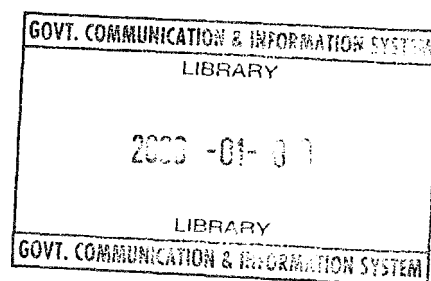


REPUBLIC OF SOUTH AFRICA

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA AMENDMENT BILL

*(As amended by the Portfolio Committee on Communications (National Assembly))
(The English text is the official text of the Bill)*

(MINISTER OF COMMUNICATIONS)



[B 32D—2005]

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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 Independent Communications Authority of South Africa Act, 2000, so as to amend certain definitions and insert certain new definitions; to provide for the substitution of the Postal Regulator for the Authority; to determine in greater detail the functions of the Authority; to consolidate certain powers and duties of the Authority; to provide for inquiries by the Authority; to amend the procedure for the appointment and removal of councillors; to further regulate the financing of the Authority; to provide for the establishment of a Complaints and Compliance Committee; to provide for the appointment of inspectors; and to provide for the creation of new offences and penalties; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of Preamble of Act 13 of 2000

1. The following Preamble is hereby substituted for the Preamble to the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000) (hereinafter referred to as the principal Act): 5

“PREAMBLE

Recognising that technological and other developments in the fields of broadcasting and [telecommunications] electronic communications are causing a rapid convergence of these fields; 10

Acknowledging that the establishment of an independent body to regulate broadcasting and [telecommunications] electronic communications is required.”.

Amendment of section 1 of Act 13 of 2000

2. Section 1 of the principal Act is hereby amended— 15
(a) by the substitution in section 1 for the words preceding the definition of “Authority” of the following words:

“In this Act, unless the context indicates otherwise, any word or expression defined in the Broadcasting Act or the [IBA Act or the Telecommunications Act] Electronic Communications Act has the meaning assigned to it in the Act in question and—”; 20

- (b) by the insertion after the definition of “Broadcasting Act” of the following definition:
 “ **‘Complaints and Compliance Committee’** means the committee established by the Authority in terms of section 17A;”;
- (c) by the insertion after the definition of “Council” of the following definition:
 “ **‘Electronic Communications Act’** means an Act of Parliament providing for convergence in the broadcasting, broadcasting signal distribution and telecommunications sectors;”;
- (d) by the deletion of the definitions of “IBA” and “IBA Act”; 10
- (e) by the insertion after the definition of “National Revenue Fund” of the following definition:
 “ **‘Postal Services Act’** means the Postal Services Act, 1998 (Act No. 124 of 1998);”;
- (f) by the deletion of the definition of “SATRA”; and 15
- (g) by the substitution for the definition of “underlying statutes” of the following definition:
 “ **‘underlying statutes’** means the Broadcasting Act, **[the IBA Act and Telecommunications Act]** Postal Services Act and Electronic Communications Act.”. 20

Amendment of section 2 of Act 13 of 2000

3. Section 2 of the principal Act is hereby amended —

- (a) by the substitution for paragraph (b) of the following paragraph:
 “~~(b) regulate~~ **[telecommunications]** electronic communications in the public interest; **[and]**”; and 25
- (b) by the insertion after paragraph (b) of the following paragraph:
 “~~(bA)~~ regulate postal matters in the public interest in terms of the Postal Services Act; and”.

Amendment of section 3 of Act 13 of 2000

4. Section 3 of the principal Act is hereby amended by the insertion after subsection (1) of the following subsection: 30
 “(1A) The Authority is deemed to be the Regulator contemplated in the Postal Services Act.”.

Substitution of section 4 of Act 13 of 2000

5. The following section is hereby substituted for section 4 of the principal Act: 35

“Functions of Authority and chairperson

4. (1) The Authority —
- (a) must exercise the powers and perform the duties conferred and imposed upon **[the former authorities by or under]** it by this Act, the underlying statutes and by any other law; 40
- [(b) may exercise the powers conferred upon the former authorities by or under the underlying statutes;]**
- (c) subject to section 231 of the Constitution, must act in a manner that is consistent with the obligations of the Republic under any applicable international agreement. 45
- (2) The Authority is subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999).
- (3) Without derogating from the generality of subsection (1), the Authority —
- (a) may make recommendations to the Minister on policy matters and amendments to this Act and the underlying statutes which accord with the objects of this Act and the underlying statutes to promote development in the postal and communications sectors; 50
- (b) must monitor the electronic communications sector to ensure compliance with this Act and the underlying statutes; 55

- (c) must manage the radio frequency spectrum in accordance with bilateral agreements or international treaties entered into by the Republic;
 - (d) must develop and enforce licence conditions consistent with the objects of this Act and the underlying statutes for different categories of licences; 5
 - (e) must grant, renew, amend, transfer and revoke licences;
 - (f) must approve technical parameters and transmitter and transmission characteristics to be used by licensees;
 - (g) may, by notice in writing, direct the holder of a licence in terms of the underlying statutes to produce or furnish to the Authority, at a time and place specified in the notice, any documents and information specified in such notice and relating to any matter in respect of which a duty or obligation is imposed on such licensee by this Act or the underlying statutes; 10 15
 - (h) may conduct research on all matters affecting the postal and communications sectors in order to exercise its powers and perform its duties;
 - (i) may attend conferences convened by the relevant United Nations Specialised Agencies and any other bodies and, where applicable, must implement any decisions adopted by such Agencies and other bodies to which the Republic is a party; 20
 - (j) may make regulations on any matter consistent with the objects of this Act and the underlying statutes or that are incidental or necessary for the performance of the functions of the Authority; 25
 - (k) may make regulations on empowerment requirements in terms of Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);
 - (l) may inspect transmitters or other communications apparatus used for communications; 30
 - (m) may undertake inquiries on any matter within its jurisdiction;
 - (n) must investigate and adjudicate complaints submitted in terms of this Act, the underlying statutes, and licence conditions.
- (4) (a) Subject to subsection (2), the Council may in writing delegate any power, function or duty of the Authority in terms of this Act or the underlying statutes to— 35
- (i) any councillor;
 - (ii) any committee of the Council established in terms of section 17; or
 - (iii) the chief executive officer appointed in terms of section 14. 40
- (b) The power to make regulations may not be delegated in terms of paragraph (a).
- (c) A power, function or duty delegated to the chief executive officer may be performed by any other staff member of the Authority authorised by the chief executive officer, except where precluded by the terms of such delegation. 45
- (d) Subject to paragraph (e), a delegation in terms of paragraph (a) or (c)—
- (i) is subject to such conditions as may be determined by the Council or chief executive officer, as the case may be; and
 - (ii) may at any time be amended or revoked. 50
- (e) The Council or chief executive officer, as the case may be, is not divested of any power, function or duty or relieved of any duty which it may have delegated in terms of paragraph (a) or (c) and may amend or revoke any decision made in terms of such delegation except where any licence will be affected by the revocation or the amendment of the decision. 55
- (f) The power to grant, renew, amend or transfer any individual licence may only be delegated to a councillor or to a committee of the Council.
- (g) Notwithstanding the provisions of this section, any councillor or committee delegated with the power to grant, amend, revoke, transfer or renew a licence in terms of this Act must report its decision to the Council. 50
- (5) The chairperson of the Council must—

- (a) provide overall leadership to the Council;
- (b) manage the activities of the councillors; and
- (c) perform any function assigned to him or her in terms of any law.”.

Insertion of sections 4A, 4B, 4C and 4D in Act 13 of 2000

6. The following sections are hereby inserted in the principal Act after section 4:

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“Register of licences

4A. (1) The Authority must keep a register in which it must record all licences granted and amended in terms of the underlying statutes and any transfer of such licences.

(2) The register referred to in subsection (1) must be open to inspection by the public at the premises and during the normal office hours of the Authority.

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(3) The Authority must at the request of an interested person and on payment of the prescribed fee furnish such person with a copy of or extract from any part of the register.

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Inquiries by Authority

4B. (1) The Authority may conduct an inquiry into any matter with regard to—

- (a) the achievement of the objects of this Act or the underlying statutes;
- (b) regulations and guidelines made in terms of this Act or the underlying statutes;
- (c) compliance by applicable persons with this Act and the underlying statutes;
- (d) compliance with the terms and conditions of any licence by the holder of such licence issued pursuant to the underlying statutes; and
- (e) the exercise and performance of its powers, functions and duties in terms of this Act or the underlying statutes.

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(2) The Authority must, in the *Gazette*, give notice of its intention to conduct an inquiry and such notice must indicate the purpose of the inquiry and invite interested persons to—

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- (a) submit written representations within 60 days from the date of publication; and
- (b) indicate in their written representations whether they require an opportunity to make oral representations to the Authority.

(3) Written representations made pursuant to a notice referred to in subsection (2) must, subject to subsection (5), be open to inspection by the public at the premises and during the normal office hours of the Authority.

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(4) The Authority must, when so requested by any person and upon payment of the prescribed fee, provide such person with a copy of or extract from any representation made.

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(5) Subject to section 4D, the Authority may, at the request of any person making a written representation, determine that any document or information that is commercially sensitive or any other matter reasonably justifying confidentiality may not be open to inspection by the public, if such document or information can be separated from the written representation or other documents in question.

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(6)(a) The Authority must advise persons contemplated in subsection (2)(b) of the place where and time when oral representations may be made.

(b) Oral representations must, subject to section 4C, be open to the public.

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Conduct of inquiries

4C. (1) Subject to this Act, a councillor presiding at an inquiry conducted in terms of section 4B must determine the procedure at such inquiry.

(2) The Authority may, subject to any law governing privilege, for the purpose of an inquiry —

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- (a) through the person presiding at such inquiry, by notice in writing in the prescribed form, require from any person such particulars and information as may be reasonably necessary;
- (b) by notice in writing in the prescribed form under the hand of a councillor, addressed and delivered by an authorised person or a sheriff to any person, require such person to—
- (i) appear before it at the date, time and place specified in such notice;
 - (ii) make a statement; and
 - (iii) submit to it all the documents or objects in the possession or custody or under the control of any such person which may be reasonably necessary; and
- (c) through the person presiding at such inquiry and after explaining applicable rights under the Constitution and this section, question any person referred to in paragraph (b) in connection with any matter which may be reasonably necessary.
- (3) The Authority may retain for a reasonable period for the purposes of this Act or the underlying statutes any document or object submitted to it.
- (4) A person may have a legal representative or other adviser present when such person—
- (a) makes an oral representation, contemplated in section 4B(2)(b), to the Authority; and
 - (b) appears before, makes a statement to and is questioned by the Authority as contemplated in subsection (2).
- (5) The person presiding at an inquiry may, after hearing representations from any person present at and connected to the inquiry and having regard to—
- (a) any reasonable apprehension of prejudice or harm to the person to be questioned;
 - (b) the rights of reply and rebuttal of any person whose rights may be adversely affected; and
 - (c) whether it is in the interest of the achievement of the objects of the inquiry,
- determine that any part of the inquiry be held behind closed doors and direct that the public or any class thereof may not be present.
- (6) The Authority must, within 180 days from the date of conclusion of the inquiry—
- (a) make a finding on the subject matter of the inquiry; and
 - (b) publish in the *Gazette* —
 - (i) a summary of its finding; and
 - (ii) the details of the place where and the time when the finding and the reasons for the finding can be obtained by the public.

Confidential information

- 4D.** (1) (a) When a person submits information to the Authority, such person may request that specific information be treated as confidential information.
- (b) The request for confidentiality must be accompanied by a written statement explaining why the specific information should be treated as confidential.
- (2) Within 14 days of receiving a request for confidentiality, the Authority must make a determination whether or not confidentiality will be granted and provide the person contemplated in subsection (1) with written reasons for such determination.
- (3) Should the Authority determine that a request for confidentiality cannot be acceded to, the party providing the information must be given an opportunity to withdraw the information that is the subject of the confidentiality request.
- (4) When considering a request contemplated in subsection (1), the Authority must treat the following information, as confidential information, namely —
- (a) trade secrets of such person;

- (b) financial, commercial, scientific or technical information, other than trade secrets, the disclosure of which is likely to cause harm to the commercial or financial interests of such person;
 - (c) information of which the disclosure could reasonably be expected—
 - (i) to put the person at a disadvantage in contractual or other negotiations; or
 - (ii) to prejudice the person in commercial competition;
 - (d) the names of prospective employees; and
 - (e) business plans of a licensee.
- (5) A determination of confidentiality may not be made in respect of a document or information that is in the public domain or is required to be disclosed by operation of law or a court order.”

Amendment of section 5 of Act 13 of 2000

7. Section 5 of the principal Act is hereby amended —
- (a) by the substitution for subsection (1) of the following subsection:
 - “(1) **[The Council consists of seven councillors appointed by the President on the recommendation of the National Assembly according to the following principles, namely —**
 - (a) participation by the public in the nomination process;**
 - (b) transparency and openness; and**
 - (c) the publication of a shortlist of candidates for appointment, with due regard to subsection (3) and section 6.]** The Council consists of a chairperson and eight other councillors appointed by the Minister, by notice in the *Gazette*.”;
 - (b) by the insertion after subsection (1) of the following subsections:
 - “(1A) (a) Whenever it is necessary to appoint a chairperson or other councillor, the Minister must appoint an independent and impartial selection panel consisting of seven persons who have an understanding of issues relating to the electronic communications and postal sectors.
 - (b) The panel must consist of—
 - (i) a person with knowledge and experience from the industry;
 - (ii) a person with a legal background and knowledge of the ICT sector;
 - (iii) an academic in the field of electronic communications;
 - (iv) a representative from the labour sector;
 - (v) a representative of consumer interests; and
 - (vi) two representatives from Parliament.
 - (c) The names and terms of reference of persons on the selection panel must be published by the Minister by notice in the *Gazette*.
 - (1B) The selection panel contemplated in subsection (1A) must—
 - (a) at least 60 days prior to the last day of service of a councillor, invite the public to nominate candidates for appointment to the Council in not less than two newspapers circulating nationally;
 - (b) submit to the Minister a list of suitable candidates at least one and a half times the number of councillors to be appointed.
 - (1C) If the Minister is not satisfied that the persons recommended by the panel do not comply with subsection (3), the Minister may request the panel to review its recommendations.
 - (1D) The selection panel will be automatically dissolved when the appointment is published in the *Gazette* in terms of subsection (1).”;
 - (c) by the substitution for subsection (2) of the following subsections:
 - “(2) (a) **[The President must appoint one of the councillors as chairperson of the Council.]** The chairperson must, in writing, appoint a councillor as acting chairperson to perform the functions of the chairperson in his or her absence.
 - (b) [In the absence of the chairperson, the remaining councillors must from their number elect an acting chairperson, who, while he or she so acts, may perform all the functions of the chairperson.]** Where the chairperson is unable to make an appointment, the remaining councillors must from their number elect an acting chairperson.”; and

- (d) by the substitution for subparagraph (ii) of paragraph (b) of subsection (3) of the following subparagraph:

“(ii) possess suitable qualifications, expertise and experience in the fields of, amongst others, broadcasting, **[and telecommunications policy]** electronic communications and postal policy or operations, public policy development, electronic engineering, [technology, frequency band planning,] law, marketing, journalism, entertainment, education, economics, **[business practice and]** finance or any other related expertise or qualifications.”.

Amendment of section 6 of Act 13 of 2000, as amended by section 36 of Act 12 of 2004

8. Section 6 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (f) of the following paragraph:

“(f) or his or her family member has a direct or indirect financial interest in the **[telecommunications]** electronic communications, postal or broadcasting industry;”.

Insertion of section 6A in Act 13 of 2000

9. The following section is hereby inserted in the principal Act after section 6:

“Performance management system

6A. (1) The Minister must establish a performance management system to monitor and evaluate the performance of the chairperson and other councillors.

(2) The performance management system must —

- (a) set appropriate key performance indicators as a yardstick for measuring performance;
- (b) set measurable performance targets; and
- (c) set a procedure to measure and review performance at least once a year.

(3) As soon as is practicable after the appointment of the chairperson or other councillor a performance agreement must be concluded between—

- (a) the chairperson and the Minister; and
- (b) a councillor and the chairperson.

(4) (a) The evaluation of the performance of the chairperson must be conducted by a panel constituted by the Minister for that purpose.

(b) The evaluation of the performance of a councillor must be conducted by a panel constituted by the chairperson for that purpose.”.

Amendment of section 7 of Act 13 of 2000

10. Section 7 of the principal Act is hereby amended —

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

“(1)(a) The chairperson holds office for a period of five years as from the date of his or her appointment.

(b) The chairperson may at the end of his or her term of office be reappointed in terms of section 5.”;

- (b) by the substitution in subsection (2) for paragraph (a) of the following paragraph:

“(2) [(a) Subject to paragraph (b), the] The other councillors hold office for a period of four years as from the date of their appointment.”;

- (c) by the deletion in subsection (2) of paragraph (b); and

- (d) by the substitution for subsection (3) of the following subsection:

“(3) A councillor may at any time, upon at least three months’ written notice tendered to the **[President]** Minister, resign from office.”

Substitution of section 8 of Act 13 of 2000

11. The following section is hereby substituted for section 8 of the principal Act:

“Removal from office

8. (1) Subject to subsection (2), a councillor may be removed from office on account of— 5
- (a) misconduct;
 - (b) inability to perform the duties of his or her office efficiently;
 - (c) absence from three consecutive meetings of the Council without the permission of the Council, except on good cause shown;
 - (d) a contravention of section 7(6); 10
 - (e) failure to disclose an interest in terms of section 12(2)(a) or voting or attendance at, or participation in, proceedings of the Council while having an interest contemplated in section 12(1); **[or]**
 - (f) his or her becoming disqualified as contemplated in section 6(1); or
 - (g) refusal to sign a performance agreement. 15
- (2) A councillor may be removed from office only **[on]**—
- (a) **[a finding to that effect by the National Assembly]** on recommendation by the panel contemplated in section 6A(4) to the Minister; and
 - (b) **[the adoption by the National Assembly of a resolution calling for that councillor’s removal from office]** upon approval by the Minister of the recommendation contemplated in paragraph (a). 20
- (3) The **[President]** Minister—
- (a) may suspend a councillor from office at any time after the start of the proceedings of **[the National Assembly]** the panel contemplated in section 6A (4) for the removal of that councillor; 25
 - (b) **[must]** may remove a councillor from office upon **[adoption]** approval by **[the National Assembly]** the Minister of the **[resolution calling]** recommendation for that councillor’s removal.”

Amendment of section 9 of Act 13 of 2000

12. Section 9 of the principal Act is hereby amended by the substitution in subsection (2) for paragraph (b) of the following paragraph: 30
- “(b) Any councillor appointed under this subsection holds office for the rest of the period of the predecessor’s term of office, unless the **[National Assembly]** Minister, following approval by the National Assembly, directs that such councillor holds office for a longer period which may not exceed one 35
- subsequent term of four years.”

Insertion of section 11A in Act 13 of 2000

13. The following section is hereby inserted in the principal Act after section 11:

“Minutes of meetings

- 11A. (1) The Council and a committee contemplated in sections 17 and 17A must prepare and keep minutes of the proceedings of every meeting of the Council or committee and cause copies of such minutes to be circulated to all councillors or members of such committee. 40
- (2) The minutes prepared, when confirmed by a subsequent meeting and signed by the person presiding at such meeting, must be regarded as a true and correct record of the proceedings which they purport to minute and is prima facie evidence at proceedings before a court of law or any tribunal or in terms of this Act or the underlying statutes.”. 45

Amendment of section 14 of Act 13 of 2000

14. Section 14 of the principal Act is hereby amended—

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

“(1) The Council must establish its own administration to assist the Authority in the performance of its functions and to this end the Council must appoint—

(a) a suitably qualified and experienced person as chief executive officer of the **[Council] Authority** for the purpose of assisting the Authority, subject to the Council’s direction and **[control]** supervision, in the performance of all financial[,] **and** administrative **[and clerical]** functions in terms of this Act and the underlying statutes, [and] work arising from the administration of this Act and the underlying statutes and to exercise any power delegated by the Council to him or her; and

(b) such other staff as the Council may deem necessary to assist the Authority and the chief executive officer, as the case may be, with all such work as may arise through the performance of its functions.”; and

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

“(1A) (a) The chief executive officer may appoint a senior official as acting chief executive officer to perform the functions of the chief executive officer in his or her absence.

(b) A councillor may not be appointed as acting chief executive officer.

(c) In the event that the chief executive officer is absent for a longer period the Council must appoint an acting chief executive officer.”.

Insertion of sections 14A, 14B, 14C and 14D in Act 13 of 2000

15. The following sections are hereby inserted in the principal Act after section 14:

“Appointment of experts

14A. (1) The Authority may appoint as many experts as may be necessary with a view to assisting the Authority in the performance of its functions.

(2) Where an expert contemplated in subsection (1) is not a citizen or permanent resident of the Republic, the Minister must approve the appointment before such expert is appointed.

(3) The Authority and an expert must enter into a written agreement setting out the expert’s terms and conditions of employment.

Transfer of staff

14B. (1) All employees of the Postal Regulator established by section 3 of the Postal Services Act must be made an employment offer by the Authority for transfer to the Authority on a date determined by the Minister.

(2) The remuneration, benefits and privileges offered by the Authority may not be less than those payable to the employee by the Postal Regulator immediately prior to his or her transfer.

(3) For the purposes of the Income Tax Act, 1962 (Act No. 58 of 1962), no change of employer is deemed to have taken place in respect of an employee who accepts the employment offer contemplated in subsection (1).

(4) When any person becomes an employee of the Authority in terms of subsection (1)—

(a) he or she retains all vacation leave which accrued to his or her credit up to the date immediately before the date of transfer, adjusted in accordance with the conditions of employment of the Authority; and

(b) any inquiry instituted or intended to be instituted in respect of alleged misconduct committed by such person before the date of transfer must be disposed of or instituted by the Authority and the Authority must take the appropriate steps against the person concerned in accordance

with the laws, policy and conditions of service applicable to him or her immediately before the date of transfer.

(5)(a) A person transferred to the Authority in terms of subsection (1) who immediately prior to such transfer was a member of the Government Employees Pension Fund must join such pension, provident or other fund as the Authority may establish or subscribe to.

(b) The Government Employees Pension Fund must pay, in respect of each person transferred to the Authority, into a fund referred to in paragraph (a) an amount equal to the financing percentage of the Government Employees Pension Fund, multiplied by the actuarial liability of that Fund towards such person, plus interest calculated at the bank rate from the date of transfer of such person to the date of payment.

(c) A person transferred to the Authority, upon becoming a member of a fund referred to in paragraph (a), has no further claim against the Government Employees Pension Fund and the Government Employees Pension Fund must cede any claim which it may have against that person to such a fund

(6) For the purposes of this section—

(a) the actuarial liability of a pension fund in respect of a specific member or group of members of the fund means the actuarial liability as determined by an actuary appointed by the Minister of Finance;

(b) the financing percentage of a pension fund means the market value of the assets of the fund expressed as a percentage of the total actuarial liability of the fund, after such assets and liabilities have been reduced by the amount of the liability of the fund towards all its pensioners, as determined at the time of the most recent actuarial assessment of the fund or any reappraisal thereof done on the instructions of the Minister of Finance; and

(c) bank rate means the rate determined from time to time under section 10(2) of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989).

Confidentiality

14C. (1) No councillor or person in the employ of the Authority may disclose any information with regard to any matter which may come to his or her knowledge in the performance of any function in terms of this Act or the underlying statutes or by virtue of the office held by him or her, except—

(a) in so far as the Constitution, this Act, the underlying statutes or any other law require or provide for the access to information relating to such matter;

(b) subject to paragraph (a), in so far as may be necessary for the due and proper performance of any function in terms of this Act or the underlying statutes; or

(c) when so ordered by a competent court of law.

(2) Any person performing any task or function for or on behalf of the Authority, or providing any advice to the Authority, is bound by the provisions of section 14.

personally liable for any damage or loss suffered by any person in consequence of any act which in good faith was performed or omitted in the

Amendment of section 15 of Act 13 of 2000

16. Section 15 of the principal Act is hereby amended by the insertion after subsection (1) of the following subsection:

“(1A) The Authority may receive money determined in any other manner as may be agreed between the Minister and the Minister of Finance and approved by Cabinet.”. 5

Insertion of section 16A in Act 13 of 2000

17. The following section is hereby inserted in the principal Act after section 16:

“Restriction on use of name or description implying connection with Authority” 10

16A. No person may apply to any venture, undertaking, business, company or other association or body, whether corporate or incorporate, a name or description signifying or implying some connection between such venture, undertaking, business, company or other association or body and the Authority, except with the consent of the Authority.”. 15

Amendment of section 17 of Act 13 of 2000, as amended by section 30 of Act 64 of 2002

18. Section 17 of the principal Act is hereby amended —

(a) by the substitution in subsection (2) for paragraph (a) of the following paragraph: 20

“(a) one or more councillors or any member of staff designated by the Council; and”;

(b) by the substitution for subsection (8) of the following subsection:

“(8) The members of any committee, including the [Broadcasting Monitoring and Complaints Committee referred to in section 21 of the IBA Act] Complaints and Compliance Committee, who are not councillors or members of the staff of the Authority must be paid such remuneration and allowances as the Council determines.”. 25

Insertion of sections 17A, 17B, 17C 17D, 17E, 17F, 17G and 17H in Act 13 of 2000

19. The following sections are hereby inserted in the principal Act after section 17: 30

“Establishment of Complaints and Compliance Committee”

17A. (1) The Authority must establish a Complaints and Compliance Committee which consists of not more than seven members, one of whom must be a councillor. 35

(2) The chairperson of the Complaints and Compliance Committee must be— 35

(a) a judge of the High Court of South Africa, whether in active service or not;

(b) an advocate or attorney with at least 10 years’ appropriate experience; or 40

(c) a magistrate with at least 10 years’ appropriate experience, whether in active service or not.

(3) The chairperson of the Complaints and Compliance Committee must—

(a) manage the work of the Complaints and Compliance Committee; and 45

(b) preside at hearings of the Complaints and Compliance Committee.

(4) A member of the Complaints and Compliance Committee must be a fit and proper person and must—

(a) have suitable qualifications and experience in communications, economics, electronic engineering, broadcasting, law, commerce, technology or public policy; 50

(b) be committed to the objects of this Act and the underlying statutes;

- (c) not be an office-bearer or an employee of any party, movement or organisation of a party-political nature;
- (d) not be an unrehabilitated insolvent;
- (e) not be mentally ill or disordered;
- (f) not have been convicted of an offence after the commencement of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) and sentenced to imprisonment without the option of a fine; and
- (g) not be subject to any disqualification contemplated in section 6 and be subject to the provisions of section 12.

Functions of Complaints and Compliance Committee

17B. The Complaints and Compliance Committee—

- (a) must investigate, and hear if appropriate, and make a finding on—
 - (i) all matters referred to it by the Authority;
 - (ii) complaints received by it; and
 - (iii) allegations of non-compliance with this Act or the underlying statutes received by it; and
- (b) may make any recommendation to the Authority necessary or incidental to—
 - (i) the performance of the functions of the Authority in terms of this Act or the underlying statutes; or
 - (ii) achieving the objects of this Act and the underlying statutes.

Procedure of Complaints and Compliance Committee

- 17C. (1) (a)** A person who has reason to believe that a licensee is guilty of any non-compliance with the terms and conditions of its licence or with this Act or the underlying statutes may lodge a complaint with the Authority within 60 days of becoming aware of the alleged non-compliance.
- (b) The Authority may direct the complaint to the Complaints and Compliance Committee for consideration.
- (2) Before the Complaints and Compliance Committee hears a matter it must—
- (a) provide the licensee to the dispute with—
 - (i) a copy of the complaint where a complaint has been lodged; and
 - (ii) a notice setting out the nature of the alleged non-compliance;
 - (b) afford the licensee a reasonable opportunity to respond to the allegations in writing; and
 - (c) afford the complainant a reasonable opportunity to reply to such response in writing where a complaint has been lodged.
- (3) The Complaints and Compliance Committee must hear oral representations made by the parties referred to in subsection (2) and must permit such parties to be assisted by a legal representative or other adviser.
- (4) The Complaints and Compliance Committee may hold a pre-hearing conference for the purpose of giving direction to the parties regarding the procedure to be followed at a hearing and other relevant matters determined by the Complaints and Compliance Committee.
- (5) Notwithstanding this section, the Authority may prescribe procedures for the handling of urgent complaints and non-compliance matters.
- (6) Sections 4C(2), (4) and (5) and 4D apply with the necessary changes required by the context to a hearing conducted by the Complaints and Compliance Committee.
- (7) (a) The Complaints and Compliance Committee must keep a record of all complaints received by it, all notices contemplated in subsection (2) issued by it and a record of all its proceedings and findings.
- (b) Such record must be open to inspection by the public at the premises and during the normal office hours of the Authority.
- (c) The Authority must, when so requested by any person and upon payment of the prescribed fee, provide such person with a copy of or extract from such record.

Findings by Complaints and Compliance Committee

17D. (1) The Complaints and Compliance Committee must make a finding within 90 days from the date of conclusion of a hearing contemplated in section 17B.

(2) The Complaints and Compliance Committee must recommend to the Authority what action by the Authority should be taken against a licensee, if any.

(3) The Complaints and Compliance Committee must submit its finding and recommendations contemplated in subsections (1) and (2) and a record of such proceedings to the Authority for a decision regarding the action to be taken by the Authority.

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Decision by Authority

17E. (1) When making a decision contemplated in section 17D, the Authority must take all relevant matters into account, including —

- (a) the recommendations of the Complaints and Compliance Committee;
- (b) the nature and gravity of the non-compliance;
- (c) the consequences of the non-compliance;
- (d) the circumstances under which the non-compliance occurred;
- (e) the steps taken by the licensee to remedy the complaint; and
- (f) the steps taken by the licensee to ensure that similar complaints will not be lodged in the future.

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(2) The Complaints and Compliance Committee may recommend that one or more of the following orders be issued by the Authority, namely—

- (a) direct the licensee to desist from any further contravention;
- (b) direct the licensee to pay as a fine the amount prescribed by the Authority in respect of such non-compliance or non-adherence;
- (c) direct the licensee to take such remedial or other steps in conflict with this Act or the underlying statutes as may be recommended by the Complaints and Compliance Committee;
- (d) where the licensee has repeatedly been found guilty of material violations—
 - (i) prohibit the licensee from providing the licensed service for such period as may be recommended by the Complaints and Compliance Committee, subject to the proviso that a broadcasting or communications service, as applicable, must not be suspended in terms of this subsection for a period in excess of 30 days; or
 - (ii) amend or revoke his or her licence; and
- (e) direct the licensee to comply with any settlement.

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(3) The Complaints and Compliance Committee must submit its finding and recommendations contemplated in subsections (1) and (2) and a record of its proceedings to the Authority for a decision regarding the action to be taken by the Authority within 60 days.

(4) The Authority must make a decision permitted by this Act or the underlying statutes and provide persons affected by such decision with written reasons therefor.

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Inspectors

17F. (1) The Authority must appoint suitably Qualified inspectors to perform the functions provided for in this Act.

(2) Any person who is not in the full-time service of the Authority and who is appointed as an inspector pursuant to subsection (1) must be paid such remuneration as the Authority may determine.

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(3) An inspector appointed in terms of subsection (1) must be provided with a certificate of appointment stating that he or she has been appointed as an inspector in terms of this Act signed by or on behalf of the chairperson of the Council.

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(4) When an inspector performs a function in terms of this Act, he or she must be in possession of such certificate of appointment and show it at the request of any person affected by the performance of such function.

(5) An inspector must—

- (a) monitor compliance by licensees of licence terms and conditions; 5
 - (b) monitor compliance by licensees with the provisions of this Act and the underlying statutes; 10
 - (c) investigate and evaluate any alleged or suspected—
 - (i) non-compliance by a licensee with its licence terms and conditions and provisions of this Act or the underlying statutes; 15
 - (ii) breach by a licensee of an agreement between such licensee and its subscribers; 20
 - (iii) failure to provide a communications service that the licensee is required to provide under the terms of its licence or in terms of this Act or the underlying statutes; 25
 - (d) refer all non-compliance matters to the Complaints and Compliance Committee for consideration where an inspector determines that a licensee has not complied with the terms and conditions of its licence, the provisions of this Act or the underlying statutes or failed to provide broadcasting or communications services; 30
 - (e) refer all complaints to the Complaints and Compliance Committee for consideration after an investigation into the complaint has been carried out; 35
 - (f) appear before the Complaints and Compliance Committee when requested by such committee; 40
 - (g) co-operate with enforcement officials when performing his or her functions. 45
- (6) The Authority may prescribe the procedures to be followed by inspectors. 50

Power of inspector to enter, search and seize

17G. (1) The Criminal Procedure Act, 1977 (Act No. 51 of 1977), applies with the necessary changes required by the context to entries, searches and seizures in terms of this Act.

- (2) An inspector appointed in terms of section 17F may, in order to carry out his or her functions under this Act or the underlying statutes, at any reasonable time without prior notice and on the authority of a warrant issued in terms of subsection (4) enter any premises and— 35
- (a) demand the production of a licence issued in terms of the underlying statutes for inspection; 40
 - (b) search such premises or the owner or person in control of such premises; 45
 - (c) inspect any book, record or other document found on such premises and make copies thereof; 50
 - (d) inspect any radio apparatus, studio, plant, transmitters, apparatus, other equipment or other broadcasting, communications or postal service facilities on the premises; 55
 - (e) inspect anything referred to in paragraph (c) which is in the possession of or used by, or suspected of being in the possession of or being used by, any person in contravention of this Act, the underlying statutes or an applicable licence; 60
 - (f) request the owner or person in control of such premises or any person on such premises who may reasonably be expected to have the necessary information to furnish information regarding a document or thing; 65
 - (g) seize for further examination or safe custody any document or thing which has a bearing on the alleged non-compliance or other act referred to in section 17F on such premises. 70
- (3) An inspector requesting information from a person in terms of subsection (2) must, before requesting such information, inform the person in a language that the person understands of—

- (a) the right to remain silent; and
 (b) the consequences of not remaining silent.
- (4) (a) A magistrate or judge may, upon request by an inspector, issue a warrant to such inspector.
- (b) A magistrate or judge must issue a warrant if it appears to him or her, from information on oath or affirmation, that there are reasonable grounds for believing that a document or thing which has a bearing on the alleged non-compliance or other act referred to in section 17F—
- (i) is or will be in the possession or under the control of any person or on or in any premises within the area of jurisdiction of that magistrate or judge; and
- (ii) cannot reasonably be obtained otherwise.
- (5) (a) The warrant contemplated in subsection (4) must identify the premises that may be entered and searched and specify which of the acts contemplated in subsection (2)(a) to (g) may be performed thereunder by the inspector to whom it is issued.
- (b) Such warrant may be issued on any day and is valid until—
- (i) it is executed;
- (ii) it is cancelled by the person who issued it or, if such person is not available, by a person with similar authority;
- (iii) the expiry of one month from the day of its issue; or
- (iv) the purpose for which the warrant was issued no longer exists.
- (6) An inspector must, immediately before commencing the execution of a warrant issued in terms of subsection (4)—
- (a) identify himself or herself to the owner or person in control of the premises referred to in such warrant; and
- (b) hand to such person a copy of the warrant.
- (7) An inspector who removes a document or thing from any premises under this section must issue a receipt to the person who is the owner or in possession or in control thereof.

Offences and Penalties

- 17H.** (1) A person is guilty of an offence if that person—
- (a) fails to comply with a notice issued under section 4(3)(g) or 4C(2)(a) or (b);
- (b) fails to answer a question put to him or her in terms of section 4C(2)(c);
- (c) makes a false statement before the Authority on any matter, knowing such statement to be false;
- (d) contravenes section 14C;
- (e) contravenes section 16A;
- (f) fails to comply with a decision made by the Authority in terms of section 17E; or
- (g) (i) fails to comply with a demand of an inspector appointed in terms of section 17F;
- (ii) hinders or obstructs such inspector in the exercise of his or her powers; or
- (iii) falsely holds himself or herself out as an inspector.
- (2) A person convicted of an offence in terms of subsection (1) is liable, in the case of a contravention of—
- (a) subsection (1)(a), (b) and (c), to a fine not exceeding R250 000;
- (b) subsection (1)(d), to a fine not exceeding R50 000 or to imprisonment not exceeding three years;
- (c) subsection (1)(e) and (f), to a fine not exceeding R1 000 000 or to imprisonment not exceeding five years; and
- (d) subsection (1)(g), to a fine not exceeding R15 000.”.
- (3) Any person who –
- (a) in applying for a licence in terms of this Act or the underlying statutes or for the renewal, amendment or transfer of such licence, in his or her application furnishes any false or misleading information or particulars or makes any statement which is false or misleading in any

- material respect, or who wilfully fails to disclose any information particulars material to his or her application;
- (b) provides a service without a licence or registering as required by this Act or the underlying statutes or fails to obtain the prior written permission of the Authority before transferring a licence;
 - (c) fails to keep records as required by this Act or the underlying statutes;
 - (d) fails to comply with any order made by the Authority in terms of this Act or the underlying statutes;
 - (e) acts in disregard of any prohibition imposed by order of the Authority in terms of this Act or the underlying statutes;
 - (f) fails to produce any licence issued to him or her under this Act or the underlying statutes on the demand of any authorised person, or who hinders or obstructs any authorised person in the exercise or performance by the latter of his or her powers, functions or duties in terms of this Act or the underlying statutes;
 - (g) has been required in terms of this Act or the underlying statutes to attend and make a statement or to produce any document or object before the Authority who, without sufficient cause, fails to attend at the time and the place specified in the notice, or to remain in attendance until the conclusion of the inquiry or hearing for the purpose he or she is required or until he or she is excused by the chairperson to do so or fails to answer fully and satisfactorily any question lawfully put to him or her, or fails to produce any document or object in his or her possession or custody or under his or her control, which he or she has been required to produce;
 - (h) wilfully interrupts the proceedings at any such inquiry or hearing or wilfully hinders or obstruct the Authority or any member thereof in the performance of its or his or her functions at the inquiry or hearing, is guilty of an offence and liable on conviction—
 - (i) in the case of an offence contemplated in paragraph (a) to a maximum fine of R250 000;
 - (ii) in the case of an offence contemplated in paragraph (b) to a fine not exceeding the greater of R1 000 000 or 10% of the person or licensee's annual turnover for every day or part thereof during which the offence continued;
 - (iii) in the case of an offence contemplated in paragraph (c), (d), and (e) of this subsection, to a fine not exceeding R100 000;
 - (iv) in the case of an offence contemplated in paragraph (f), (g) and (h) of this subsection, to a maximum fine of R250 000;
- (4) The court convicting a person of any offence referred to in subsection (3)(b) of this section may, in addition to any fine which it may impose in terms of subsection (1), declare any transmitters, apparatus and other equipment and any article, object or thing by means of which such offence was committed, to be forfeited to the Authority: Provided that such declaration must not be so made upon proof to the satisfaction of the court that such transmitter, apparatus, equipment, article, object or thing is not the property of the person so convicted and that, as regards such article, object or thing, the owner thereof was unable to prevent it from being used as a means to commit such offence.

Repeal of sections 18, 19 and 20 of Act 13 of 2000

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20. Sections 18, 19 and 20 of the principal Act are hereby repealed.

Amendment of section 21 of Act 13 of 2000

21. Section 21 of the principal Act is hereby amended by the deletion of subsection (2), the current subsection (1) becoming section 17.

Repeal of Schedule 2 to Act 13 of 2000

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22. Schedule 2 to the principal Act is hereby repealed.

Amendment of Contents of Act 13 of 2000

- 23.** The Contents of Act after the Preamble of the principal Act is hereby amended—
- (a) by the substitution for “4. Functions of Authority” of the following:
“4. Functions of Authority and chairperson”;
 - (b) by the insertion after “4. Functions of Authority” of the following: 5
“4A. Register of licences
4B. Inquiries by Authority
4C. Conduct of inquiries
4D. Confidential information”;
 - (c) by the insertion after “6. Disqualification” of the following: 10
“6A. Performance management system”;
 - (d) by the insertion after “11. Meetings of Council” of the following:
“11A. Minutes of meetings”;
 - (e) by the insertion after “14. Staff” of the following: 15
“14A. Appointment of experts
14B. Transfer of staff
14C. Confidentiality
14D. Limitation of liability”;
 - (f) by the insertion after “16. Annual Report” of the following: 20
“16A. Restriction on use of name or description implying connection
with Authority”;
 - (g) by the insertion after “17. Standing and special committees” of the following:
“17A. Establishment of Complaints and Compliance Committee
17B. Functions of Complaints and Compliance Committee
17C. Procedure of Complaints and Compliance Committee
17D. Findings by Complaints and Compliance Committee
17E. Decision by Authority
17F. Inspectors
17G. Power of inspector to enter, search and seize
17H. Offences and penalties”; 25
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 - (h) by the deletion after “CHAPTER IV TRANSITIONAL PROVISIONS” of
the following:
“[18. Dissolution of IBA and SATRA, and first meeting of Council
19. Transfer of staff
20. Passing of assets and liabilities to Authority]”; and 35
 - (i) by the deletion after “Schedule 1 Laws amended or repealed” of the
following:

“[Schedule 2

Determination by lot for purposes of section 7(2)(b)]”.

Repeal and amendment of laws 40

24. The law specified in the second column of Schedule 1 is hereby amended to the extent indicated in the third column thereof.

Short title and commencement

25. This Act is called the Independent Communications Authority of South Africa Amendment Act, 2005, and comes into operation on a date fixed by the President by proclamation in the *Gazette*. 45

SCHEDULE 1

SCHEDULE OF LAWS AMENDED OR REPEALED

(Section 25)

Act No. and Year	Short Title	Extent of amendment or repeal	5
Act No. 124 of 1998	Postal Services Act	<p>1. The repeal of sections 3, 4, 5, 6, 7, 9, 10, 11, 12, 13 and 14.</p> <p>2. The amendment of section 16 by— (a) the substitution for subsection (2) of the following subsection: “(2) [Subject to subsection (3), no] No application may be entertained to provide a reserved postal service unless such application is lodged pursuant to and in accordance with an invitation issued by the [Minister] <u>Regulator</u> in the Gazette.”; and (b) the substitution in subsections (8), (9) and (10) for the expression “Minister” wherever it occurs of the expression “Regulator”.</p> <p>3. The amendment of section 19 by the substitution for subsection (2) of the following subsection: “(2) Every holder of a licence must, at the prescribed time, pay to the [Department] <u>Regulator</u> the licence fee specified in the licence or where no such fee is so specified, the prescribed licence fee.”.</p> <p>4. The substitution for section 21 of the following section: “Application for registration 21. An application for registration with the Regulator to operate an unreserved postal service must be in the format and in accordance with the procedure prescribed by the [Minister on the recommendation of the] <u>Regulator</u> and must be accompanied by the prescribed registration fee.”.</p> <p>5. The repeal of section 23.</p> <p>5. The amendment of section 24 by the substitution for subsection (4) of the following subsection: “(4) Any person who is aggrieved by the suspension or cancellation of his or her licence or registration certificate in terms of subsection (1) [has, in addition to any right to review by the court, the right to appeal to the Minister against such suspension or cancellation and the Minister may either confirm the suspension or cancellation or direct the Regulator to restore the licence or registration certificate to the person concerned] <u>may</u> apply to a court to review a decision of the Regulator in terms of this section.”.</p> <p>7. The repeal of sections 25, 26, 27 and 28.</p>	<p>10</p> <p>15</p> <p>20</p> <p>25</p> <p>30</p> <p>35</p> <p>40</p> <p>45</p>

Act No. and Year	Short Title	Extent of amendment or repeal
		<p>3. The amendment of section 30 by—</p> <p>a) the substitution for subsection (1) of the following subsection:</p> <p>“(1) [Subject to the approval of the Minister, the] Regulator, in consultation with the postal company or, where applicable, any other licensee, may determine the fees and charges payable in respect of the provision of a postal service by the postal company or where applicable, by such other licensee.”; and</p> <p>b) the substitution for subsection (3) of the following subsection:</p> <p>“(3) In exercising a power under subsection (1) the Regulator may[, subject to the approval of the Minister,] determine different fees and charges in respect of different services, or services rendered in different areas or circumstances or may determine special fees and charges which may be higher or lower than the normal fees and charges, and may exempt particular users or prospective users of services in specific circumstances from any of the prescribed fees and charges.”.</p> <p>4. The repeal of section 60.</p> <p>10. The substitution in section 61 for the words preceding paragraph (a) of the following words:</p> <p>“The [Minister] Regulator may[, upon the advice of the Regulator,] make regulations regarding—”.</p> <p>11. The repeal of sections 63 and 64</p> <p>12. The substitution for section 65 of the following section:</p> <p>“Obstructing officer in performance of functions</p> <p>65. Any person who obstructs [an inspector or] any officer in the performance of his or her functions in terms of this Act is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment.”.</p> <p>13. The substitution for section 73 of the following section:</p> <p>“False declarations</p> <p>73. Any person who[, in appearing before a Regulator or] in applying for a licence makes a false statement, knowing it to be false, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment.”.</p>

Act No. and Year	Short Title	Extent of amendment or repeal
		<p>14. The amendment of section 80—</p> <p>(a) by the substitution in subsection (3) for the words preceding paragraph (a) of the following words: “The [Regulator] Complaints and Compliance Committee established by section 17A of the Electronic Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000) must investigate and [adjudicate] consider—”; 5</p> <p>(b) by the substitution in subsection (4) for the words preceding paragraph (a) of the following words: 10 “Where the [Regulator] Complaints and Compliance Committee referred to in subsection (3), after investigation, finds that the licensee or the registered unreserved postal service operator has been responsible for a failure or contravention contemplated in subsection (3), the Regulator may—”. 15</p>

**MEMORANDUM ON THE OBJECTS OF THE INDEPENDENT
COMMUNICATIONS AUTHORITY OF SOUTH AFRICA
AMENDMENT BILL, 2005**

1. BACKGROUND TO AND OBJECTS OF BILL

1.1 The Independent Communications Authority of South Africa Amendment Bill (the Bill) addresses the need for strengthening the Authority to make it capable of responding to the changing communications landscape, particularly in view of a more converged and competitive environment.

1.2 The Bill seeks to—

- provide for the substitution of the Authority for the Postal Regulator established by the Postal Services Act;
- ensure certainty within the communications and postal sectors by providing for the functions of the Authority and the chairperson of the Council;
- consolidate certain powers and duties of the Authority contained in the Independent Broadcasting Authority Act, 1993 (Act No. 153 of 1993) and the Telecommunications Act, 1996 (Act No. 103 of 1996), now being repealed by an Act of Parliament dealing with convergence in the broadcasting, broadcasting signal distribution and telecommunications sectors;
- provide for a new, faster and more focused procedure for the appointment of the chairperson and other councillors of the Authority;
- provide for the establishment of a Complaints and Compliance Committee and the appointment of inspectors; and
- empower the Authority to conduct inquiries for the purpose of improving the performance of its functions.

2. CONSULTATION

The following bodies have been consulted:

- Department of Justice and Constitutional Development;
- The Presidency;
- National Treasury;
- Department of Trade and Industry;
- Department of Science and Technology;
- Competition Commission;
- ICASA; and
- Industry.

3. IMPLICATIONS FOR PROVINCES

None.

4. FINANCIAL IMPLICATIONS FOR STATE

There will be financial implications for the State. This will be subject to agreement between the Minister of Communications and the Minister of Finance.

5. PARLIAMENTARY PROCEDURE

- 5.1 The State Law Advisers and the Department of Communications are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section **74** or 76 of the Constitution applies.
- 5.2 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 does not contain provisions pertaining to customary law or customs of traditional communities.