

REPUBLIC OF SOUTH AFRICA

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# **ELECTRONIC COMMUNICATIONS AMENDMENT BILL**

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*(As introduced in the National Assembly (proposed section 75); explanatory summary of  
Bill published in Government Gazette No. 41880 of 31 August 2018)  
(The English text is the official text of the Bill)*

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(MINISTER OF TELECOMMUNICATIONS AND POSTAL SERVICES)

**[B 31—2018]**

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**GENERAL EXPLANATORY NOTE:**

[                    ]     Words in bold type in square brackets indicate omissions from existing enactments.

                         Words underlined with a solid line indicate insertions in existing enactments.

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## **BILL**

To amend the Electronic Communications Act, 2005, so as to provide for transformation of the sector through enforcement of broad-based black economic empowerment; to provide for lowering of cost of communications, reducing infrastructure duplications and encouraging service-based competition through a wireless open access network service; to provide a new framework for rapid deployment of electronic communications facilities; to provide for new approaches on scarce resources such as spectrum, including the assignment of high-demand spectrum on open access principles; to create a new framework for open access; to provide for the regulation of international roaming, including SADC roaming to ensure regulated roaming costs, quality of service and transparency; to provide for regular market definition and review to ensure effective competition; to provide for improved quality of services, including for persons with disabilities; to provide for consumer protection of different types of end-users and subscribers, including persons and institutions; to provide for enhanced co-operation between the National Consumer Commission and the Authority, as well as the Competition Commission and the Authority; and to provide for matters connected therewith.

**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

**Amendment of section 1 of Act 36 of 2005, as amended by section 1 of Act 37 of 2007 and section 1 of Act 1 of 2014**

1. Section 1 of the Electronic Communications Act, 2005 (hereinafter referred to as the “principal Act”), is hereby amended— 5

(a) by the insertion after the definition of “Authority” of the following definition:  
“**‘B-BBEE ICT Sector Code’** means the Broad-Based Black Economic Empowerment Information, Communications and Technology Sector Code, a sector code on broad-based black economic empowerment, issued in terms of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);” 10

(b) by the substitution for the definition of “broadband” of the following definition:  
“**‘broadband’** means an always available, multimedia capable connection with a minimum download speed and quality as determined every 15

- two years by the Minister responsible for Telecommunications and Postal Services by notice in the *Gazette*, following recommendations by the Authority;”;
- (c) by the insertion after the definition of “Competition Act” of the following definition: 5  
 “**‘Competition Commission’** means the Competition Commission established by section 19 of the Competition Act;”;
- (d) by the insertion after the definition of “free-to-air service” of the following definition: 10  
 “**‘general open access principles’** means providing wholesale open access on terms that are effective, transparent and non-discriminatory;”;
- (e) by the insertion after the definition of “harmful interference” of the following definition: 15  
 “**‘high demand spectrum’** means spectrum where—  
 (a) the demand for access to the radio frequency spectrum resource exceeds supply; or  
 (b) radio frequency spectrum is fully assigned, as determined by the Minister responsible for Telecommunications and Postal Services, by notice in the *Gazette*, after consultation with the Authority;”;
- (f) by the deletion of the definition of “ICT Charter”;
- (g) by the insertion after the definition of “multi-channel distribution service” of the following definition: 20  
 “**‘National Consumer Commission’** means the National Consumer Commission established by section 85 of the Consumer Protection Act, 2008 (Act No. 68 of 2008);”;
- (h) by the insertion after the definition of “person” of the following definition: 25  
 “**‘persons with disabilities’** means persons with long-term physical, psychosocial, intellectual, neurological or sensory impairments which, in interaction with various barriers, hinder their full and effective use of electronic communications and broadcasting devices, services and technologies on an equal basis with others;”;
- (i) by the insertion after the definition of “radio frequency spectrum licence” of the following definitions: 30  
 “**‘radio frequency spectrum refarming’** means the re-use of an assigned frequency band for a different application, and ‘spectrum refarming’ has a similar meaning;  
**‘radio frequency spectrum sharing’** means the simultaneous usage of a specific radio frequency or radio frequency spectrum band in a specific geographical area by different radio frequency spectrum licensees in order to enhance the efficient use of spectrum, and ‘spectrum sharing’ has a similar meaning;  
**‘radio frequency spectrum trading’** means the transfer, by a licensee, of ownership or control of the rights, in full or in part, held under a radio frequency spectrum licence by way of a sale, lease or sub-letting to a third party, and ‘spectrum trading’ has a similar meaning;”;
- (j) by the insertion after the definition of “radio station” of the following definitions: 35  
 “**‘Rapid Deployment National Co-ordinating Centre’** means the Centre established in terms of section 20A(2);  
**‘Rapid Deployment Steering Committee’** means the Committee established in terms of section 20A(3);”;
- (k) by the insertion after the definition of “retail” of the following definitions: 40  
 “**‘SA Connect’** means South Africa’s National Broadband Policy, 2013, published in Government *Gazette* No. 37119 of 6 December 2013, under Government Notice No. 953;  
**‘SADC’** means the Southern African Development Community;  
**‘SADC Roaming decisions’** means the decisions agreed to by SADC Ministers responsible for Telecommunications, Postal Services and ICTs in pursuit of the objectives of the Protocol on Transport, Communications and Meteorology in the Southern African Development Community Region, 1996, which Protocol was adopted in terms of the Treaty of the Southern African Development Community of 1992;”;

- ‘sector-specific agencies’** means the South African Maritime Safety Authority and the Civil Aviation Authority;”;
- (l) by the insertion after the definition of “service licence” of the following definition:
- “**‘SIP’** means a strategic integrated project designated in terms of section 8 of the Infrastructure Development Act, 2014 (Act No. 23 of 2014);”;
- (m) by the addition of the following definitions:
- “**‘wholesale open access’** means the sale, lease, or otherwise making available, of an electronic communications network service or electronic communications facility by an electronic communications network service licensee on a wholesale basis on general open access principles, and, to the extent applicable, the additional wholesale open access principles provided in sections 19A(4)(b), 20H(2)(a)(ii) and 43(1A) and (1B);
- ‘wireless open access network service’** means an electronic communications network service provided on a wholesale open access basis and on open access principles, as contemplated in section 19A; and
- ‘wireless open access network service licensee’** means a person to whom a wireless open access network service licence has been granted in terms of section 19A;”.

**Amendment of section 2 of Act 36 of 2005, as amended by section 2 of Act 37 of 2007 and section 2 of Act 1 of 2014**

2. Section 2 of the principal Act is hereby amended—
- (a) by the insertion after paragraph (c) of the following paragraphs:
- “(cA) redress the skewed access by a few to economic and scarce resources, such as radio frequency spectrum, to address the barriers to market entry;
- (cB) promote service-based competition and avoid concentration and duplication of electronic communications infrastructure;
- (cC) promote an environment of wholesale open access to electronic communications networks on terms that are effective, transparent and non-discriminatory;
- (cD) redress market dominance and control;”;
- (b) by the substitution for paragraph (i) of the following paragraph:
- “(i) encourage research, [and] development and innovation within the [ICT sector] electronic communications and broadcasting sectors;”;
- (c) by the substitution for paragraph (p) of the following paragraph:
- “(p) develop and promote SMMEs and cooperatives, and market entry by SMMEs;”.

**Amendment of section 3 of Act 36 of 2005, as amended by section 1 of Act 37 of 2007 and section 3 of Act 1 of 2014**

3. Section 3 of the principal Act is hereby amended—
- (a) by the substitution in subsection (1) for paragraph (e) of the following paragraph:
- “(e) [guidelines for] the determination by the Authority of licence fees and spectrum fees associated with the award of the licences contemplated in Chapter 3 and Chapter 5, including incentives that may apply to individual licences where the applicant makes binding commitments to construct electronic communications networks and provide electronic communications services in rural and underserved areas of the Republic;”;
- (b) by the insertion in subsection (2) after paragraph (b) of the following paragraph:
- “(bA) universal service and universal access obligations, having identified any access gaps;”;
- (c) by the insertion in subsection (2) after paragraph (c) of the following paragraph:

- “(cA) compliance with international obligations;”;
- (d) by the substitution in subsection (2) for paragraph (d) of the following paragraph: 5  
 “(d) **[guidelines for]** the radio frequency spectrum and the determination by the Authority of spectrum fees, including incentives, spectrum fee exemption and spectrum fee reductions that may apply; and”;
- (e) by the substitution in subsection (2) for paragraph (e) of the following paragraph: 10  
 “(e) any other matter which may be necessary to give effect to ICT related national policy or for the application of this Act or the related legislation.”.

**Amendment of section 4 of Act 36 of 2005, as amended by section 4 of Act 1 of 2014**

4. Section 4 of the principal Act is hereby amended—
- (a) by the substitution in subsection (1) for paragraph (d) of the following paragraph: 15  
 “(d) generally, the **[control of the]** use of the radio frequency spectrum, radio activities and the use of radio apparatus, in line with the radio frequency plan.”; and
- (b) by the insertion after subsection (1) of the following subsection: 20  
 “(1A) (a) Despite section 3(4), any regulations prescribed by the Authority on radio frequency spectrum and radio frequency spectrum fees must be in accordance with the policies and policy directions issued by the Minister in terms of section 3(1)(e) and 3(2)(d). 25  
 (b) The Authority must amend any regulations on existing radio frequency spectrum and radio frequency spectrum fees which are in force when the Minister issues a policy direction in terms of section 3(2)(d), within six months after the Minister issues such policy direction.”.

**Amendment of section 5 of Act 36 of 2005, as amended by section 5 of Act 1 of 2014** 30

5. Section 5 of the principal Act is hereby amended by the substitution in subsection (9) for paragraph (b) of the following paragraph:  
 “(b) promote broad-based black economic empowerment, including the empowerment of women and the youth and persons with disabilities, in accordance with the requirements of the **[ICT charter] B-BBEE ICT Sector Code.**” 35

**Amendment of section 8 of Act 36 of 2005, as amended by section 6 of Act 1 of 2014**

6. Section 8 of the principal Act is hereby amended—
- (a) by the substitution in subsection (2) for the words preceding paragraph (a) of the following words: 40  
 “Such standard terms and conditions **[may include,]** must, in the case of individual licences, and may, in the case of class licences, include, but are not limited to—”;
- (b) by the deletion in subsection (2)(d) of the word “and” at the end of subparagraph (iii), and the insertion after subparagraph (iii) of the following subparagraph: 45  
 “(iiiA) informing subscribers and end-users about the quality of service standards contemplated in section 69A; and”;
- (c) by the substitution for subsections (3) and (4) of the following subsections, respectively: 50  
 “(3) The Authority may prescribe additional terms and conditions that may be applied to any individual licence or class licence **[subject to the provisions of Chapter 10].**  
 (4) The Authority **[may] must**, by regulation, make provision for the designation of licensees to whom universal service and universal access obligations are to be applicable and **[may] must** prescribe additional terms and conditions in respect of the relevant universal service and universal access obligations on such designated licensees.”; 55

- (d) by the insertion after subsection (4) of the following subsection:  
 “(4A) The Authority must review the regulations contemplated in subsection (4) at least every five years and the review must include an assessment of—
- (a) the appropriateness of target levels set in universal service and universal access obligations; 5
  - (b) the timelines set for achieving such targets;
  - (c) the level of service to be provided; and
  - (d) mechanisms to enforce compliance, including reporting frameworks.”; and 10
- (e) by the addition of the following subsection:  
 “(6) The Authority must, by regulation, make provision for obligations applicable to electronic communications network service licensees for the rapid deployment of electronic communications networks or facilities and must prescribe additional terms and conditions for such licences.”. 15

**Amendment of section 9 of Act 36 of 2005, as amended by section 7 of Act 1 of 2014**

7. Section 9 of the principal Act is hereby amended by the substitution in subsection (2) for paragraph (b) of the following paragraph:  
 “(b) include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, or such other conditions or higher percentage as [may be] prescribed under section 4(3)(k) of the ICASA Act;” 20

**Amendment of section 10 of Act 36 of 2005, as amended by section 8 of Act 1 of 2014**

8. Section 10 of the principal Act is hereby amended by the addition in subsection (1) of the following paragraph:  
 “(i) if the amendment relates to the rapid deployment of electronic communications networks or facilities, as contemplated in Chapter 4.”.

**Amendment of section 13 of Act 36 of 2005, as amended by section 9 of Act 1 of 2014**

9. Section 13 of the principal Act is hereby amended by the substitution for subsection (5) of the following subsection:  
 “(5) The regulations contemplated in subsection (3) must be made with due regard to the objectives of this Act, the related legislation and, where applicable, any other relevant legislation.”.

**Insertion of Chapter 3A in Act 36 of 2005** 35

10. The following Chapter is hereby inserted in the principal Act after Chapter 3:

**“CHAPTER 3A**

**LICENSING FRAMEWORK FOR WIRELESS OPEN ACCESS NETWORK SERVICE**

**Licensing of wireless open access network service** 40

- 19A.** (1) The Authority must ensure that a wireless open access network service licence and a radio frequency spectrum licence are issued to a wireless open access network service licensee.
- (2) An applicant for a wireless open access network service licence—
- (a) must be a consortium of persons that participate voluntarily; 45
  - (b) must comply with the empowerment requirements contemplated in section 9(2)(b);
  - (c) must include diversity of ownership and control to ensure meaningful participation of all entities involved;
  - (d) must include effective participation by targeted groups, including women, youth and persons with disabilities; 50

- (e) may not be dominated or controlled by any single entity;
- (f) may not be a public entity under the Public Finance Management Act, 1999 (Act No. 1 of 1999);
- (g) may not have members in the consortium that either separately or collectively possess a market share of more than 50% in electronic communications services. 5
- (3) If any member of the consortium applying for the wireless open access network service licence provides electronic communications services, the Authority must require functional separation between such electronic communications services and the member's participation in the wireless open access network service licence, which must be provided by an independently operating business entity. 10
- (4) A wholesale open access agreement entered into between the wireless open access network service licensee and any member of the wireless open access network service licensee that provides electronic communications services, must be in accordance with the wholesale rates contemplated in subsection (5)(b)(ii) and any wholesale open access requirements prescribed by the Authority to ensure non-discrimination. 15
- (5) A wireless open access network service licensee must—
- (a) except in case of technical inability, provide wholesale open access, upon request, to any other person licensed in terms of this Act and persons providing services pursuant to a licence exemption in accordance with the terms and conditions of a wholesale open access agreement entered into between the parties, in accordance with the general open access principles; 20 25
- (b) in addition to the requirement in paragraph (a), comply with the following wholesale open access principles on its electronic communications network:
- (i) Engage in active infrastructure-sharing;
- (ii) charge wholesale rates as prescribed by the Authority in terms of section 47; and 30
- (iii) comply with specific network and population coverage targets.
- (6) The Minister responsible for Telecommunications and Postal Services must issue a policy direction to the Authority in terms of section 5(6), directing the Authority to issue an invitation to apply for the wireless open access network service licence and radio frequency spectrum licence. 35
- (7) The Authority must, in terms of section 9, issue an invitation to apply for the wireless open access network service licence and radio frequency spectrum licence. 40
- (8) The Authority must determine—
- (a) the terms and conditions, including universal service and access obligations; and
- (b) incentives, such as— 45
- (i) reduced or waived spectrum fees;
- (ii) refraining, for a specific period, from prescribing the wholesale rates that can be charged by the wireless open access network service licensee, notwithstanding the provisions of subsection (5)(b)(ii), 50
- which will apply to the wireless open access network service licensee, in accordance with policies or policy directions issued by the Minister responsible for Telecommunications and Postal Services, if any.
- (9) The Authority must—
- (a) consider imposing regulatory remedies on the wireless open access network service licensee, to ensure effective service-based competition, and to avoid any anti-competitive effects; and 55
- (b) perform strict regulatory oversight.” .

#### **Substitution of heading to Chapter 4 of Act 36 of 2005**

11. The following heading is hereby substituted for the heading to Chapter 4 of the principal Act:

**“RAPID DEPLOYMENT OF ELECTRONIC COMMUNICATIONS NETWORKS AND ELECTRONIC COMMUNICATIONS FACILITIES”.** 60

**Substitution of section 20 of Act 36 of 2005, as amended by section 12 of Act 1 of 2014**

12. The following section is hereby substituted for section 20 of the principal Act:

**“Definitions and application**

**20.** (1) In this Chapter, unless the context indicates otherwise, ‘**land**’ 5  
includes any property or premises, street, road, footpath, railway or  
waterway in the Republic of South Africa.

(2) The Promotion of Access to Information Act, 2000 (Act No. 2 of 2000), applies to information provided by electronic communications network service licensees under this Chapter, where the information was supplied in confidence by the licensee: Provided that, to the extent that the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000), does not apply, any person receiving information provided by electronic communications network service licensees under this Chapter, must treat such information as confidential, where the information was supplied in confidence by the licensee, except as permitted in terms of this Act.”. 10  
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**Insertion of sections 20A to 20K in Act 36 of 2005**

13. The following sections are hereby inserted in the principal Act after section 20:

**“Role of Minister responsible for Telecommunications and Postal Services** 20

**20A.** (1) The Minister responsible for Telecommunications and Postal Services must provide oversight over the implementation of this Chapter and liaise with other Ministers responsible for matters affected by the rapid deployment of electronic communications networks and facilities.

(2) The Minister responsible for Telecommunications and Postal Services must establish a Rapid Deployment National Co-ordinating Centre as a division within the Department of Telecommunications and Postal Services. 25

(3) The Minister responsible for Telecommunications and Postal Services must establish a Rapid Deployment Steering Committee to oversee the activities of the Rapid Deployment National Co-ordinating Centre. 30

(4) The Rapid Deployment Steering Committee consists of—  
(a) the Director-General of the Department of Telecommunications and Postal Services or his or her delegate; 35  
(b) no more than two representatives of the Authority, nominated by the Authority, that will serve as *ex officio* members;  
(c) representatives of departments and other organs of state across all three spheres of government responsible for granting of approvals, authorisations, licences, permissions or exemptions to deploy electronic communications networks and facilities; and 40  
(d) such other members as the Minister responsible for Telecommunications and Postal Services may determine.

**Role of Rapid Deployment National Co-ordinating Centre**

**20B.** (1) The Rapid Deployment National Co-ordinating Centre must support, promote and encourage the rapid deployment of electronic communications networks and facilities, including between and amongst electronic communications network service licensees, municipalities, relevant authorities and relevant SIPs. 45

(2) The Rapid Deployment National Co-ordinating Centre must cooperate with local municipalities to promote and encourage the fast-tracking of rights of way and wayleave approvals and provide guidance on application processes and application templates for rights of way and wayleaves. 50



- (3) The Rapid Deployment National Co-ordinating Centre must—
- (a) oversee the establishment of common wayleave application systems based on an understanding of common information requests across municipalities, including the automation thereof;
  - (b) oversee the creation of a geographic information system database and mapping of all fibre deployments and other electronic communications network and facility deployments in co-operation with the Authority and other stakeholders;
  - (c) oversee the co-ordination of infrastructure rollout, including between and amongst electronic communications network service licensees and participate in other infrastructure co-ordination forums such as SIPs;
  - (d) oversee the engagement with relevant industry bodies dealing with rapid deployment or any aspect thereof; and
  - (e) provide advice to electronic communications network service licensees on the deployment of electronic communications networks and facilities on an expedited basis.

### Role of Authority

- 20C.** (1) The Authority must prescribe rapid deployment regulations, which must include—
- (a) the structure of the geographic information system database contemplated in section 20B(3)(b), its security and the manner in which it can be accessed, determined in consultation with the Rapid Deployment National Co-ordinating Centre;
  - (b) obligations applicable to electronic communications network service licensees for the rapid deployment of electronic communications networks or facilities;
  - (c) alternatives to new deployment of electronic communications networks and facilities, in order to use suitable existing electronic communications networks and facilities;
  - (d) processes and procedures to enable a landowner to object to the Authority at least 14 days before the electronic communications network service licensee commences with the activity, if the proposed electronic communications network or facility will cause significant interference with the land;
  - (e) high sites that are not technically feasible for access and use by an electronic communications network service licensee for the deployment of electronic communications networks and facilities that promote broadband;
  - (f) processes and procedures that enable single trenching for fibre in each geographic location where it is technically feasible to do so; and
  - (g) guidelines on reasonable access fees that may be charged by landholders to electronic communications network service licensees for deploying electronic communications networks or facilities that are intrusive.
- (2) The regulations contemplated in subsection (1) must provide for procedures and processes for the Authority to resolve disputes that may arise between an electronic communications network service licensee and any landowner on an expedited basis, in order to satisfy the public interest in the rapid rollout of electronic communications networks and electronic communications facilities.
- (3) The Authority must ensure that electronic communications network service licensees—
- (a) provide information on existing and planned electronic communications networks and facilities, including alterations or removal thereof, as contemplated in this Chapter, to the Rapid Deployment National Co-ordinating Centre for inclusion in the geographic information system database: Provided that information on existing electronic communications networks and facilities must be provided within 12 months of the coming into operation of the Electronic Communications Amendment Act, 2018, and that information on planned

- electronic communications networks and facilities, including alterations or removal thereof, must be provided within 30 days of such planning, alteration or removal;
- (b) provide information on existing and planned electronic communications networks and facilities to the Authority; 5
  - (c) seek out alternatives to new deployment of electronic communications networks and facilities, notably through the sharing or leasing of existing facilities;
  - (d) contribute to research and development on new deployment methods;
  - (e) co-ordinate activities, wherever appropriate, avoiding anti-competitive behaviour; and 10
  - (f) advise landholders, in writing, of their right to recourse through the Authority.

### **Right to enter and use property**

**20D.** (1) Electronic communications network service licensees have the right to enter upon and use public and private land for the deployment of electronic communications networks and facilities, subject to subsection (5). 15

(2) Electronic communications network service licensees are entitled to select appropriate land and gain access to such land for the purposes of constructing, maintaining, altering or removing their electronic communications networks or facilities. 20

(3) Electronic communications network service licensees retain ownership of any electronic communications networks and facilities constructed.

(4) Property owners may not cause damage to electronic communications networks or facilities. 25

(5) An electronic communications network service licensee must, for the purposes of subsection (1)—

- (a) give 30 calendar days' notice, in writing, of its proposed property access activity to an owner and, if applicable, occupier of the affected land, which must— 30
  - (i) specify the reasons for engaging in the activity;
  - (ii) specify the date of commencement of such activity;
  - (iii) outline the objection process to its plans; and
  - (iv) provide environmental, health and safety information, as may be applicable; 35
- (b) provide all information required by the application process, if any, and obtain a wayleave certificate from the relevant authority, noting that the exercise of rights by the electronic communications network service licensee is subject to by-laws that regulate the manner in which a licensee should exercise its powers, though the by-law may not require the municipality's consent; 40
- (c) exercise due care and diligence to minimise damage, which must include acting according to good engineering practice, and taking all reasonable steps to restore the property to its former state, including the repair of damages caused; 45
- (d) ensure the design, planning and installation of the electronic communications network or facility, follow best practice and comply with regulatory or industry standards;
- (e) take all reasonable steps to ensure the activity does not compromise or impede a public utility's ability to exercise its powers or perform its functions; 50
- (f) update the geographic information system database about the type and location of electronic communications networks and facilities deployed as contemplated in section 20C(3)(a); and 55
- (g) uphold the principle of wholesale open access and infrastructure sharing and seek out alternatives to new deployment of electronic communications networks and facilities in accordance with the rapid deployment regulations prescribed by the Authority, in order to use suitable existing electronic communications networks and facilities. 60

(6) A landowner may object to the Authority in the prescribed manner at least 14 days before the electronic communications network service licensee commences with the activity and only if the proposed electronic communications network or facility will cause significant interference with the land.

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#### **Access to high sites for radio-based systems**

**20E.** (1) For the purpose of this section ‘high site’ means any structure or feature, constructed or natural, including buildings, whether used for public or private purposes, which is suitable for radio-based systems.

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(2) An electronic communications network service licensee may access and use any high site for the deployment of electronic communications networks and facilities that promote broadband, except for high sites that are not technically feasible for this purpose, as may be prescribed by the Authority.

(3) An owner of a high site may not refuse access to an electronic communications network service licensee for the installation of electronic communications networks and facilities that promote broadband: Provided that such installation must be in accordance with any reasonable requirements of the owner.

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#### **Single trenching**

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**20F.** The Authority must, in order to ensure a single trench for fibre in each geographic location where it is technically feasible to do so, prescribe the processes and procedures that enable a single trench for fibre under the rapid deployment regulations.

#### **Access to buildings**

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**20G.** Electronic communications network service licensees may access any building with multiple tenants, whether used for public or private purposes—

- (a) to inspect the building to determine whether it is suitable for deployment of electronic communications networks and facilities;
- (b) to deploy electronic communications networks and facilities for such building or subscribers outside the building;
- (c) to maintain electronic communications networks and facilities located in or on the building; or
- (d) to provide electronic communications services.

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#### **Adequately served**

**20H.** (1) For the purposes of this section, ‘adequately served’ means an electronic communications network that enables the provision of electronic communications services, including voice services and broadband services, at the quality and speeds provided in SA Connect or any subsequent amendment of such quality and speeds, and has already been deployed within premises, such as a gated complex, an office park, a shopping mall or a block of flats, by an electronic communications network service licensee (referred to in this section as the ‘access provider’).

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(2) (a) The access provider must, in respect of the adequately served premises—

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- (i) except in case of technical inability, provide wholesale open access, upon request, to any other person licensed in terms of this Act and persons providing services pursuant to a licence exemption, in accordance with the terms and conditions of a wholesale open access agreement entered into between the parties, in accordance with the general open access principles;
- (ii) charge wholesale rates as prescribed by the Authority in terms of section 47; and

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- (iii) establish a co-location facility at a suitable point within the premises or such other suitable place as the Authority may determine, at which all access seeking licensees may install their own electronic communications facilities or equipment so as to interconnect with the electronic communications network of the access provider, or that the access-seeking licensee may use those facilities of the access provider as would enable it to provide services, as requested. 5
- (b) An occupant within the adequately served premises is not obliged to receive an electronic communications service from the access provider and may select and receive a service from any electronic communications service provider of choice. 10
- (3) No electronic communications network or facility may be deployed in adequately served premises, except with the approval of the Authority.
- (4) The Authority must prescribe the procedure and criteria that will be used by the Authority to consider applications for approval, as contemplated in subsection (3), with due regard to the policy objective to promote service-based competition. 15

### **Emergency**

**20I.** No entity may refuse access to any site or charge a fee for access to any site for the deployment of electronic communications networks or facilities during a state of emergency, declared in terms of the State of Emergency Act, 1997 (Act No. 64 of 1997). 20

### **Application process and procedure**

- 20J.** (1) The Rapid Deployment National Co-ordinating Centre must engage with departments and other organs of state across all three spheres of government responsible for the granting of approvals, authorisations, licences, permissions or exemptions, to deploy electronic communications networks and facilities to promote and encourage that all applications and related processes for approval, authorisation, licence, permission or exemption and processes relating to any consultation and participation required by the relevant laws, required for the deployment of electronic communications networks and facilities must, in order to expedite the matter, run concurrently. 25 30
- (2) The Rapid Deployment National Co-ordinating Centre must keep updated information on the application processes and minimum information requirements for an approval, authorisation, licence, permission or exemption and processes relating to any consultation and participation required by the relevant laws, required for the deployment of electronic communications networks and facilities. 35
- (3) The Rapid Deployment National Co-ordinating Centre must propose co-ordinated, efficient and streamlined processes for the granting of an approval, authorisation, licence, permission or exemption, in consultation with the relevant authorities, to enable rapid deployment of electronic communications networks and facilities. 40
- (4) The Rapid Deployment National Co-ordinating Centre must consult with the relevant authorities to promote and encourage the alignment of the said processes. 45
- (5) The Rapid Deployment National Co-ordinating Centre must promote and encourage consistency in the time taken by the relevant authorities to grant approvals for the deployment of electronic communications networks and facilities. 50

### **Fees, charges and levies**

**20K.** (1) No access fee may be charged by landholders to electronic communications network service licensees for deploying electronic communications networks or facilities in cases where the electronic communications networks or facilities are not intrusive, such as buried or overhead 55

cabling, that does not constitute a cost to the landholder, or deprive the landholder of its own use of the land.

(2) (a) Reasonable access fees may be charged in cases where more intrusive electronic communications networks or facilities, such as masts, are erected on property.

(b) In such cases, any access fee must be reasonable in proportion to the disadvantage suffered and must not enrich the landowner or exploit the electronic communications network service licensee.

(3) In the case of any dispute on access fees, the reasonableness of the access fees must be determined by the Authority on an expedited basis.

(4) A landholder is entitled to reasonable compensation agreed to between the landholder and the electronic communications network service licensee, for any financial loss or damage, whether permanent or temporary, caused by an electronic communications network service licensee entering and inspecting land, or installing, deploying or maintaining electronic communications networks or facilities.

(5) In the case of any dispute on compensation, the reasonableness of the compensation must be determined by the Authority on an expedited basis.

(6) An electronic communications network service licensee may not continue to deploy electronic communications networks and facilities while awaiting the resolution of the dispute by the Authority.”.

#### Repeal of sections 21, 22 and 23 of Act 36 of 2005

14. Sections 21, 22 and 23 of the principal Act are hereby repealed.

#### Amendment of section 24 of Act 36 of 2005

15. Section 24 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

“[A] An electronic communications network service licensee may, after **[providing thirty (30) days]** prior written notice to the local authority or person owning or responsible for the care and maintenance of any street, road or footpath—”; and

(b) by the substitution for subsections (2) and (3) of the following subsections, respectively:

“(2) The local authority or person to whom any such water, gas or electricity pipe belongs or by whom it is used is entitled, at all times while any work in connection with the alteration in the position of that pipe is in progress, to supervise that work.

(3) The licensee must pay all reasonable expenses incurred by any such local authority or person in connection with any alteration **[or removal]** of water, gas or electricity pipes under this section or any supervision of work relating to such alteration.”.

#### Amendment of section 25 of Act 36 of 2005

16. Section 25 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) If an electronic communications network service licensee finds it necessary to move any electronic communications facility, pipe, tunnel or tube constructed upon, in, over, along, across or under any land, railway, street, road, footpath or waterway, owing to any alteration of alignment or level or any other work on the part of any public authority or person, the reasonable cost of the alteration or removal must be borne by that local authority or person.”; and

(b) by the substitution for subsections (4), (5), (6), (7) and (8) of the following subsections, respectively:

“(4) If any deviation or alteration of an electronic communications network facility, pipe, tunnel or tube constructed and passing over any private property is desired on any ground other than those contemplated in subsection (1) or (2), the owner of the property must give the

electronic communications network service licensee written notice of 28 days, of such deviation or alteration.

(5) The electronic communications network service licensee must decide whether or not the deviation or alteration contemplated in subsection (4) is possible, necessary or expedient. 5

(6) If the electronic communications network service licensee agrees to make the deviation or alteration as provided for in subsection [(3)](4), the cost of such deviation or alteration must be borne by the person at whose request the deviation or alteration is affected.

(7) If, in the opinion of the electronic communications network service licensee, the deviation or alteration contemplated in subsection (4) is justified, the licensee may bear the whole or any part of the said cost. 10

(8) Where a dispute arises between any owner of private property and an electronic communications network service licensee in respect of any decision made by [a] an electronic communications network services licensee in terms of subsection (4), such dispute must be **[referred to the Complaints and Compliance Committee in accordance with section 17C of the ICASA Act]** resolved by the Authority on an expedited basis, as contemplated in section 20C(2).” 15

**Amendment of section 27 of Act 36 of 2005** 20

17. Section 27 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) In the event of failure to comply with a notice referred to in subsection (1)[(b)], the electronic communications network service licensee may cause the said tree or vegetation to be cut down or trimmed as the electronic communications network service licensee may consider necessary.” 25

**Repeal of section 28 of Act 36 of 2005**

18. Section 28 of the principal Act is hereby repealed.

**Insertion of sections 29A and 29B in Chapter 5 of Act 36 of 2005**

19. The following sections are hereby inserted in Chapter 5 of the principal Act before section 30: 30

**“Definition**

**29A.** In this Chapter, unless the context indicates otherwise, **‘Minister’** means the Minister responsible for Telecommunications and Postal Services. 35

**Functions of Minister responsible for Telecommunications and Postal Services**

**29B.** The Minister is responsible for—

- (a) representing the Republic on radio frequency spectrum at international, multi-lateral and bi-lateral level; 40
- (b) representing the Republic at the ITU, including radio frequency spectrum planning, allocation, and international co-ordination of radio frequency spectrum use;
- (c) issuing policies and policy directions in relation to radio frequency spectrum, subject to section 3; 45
- (d) the development of the radio frequency plan, including the allocation of spectrum for the exclusive use by national security services, as contemplated in section 34;
- (e) the establishment of a National Radio Frequency Spectrum Planning Committee, as contemplated in section 34A; 50
- (f) co-ordination across Government, including sector-specific agencies;

- (g) co-ordination with the Minister responsible for Communications on issues relating to spectrum that has been allocated to the broadcasting services; and
- (h) any other matter relevant to radio frequency spectrum that is necessary or expedient for the proper implementation or administration of this Act or the related legislation.” 5

**Substitution of section 30 of Act 36 of 2002, as amended by section 14 of Act 1 of 2014**

20. The following section is hereby substituted for section 30 of the principal Act:

“**[Control] Administration of radio frequency spectrum** 10

30. (1) In carrying out its functions under this Act and the related legislation, the Authority **[controls, plans,]** administers and manages the **[use]** assignment, **[and]** licensing, monitoring and enforcement of the radio frequency spectrum **use [except as provided for in section 34].**

(2) **[In controlling, planning, administering, managing, licensing and assigning the use of the radio frequency spectrum, the]** The Authority must, in the performance of the functions contemplated in subsection (1),— 15

- (a) comply with the applicable standards and requirements of the ITU and its Radio Regulations, as agreed to or adopted by the Republic, as well as with the national radio frequency plan contemplated in section 34 **and ministerial policies and policy directions, as contemplated in section 3;** 20
- (b) take into account modes of transmission and efficient utilisation of the radio frequency spectrum, including allowing shared use of radio frequency spectrum when interference can be eliminated or reduced to acceptable levels as determined by the Authority, **subject to section 31C;** 25
- (c) give high priority to applications for radio frequency spectrum where the applicant proposes to utilise digital electronic communications facilities for the provision of broadcasting services, electronic communications services, electronic communications network services, and other services licensed in terms of this Act or provided in terms of a licence exemption; 30
- (d) **do assignment planning [plan] for the conversion of analogue uses of the radio frequency spectrum to digital, including the migration to digital broadcasting [in the Authority’s preparation and modification of the radio frequency spectrum plan]; [and]** 35
- (e) give due regard to the radio frequency spectrum allocated to security services[.];
- (f)
  - (i) perform monitoring and evaluation of radio frequency spectrum use and conduct periodic radio frequency spectrum audits based on the information contemplated in paragraph (i); 40
  - (ii) make available monitoring and evaluation and audit reports to the Minister; and
  - (iii) publish the audit results on the Authority’s website; 45
- (g) maintain a high quality and appropriately accessible real-time database of radio frequency spectrum assignments and any other information determined by the Authority, excluding assignments to security services, that includes real-time updates from sector-specific agency databases as contemplated in section 34B; 50
- (h) advise the Minister on areas for future research, development and planning;
- (i) ensure that radio frequency spectrum licensees submit an annual report on its spectrum usage to the Authority and Minister that includes information on achievement of spectrum license obligations, as applicable, and such information as determined by the Authority, in consultation with the Minister; and 55

- (j) publish guidelines on the information contemplated in paragraph (i), including a procedure to allow licensees to submit a supplementary annual report to address concerns which the Authority may identify.
- (3) The Authority must, in performing its functions in terms of subsection (1), ensure that in the use of the radio frequency spectrum harmful interference to authorised or licensed users of the radio frequency spectrum is eliminated or reduced to the extent reasonably possible.
- (4) The Authority must investigate and resolve all instances of harmful interference to licensed services that are reported to it.”.

**Amendment of section 31 of Act 36 of 2002, as amended by section 15 of Act 1 of 2014**

**21. Section 31 of the principal Act is hereby amended—**

- (a) by the deletion of subsection (2A);
- (b) by the substitution for subsection (3) of the following subsection: 15  
“(3) The Authority may, taking into account the objects of the Act, prescribe procedures and criteria for radio frequency spectrum licences contemplated in section 31E(4) and the amendment, renewal, suspension, cancellation and withdrawal of radio frequency spectrum licences.”;
- (c) by the deletion in subsection (4) of the word “or” at the end of paragraph (d), insertion of that word at the end of paragraph (e) and addition of the following paragraph: 20  
“(f) if the Authority has approved an application for spectrum sharing, spectrum trading or spectrum re-farming.”;
- (d) by the substitution for subsection (7) of the following subsection: 25  
“(7) The Authority may, on its own initiative, take appropriate action to ensure compliance with the provisions of this Chapter and must develop and implement an effective monitoring and enforcement system, including adjudication of spectrum disputes.”;
- (e) by the substitution for subsection (8) of the following subsection: 30  
“(8) Subject to subsection (9), the Authority may withdraw any radio frequency spectrum licence or assigned radio frequency spectrum when the licensee fails to comply with section 31A(6), to utilise the assigned radio frequency spectrum in accordance with the licence conditions applicable to such licence or fails to use the assigned radio frequency spectrum for a period of two years, referred to as the ‘use it or lose it’ principle.”; 35
- (f) by the insertion after subsection (8) of the following subsection: 40  
“(8A) (a) The ‘use it or lose it’ principle contemplated in subsection (8) does not apply to passive science services due to the nature of their operations which do not transmit signals frequently.  
(b) The Minister may, upon recommendation by the Authority, and upon good cause shown, exempt SMMEs and new entrants from the ‘use it or lose it’ principle contemplated in subsection (8) for a period defined by notice in the Gazette.”; 45
- (g) by the substitution for subsection (9) of the following subsection: 50  
“(9) Before the Authority withdraws a radio frequency spectrum licence or assigned radio frequency spectrum in terms of subsection (8), it must give the licensee prior written notice of at least 30 days and the licensee must have 7 (seven) business days in which to respond, in writing, to the notice (unless otherwise extended by the Authority) demonstrating its compliance with section 31A(6) or that it is utilising the radio frequency spectrum in compliance with this Act and the licence conditions.”; and
- (h) by the addition of the following subsection: 55  
“(11) The Authority must develop an automated licensing system for radio frequency spectrum that is not high demand radio frequency spectrum that may be linked to the real-time database contemplated in section 30(2)(g).”.



**Insertion of sections 31A, 31B, 31C, 31D and 31E in Act 36 of 2005**

22. The following sections are hereby inserted in the principal Act after section 31:

**“Universal access and universal service obligations of radio frequency spectrum licences**

**31A.** (1) In addition to any universal access and universal service obligations contemplated in section 8(2)(g), the Authority must impose universal access and universal service obligations on existing and new radio frequency spectrum licensees, determined by the Authority. 5

(2) The Authority must obtain the Minister’s approval on the nature and form of all universal access and universal service obligations before they are imposed on any radio frequency spectrum licensees, as well as the approval of the Minister of Communications, if such radio frequency spectrum licensees are broadcasting service licensees, to ensure that the obligations are co-ordinated, relevant and aligned with national policy objectives and priorities. 10 15

(3) Radio frequency spectrum licensees that were assigned radio frequency spectrum in similar radio frequency spectrum bands must have similar universal access and universal service obligations.

(4) Radio frequency spectrum licensees must report annually to the Authority on their compliance with their universal access and universal service obligations, which report the Authority must make publicly available. 20

(5) Universal access and universal service obligations must be specific, attainable and measurable and compliance must be evaluated by the Authority on an annual basis; and 25

(6) The Authority may withdraw any radio frequency spectrum licence or assigned radio frequency spectrum when the licensee fails to comply with its universal access and universal service obligations.

**Radio frequency spectrum trading**

**31B.** (1) Radio frequency spectrum licensees may trade licenced spectrum, subject to approval from the Authority. 30

(2) The Authority must prescribe spectrum trading regulations, within 12 months of the commencement of this section, that include—  
(a) the spectrum trading application and notification processes; and  
(b) the criteria and conditions for spectrum trading. 35

(3) The criteria and conditions contemplated in subsection (2)(b) must include the following:

(a) Competition may not be distorted by any spectrum trade or by the accumulation and hoarding of spectrum rights of use;  
(b) licence obligations will be passed on to the new user of the radio frequency spectrum; 40

(c) the current radio frequency spectrum licensee must have used the radio frequency spectrum in the year prior to the spectrum trade to ensure that the trade is not used to subvert the ‘use it or lose it’ principle; 45

(d) the current and new radio frequency spectrum licensee must comply with all the relevant legislation; and

(e) submission to the Authority of the particulars of the spectrum trade transaction, including the legal, technical and financial terms and conditions to ensure that the spectrum trade does not undermine policy objectives. 50

(4) The Minister may issue policy directions to the Authority on spectrum trading and spectrum use rights in order to fulfil specific national objectives.

### Radio frequency spectrum sharing

- 31C.** (1) Radio frequency spectrum licensees may share licenced spectrum, subject to—
- (a) approval from the Authority, in the case of high demand spectrum; and
  - (b) notification to the Authority, in the case of non-high demand spectrum.
- (2) The Authority may not approve spectrum sharing of high demand spectrum if it will—
- (a) have a negative impact on competition;
  - (b) amount to spectrum trading; or
  - (c) compromise emergency services and other services that meet public interest goals.
- (3) The Authority must prescribe spectrum sharing regulations within 12 months of the commencement of this section that include—
- (a) the spectrum sharing application and notification processes; and
  - (b) the criteria and conditions for spectrum sharing, including for sharing of sector-specific spectrum assigned to sector-specific agencies contemplated in section 34B.

### Radio frequency spectrum refarming

- 31D.** (1) Radio frequency spectrum licensees may refarm licenced spectrum, subject to approval from the Authority.
- (2) The Authority may not approve spectrum refarming if it will have a negative impact on competition.
- (3) Universal access and universal service obligations must be imposed on radio frequency spectrum licensees if other assigned spectrum in similar bands to the refarmed spectrum, carry universal access and universal service obligations, as contemplated in section 31A.
- (4) Spectrum fees must be imposed on radio frequency spectrum licensees for refarmed spectrum commensurate with other assigned spectrum in similar bands.
- (5) The Authority must prescribe spectrum refarming regulations within 12 months of the commencement of this section that include—
- (a) the spectrum refarming application process; and
  - (b) the criteria and conditions for spectrum refarming.

### High demand spectrum

- 31E.** (1) The Minister must, within six months of the commencement of the Electronic Communications Amendment Act, 2018, and thereafter as required, determine, by notice in the *Gazette*, after consultation with the Authority—
- (a) what constitutes high demand spectrum; and
  - (b) which unassigned high demand spectrum must be reserved for assignment to the wireless open access network service licensee.
- (2) Subject to the provisions of the national radio frequency plan, the assignment of high demand spectrum—
- (a) is subject to the principles of wholesale open access as contemplated in Chapter 8; and
  - (b) must be done on a non-exclusive basis.
- (3) The Authority must assign the spectrum contemplated in subsection (1)(b) to the wireless open access network service licensee in accordance with section 19A.
- (4) The Authority must issue radio frequency spectrum licences for unassigned high demand spectrum not reserved for assignment to the wireless open access network service licensee, as contemplated in subsection (3), on condition that—
- (a) the radio frequency spectrum licensee provides immediate wholesale open access to its electronic communications networks or electronic communications facilities in urban areas, to the wireless open access network service licensee;

- (b) the radio frequency spectrum licensee procures a minimum of 30% capacity or such higher capacity as determined by the Authority, in the wireless open access network service contemplated in section 19A, for a period determined by the Authority; and
- (c) universal access and universal service obligations contemplated in section 31A are imposed on the radio frequency spectrum licensee, and such obligations are complied with in rural and under-served areas before the assigned spectrum may be used by the licensee in other areas.
- (5) The provisions of subsection (4)(a) and (b) only apply to unassigned high demand spectrum that is identified for International Mobile Telecommunications, not reserved for assignment to the wireless open access network service licensee.
- (6) Radio frequency spectrum licences that include exclusively or individually assigned high demand spectrum on the date contemplated in subsection (1), may not be renewed on the same terms and conditions at the end of the licence term, to ensure compliance with section 31E(2).
- (7) The Authority must, within 24 months before the expiry of radio frequency spectrum licences contemplated in subsection (6), conduct an inquiry, as contemplated in section 4B of the ICASA Act, and make recommendations to the Minister, at least six months before the expiry of the radio frequency spectrum licences contemplated in subsection (6), on the terms and conditions that may apply to such radio frequency spectrum licences, as a condition for the renewal thereof, taking into account—
- (a) policy;
- (b) market developments;
- (c) the promotion of competition; and
- (d) the extent of availability of wholesale open access networks.
- (8) Notwithstanding the provisions of section 3(3), the Minister must issue a policy direction to the Authority in terms of section 3(2) on the terms and conditions that must apply to such radio frequency spectrum licences, as a condition for the renewal thereof, at least three months before the expiry of such radio frequency spectrum licences.”.

**Amendment of section 34 of Act 36 of 2005, as amended by section 16 of Act 1 of 2014**

23. Section 34 of the principal Act is hereby amended—

- (a) by the deletion of subsection (1);
- (b) by the substitution for subsection (2) of the following subsection:
- “(2) The Minister must **[approve]** develop the national radio frequency plan **[developed by the Authority]**, which must set out the specific frequency bands designated for use by particular types of services, taking into account the radio frequency spectrum bands allocated to the security services.”;
- (c) by the deletion of subsection (4);
- (d) by the addition in subsection (6) of the following paragraph:
- “(g) determine the service allocation to be made in the national table of frequency allocations in cases where there are competing services in a particular radio frequency spectrum band, and where the decisions of an ITU World Radiocommunication Conference create divergent interests nationally.”;
- (e) by the substitution for subsection (7) of the following subsection:
- “(7) In preparing the national radio frequency plan **[as contemplated in subsection (4)]**, the **[Authority] Minister** must—
- (a) take into account the ITU’s international spectrum allocations for radio frequency spectrum use, in so far as ITU allocations have been adopted or agreed upon by the Republic, and give due regard to the reports of experts in the field of spectrum or radio frequency planning and to internationally accepted methods for preparing such plans;
- (aA) consult the Authority;

- (b) take into account existing uses of the radio frequency spectrum and any radio frequency band plans in existence or in the course of preparation; and
- (c) **[consult with the Minister to]** take into account—
- (i) **[incorporate]** the radio frequency spectrum allocated **[by the Minister]** for the exclusive use of the security services **[into the national radio frequency plan]**; 5
  - (ii) **[take account of]** the government’s current and planned uses of the radio frequency spectrum, including but not limited to, civil aviation, aeronautical services, public protection and disaster relief services and scientific research; **[and]** 10
  - (iii) **[co-ordinate a plan for]** migration of existing users, as applicable, to make available radio frequency spectrum to satisfy the requirements of subsection (2) and the objects of this Act and of the related legislation[.]; 15
  - (iv) the priority of access, availability and protection from harmful interference of frequencies for safety-of-life services; and
  - (v) the allocation and preservation of specific bands for broadcasting.”;
- (f) by the insertion after subsection (7) of the following subsection: 20
- “(7A) If the national radio frequency plan includes the migration of existing users, the time period for migration may not exceed five years, unless otherwise specified by the Minister, and the plan must indicate whether any licensee or another party is responsible for the migration costs.”; 25
- (g) by the deletion of subsections (8), (9), (10), (11), (12), (13), (14) and (15);
- (h) by the insertion after subsection (8) of the following subsection: 30
- “(8A) The provisions of section 3(5) apply, with the necessary changes, to the development or amendment of the national radio frequency plan.”; and
- (i) by the substitution for subsection (16) of the following subsection: 35
- “(16) The Authority **[may]** must, where the national radio frequency plan identifies radio frequency spectrum that is occupied and requires the migration of the users of such radio frequency spectrum to other radio frequency bands, migrate the users to such other radio frequency bands in accordance with the national radio frequency plan, and any migration plans developed by the Authority, except where such migration involves governmental entities or organisations, in which case the Authority must—
- (a) **[must]** refer the matter to the Minister; and 40
  - (b) **[may]** migrate the users **[after]** in consultation with the Minister.”.

#### Insertion of sections 34A and 34B of Act 36 of 2005

24. The following sections are hereby inserted in the principal Act after section 34:

##### “National Radio Frequency Spectrum Planning Committee

**34A.** (1) The Minister must co-ordinate radio frequency spectrum across government and sector-specific agencies contemplated in section 34B. 45

(2) (a) The Minister must establish a National Radio Frequency Spectrum Planning Committee that includes representation from relevant government stakeholders.

(b) Members of the National Radio Frequency Spectrum Planning Committee must possess suitable qualifications, skills and experience in radio frequency spectrum management and planning. 50

(c) The purpose of the National Radio Frequency Spectrum Planning Committee is to ensure fairness and equitable distribution of radio frequency spectrum. 55

(3) The Department of Telecommunications and Postal Services must co-ordinate the work of the National Radio Frequency Spectrum Planning Committee.

**Sector-specific agencies**

**34B.** (1) The sector-specific agencies must—

- (a) account to the Authority as determined by the Authority for the use of radio frequency spectrum assigned to such sector-specific agencies;
- (b) assign the radio frequency spectrum contemplated in paragraph (a) and register users of radio frequency spectrum in such sector in accordance with regulations prescribed by the Authority;
- (c) ensure availability and maintenance of quality information related to radio frequency spectrum assignments and usage; and
- (d) maintain a database of radio frequency spectrum users in their respective sectors and ensure that such database enables real-time updating of the corresponding database of the Authority.

(2) The Minister, the Authority and the sector-specific agencies must enter into a Memorandum of Understanding on matters relevant to the radio frequency spectrum contemplated in this section.

(3) The Authority is required to develop a database with real-time updates, including that such database enables real-time updating by the corresponding databases of sector-specific agencies.”.

**Amendment of section 36 of Act 36 of 2005, as amended by section 18 of Act 1 of 2014**

25. Section 36 of the principal Act is hereby amended by the deletion in subsection (2) of the word “and” at the end of paragraph (c), insertion of that word at the end of paragraph (d) and addition of the following paragraph:

“(e) ensuring universal design requirements to make provision for persons with disabilities.”.

**Insertion of Chapter 7A in Act 36 of 2005**

26. The following Chapter is hereby inserted in the principal Act after Chapter 7:

**“CHAPTER 7A**

**INTERNATIONAL ROAMING**

**International roaming regulations**

**42A.** (1) The Authority must prescribe international roaming regulations, including SADC roaming regulations.

(2) (a) The regulations contemplated in subsection (1) must be conditional on reciprocal terms and conditions being imposed on electronic communications service providers of another country by such country or its national regulatory authority.

(b) The reciprocal terms and conditions contemplated in paragraph (a) means that the electronic communications service provider of another country must offer similar tariffs as those offered by the South African electronic communications service provider.

(3) (a) (i) When prescribing international roaming regulations, the Authority must take into consideration any policy direction that may be issued by the Minister responsible for Telecommunications and Postal Services;

(ii) When prescribing SADC roaming regulations, the Authority must take note of SADC Roaming decisions and must take into consideration any policy direction that may be issued by the Minister responsible for Telecommunications and Postal Services.

(b) The regulations may include rate regulation for the provision of roaming services, including without limitation price controls on wholesale and retail rates, as determined by the Authority.

(4) The Authority may—

- (a) obtain any information required for international roaming regulation from electronic communications service licensees;

- (b) share the information obtained in terms of paragraph (a) with relevant national regulatory authorities of other countries; and
  - (c) for purposes of SADC roaming regulations, share the information obtained in terms of paragraph (a) with the Communications Regulators' Association of Southern Africa. 5
- (5) The Authority may engage national regulatory authorities of any other country in order to—
- (a) promote international roaming between the respective countries;
  - (b) ensure reciprocity of the roaming terms and conditions applicable to electronic communications service providers of the respective countries, as contemplated in subsection (2); or 10
  - (c) enter into a bi-lateral agreement to give effect to international roaming and reciprocity, as contemplated in this section, despite any other provision in the underlying legislation.”.

**Substitution of heading to Chapter 8 of Act 36 of 2005** 15

27. The following heading is hereby substituted for the heading to Chapter 8 of the principal Act:

**“[ELECTRONIC COMMUNICATIONS FACILITIES LEASING]  
WHOLESALE OPEN ACCESS”**

**Substitution of heading of section 43 of Act 36 of 2005** 20

28. The following heading is hereby substituted for the heading to section 43 of the principal Act:

**“Obligation to [lease electronic communications facilities] provide wholesale open access”**

**Amendment of section 43 of Act 36 of 2005, as amended by section 22 of Act 1 of 2014** 25

29. Section 43 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) All electronic communications network service licensees, except electronic communications network service licensees that provide broadcasting signal distribution or multi-channel distribution services, must provide wholesale open access, upon request, to any other person licensed in terms of this Act and persons providing services pursuant to a licence exemption in accordance with the terms and conditions of a wholesale open access agreement entered into between the parties, in accordance with the general open access principles, except in case of technical inability.”; 30 35

(b) by the insertion after subsection (1) of the following subsections:

“(1A) An electronic communications network service licensee that is determined a vertically integrated operator by the Authority in the wholesale open access regulations must, in addition to the requirement in subsection (1), do accounting separation. 40

(1B) An electronic communications network service licensee that is determined a deemed entity by the Authority in the wholesale open access regulations must, in addition to the requirement in subsection (1), comply with the following wholesale open access principles on its electronic communications network: 45

- (a) Active infrastructure sharing;
- (b) wholesale rates as prescribed by the Authority in terms of section 47; and 50

- (c) specific network and population coverage targets.”; 50

(c) by the deletion of subsections (2), (3) and (4).

(d) by the substitution for subsections (5), (6) and (7) of the following subsections, respectively:

“(5) In the case of unwillingness or technical inability of an electronic communications network service licensee to negotiate or agree on the terms and conditions of [**an electronic communications facilities** 55

- leasing agreement]** a wholesale open access agreement, either party may notify the Authority in writing and the Authority may—
- (a) impose terms and conditions consistent with this Chapter;
  - (b) propose terms and conditions consistent with this Chapter which, subject to negotiations among the parties, **[must]** may be agreed to by the parties within such period as the Authority may specify; **[or]**
  - (c) if no agreement is reached as contemplated in paragraph (b), refer the dispute to the Complaints and Compliance Committee for resolution on an expedited basis in accordance with the procedures prescribed in terms of section 46[.] or
  - (d) in case of technical inability (other than environmental and technological inability), determine how to resolve technical inability that may include the apportionment of costs.
- (6) For the purposes of subsection (5), unless otherwise agreed in writing by the parties, a party is considered unwilling to negotiate or unable to agree if a **[facilities leasing agreement]** wholesale open access agreement is not concluded within the time frames prescribed.
- (7) The **[lease of electronic communications facilities]** wholesale open access provided by an electronic communications network service licensee in terms of subsection (1) must, unless otherwise requested by the **[leasing]** requesting party, be non-discriminatory as among comparable types of **[electronic communications facilities ] wholesale open access being [leased] provided** and not be of a lower technical standard and quality than the technical standard and quality provided by such electronic communications network service licensee to itself or to an affiliate or in any other way discriminatory compared to the **[the comparable network services]** wholesale open access provided by such licensees to itself or an affiliate.”;
- (e) by the insertion after subsection (7) of the following subsection:
    - “(7A) Subject to section 4D of the ICASA Act, licensees must provide to the Authority any information specified by the Authority in order that the Authority may carry out its duties in terms of this Chapter.”; and
  - (f) by the deletion of subsections (8), (8A) and (9).

### **Substitution of heading to section 44 of Act 36 of 2005**

**30.** The following heading is hereby substituted for the heading to section 44 of the principal Act:

“**[Electronic communications facilities leasing] Wholesale open access regulations**”

### **Amendment of section 44 of Act 36 of 2005, as amended by section 23 of Act 1 of 2014**

**31.** Section 44 of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection:
  - “(1) The Authority must prescribe wholesale open access regulations to facilitate wholesale open access to electronic communications networks and facilities within 18 months of the coming into operation of the Electronic Communications Amendment Act, 2018.”;
- (b) by the deletion of subsection (2);
- (c) by the substitution for subsection (3) of the following subsection:
  - “(3) Matters which the wholesale open access regulations must address, include, but are not limited to—
  - (a) wholesale open access agreement principles, including—
    - (i) reference offers containing model terms and conditions for the different wholesale open access categories contemplated in section 43;
    - (ii) the timeframe and procedures for—
      - (aa) the negotiation of wholesale open access agreements;
      - (bb) the conclusion of wholesale open access agreements; and

- (cc) the technical implementation of the wholesale open access agreements;
- (b) the definitions of the general open access principle terms, ‘effectiveness’, ‘transparency’ and ‘non-discrimination’, considering that ‘effective access’ refers to access to a high quality service, unbundled to a sufficient degree, that is easily obtained in reasonable locations using standardised interfaces; 5
- (c) the implementation and enforcement of wholesale open access principles;
- (d) a list of vertically integrated entities, including the criteria used to determine vertically integrated entities: Provided that only entities that are deemed entities as contemplated in paragraph (e), may be determined to be vertically integrated entities; 10
- (e) accounting separation procedures for vertically integrated entities;
- (f) determination of deemed entities; 15
- (g) the quality, performance and level of service to be provided, including time to repair or restore, performance, latency and availability;
- (h) wholesale rates, as contemplated in section 47;
- (i) the sharing of technical information including obligations imposed in respect of the disclosure of current and future electronic communications network planning activities; 20
- (j) contractual dispute resolution procedures;
- (k) billing and settlement procedures;
- (l) a list of essential facilities; 25
- (m) services associated with wholesale open access, such as support systems, collocation, fault reporting, supervision, functionality, unbundling, and co-operation in the event of faults;
- (n) access and security arrangements;
- (o) the framework for determining technical inability, as contemplated in section 43(1); 30
- (p) the requirement that an electronic communications network service licensee negotiate and enter into a wholesale open access agreement with an applicant for an individual licence;
- (q) the manner in which unbundled electronic communications facilities are to be made available; 35
- (r) any controls necessary to reduce competition concerns; and
- (s) any other matter necessary for the effective regulation of wholesale open access in accordance with this Act.”;
- (d) by the insertion after subsection (3) of the following subsection: 40
- “(3A) For purposes of the determination of deemed entities, as contemplated in subsection (3), the Authority must—
- (a) following the definition of markets, as contemplated in section 67(3A), determine in respect of infrastructure markets, which electronic communications network service licensee, if any, has significant market power in such market or has an electronic communications network that constitutes more than 25% of the total electronic communications infrastructure in such markets, following which such electronic communications network service licensee is regarded as a deemed entity; or 45
- (b) determine which electronic communications network service licensee, if any, controls an essential facility or a scarce resource, such as radio frequency spectrum that is identified for International Mobile Telecommunications, following which such electronic communications network service licensee is regarded as a deemed entity.”; 50
- (e) by the substitution for subsection (4) of the following subsection: 55
- “(4) Where the regulations require negotiations with an applicant in terms of subsection (3)(l), a reference in this Chapter to a licensee seeking to **[lease]** access electronic communications networks or facilities must be considered to include such applicant.”; and 60
- (f) by the deletion of subsections (5), (6) and (7).



**Substitution of section 45 of Act 36 of 2005, as amended by section 24 of Act 1 of 2014**

32. The following section is hereby substituted for section 45 of the principal Act:

**“Filing of [electronic communications facilities leasing] wholesale open access agreements** 5

**45. (1) [An electronic communications facilities leasing] A wholesale open access agreement must be in writing and must be submitted to the Authority.**

(2) **[Electronic communications facilities leasing] Wholesale open access agreements are effective and enforceable upon being filed with the Authority in the prescribed manner, unless an order of a court of competent jurisdiction is granted against such agreement or the Authority provides the parties with written notice of non-compliance in terms of subsection (6).** 10

(3) . . .

(4) The Authority must, at the request of any person and on payment of such fee as may be prescribed, furnish that person with a copy of any **[electronic communications facilities leasing] wholesale open access agreement.** 15

(5) The Authority must review **[electronic communications facilities leasing] wholesale open access agreements** submitted in terms of subsection (1) to determine whether such agreements are consistent with the regulations prescribed. 20

(6) Where the Authority determines that any term or condition of **[an electronic communications facilities leasing] a wholesale open access agreement** is not consistent with the regulations, the Authority must, in writing— 25

- (a) notify the parties of the non-complying terms and conditions; and
- (b) direct the parties to agree on new terms and conditions consistent with the regulations.

(7) The parties must, upon reaching agreement and amending the non-complying terms and conditions of the **[electronic communications facilities leasing] wholesale open access agreement**, submit the amended agreement to the Authority for consideration and review. 30

(8) The provisions of subsections (5) and (6) apply, with the necessary changes, to such consideration and review of the amended agreement by the Authority.”. 35

**Substitution of section 46 of Act 36 of 2005**

33. The following section is hereby substituted for section 46 of the principal Act:

**“Notification of [electronic communications facilities leasing] wholesale open access agreement disputes** 40

**46. (1) A party to a dispute arising out of [an electronic communications facilities leasing] a wholesale open access agreement may notify the Authority, in writing, of the dispute and such dispute must be resolved, on an expedited basis, by the Complaints and Compliance Committee in accordance with the regulations prescribed by the Authority.** 45

(2) A party who notifies the Authority of a dispute in terms of subsection (1) may, at any time, withdraw the notice in writing.

(3) A decision by the Complaints and Compliance Committee concerning any dispute or a decision concerning a dispute contemplated in section 43(5)(c) is, in all respects, effective and binding on the parties to the **[electronic communications facilities leasing] wholesale open access agreement**, unless an order of a court of competent jurisdiction is granted against the decision.”. 50

**Substitution of section 47 of Act 36 of 2005**

34. The following section is hereby substituted for section 47 of the principal Act:

**“[Facilities leasing] Wholesale open access pricing principles**

**47. (1) The Authority [may] must prescribe [regulations establishing a framework for the establishment and implementation of] wholesale rates applicable to [specified types of electronic communication facilities and associated services taking into account the provisions of Chapter 10] deemed entities that must be cost-oriented.** 5

(2) The Authority—

(a) must ensure that any cost recovery mechanism or pricing methodology that is mandated, serves to promote efficiency and sustainable competition, and maximise consumer benefits; and 10

(b) may also take account of prices available in comparable competitive markets.

(3) The Authority must ensure that any cost recovery mechanism or pricing methodology is— 15

(a) fair and reasonable; and

(b) non-discriminatory, unless there are pro-competitive or efficiency justifications that exist and the cost recovery mechanism or pricing methodology does not prevent or distort competition. 20

(4) The regulations must be reviewed at least every three years.”.

**Amendment of section 67 of Act 36 of 2005, as amended by section 28 of Act 1 of 2014**

35. Section 67 of the principal Act is hereby amended—

(a) by the insertion after subsection (3) of the following subsections: 25

“(3A) (a) The Authority must, within 12 months of the coming into operation of the Electronic Communications Amendment Act, 2018, define all the relevant markets and market segments relevant to the broadcasting, and electronic communications sectors, by notice in the *Gazette*. 30

(b) The notice contemplated in paragraph (a) must set out a schedule in terms of which the Authority will conduct market reviews of the defined markets and market segments, prioritising those markets with the most significant impact on consumer pricing, quality of service and access by users to a choice of services and markets relevant to policy directions, issued by the Minister responsible for Telecommunications and Postal Services. 35

(3B) Subsequent to defining all the relevant markets and market segments, as contemplated in subsection (3A)(a), the Authority must, at least every three years, review and update the market definitions and schedule in terms of which the Authority will conduct market reviews, by notice in the *Gazette*. 40

(3C) The Authority must give notice of its intention to define or review and update all the relevant markets and market segments in the *Gazette* and, in such notice, invite interested parties to submit their written representations to the Authority within such period as may be specified in such notice.”. 45

(b) by the substitution for subsection (4) of the following subsection:

“(4) The Authority must, when conducting a market review, prescribe regulations that must— 50

(a) determine whether there is effective competition in such market or market segment;

(b) determine which, if any, licensees have significant market power in such market or market segment where there is ineffective competition; 55

(c) impose appropriate pro-competitive license conditions on those licensees having significant market power to remedy the market failure;

- (d) set out a schedule in terms of which the Authority will undertake periodic review of the market or market segment, taking into account subsection (8) and the determination in respect of the effectiveness of competition and application of pro-competitive measures in such market or market segment; and 5
- (e) provide for monitoring and investigation of anti-competitive behaviour in the market or market segment.”;
- (c) by the substitution for subsection 4B of the following subsection:  
 “(4B) Subject to section 4D of the ICASA Act, licensees or any other person must provide to the Authority any information specified by the Authority in order that the Authority may carry out its duties in terms of this section.”; 10
- (d) by the insertion after subsection (4B) of the following subsection:  
 “(4C) A market review under this Chapter must not take longer than 12 months.”; 15
- (e) by the substitution in subsection (7) for paragraph (a) of the following paragraph:  
 “(a) obligations in respect of interconnection and **[facilities leasing]** wholesale open access, in addition to those provided for in Chapters 7 and 8 and any regulations made in terms thereof;” 20
- (f) by the substitution for subsection (8) of the following subsection:  
 “(8) Review of pro-competitive conditions:  
 (a) Where the Authority undertakes a review of the pro-competitive conditions imposed upon one or more licensees under this subsection, the Authority must[— 25  
     (i) **review the market determinations made on the basis of earlier analysis; and**  
     (ii)] decide whether to modify the pro-competitive conditions set by reference to **[a market determination]** the previous market review[;]. 30  
 (b) Where, on the basis of a review under this subsection, the Authority determines that a licensee to whom any pro-competitive conditions apply, is no longer a licensee possessing significant market power in that market or market segment, the Authority must revoke the applicable pro-competitive conditions applied to that licensee by reference to the previous market **[determination based on earlier analysis]** review[;]. 35  
 (c) Where, on the basis of such review, the Authority determines that the licensee to whom pro-competitive conditions apply continues to possess significant market power in that market or market segment, but due to changes in the competitive nature of such market or market segment, the pro-competitive conditions are no longer proportional in accordance with subsection (7), the Authority must modify the applicable pro-competitive conditions applied to that licensee to ensure proportionality. 40  
 (d) Where, on the basis of such review, the Authority determines that the appropriate market or market segment have changed as contemplated in subsection (3A) or (3B), the Authority must revoke the applicable pro-competitive conditions applied to that licensee and conduct a market review of the changed market or market segment in accordance with the Schedule contemplated in subsection (3A).”; and 45  
 (g) by the addition of the following subsection:  
 “(13) The Authority must perform the market definition and market review proceedings under this Chapter, after consultation with the Competition Commission.”. 50 55

### Insertion of section 67A in Act 36 of 2005

36. The following section is hereby inserted in the principal Act after section 67:

**“Concurrent jurisdiction agreement between Authority and Competition Commission**

- 67A.** (1) The Authority must enter into a concurrent jurisdiction agreement with the Competition Commission in terms of section 4(3A) of the ICASA Act and such agreement must be published in the *Gazette*. 5
- (2) The concurrent jurisdiction agreement contemplated in subsection (1) must address all issues pursuant to the co-operation between the Authority and the Competition Commission, including— 10
- (a) mechanisms to facilitate consultation between the Authority and the Competition Commission;
  - (b) the sharing of information between the two institutions; and
  - (c) the management of complaints, mergers, market reviews, market definitions and other relevant matters conducted by the institutions.”. 15

### Substitution of section 69 of Act 36 of 2005

37. The following section is hereby substituted for section 69 of the principal Act:

**“Code of conduct, end-user and subscriber service charter**

- 69.** (1) The Authority must [**as soon as reasonably possible after the coming into force of this Act,**] prescribe regulations, that must be reviewed at least every three years, setting out a code of conduct on consumer protection for licensees, subject to this Act and persons exempted from holding a licence in terms of section 6, to the extent such persons provide a service to the public. 20
- (1A) The code of conduct contemplated in subsection (1) must include, without limitation, provision for the protection of different types of end-users and subscribers including persons and institutions as well as users of wholesale services. 25
- (2) The Authority may develop different codes of conduct applicable to different types of services. All electronic communications network [**services licence**] service licensees and electronic communications service licensees must comply with the Code of Conduct for such services as prescribed. 30
- (3) The Authority must [**as soon as reasonably possible after the coming into force of this Act,**] prescribe regulations, that must be reviewed at least every three years, setting out the minimum standards for [**and**] end-user and subscriber service charters. 35
- (4) The Authority may develop different minimum standards for [**and**] end-user and subscriber service charters for different types of services.
- (5) The matters which an end-user and subscriber service charter [**may**] must address, include, but are not limited to— 40
- (a) the provision of accurate, understandable and comparable information to end-users and subscribers regarding services, rates, and performance procedures;
  - (aA) standards of service that end-users and subscribers may expect; 45
  - (b) provisioning and fault repair services;
  - (c) the protection of private end-user and subscriber information;
  - (d) end-user and subscriber charging, billing, collection and credit practices;
  - (e) complaint procedures and the remedies that are available to address the matters at issue; and
  - (f) any other matter of concern to end-users and subscribers.
- (6) Where an end-user or subscriber is not satisfied after utilising the complaint procedures set out in the regulations, his or her complaint may be submitted to the Authority in accordance with the provisions of section 17C of the ICASA Act. 55

(7) The Authority must enter into a concurrent jurisdiction agreement with the National Consumer Commission in terms of section 4(3A) of the ICASA Act, to ensure co-ordination of consumer protection within the ICT sector.”.

**Insertion of section 69A to Act 36 of 2005**

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38. The following section is hereby inserted in the principal Act after section 69:

**“Quality of service**

**69A.** (1) The Authority must make regulations prescribing quality of service standards for each category of licence, which must be reviewed at least every three years.

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(2) The standards contemplated in subsection (1) must include matters relating to—

(a) broadband download and upload speeds and latency, together with waiting time for installation and fault clearance;

(b) the defined level of technical quality such as call quality and success rates;

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(c) timeframes for service installations;

(d) requirements to ensure reliability and robustness of services;

(e) the required level of customer service, including the handling and resolution of complaints and disputes;

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(f) minimum requirements to meet the needs of persons with disabilities; and

(g) standards to ensure quality of emergency services.

(3) Subject to subsection (2), the Authority must, in preparing quality of service standards, take account of guidelines issued by the ITU, as well as best practice in other jurisdictions.

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(4) The Authority must promote public awareness of the quality of service standards.

(5) Licensees must publish information for end-users and subscribers on the quality of their services which information must also be supplied to the Authority.

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(6) The Authority may prescribe the quality of service parameters to be measured, and the content, form and manner of information to be published by licensees.

(7) The Authority must monitor and evaluate the national broadband policy targets in SA Connect and compliance with broadband quality of service standards on an ongoing basis, and make recommendations to the Minister responsible for Telecommunications and Postal Services every two years regarding the review of the national broadband policy targets, as necessary.”.

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**Amendment of section 74 of Act 36 of 2005**

39. Section 74 of the principal Act is hereby amended by the addition of the following subsection:

“(6) A person who fails to comply with a notice issued under section 67(4B) is guilty of an offence and liable, upon conviction, to a fine not exceeding R5 000 000.”.

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**Insertion of section 79C in Act 36 of 2005**

40. The following section is hereby inserted in the principal Act after section 79B:

**“Market performance report**

**79C.** (1) The Authority must annually publish a market performance report in respect of the broadcasting, electronic transactions, postal and electronic communications sectors, which report must—

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- (a) include assessment of affordability of services, accessibility to services, quality of service, impact on users of market trends, expected market trends and compliance by licensees with conditions and obligations set;
  - (b) consider the effects of convergence, including monitoring of the extent and impact of horizontal and vertical integration and bundling of services; and
  - (c) consider the impact of policy and legislation.
- (2) Subject to section 4D of the ICASA Act, licensees must provide to the Authority any information specified by the Authority in order that the Authority may carry out its duties in terms of this section.
- (3) The Authority must submit the market performance report to the Minister and Parliament within 30 days of publication.”.

#### **Amendment of section 82 of Act 36 of 2005**

41. Section 82 of the principal Act is hereby amended by the substitution in subsection (3)(a) for the words preceding subparagraph (i) of the following words:
- “The Agency must from time to time, with due regard to circumstances and attitudes prevailing in the Republic, including the needs of persons with disabilities and broadband, and after obtaining public participation to the greatest degree practicable, make recommendations to enable the Minister to determine what constitutes—”.

#### **Amendment of section 88 of Act 36 of 2005, as amended by section 41 of Act 1 of 2014**

42. Section 88 of the principal Act is hereby amended by the addition of the following subsection:
- “(4A) In exercising the powers contemplated in subsection (4), the Agency must consider the needs of persons with disabilities in assessing the access gap and setting universal service and access definitions and targets.”.

#### **Substitution of section 94 of Act 36 of 2005**

43. The following section is hereby substituted for section 94 of the principal Act:
- “(1) In the event of any conflict between the provisions of this Act, the related legislation or any other law relating to the regulation of broadcasting or electronic communications, the provisions of this Act prevail.
- (2) In the event of any conflict between the provisions of this Act and any regulations made in terms of this Act prior to the commencement of the Electronic Communications Amendment Act, 2018, the provisions of this Act prevail.
- (3) Any regulations made in terms of this Act prior to the commencement of the Electronic Communications Amendment Act, 2018, that are inconsistent with any provision of this Act, must be reviewed by the Authority within a period of 24 months from the date of commencement of the Electronic Communications Amendment Act, 2018.”.

#### **Amendment of section 95 of Act 36 of 2005, as amended by section 43 of Act 1 of 2014**

44. Section 95 of the principal Act is hereby amended by the addition of the following subsection:
- “(3) Any regulations made in terms of this Act prior to the commencement of the Electronic Communications Amendment Act, 2018, remain in force until they are amended or repealed in terms of this Act.”.

#### **Amendment of Schedule to Act 36 of 2005**

45. The following amendments are hereby inserted in the Schedule to the principal Act after Act No. 63 of 1996:

## SCHEDULE

| No. and year of Act | Short Title  | Extent of repeal or amendment  |
|---------------------|--|--|
| Act No. 13 of 2000  | Independent Communications Authority of South Africa Act, 2000 | <p>1. Amends section 1—</p> <p>(a) by the insertion after the definition of “Broadcasting Act” of the following definition:<br/> <u>“B-BBEE ICT Sector Code” means the Broad-Based Black Economic Empowerment Information, Communications and Technology Sector Code, a sector code on broad-based black economic empowerment, issued in terms of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003); and</u></p> <p>(b) by the deletion of the definition of “policy directions”.</p> <p>2. Amends section 4(3)—</p> <p>(a) by the substitution for paragraph (c) of the following paragraph:<br/> “(c) must <b>[control, plan,]</b> administer and manage the <b>[use] assignment [and]</b>, <u>licensing monitoring and enforcement of the radio frequency spectrum use in accordance with bilateral agreements or international treaties entered into by the Republic;”</u>; and</p> <p>(b) by the substitution for paragraph (k) of the following paragraph:<br/> “(k) <b>[may]</b> must make regulations <b>[on empowerment requirements]</b> <u>to apply the B-BBEE ICT Sector Code to existing and new licences or exemptions, including spectrum assignment to promote broad-based black economic empowerment within 12 months of the promulgation of the Electronic Communications Amendment Act, 2018.”</u></p> <p>3. Amends section 4 by the substitution for subsection (3A) of the following subsection:<br/> “(3A) The Authority, in exercising its powers and performing its duties—</p> <p>(a) must consider policy made, and policy directions issued, by the Minister in terms of this Act, the underlying statutes and any other applicable law; <b>[and]</b></p> |

| No. and year of Act | Short Title | Extent of repeal or amendment  |
|---------------------|-------------|--|
|                     |             | <p><u>(aA) must act in accordance with any policy or policy directions issued by—</u></p> <p><u>(i) the Minister responsible for Communications or the Minister responsible for Telecommunications and Postal Services in terms of sections 3(1)(e) or 3(2)(d) of the Electronic Communications Act; or</u></p> <p><u>(ii) the Minister responsible for Telecommunications and Postal Services in terms of sections 19A(3) or 30(2)(a) of the Electronic Communications Act; and</u></p> <p><u>(b) may conclude a concurrent jurisdiction agreement with any relevant authority or institution and must, at least once every three years, where necessary, review and revise the agreement by agreement with the authority or institution in question, subject to sections 67A and 69(7) of the Electronic Communications Act.”.</u></p> |

#### Amendment of Arrangement of Sections

46. The Arrangement of Sections which occur before section 1 of the principal Act is hereby amended—

- (a) by the insertion after item 19 of the following heading and item:

“CHAPTER 3A

LICENSING FRAMEWORK FOR WIRELESS OPEN ACCESS  
NETWORK SERVICE

19A. Licensing of wireless open access network service”;

- (b) by the substitution for the heading to items 20 to 29 of the following heading:

“CHAPTER 4

RAPID DEPLOYMENT OF ELECTRONIC COMMUNICATIONS  
NETWORKS AND ELECTRONIC COMMUNICATIONS  
FACILITIES”;

- (c) by the substitution for item 20 of the following item:

“20. Definitions and application”;

- (d) by the insertion after item 20 of the following items:

|  |
|--|
| <u>“20A. Role of Minister responsible for Telecommunications and Postal Services</u> |
| <b>20B.</b> Role of Rapid Deployment National Co-ordinating Centre                   |
| <b>20C.</b> Role of Authority  |
| <b>20D.</b> Right to enter and use property  |
| <b>20E.</b> Access to high sites for radio-based systems                             |
| <b>20F.</b> Single trenching   |
| <b>20G.</b> Access to buildings  |
| <b>20H.</b> Adequately served  |
| <b>20I.</b> Emergency  |
| <b>20J.</b> Application process and procedure  |



- 20K.** Fees, charges and levies”;
- (e) by the insertion after item 29 of the following items:  
**29A.** Definition  
**29B.** Functions of the Minister responsible for Telecommunications and Postal Services”;
- (f) by the substitution for item 30 of the following item:  
**30.** [Control] Administration of radio frequency spectrum”;
- (g) by the insertion after item 31 of the following items:  
**31A.** Universal access and universal service obligations of radio frequency spectrum licences  
**31B.** Radio frequency spectrum trading  
**31C.** Radio frequency spectrum sharing  
**31D.** Radio frequency spectrum refarming  
**31E.** High demand spectrum”;
- (h) by the insertion after item 34 of the following items:  
**34A.** National Radio Frequency Spectrum Planning Committee  
**34B.** Sector-specific agencies”;
- (i) by the insertion after item 42 of the following heading and item:

“CHAPTER 7A

INTERNATIONAL ROAMING

- 42A.** International roaming regulations”;
- (j) by the substitution for the heading to items 43 to 47 of the following heading:

“CHAPTER 8

**[ELECTRONIC COMMUNICATIONS FACILITIES LEASING]  
WHOLESALE OPEN ACCESS”;**

- (k) by the substitution for items 43 to 47 of the following items:  
**43.** Obligation to [lease electronic communications facilities] provide wholesale open access  
**44.** [Electronic communications facilities leasing] Wholesale open access regulations  
**45.** Filing of [electronic communications facilities leasing] wholesale open access agreements  
**46.** Notification of [electronic communications facilities leasing] wholesale open access agreement disputes  
**47.** [Facilities leasing] Wholesale open access pricing principles”;
- (l) by the insertion after item 67 of the following item:  
**67A.** Concurrent jurisdiction agreement between Authority and Competition Commission”;
- (m) by the insertion after item 69 of the following item:  
**69A.** Quality of service”;
- (n) by the insertion after item 79B of the following item:  
**79C.** Market performance report”.

**Short title and commencement**

**47.** (1) This Act is called the Electronic Communications Amendment Act, 2018, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

(2) The President may fix different dates for the coming into operation of different sections of this Act.

## **MEMORANDUM ON THE OBJECTS OF THE ELECTRONIC COMMUNICATIONS AMENDMENT BILL, 2018**

### **1. BACKGROUND AND CURRENT REGULATORY FRAMEWORK**

- 1.1 The Electronic Communications Act, 2005 (Act No. 36 of 2005) (the “Act”), created the first converged regulatory framework for telecommunications and broadcasting in South Africa. It established the framework in line with developments internationally, renaming telecommunications “electronic communications” for consistency and introducing various changes to the way in which networks and services were regulated.
- 1.2 The sector is currently governed primarily by the Act and the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000) (“ICASA Act”), which establishes the sector regulatory authority.
- 1.3 Cabinet initiated the review of all ICT-related policies in 2012. The then Minister of Communications appointed a Policy Review Panel in January 2013 following public nominations. The Panel included representatives from the South African ICT industry, academia, NGOs, public institutions and state-owned companies.
- 1.4 Research was commissioned to assist the Panel in assessing and diagnosing challenges and to identify proactive policy approaches for the future. The Panel, together with the Ministry and Department, initiated a series of public consultations—broadly in line with the approach for regulatory impact assessments, issued by the Presidency in 2012, prior to the Panel making its final recommendations to the Minister in March 2015.
- 1.5 The following Papers were released for public comment as part of the consultation process: The Framing Paper issued in April 2013 sought input on the objectives and goals of policy. A Green Paper released in January 2014 reflected on achievements against the original vision, and asked what core issues or problems need to be addressed in future policy. A Discussion Paper was published in November 2014 outlining a range of options and possible policy approaches to realise the objectives set in the Framing Paper. The Policy Review Panel then prepared the National Integrated ICT Policy Review report in March 2015. This White Paper has been developed after considering the Panel recommendations and the inputs received from stakeholders through the policy review process. Cabinet approved the White Paper on 28 September 2016, following which it was published on 3 October 2016.
- 1.6 The National Integrated ICT Policy White Paper outlines the overarching policy framework for the transformation of South Africa into an inclusive and innovative digital and knowledge society. The White Paper outlines government’s approach to providing cross-government leadership and facilitating multi-stakeholder participation; interventions to reinforce fair competition and facilitate innovation in the converged environment; policies to protect the open Internet; policies to address the digital divide and new approaches to addressing supply-side issues and infrastructure rollout including managing scarce resources.
- 1.7 In addition, the White Paper outlines policies to address demand-side issues in order to facilitate inclusive digital transformation in the country and provides for a new national postal sector policy framework, in respect of the market structure for the postal sector and the regulation and licensing thereof. The White Paper also addresses issues related to promotion of growth in the ICT and postal industries and provides for institutional frameworks necessary to facilitate the implementation of this policy document.

- 1.8 This Bill is one of a number of Bills that will be introduced to give effect to the White Paper, including a Bill creating a new economic regulator, the ICT Sector Commission and a Bill creating a new Digital Development Fund.

## **2. OBJECTS OF BILL**

The objects of the Bill are to amend the Act, so as to align it with the National Integrated ICT Policy White Paper approved by Cabinet on 28 September 2016; to provide for transformation of the sector through enforcement of broad-based black economic empowerment; to provide for lowering of cost of communications, reducing infrastructure duplications and encouraging service based competition through a wireless open access network service; to provide a new framework for rapid deployment of electronic communications facilities; to provide for new approaches on scarce resources such as spectrum including the allocation of high demand spectrum on open access principles; to create a new framework for open access; to provide for the regulation of international roaming including SADC roaming to ensure regulated roaming costs, quality of service and transparency; to provide for regular market definition and review to ensure effective competition; to provide for improved quality of services including for persons with disabilities; to provide for consumer protection of different types of end-users and subscribers, including persons and institutions; to provide for enhanced co-operation between the National Consumer Commission and Authority as well as the Competition Commission and the Authority; and to provide for matters connected therewith.

## **3. SUMMARY OF BILL**

### **3.1 Clause 1: Amendment of section 1 of Act 36 of 2005**

The definitions contained in the Act are amended as follows:

- A definition for “B-BBEE ICT Sector Code” is inserted in view of the deletion of the definition of ICT Charter.
- The definition of “broadband” is amended to align it with and enable achievement of SA Connect targets. It is further amended to ensure that the Authority makes recommendations in this regard, as required under SA Connect.
- A definition for “Competition Commission” is inserted to refer to the Competition Commission established in terms of the Competition Act.
- A new definition for “general open access principles” is inserted to mean providing wholesale open access on terms that are effective, transparent and non-discriminatory.
- A definition is inserted for “high demand spectrum”, to provide which spectrum can be determined to be high demand spectrum by the Minister, after consultation with the Authority.
- The definition of “ICT Charter” is deleted due to new definition for “B-BBEE ICT Sector Code”.
- A definition is inserted for “National Consumer Commission” to mean the National Consumer Commission established under section 85 of the Consumer Protection Act, 2008 (Act No. 68 of 2008).
- A definition is inserted for “persons with disabilities”, to align it with the White Paper definition that is based on the UN Convention on the Rights of Persons with Disabilities.
- A new definition for “radio frequency spectrum refarming” is inserted to mean the re-use of an assigned frequency band for a different application. This definition is necessary in view of the proposed new section 31D that provides for the conditions for radio frequency spectrum refarming.

- A new definition for “radio frequency spectrum sharing” is inserted to mean the simultaneous usage of a specific radio frequency or radio frequency spectrum band in a specific geographical area by different radio frequency spectrum licensees in order to enhance the efficient use of spectrum, and “spectrum sharing” has the same meaning. This definition is necessary in view of the proposed new section 31C that provides for the conditions for radio frequency spectrum sharing.
- A new definition for “radio frequency spectrum trading” is inserted to mean the transfer by a licensee, of ownership or control of the rights, in full or in part, held under a radio frequency spectrum licence by way of a sale, lease or sub-letting to a third party, and “spectrum trading” has the same meaning. This definition is necessary in view of the proposed new section 31B that provides for the conditions for radio frequency spectrum trading.
- New definitions are inserted for the terms “Rapid Deployment National Co-ordinating Centre” and “Rapid Deployment Steering Committee” to refer to the structures established in section 20A(2) and (3), respectively.
- A definition for “SA Connect” is inserted to refer to South Africa’s National Broadband Policy, 2013 published in Government *Gazette* No. 37119 of 06 December 2013, under Government Notice No. 953.
- A new definition is inserted for “SADC” to mean the Southern African Development Community.
- A new definition is inserted for “SADC Roaming decisions” to mean the decisions agreed to by SADC Ministers responsible for Telecommunications, Postal Services and ICTs in pursuit of the objectives of the Protocol on Transport, Communications and Meteorology in the Southern African Development Community Region, 1996, which Protocol was adopted in terms of the Treaty of the Southern African Development Community of 1992.
- A new definition is inserted for “sector-specific agencies” to mean the South African Maritime Safety Authority and the Civil Aviation Authority in alignment with the new clause 34B.
- A definition is inserted for “SIP “ to mean a strategic integrated project designated in terms of section 8 of the Infrastructure Development Act, 2014 (Act No. 23 of 2014).
- A new definition is inserted for “wholesale open access” that, read with the definition of “wholesale”, gives meaning to the wireless open access network service contemplated in the proposed new section 19A and to the new wholesale open access framework in Chapter 8.
- New definitions are inserted for the terms “wireless open access network service” and “wireless open access network service licensee” to describe this new service and type of licence that will be issued under the proposed new section 19A.

### **3.2 Clause 2: Amendment of section 2 of Act 36 of 2005**

Section 2 is amended to align the objects of the Act with amendments in the Act emanating from the White Paper. The role that ICTs play in socio-economic development and effective participation of all South Africans in the affairs of the Republic is emphasised. Objects of the Act that were added include—

- redressing the skewed ownership and control of economic and scarce resources such as radio frequency spectrum, to address the barriers to market entry including for SMMEs;

- promoting serviced-based competition and avoiding concentration and duplication of electronic communications infrastructure in urban areas;
- promoting an environment of wholesale open access to electronic communications networks on terms that are effective, transparent and non-discriminatory; and
- the encouragement of innovation.

### **3.3 Clause 3: Amendment of section 3 of Act 36 of 2005**

- 3.3.1 Section 3(1)(e) is amended to remove the reference to guidelines to clarify that policy is required similar to the other provisions in this subsection.
- 3.3.2 Section 3(2)(bB) is inserted to provide that the Minister may issue policy directions on universal service and universal access obligations, having identified any access gaps.
- 3.3.3 Section 3(2)(cC) is inserted to provide that the Minister may issue policy directions on compliance with international obligations.
- 3.3.4 Section 3(2)(d) is amended to remove the reference to guidelines to clarify that policy direction is required. It further ensures that policy directions can be issued on spectrum. On spectrum fees, it adds that policy directions can be issued on incentives, spectrum fee exemption and spectrum fee reductions that may apply.
- 3.3.5 Section 3(2)(e) is amended to make it clear that policy directions can be issued by the Minister to give effect to ICT-related national policy.

### **3.4 Clause 4: Amendment of section 4 of Act 36 of 2005**

- 3.4.1 This clause seeks to amend section 4(1)(d) by removing the reference to ‘control’ in line with the proposed new section 29A and proposes further amendments to section 30. The amendment is part of amendments that clarify the role of the Minister, as supported by the National Radio Frequency Spectrum Planning Committee and National Radio Frequency Spectrum Division *vis-a-vis* the Authority and sector-specific agencies on spectrum.
- 3.4.2 A proposed new subsection (1A) is inserted into section 4 to ensure that regulations on radio frequency spectrum and spectrum fees must be in accordance with any policies or policy directions issued by the Minister.

### **3.5 Clause 5: Amendment of section 5 of Act 36 of 2005**

This clause amends section 5(9)(b) of the Act in order to substitute the term “ICT Charter” with “B-BBEE ICT Sector Code”.

### **3.6 Clause 6: Amendment of section 8 of Act 36 of 2005**

- 3.6.1 Section 8(2) of the Act is amended to ensure that standard terms and conditions prescribed by the Authority for individual licences, must include the matters provided in that subsection and to require that such regulations include regulations that strengthen the protection of subscribers and end-users in relation to quality of service standards.
- 3.6.2 Section 8(3) of the Act is amended to delete the reference to Chapter 10 that will make it impractical for the Authority to prescribe additional license terms and conditions.

3.6.3 Section 8(4) of the Act is amended to oblige the Authority to make regulations on universal service and access obligations (“USAO”) and to designate licensees that carry such obligations.

3.6.4 A new subsection (4A) is inserted into section 8 of the Act to ensure a regular review of such USAO regulations and provide for considerations relevant to such review.

3.6.5 A new subsection (6) is added to section 8 of the Act to provide for the inclusion of rapid deployment obligations on licensees.

### **3.7 Clause 7: Amendment of section 9 of Act 36 of 2005**

This amendment seeks to make it clear that the broad-based black economic empowerment conditions must be prescribed.

### **3.8 Clause 8: Amendment of section 10 of Act 36 of 2005**

The purpose of this amendment is to ensure that the Authority may amend licences to include rapid deployment obligations.

### **3.9 Clause 9: Amendment of section 13 of Act 36 of 2005**

This amendment seeks to remove the requirement for an inquiry before regulations are made since it is not required, and may result in an over burdensome process.

### **3.10.Clause 10: Insertion of section 19A in Act 36 of 2005**

3.10.1 The proposed new section 19A seeks to enable the issuing of a wireless open access network service licence and radio frequency spectrum licence to provide wireless open access network services.

3.10.2 The proposed new section includes the minimum requirements for the applicant for the wireless open access network service licence, including provisions to ensure fair competition. It further describes the type of services that the licensee must provide.

3.10.3 The Minister must issue a policy direction to the Authority in terms of section 5(6) of the Act to issue an invitation to apply for the wireless open access network service licence and spectrum licence. The Authority will, during the licensing process, determine the terms and conditions, as well as incentives that must apply to the wireless open access network service licence.

### **3.11 Clause 11: Substitution of heading to Chapter 4 of Act 36 of 2005**

The purpose of this clause is to substitute the heading to Chapter 4 of the Act.

### **3.12 Clause 12: Substitution of section 20 of Act 36 of 2005**

Section 20 of the Act is substituted for a new section that defines the meaning of “land”.

### **3.13 Clause 13: Insertion of sections 20A to 20K in Act 36 of 2005**

3.13.1 This clause further replaces sections 21 to 23 of the Act with new sections 20A to 20K.

3.13.2 A proposed new section 20A is inserted to provide for the oversight role of the Minister of Telecommunications and Postal Services, including liaison with other relevant Ministries and the establishment

of the Rapid Deployment National Co-ordinating Centre and Rapid Deployment Steering Committee.

- 3.13.3 A new section 20B is inserted on the role of the Rapid Deployment National Co-ordinating Centre to ensure central co-ordination of activities and process for rapid deployment including its relationship with licensees, SIPs and local municipalities.
- 3.13.4 Section 20C on the role of the Authority is inserted to establish the regulatory framework for rapid deployment of electronic communications networks, for resolving disputes on an expedited basis and matters that must be included in the regulations.
- 3.13.5 A new section 20D is inserted to provide for the rights and obligations of Electronic communication network service (“ECNS”) licensees. The rights include entering upon public and private land to deploy networks, which networks remain their property. A procedure is provided to give notice and apply to the property owner or occupier including right to objection and relevant procure, if the network or facility will cause significant interference with the land. Obligations are placed on ECNS licensees to act with due care in accordance with industry standards and restore the property to its former state. ECNS licensees must update the geographic information system database about the type and location of facilities deployed. The section further seeks to uphold open access principles and infrastructure sharing obliging ECNS licensees to seek alternatives to new infrastructure deployments.
- 3.13.6 Section 20E is inserted to provide for access to high sites for radio-based systems to ensure that ECNS licensees may access and use any high site, whether public or private, for the deployment of electronic communications networks and facilities that promote broadband.
- 3.13.7 A new section 20F is inserted to enable the Authority to prescribe regulations on processes and procedures for single trenching.
- 3.13.8 A new section 20G is inserted to provide that ECNS licensees may access any building to deploy electronic communications networks or facilities.
- 3.13.9 Section 20H is inserted to introduce the concept of ‘adequately served’ and provides that ECNS licensees may not deploy networks or facilities in adequately served premises except if the Authority determines otherwise. Adequately served is described to mean that an electronic communications network that enables electronic communications services including voice services and broadband services at the quality and speeds provided in SA Connect, has already been deployed within premises such as a gated complex, an office park, a shopping mall, or a block of flats by an electronic communications network service licensee. The section provides for the requirements that must be met by the access provider in an adequately served area such as providing its network on wholesale open access basis and providing a “co-location” facility where access seekers can connect to the network of the access provider. It further establishes a right for occupants in the adequately served premises to choose who to receive a service from.
- 3.13.10 Section 20I on emergency is inserted to ensure that no entity may refuse access to any site nor charge any fee for access for the deployment of electronic communications network or facilities during a state of emergency.

- 3.13.11 Section 20J, on application process or procedure, is inserted in order to expedite all applications and related processes for approval, authorisation, licence, permission or exemption and processes relating to any consultation and participation required by the relevant laws, required for the deployment of electronic communications networks and facilities, and provides that the National Co-ordination Centre must engage with relevant stakeholders to promote and encourage that such applications and processes run concurrently. The role of the Rapid Deployment National Co-ordination Centre is described to keep updated information about application processes and requirements.
- 3.13.12 A new section 20K is inserted to provide for fees, charges and levies. Access fees may not be charged by landowners if networks and facilities are not intrusive or deprive the landholder of its use of the land. It describes when reasonable access fees are payable when the access is more intrusive. The section enables dispute resolution by the Authority. This section also ensures that a landholder is entitled to reasonable compensation agreed to between the landholder and the electronic communications network service licensee, for any financial loss or damage, and that in any dispute about compensation, the reasonability of the compensation must be determined by the Authority on an expedited basis.

#### **3.14 Clause 14: Repeal of sections 21, 22 and 23 of Act 36 of 2005**

This clause repeals sections 21, 22 and 23 of the Act.

#### **3.15 Clause 15: Amendment of section 24 of Act 36 of 2005**

Section 24 is amended to remove the timeframe for the electronic communications network service licensee to give notice to the local authority, to avoid conflicting timeframes elsewhere in this Chapter. The amendment further ensures that water, gas and electricity pipes are covered.

#### **3.16 Clause 16: Amendment of section 25 of Act 36 of 2005**

Section 25 is amended to ensure that the costs payable by a local authority to an ECNS licensee for moving any electronic communications facility, owing to any alteration or other work required by a public authority, is reasonable. The section is further amended to replace the reference to section 17C of the ICASA Act with a reference to section 20C(2) of the Electronic Communications Act, once it has been amended by the Bill, that sets out a new process for expedited dispute resolution.

#### **3.17 Clause 17: Amendment of section 27 of Act 36 of 2005**

Section 27 is amended to improve a cross-reference to another subsection.

#### **3.18 Clause 18: Repeal of section 28 of Act 36 of 2005**

Section 28 is deleted since it is covered by the new section 20D.

#### **3.19 Clause 19: Insertion of sections 29A and 29B in Act 36 of 2005**

- 3.19.1 The purpose of these amendments are to clarify the functions of the Minister of Telecommunications and Postal Services in relation to spectrum, in accordance with the White Paper. This clause seeks to clarify that the Minister's role in representing the Republic is wider than just international allocation of spectrum, co-ordination of spectrum usage and approval of regional radio frequency spectrum plans. The Minister represents the Republic on all radio frequency matters at international, multi-lateral and bi-lateral level.



- 3.19.2 Some of the new functions include the development and approval of the National Radio Frequency Plan, the establishment of a National Radio Frequency Spectrum Planning Committee and co-ordination across Government including sector-specific agencies.

### **3.20 Clause 20: Amendment of section 30 of Act 36 of 2005**

- 3.20.1 The amendment of Chapter 5 of the Act seeks to align the radio frequency spectrum provisions with the White Paper.
- 3.20.2 Section 30(1) is amended to provide that the Authority is responsible for the administration and management of the assignment of spectrum, the issuing of licenses and monitoring and enforcement of spectrum use. Planning will become the responsibility of the national radio frequency spectrum planning committee appointed by the Minister, as contemplated in section 34A.
- 3.20.3 The amendment of section 30(2) seeks to ensure that the Authority in assigning radio frequency spectrum must comply with radio frequency spectrum policy and policy directions issued by the Minister.
- 3.20.4 A number of new responsibilities of the Authority are inserted, such as—
- a requirement to conduct periodic audits;
  - the establishment of a real-time database of radio frequency spectrum assignments; and
  - monitoring and evaluation of harmful interference.

The Authority should also ensure that radio frequency spectrum licensees submit an annual report on its spectrum usage to the Authority and Minister.

### **3.21 Clause 21: Amendment of section 31 of Act 36 of 2005**

- 3.21.1 Section 31(2A) and (3)(c) of the Act are deleted and section 31(3)(b) is amended in view of the spectrum trading clause contemplated in section 31B.
- 3.21.2 Section 31(7) of the Act is amended to ensure that the Authority develops a monitoring and evaluation system.
- 3.21.3 Amendments to section 31(8) of the Act are made to insert the ‘use it or lose it’ principle that provides for the withdrawal of a licence, if assigned radio frequency spectrum is not used for two years.
- 3.21.4 The proposed section 31(8A) creates exceptions to the ‘use it or lose it’ principle, such as for passive science services.
- 3.21.5 The proposed section 31(9) seeks to enable consultation with a licensee before withdrawal of a spectrum licence for non-compliance with universal service and access obligations.
- 3.21.6 The proposed section 31(11) requires that the Authority develops an automated licensing system for non-high demand radio frequency spectrum.

### **3.22 Clause 22: Insertion of sections 31A, 31B, 31C, 31D and 31E in Act 36 of 2005**

- 3.22.1 Through the insertion of the proposed new section 31A, this clause seeks to introduce a specific requirement for universal service and

universal access obligations for specific radio frequency spectrum licensees determined by the Authority. A role is inserted for the Minister to approve obligations to ensure alignment with national policy objectives. The obligations must be similar for similar bands and licensees must report annually on their compliance with such obligations. A licence may be withdrawn for failure to comply with universal service and access obligations.

- 3.22.2 Through the insertion of the proposed new section 31B, this clause seeks to provide for spectrum trading subject to approval from the Authority. It enables the Authority to make spectrum trading regulations. The clause provides the criteria and conditions for spectrum trading including that competition may not be distorted and policy objectives may not be undermined.
- 3.22.3 The proposed insertion of a new section 31C enables spectrum sharing subject to approval from the Authority in case of high demand spectrum and notification in case of non-high demand spectrum. Conditions include that it may not have a negative impact on competition or compromise emergency services.
- 3.22.4 It makes provision for spectrum sharing regulations that should amongst other things provide criteria for spectrum sharing.
- 3.22.5 The proposed insertion of a new section 31D seeks to introduce provisions on spectrum refarming since no policy previously existed for it. Refarming of spectrum relates to the re-use of spectrum for a different application than it was originally assigned.
- 3.22.6 Radio frequency spectrum licensees may refarm licenced spectrum subject to approval from the Authority as long as it will not have a negative impact on competition.
- 3.22.7 Spectrum fees and universal access and universal service obligations must be imposed on radio frequency spectrum licensees for refarmed spectrum commensurate with other assigned spectrum in similar bands.
- 3.22.8 The insertion of the proposed new section 31E seeks to introduce provisions for determining what constitutes high demand spectrum, which unassigned high demand spectrum must be assigned to a wireless open access network service, and that high demand spectrum must be subject to the principles of open access and non-exclusivity as provided in the White Paper.
- 3.22.9 The section also makes provision for the assignment of unassigned high demand spectrum not assigned to the WOAN, to other licensees on certain conditions such as the procurement of capacity in the WOAN.
- 3.22.10 The section also provides that the Authority must conduct an inquiry on currently assigned high demand spectrum, at least 24 months before the expiry of the relevant radio frequency spectrum licences, and make recommendations to the Minister on the terms and conditions that may apply to such licences as a condition for the renewal thereof.

### **3.23 Clause 23: Amendment of section 34 of Act 36 of 2005**

- 3.23.1 Subsection (1) is deleted in view of the new section 29A.
- 3.23.2 The White Paper makes the Minister responsible for the development of the national radio frequency plan and the majority of the

amendments in this clause seek to align section 34 accordingly including procedural aspects such as public consultation.

- 3.23.3 The White Paper provides that the Minister will make a determination in the best interest of the Republic regarding the service allocation to be made in the national table of frequency allocations, in cases where there are competing services in a particular frequency band, and where the decisions of an ITU World Radio-communication Conference could create divergent interests nationally. Subsection 34(6) is amended to make provision for this requirement.
- 3.23.4 Provision is made in section 34(7)(aA) for consultation with the Authority. Section 34(7)(c)(ii) is further amended to ensure that public protection and disaster relief services are also taken into account in the development of the national radio frequency plan, in accordance with World Radio-communication Conferences.
- 3.23.5 Section 34(7)(c)(iv) and (v) are included to ensure that the following matters are taken into account in the development of the national radio frequency plan:
- priority of access, availability and protection from harmful interference of frequencies for safety-of-life services; and
  - the allocation and preservation of specific bands for broadcasting.
- 3.23.6 A new section 34(7A) is inserted to place a cap on the time period for migration of radio frequency spectrum users and to require that the national radio frequency plan should, where it includes migration, indicate whether any licensee or another party is responsible for the migration costs.

### **3.24 Clause 24: Insertion of sections 34A and 34B in Act 36 of 2005**

- 3.24.1 The insertion of the proposed new section 34A seeks to give effect to the responsibility placed on the Minister to establish a National Radio Frequency Planning Committee.
- 3.24.2 The White Paper provides as follows in paragraph 9.2.5.1. “The Ministry of Telecommunications and Posts (“the Ministry”) is responsible for:
- Co-ordination across other Departments and sector-specific agencies whose industries are impacted by policy related to the use of the frequency spectrum resource;
  - Establishment of a National Radio Frequency Planning Committee with representatives from Government Departments. The Committee would ensure fairness and equitable distribution of Spectrum”.
- 3.24.3 The insertion of the proposed new section 34B seeks to specify the responsibilities of sector-specific agencies that manage radio frequency spectrum use, in relation to the Authority, such as the South African Maritime Safety Authority. The responsibilities include—
- Ensuring availability and maintenance of quality information related to spectrum assignments, licensing and utilisation; and
  - Maintaining a database of frequency spectrum users in their respective industries and ensuring that their database corresponds with that of the Authority.
- 3.24.4 The insertion further seeks to ensure that the Minister, the Authority and the sector-specific agencies enter into a Memorandum of Understanding on matters relevant to the management of the radio frequency spectrum by sector sector-specific agencies.

- 3.24.5 The Authority will be required to develop a database with real-time updates including that such database enables real-time updating by the corresponding databases of sector-specific agencies.

### **3.25 Clause 25: Amendment of section 36 of Act 36 of 2005**

This clause seeks to amend section 36 on technical standards that ICASA may prescribe for electronic communications facilities and equipment by requiring that it meets universal design requirements to make provision for persons with disabilities which means that electronic communications facilities and equipment must be usable by all people, to the greatest extent possible, without the need for adaptation or specialised design.

### **3.26 Clause 26: Insertion of Chapter 7A in Act 36 of 2005**

A new Chapter 7A is inserted to make provision for international roaming, including SADC roaming regulations. It places an obligation on the Authority to prescribe regulations taking into consideration policy directions issued by the Minister and SADC Roaming decisions. The regulations must be conditional on reciprocal terms and conditions being imposed on electronic communications service providers of another country by such country or its National Regulatory Authority. The section enables the Authority to obtain any information required for international roaming regulation from electronic communications service licensees and that the Authority may engage National Regulatory Authorities of any other country in order to promote international roaming.

### **3.27 Clause 27: Substitution of heading to Chapter 8 of Act 36 of 2005**

- 3.27.1 This clause merely substitutes the heading to Chapter 8 of the Act to include a reference to wholesale open access.
- 3.27.2 In order to realise South Africa's developmental objectives, transform society and the economy, encourage broadband deployment, and preserve and promote the open and interconnected nature of the Internet, a wholesale open access regime will be implemented in South Africa along the entire infrastructure and services value chain.
- 3.27.3 To support this new approach, a wholesale open access framework has to be created and therefore Chapter 8 is amended to convert it from facilities leasing to wholesale open access to give effect to Chapter 9.1 of the White Paper. Chapter 8 of the Act is amended to provide how networks should be shared between all licensees for the benefit of society, including through a Wireless Open Access Network Service.

### **3.28 Clauses 28 and 29: Amendment of section 43 of Act 36 of 2005**

- 3.28.1 Section 43 is amended, in general, to substitute facilities leasing with open access. The amendment seeks to oblige electronic communications network service licensees to provide wholesale open access upon request, to enter into wholesale open access agreements, and to provide wholesale open access on the general open access principles. Exceptions are created for electronic communications network service licensees that provide broadcasting signal distribution and based on technical inability.
- 3.28.2 If the Authority determines that an electronic communications network service licensee is a vertically integrated operator then that licensee must do accounting separation, in addition to the defined general open access principles.
- 3.28.3 If the Authority determines that an electronic communications network service licensee is a deemed entity that licensee must in

addition to the defined general open access principles, do active infrastructure sharing, render services at prescribed wholesale rates, and comply with specific network and population coverage targets.

- 3.28.4 Sections 43(2) to (4) are deleted and replaced with technical inability as a basis for denying access. The Authority can perform a number of actions to resolve unwillingness or technical inability to provide access. In case of technical inability (other than environmental and technological inability), the Authority can determine how to resolve technical inability, that may include the apportionment of costs.
- 3.28.5 Subsections (8), (8A) and (9) of section 43 are deleted in their current form since these provisions are related to the reasonability test. The wholesale open access regulations contemplated in section 44 will include a list of essential facilities since the determination of essential facilities is still necessary for deemed entity classification.

### **3.29 Clauses 30 and 31: Amendment of section 44 of Act 36 of 2005**

- 3.29.1 Section 44 is amended, in general, to substitute the requirement for facilities leasing regulations with wholesale open access regulations. The regulations will now also include implementation and enforcement of wholesale open access principles, a list of vertically integrated entities including the criteria used to determine vertically integrated entities, accounting separation procedures for vertically integrated entities, the determination of deemed entities and essential facilities.
- 3.29.2 A new subsection (3A) is inserted into section 44 of the Act to describe the procedure to determine deemed entities.
- 3.29.3 Subsections (5) to (7) of section 44 of the Act are deleted, since the White Paper does not mention these exemptions for purposes of open access.

### **3.30 Clause 32: Amendment of section 45 of Act 36 of 2005**

Section 45 is amended, in general, to substitute the requirement for the filing of facilities leasing agreements with wholesale open access agreements.

### **3.31 Clause 33: Amendment of section 46 of Act 36 of 2005**

Section 46 is amended, in general, to substitute facilities leasing with wholesale open access in the context of notification of agreement disputes.

### **3.32 Clause 34: Amendment of section 47 of Act 36 of 2005**

Section 47 is amended, in general, to substitute facilities leasing pricing principles with wholesale open access pricing principles. The requirement for the Authority to prescribe a pricing framework is now made compulsory since pricing is integrally linked to wholesale open access. A new provision is inserted to ensure that the framework includes cost-oriented pricing for deemed entities. The requirements applicable to cost recovery are also included such as fairness and reasonability.

### **3.33 Clause 35: Amendment of section 67 of Act 36 of 2005**

- 3.33.1 Subsections (3A), (3B) and (3C) are inserted in section 67 of the Act, requiring the Authority to define all the relevant markets and market segments relevant to the broadcasting and electronic communications sectors within 12 months of the coming into operation of the Electronic Communications Amendment Act. Importantly, the section requires that the Authority sets out a schedule in terms of which it will conduct market reviews of the defined markets and which markets

should be prioritised. It also requires that such market definitions be reviewed every three years. Market definition of all markets therefore becomes a distinct action that the Authority must continuously perform.

- 3.33.2 Section 67(4) is amended to remove the requirement for an inquiry that overburdens the market review process and also omits reference to market definition that is now provided separately in the proposed new subsections (3A), (3B) and (3C). This section is further simplified and consequential amendments made.
- 3.33.3 Subsection (4B) of section 67 of the Act is amended to ensure that the Authority can request information from any person, in addition to licensees, during market review processes. This is necessary since industry players such as mobile virtual network operators may have information that is relevant for such market review.
- 3.33.4 Subsection (8) of section 67 of the Act is amended to delete the reference to market determinations, as such exercise is already provided for in the proposed new subsections (3A), (3B) and (3C), and to effect consequential amendments that are necessary. A new paragraph (d) is inserted to ensure that where, on the basis of such review, the Authority determines that the appropriate market or market segment have changed as contemplated in subsection (3A) or (3B), the Authority must revoke the applicable pro-competitive conditions applied to that licensee and conduct a market review of the changed market or market segment.
- 3.33.5 Subsection (13) is inserted on consultation with the Competition Commission by the Authority when performing the market definition and market review proceedings to strengthen the Authority in the regulation of competition.

### **3.34 Clause 36: Insertion of section 67A in Act 36 of 2005**

Section 67A is inserted to formalise the requirement for a concurrent jurisdiction agreement between the Authority and the Competition Commission. It also requires that such agreement must include consultative mechanisms between the two authorities, including the sharing of information and how to manage complaints, mergers, market reviews, market definitions and other relevant matters.

### **3.35 Clause 37: Amendment of section 69 of Act 36 of 2005**

- 3.35.1 Section 69 is amended to ensure that both the Code of Conduct on consumer protection for licensees and the End-User and Subscriber Service Charter, are reviewed by the Authority at least every three years. The amendment provides that the Code of Conduct must include provision for the protection of different types of end-users and subscribers, including persons and institutions, as well as users of wholesale services. The amendment also ensures that the End-User and Subscriber Service Charter “must” include the content mentioned in subsection (5). The content is also expanded by for example adding that the Charter must include standards of service that end-users and subscribers can expect.
- 3.35.2 A new subsection (7) is inserted into section 69 of the Act, to ensure that the Authority enters into a concurrent jurisdiction agreement with the National Consumer Commission (the “NCC”) to ensure that consumer related issues in the ICT sector are dealt with comprehensively and in a co-ordinated way.

### **3.36 Clause 38: Insertion of section 69A in Act 36 of 2005**

- 3.36.1 A new section 69A is inserted to comprehensively provide for quality of service issues, in line with ITU and international best practice. It empowers the Authority to prescribe regulations that must be reviewed at least every three years. It provides the type of quality of service standards that must be included in the regulations such as broadband download and upload speeds and latency, call quality, time frames for service installations etc.
- 3.36.2 The amendments place obligations on the Authority and licensees towards the promotion of awareness of the quality of service standards.
- 3.36.3 Importantly, as required under SA Connect, an obligation is placed on the Authority to monitor and advise the Minister on the review of national broadband policy targets, and compliance with broadband quality of service standards.

### **3.37 Clause 39: Amendment of section 74 of Act 36 of 2005**

This clause seeks to amend section 74 to include an offence for failure to comply with a notice to provide information under section 67(4B).

### **3.38 Clause 40: Insertion of new section 79C in Act 36 of 2005**

A new section is inserted to give effect to the requirement in the White Paper that in addition to formal market reviews, the Authority will be required to annually conduct and publish overviews of performance across all sectors. This must for example include assessment of affordability of services and accessibility to services. The market performance report must be submitted to the Minister and Parliament to strengthen the oversight roles.

### **3.39 Clause 41: Amendment of section 82 of Act 36 of 2005**

Section 82 is amended to ensure that, when the Universal Service and Access Agency of South Africa makes recommendations to the Minister, the Minister is authorised to determine the meaning of universal service and access. The Universal Service and Access Agency of South Africa must also consider the needs of persons with disabilities and broadband.

### **3.40 Clause 42: Amendment of section 88 of Act 36 of 2005**

Section 88(4) provides that the Agency must make recommendations to enable the Minister to determine, for the purposes of payments from the Universal Service and Access Fund, types of needy persons to whom assistance may be given. A new subsection (4A) is inserted to ensure that when the Agency makes such recommendations, the Agency must consider the needs of persons with disabilities in assessing the access gap and setting universal service and access definitions and targets.

### **3.41 Clause 43: Amendment of section 94 of Act 36 of 2005**

This clause seeks to provide for instances where there may be conflict between the provisions of the Electronic Communications Amendment Act and regulations issued under the Electronic Communications Act in existence at the time of commencement of the amendment Act, in which event the provisions in the Amendment Act will prevail. It further provides that conflicting regulations must be reviewed within 24 months after commencement of the Amendment Act.

### **3.42 Clause 44: Amendment of section 95 of Act 36 of 2005**

This clause seeks to make provision for the continued existence of regulations issued under the Electronic Communications Act until amended or repealed, to ensure continuity.

### **3.43 Clause 45: Amendment of Schedule on repeal and amendment of laws**

This clause provides for the amendment of the ICASA Act in the Schedule. The purpose of the amendment is to make consequential amendments to align the ICASA Act with the amendments in the Electronic Communications Amendment Act. One of the key amendments obliges the Authority to make regulations to apply the B-BBEE ICT Sector Code to existing and new licences, exemptions or other authorisations including spectrum assignment to promote broad-based black economic empowerment within 12 months of the promulgation of the Electronic Communications Amendment Act.

### **3.44 Clause 46: Arrangement of Sections**

Consequential amendments have been effected to the Arrangement of Sections of the Act.

### **3.45 Clause 47: Short title**

This clause provides the name of the Act and seeks to provide that different dates may be fixed by the President for the coming into operation of different sections of this Act by Proclamation in the *Gazette*.

## **4. CONSULTATIONS**

4.1 The Departments of Cooperative Governance and Traditional Affairs; Communications; Trade and Industry; Water and Sanitation; Environmental Affairs; Trade and Industry (DTI); Rural Development and Land Reform; Economic Development; Transport; and Water and Sanitation; as well as National Treasury, Competition Commission, ICASA, National Consumer Commission, SALGA, and the South African National Roads Agency Limited (SANRAL) were consulted.

4.2 The Bill was published for public comment in the *Gazette* on 17 November 2017. Submissions received include—

- Epilepsy South Africa
- Ethekewini
- William Osner
- Byron Coetzee
- Free Market Foundation
- Afzal Rawjee
- Rivada Networks
- Institute of Information Technology Professionals South Africa (IITPSA)
- National Association of Broadcasters
- Department of Labour
- South African Radio Astronomy Observatory (SARAO), previously known as the SKA South Africa.
- MultiChoice, M-Net and Orbicom



- Liquid Telecom
- Nokia Solutions & Networks SA
- SOS Coalition & Media Monitoring Africa
- Rain Networks (Pty) Ltd
- Facebook
- FTTX Council Africa
- Black Business Council
- SABC Limited
- Walter Brown
- Progressive Blacks in Information & Communications Technology (PBICT)
- Telkom
- Smile Communications (Pty) Ltd
- Sentech
- Cell C
- MTN
- ICASA
- Crystal Web (Pty) Ltd and LEASP (Pty) Ltd
- Convergence Partners Investments and FibreCo Telecommunications (“Convergence Group”)
- Telcoin
- Zenzeleni Networks NPC in conjunction with the Association for Progressive Communications and the University of the Western Cape
- Dark Fibre Africa Proprietary Limited
- South African Communications Forum (SACF)
- ResearchICTAfrica.Net
- SA SMME ICT Chamber
- Wireless Access Providers’ Association of SA (WAPA)
- ISPA
- Alliance for Affordable Internet (A4AI)
- Hekima Advisory
- Vodacom
- Transnet
- NAMEC
- City of Cape Town
- National ICT Forum: Economic Chamber and SMME Chamber.

- Journalists and Asset Managers: CITI.
- Stakeholder consultative public workshops were held from 06-07 March 2018

## 5. FINANCIAL IMPLICATIONS FOR STATE

- 5.1 Existing resources will be used to operationalise the Rapid Deployment Co-ordinating Centre.
- 5.2 The operational and administrative costs for the two steering committees on rapid deployment and spectrum will be funded by existing resources of the Department of Telecommunications and Postal Services, including its secretarial functions and meeting venues.

## 6. PARLIAMENTARY PROCEDURE

- 6.1 The State Law Advisers and the Department of Telecommunications and Postal Services are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.
- 6.2 In the matter of *Ex parte the President: In re Constitutionality of the Liquor Bill 2000 1 BCLR 1 (CC) (the “Liquor Bill case”)*, the Western Cape government argued that the Liquor Bill was constitutionally invalid because it had been passed following the procedure set out in section 76, when in fact it should have been passed following the procedure set out in section 75. Although the Constitutional Court found that it was unnecessary to decide this procedural issue, it did state that it would be “*formalistic in the extreme to hold a bill invalid on the ground that those steering it through Parliament erred in good faith in assuming that it was required to be dealt with under the section 76 procedure, when the only consequence of their error was to give the NCOP more weight, and to make the passage of the bill by the National Assembly in the event of inter-cameral disputes more difficult*”. At the same time, however, the Constitutional Court also pointed out that there are important differences between the procedure set out in section 75 and the procedure set out in section 76.
- 6.3 In the matter of *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others 2010 (8) BCLR 741 (CC) (the “Tongoane case”)*, Ngcobo CJ reaffirmed the decision of the Constitutional Court in the *Liquor Bill case*, at paragraphs 63 to 64 that the statement: “*any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4*”, formulates the test for determining the procedure to be followed in enacting a Bill. Ngcobo CJ further, at paragraph 58, states the following:

*“What matters for the purposes of tagging is **not the substance or the true purpose and effect of the Bill**, rather, what matters is **whether the provisions of the Bill “in substantial measure fall within a functional area listed in Schedule 4”**. This statement refers to the test to be adopted when tagging Bills. This test for classification or tagging is different from that used by this Court to characterise a Bill in order to determine legislative competence. This “involves the determination of the subject-matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about”. (Our emphasis.)*

Furthermore, at paragraph 72, it was stated as follows:

*“To summarise: any Bill whose provisions substantially affect the interests of the provinces must be enacted in accordance with the procedure stipulated in section 76. This naturally includes proposed*

*legislation over which the provinces themselves have concurrent legislative power, but it goes further. It includes Bills providing for legislation envisaged in the further provisions set out in section 76(3)(a)-(f), over which the provinces have no legislative competence, as well as Bills, the main substance of which falls within the exclusive national competence, but the provisions of which nevertheless substantially affect the provinces. What must be stressed, however, is that the procedure envisaged in section 75 remains relevant to all Bills that do not, in substantial measure, affect the provinces. **Whether a Bill is a section 76 Bill is determined in two ways. First, by the explicit list of legislative matters in section 76(3)(a)-(f); and second by whether the provisions of a Bill in substantial measure fall within a concurrent provincial legislative competence**". (Our emphasis.)*

- 6.4. The methodology that was used by the Court may be summarised as: firstly, considering all the provisions in the Bill as opposed to a single provision in the Bill and, thereafter, employing the term "substantially" when considering the impact of these provisions on the provinces. The Court referred to the affected interests of the provinces as opposed to legislative or other competence. In the English judgment of *Newspaper Licensing Authority Ltd v Marks and Spencer*<sup>1</sup> the court noted the following:

*"in deciding what amounts to a substantial part, consideration must be given to the nature of the protected work. The court referred to Laddie, Prescott and Vitoria The Modern Law of Copyright and Designs (2nd edition),*

*"What is meant by a substantial part? Since this type of copyright is not dependent on originality in the special sense in which that expression is used in copyright law "substantial part" simply means any part of the work so long as it is not so small as to be trivial. This is a question of fact, degree and common sense, and depends on the surrounding circumstances, including the purpose for which the thing is done'". (Our emphasis.)*

- 6.5. Therefore, when considering if the Bill substantially affects the provinces, this must be done in accordance with an assessment of all the relevant provisions of the Bill and, thereafter, a consideration of whether or not the impact of these provisions is not so small as to be regarded as trivial.
- 6.6. Other key points to consider, as stated in the **Tongoane case**, at paragraphs 69 and 70, are as follows:
- The tagging of Bills before Parliament must be informed by **the need to ensure that provinces fully and effectively exercise their appropriate role in the process of considering national legislation that substantially affects them**. Paying less attention to the provisions of a Bill once its substance, or purpose and effect, has been identified undermines the role that provinces should play in the enactment of national legislation affecting them.
  - To apply the "**pith and substance**" test to the tagging question, **therefore undermines the constitutional role of the provinces in legislation in which they should have a meaningful say**, and disregards the breadth of the legislative provisions that section 76(3) requires to be enacted in accordance with the section 76 procedure.
- 6.7 If we have to take into consideration the legal principles expounded by the **Tongoane case**, the following may be deduced from a reading of the Bill:
- (a) In our scrutiny of the provisions of the Bill, we established that the Bill is concerned with ICT and related matters. ICT is not a matter listed in

<sup>1</sup> (2000) 4 ALL ER 239 at par 24.

Schedule 4 of the Constitution (i.e. a functional area of concurrent national and provincial legislative competence), and neither is it listed in Schedule 5 of the Constitution (i.e. a functional area of exclusive provincial legislative competence). The Bill also does not provide for legislation envisaged in section 76(3)(a) to (f) of the Constitution.

- (b) The most significant point, other than a consideration of the purpose of the Bill, is that in terms of section 44(1)(a)(ii) of the Constitution, the national legislative authority has concurrent competence with a provincial legislative authority within a functional area listed in Schedule 4. ICT and related matters are not listed in either Schedule 4 or 5 of the Constitution.
  - (c) We are satisfied that, in its current format, the Bill would probably not have a substantial impact on the provinces.
  - (d) In the light of the case law in relation to the tagging of Bills that we have discussed in this legal opinion, we are of the view that this Bill must be dealt with in terms of section 75 of the Constitution.
- 6.8 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it contains no provision pertaining to customary law or customs of traditional communities.