is acknowledged that the regulator should not be stretched unreasonably in terms of resource constraints, the looseness with which this section is currently drafted provides for no accountability for the regulator beyond its discretion.

Clause 2, Section 6 would also benefit from redrafting: it is unclear whether the intention is to require licence category regulations to be delineated from other regulations - and if so why this should be so - or that the regulator is simply being asked to make regulations for different categories of licence (another example where the use of “may” where “shall” would have been more fitting).

The Centre applauds the removal of the requirement that ICASA regulations be approved by the Ministry. This has been responsible for critical regulatory bottlenecks in the past. This created a severe conflict of interest for the Ministry as the major shareholder of the incumbent and accountable for the value of this state asset and its removal is likely to facilitate more efficient regulation of the sector.

6. Ministerial Policy Directions and Determinations

Section 6 needs a stronger requirement that the Authority has applied its mind to any policy direction issued by the Minister than the requirement to “consider” it. Again a mechanism such as a notice in the government gazette for example, would place the Ministry and regulator’s rationale in the public domain.

Section 7 (7) which reads “The Minister may, before issuing a policy direction;

(a) consult the Authority

(b) may cause the text of such direction to be published in the Gazette....”

should read “The Minister shall...” It is important for regulatory certainty and creation of an environment conducive to investment that the Ministry not have discretion in this regard, despite the forcefulness of clause 5 with regard to policy not infringing on the independence of the Authority or licensing rights and obligations.

Clause 8 needs to be clarified to ensure that the amendment of any policy direction by the Minister follows public consultation.

It is not clear why Section 11 is specifically included as the broad rights conferred on the Minister in Section 7(4) appears repetitive in relation to issues of universal access.

SMMEs referred to in Section 11 could be added to the list in Section 7 to incorporate them specifically.

7. Delegation of Functions

Section 8(2) should not allow for the delegation of decision-making with regards to major licensing matters including the granting of individual licences and the general terms of class licences, in addition to regulations by the Council, as is currently stipulated in the Bill.

8. Licensing

As indicated in the section on definitions, it is not immediately clear what kinds of services would fit under the categories provided for in Chapter 3, Section 13.

The co-jurisdiction approach to licensing that persists through to this legislation with regard to infrastructure service licensing has not served South Africa well in the past and legislators would be advised to consider the negative impact on the investment environment and the machinations of past licensing debacles, this approach has produced. Despite Section 7(5) if the policy directive process was transparent and in the case of major issues affecting the market structure, consultative, the Minister could retain policy control in relation to such matters.

However, the licensing process needs to be comprehensively handled by an effective and resourced regulator, acting in concert with public policy - from the call for applications through to the granting of the licence. This would remove the conflicts of interest faced by the Minister with so many infrastructure providers being state-owned and instil confidence in the regulator and contribute to a more positive investment climate. As major investors may need to acquire multiple categories of services in order to offer turnkey solutions it is important that there is a coherent one-stop licensing shop with which they are able to deal.

The current guiding principles in Section 14 on the Issuing of Communications Services Licences should be the extension of network expansion and introduction of competition to create efficiencies in the sector that will benefit consumers. Section 14 in particular should require that the licence will be in the broader consumer interest, which is the overriding public interest. Section 14(3) therefore could include reference to consumer interests in addition to considerations of diversity of ownership. This would apply to Section 17(5) too.

9. Radio Frequency Spectrum

Reference to spectrum efficiency, the guiding principle of spectrum allocation and assignments specified in earlier Acts, appear to have been omitted from the objects and Chapter 5 of the Act, and should be explicitly included as a matter to which the regulator must apply its mind in consideration of spectrum determinations.

10. Renewal of the individual licence

Section 20(5) which requires the Authority to renew licences on no less favourable terms as were previous applicable, appears to remove a fair and reasonable opportunity for the regulator to bring changes to the licence that might align the licence with prevailing conditions, ensure a fair competitive environment, and the like. This clause should read instead that the licence terms may be no less favourable than any other licensee in that category of licence or regulations that the Authority may have determined in terms of Section 6.

10. Suspension or cancellation of individual licence

Section 23(1)b refers to Section 70(2) under which the licence can be cancelled; however the Bill only goes to Section 68. It may well refer to Section 70(2) of the Telecommunications Act, Chapter 9, on Monitoring and Complaints, but requires clarification.

11. Access and Interconnection

Section 40 requires only that a Communications Network Service Licensee provide access to a Communications Network Service Licensee. As such licences would presumably run on top of Infrastructure Service Licensee networks it would seem necessary to impose similar obligations on such categories of licence.

Again, a critical reference appears to be unclear. The dispute resolution procedure referred to in Section 41 9(?) (2) refers to a procedure set out in Section 67, as does Section 45 on the Notification of Interconnection disputes. Section 67 in the draft Bill refers to the Repeal and Amendment of Laws, and therefore this must either refer to the Telecommunications Act or perhaps to Section 43 of the Bill. This requires clarification.

Section 46 on Interconnection Pricing Principles currently excludes the consumer interest in the rate setting rubric. This could be counter posed against consideration of a reasonable rate of return to attract investment in 46 (3) or as a separate clause.

The same observations apply to Chapter 8 on Facilities Leasing.

12. Consumer issues

Chapter 10 on Consumer Issues pays much attention to the development of a consumer code to be approved by the Authority. This code might be strengthened by the inclusion of a mechanism of redress for consumers who fail to achieve satisfaction from their supplier. As it stands, the section offers no meaningful protection or redress.

The prevailing sense of helplessness and frustration by consumers of fixed and mobile services, despite an apparent regulatory 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 the establishment of an effective mechanism of redress for consumers and penalty for operators who infringe consumer rights.

The envisaged consumer code should therefore be required to include mechanisms for both the enforcement of consumer rights and the redress of consumer complaints, including the imposition of meaningful penalties for infringement of consumer rights.

The requirements for provision of information in the code should ensure that it is widely available to the public. Several sections do not require the provision of information - 59 (3) (a) is limited to “customers” and none of the other sub-sections make any specific information provision requirement.

Quality of Service should be an issue that is specifically included under the code, possibly under 59 (3)a.

In certain foreign jurisdictions, a consumer’s Bill of Rights is developed by the regulator, with input from the public, and which is publicised through the mainstream media and included initially in the subscriber’s monthly account. In addition some jurisdiction require the regulator to publicise the results of a consumer survey of services of all operators in order to allow consumers to make informed choices. A similar process should be considered in the South African context, particularly as the regulator has a specific office for consumer affairs and the capacity to do this.

13. Offences and penalties

The ceiling on the fine of R500 000 and a further R10 000 for each further day, needs to be increased substantially, so as to serve as a disincentive to non-compliance with licence obligations. Telecommunications is high-cost business; it may well be more profitable to pay fines of this kind than conform to licensing and regulatory requirements. Low penalties will simply serve to encourage such an approach by operators.

14. 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 that require that the Minister of Communications 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 that would be better addressed in policy and legislation emanating from the Department of Public Service Administration or the Presidency.

15. Competition

As stated above, the proposed removal of the procedures to deal with competition disputes by ICASA seems to suggest some reduction in their powers to deal with anti-competitive behaviour. If this is the intention it will remove one of the key tools to regulate effectively. It is critical that these powers are not in any way reduced. It is the sector regulator that can most rapidly provide the understanding of how anti-competitive practices occur in the sector and how best they can be ameliorated. A thorough understanding and experience of cost and technical factors determining anti-competitive behaviour are most likely to be found in the sector regulator and seldom exist outside it. A critical aspect to correcting anti-competitive behaviour is the speed with which the regulator can respond. The delays in reaching determinations on complaints put before the Competition Commission have been as long, and even longer, than those placed before ICASA due to the Commission's need to get on top of the issues prior to conducting any anti-competitive practice assessment. We strongly discourage the proposed removal of section 53 of the Telecommunications Act which conforms to administrative justice principles.

16. Transitional provisions

While the need to safeguard the rights of existing licensees is an important principle in the creation of a stable and certain environment for investors, the requirement that these be on similar terms inhibits the ability of the Bill to remove the technological constraints on the sector, for example such as in relation to VOIP and self provisioning of facilities. It may also perpetuate anti-competitive practices and create contradictions between these provisions and those requiring that licensees in a specific category all operate under similar terms and conditions.

17. Enquiries

The LINK Centre thanks the Department of Communications 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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