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Overview of Electronic Communications Regulation in South Africa

Last Updated June 2014

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About Ellipsis 4
Introduction 5
Legislative Framework in South Africa 6
Role-Players 7
Political Framework 7
Independent Communications Authority of South Africa 7
Universal Service and Access Agency of South Africa 8
Portfolio Committee on Communications 8
Competition Authorities 8
State-Owned Companies 8
National Consumer Commission 8
Policy Environment 8
National Broadband Policy 9
National Radio Frequency Spectrum Policy 9
Electronic Communications Licensing 10
Service Licensing Framework in South Africa 10
Licence Exemptions 12
Annual Licence Fees 13
Control and Ownership of Licences 14
Compliance with Licence Terms and Conditions and Applicable Regulation 14
Infrastructure Rights 14
Access 14
Interconnection and Facilities Leasing 15
Call Termination 15
Local Loop Unbundling (LLU) 16
Carrier Select and Carrier Pre-Select 16
Consumer Protection 16
Code of Conduct Regulations 17
End-User and Subscriber Service Charter Regulations 17
Code of Conduct for People with Disabilities 17
Price Controls 17
Radio Frequency Spectrum 17
Allocation vs Assignment 17
Assignment of Spectrum 18
Licence-Exempt Frequency 18
Spectrum Licence Fees 18
Spectrum Trading 18
Numbering 18
Number Portability 18

Films and Publications 19
Registration 19
Child Pornography and the Child Pornography Hotline 19
Interception and Monitoring 19
Customer Registration 19
Assisting with Investigations 20
Intermediary Liability 20
Annexure A – Strategies in the South African National Broadband Policy 22

About Ellipsis

Ellipsis Regulatory Solutions ("Ellipsis") is a niche consultancy formed in 2007 as a provider of specialised legal advice and services to the electronic communications (telecommunications), broadcasting and related industries.

The central feature of the services provided by Ellipsis is the demystification of a complex area of law and its distillation into simple, practical advice. Electronic communications law is a blend of law, economics, engineering and policy which is further complicated by the rapid pace of change in information and communication technology, creating significant challenges for industry players.

Ellipsis is involved at all stages of the communications law or regulation-making process and liaises closely with the Independent Communications Authority of South Africa (ICASA) on an ongoing basis. Our clients include industry associations, non-profits, SMMEs and global corporations.

Updates to specific items in this overview and more about the services we offer can be found at www.ellipsis.co.za.

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Introduction

As electronic communications regulation is a vastly complex subject requiring particular expertise, it is best left to those who have adopted it as a speciality. Nevertheless, a working knowledge of regulatory issues is critical for managers in telecommunications companies and customers of such companies.

In particular, awareness of consumer rights or obligations and an understanding of the regulatory framework for licensing, interconnection and facilities leasing will be critical in negotiating agreements and service levels for the provision of electronic communications services.

Communications policy, legislation and regulation is always under review and development, a trend that will increase as we move towards IP convergence and the disruption of traditional distinctions between different forms of electronic communications services.

This overview is intended as a basic primer in South African law and regulation relating to electronic communications with the hope of empowering licensees and potential licensees to appreciate the legal and regulatory environment. It is, of course, not intended to be exhaustive, nor should it be relied upon without further specific consultation.

This overview does not cover broadcasting-specific licensing or regulation, nor does it venture into postal regulation.

Please address any queries or suggestions in respect of this overview to dominic@ellipsis.co.za.

Legislative Framework in South Africa

The primary Act of Parliament regulating the electronic communications industry in South Africa is the Electronic Communications Act 36 of 2005 ("the ECA"). The Electronic Communications Amendment Act 1 of 2014 came into force on 21 May 2014.

Overview of the Electronic Communications Amendment Act 1 of 2014

The ECA can be characterised as pro-competitive legislation, in stark contrast to the preceding Telecommunications Act of 1996 which was protectionist in that it sought to protect the incumbent fixed-line provider, Telkom SA Ltd, from the effects of competition.

The ECA covers a wide range of issues, including the following:

- licensing;
- access;
- infrastructure rights such as way-leaves;
- the management and assignment of frequency;
- markets and competition; and
- universal service.

The ECA is convergence legislation which attempts to take into account the blurring between broadcasting and telecommunications in particular.

This process of convergence is one of the drivers of the ICT policy review process initiated by the Minister of Communications in 2013. This process is likely to result in the drafting of new ICT legislation to replace the ECA.

Other legislation which impacts upon the sector includes the following, among others:

- the ICASA Act 13 of 2000 ('the ICASA Act') which established the communications sector regulator – the Independent Communications Authority of South Africa (ICASA) – and sets out both powers and sanctions which can be imposed on licensees for non-compliance with their licence terms and conditions. The ICASA Amendment Act 2 of 2014 came into force on 16 May 2014;

  Overview of the ICASA Amendment Act 2014

- the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 ('RICA') which sets out a lawful intercept regime and details the obligations of electronic communications service providers in co-operating with law enforcement authorities and storage of traffic data;
- the Electronic Communications and Transactions Act 25 of 2002 ('the ECT Act') which creates legal exemptions for information intermediaries where they act as such (i.e. as a mere conduit or hosting provider). An Electronic Communications and Transactions Amendment Bill 2012 has not been finalised and it there is uncertainty that it will be;
- the Competition Act 89 of 1998 ('the Competition Act') which legislates against anti-competitive practices such as collusion and cartels;

- the Film and Publications Act 65 of 1996 ('the Film and Publications Act') which requires ISPs and others to register and sets out obligations around child sexual abuse images and exposure of children to pornography;
- the Protection from Harassment Act 17 of 2011 ("the Harassment Act") and regulations thereunder which oblige electronic communications service providers to assist where a person alleges harassment by means of electronic communications; and
- the Protection of Personal Information Act 4 of 2013, assented to by the President on 26 November 2013. Certain provisions relating to the establishment of an Information Commissioner and the drafting of regulations commenced on 7 April 2014.

Role-Players

Political Framework

As of June 2014, the political framework is confused. On 25 May 2014, the President, in his statement regarding new Cabinet appointments, announced the formation of a new Ministry of Telecommunications and Postal Services as well as a new Minister of Communications:

> *We have established a Ministry of Telecommunications and Postal Services.*
>
> *Our country has a fast growing telecommunications sector which in 2012 was estimated at being worth R180 billion. We also see a great developmental value in the Post Office given its role of delivering financial services to remote areas of our country.*
> *This new department will ensure that the country derives more value out of the booming information communications and technology industry and the postal services sector.*
> *…*
> *We have established a new Communications Ministry, which will be responsible for overarching communication policy and strategy, information dissemination and publicity as well as the branding of the country abroad.*
>
> *Improved communication and marketing will promote an informed citizenry and also assist the country to promote investments, economic growth and job creation.*
>
> *This Ministry will be formed out of the following components:*
> - *The Independent Communications Authority of South Africa;*
> - *The SA Broadcasting Corporation;*
> - *Government Communications and Information System (GCIS);*
> - *Brand SA; and*
> - *The Media Development and Diversity Agency.*

Subsequent developments indicate that this will not be the final position. It appears that the Department of Telecommunications and Postal Services will largely take over from the old Department of Communications.

Independent Communications Authority of South Africa

The Independent Communications Authority of South Africa (ICASA) is the independent communications regulator, established and governed by the ICASA Act as a consequence of South Africa's membership of the World Trade Organisation (WTO) and its accession to the Reference Paper to the Fourth Protocol on Basic Telecommunications which sets out requirements for signatories' regulatory environments.

Universal Service and Access Agency of South Africa

The Universal Service and Access Agency of South Africa (USAASA) was established under the ECA to promote the goals of universal access and universal service in the under-serviced areas of South Africa. Licensees are required to contribute to the Universal Service and Access Fund (USAF) which is intended for use in incentivising and subsidising the roll-out of electronic communications networks in under-serviced areas.

Portfolio Committee on Communications

The Parliamentary Portfolio Committee on Communications (PPCC) exercises oversight over the above three (and other) entities, with the power to conduct inquiries and subpoena documents.

Competition Authorities

ICASA is generally regarded as having *ex ante* regulatory powers (i.e. it acts so as to prevent future anti-competitive conduct). *Ex post* regulation – responding to specific complaints or instances of anti-competitive conduct – is the province of the Competition Commission and Competition Tribunal under the Competition Act.

ICASA and the Competition Commission function under a Memorandum of Agreement, but jurisdictional difficulties have meant that the Competition Commission has not as yet managed to act effectively against incumbents in respect of conduct which breach the provisions of the Competition Act.

State-Owned Companies

The South African Government has taken policy decisions to intervene in the provision of electronic communications facilities where it is of the view that there is market failure. Broadband Infraco has an individual electronic communications network service licence and will be providing national long-distance and international cable services at prices based on a cost-plus basis. Sentech, the national signal distributor, has been earmarked for the development of a national wireless backbone. 2014is likely to bring increased pressure for these two entities to be merged into a single state network provider. Telkom is also a state-owned company, now cited as Telkom SA SOC Ltd.

Film and Publications Board (FPB)

The FPB is seeking a more aggressive role in the regulation of online content.

National Consumer Commission

The National Consumer Commission (NCC) is charged with enforcing consumer rights under the Consumer Protection Act 68 of 2008, including in the telecommunications sector.

Policy Environment

As noted previously, the setting of policy with regard to electronic communications is a competency held by the South African Government through the Department of Communications (DoC).

In terms of Chapter 2 of the ECA, the Minister of Communications is entitled to issue both policy and policy directions. However, in doing so, the Minister is required to consult with ICASA and follow a public policy process.

It is generally recognised that South Africa's communications policy is overdue a comprehensive overhaul – this was last done in 1996. A National Policy Colloquium was held in the first six months of 2012 in an effort

to address this, and an ICT Policy Panel comprising experts in the field was formed to advise the Minister in the development of a Green Paper during 2013.

The National Integrated ICT Policy Green Paper 2014 was published for comment in December 2013. It is expected to be followed by a Discussion Document during the second or third quarter of 2014.

ICT policy review process

National Broadband Policy

The National Broadband Policy 2013 – South Africa Connect: Creating Opportunities, Ensuring Inclusion was approved by Cabinet on 4 December 2013.

Annexure A sets out the four core strategies of the Policy

A presentation by the Department of Communications to the Portfolio Committee sets out South Africa's broadband targets through 2030:

Target	Penetration measure	Baseline (2013)	By 2016	By 2020	By 2030
Broadband access in Mbps user experience	% of population	33.7% Internet access	50% at 5Mbps	90% at 5Mbps 50% at 100Mbps	100% at 10Mbps 80% at 100Mbps
Schools	% of schools	25% connected	50% at 10 Mbps	100% at 10Mbps 80% at 100Mbps	100% at 1Gbps
Health facilities	% of health facilities	13% connected	50% at 10Mbps	100% at 10Mbps 80% at 100Mbps	100% at 1Gbps
Public sector facilities	% of government offices	None specified	50% at 5Mbps	100% at 10Mbps	100% at 100Mbps

Table 1: South Africa Broadband Targets through 2030

These targets are to be reviewed periodically and supplemented by pricing and quality of service targets as well as speed of installation and fault repair parameters.

Updates and summary of the actual policy decisions taken by the Minister in the National Broadband Policy

National Radio Frequency Spectrum Policy

The Department of Communications adopted a National Radio Frequency Spectrum Policy in April 2010. It is anticipated that this will either be reviewed or, more likely, amplified by policy directions during 2014.

Electronic Communications Licensing

The registration and granting of electronic communications licences in South Africa is performed by ICASA under the ECA.

Service Licensing Framework in South Africa

There are two main categories of service licence available under the ECA:

- **Electronic Communications Network Service (ECNS) licences:** these licences authorise the holder to roll-out and operate a physical network. This network can be made up of any technology the holder may choose - radio equipment (for a wireless network), copper cabling, or fibre optic cabling, for example. ECNS licensees can also enter into commercial arrangements with other licensees to allow them to use the electronic communications network owned and operated by the ECNS licensee.
- **Electronic Communications Service (ECS) licences:** these licences allow holders to provide services to customers over their own, or somebody else's, network. This will typically be the licence held by an ISP which does not operate its own network or network facilities.

Examples:

- Telkom has a telephone or voice network which covers most of South Africa consisting of phone lines, switches and other hardware, and in order to operate this network Telkom requires an ECNS licence. Telkom then provides voice services to its customers over this network. In order to provide these voice services, an ECS licence is required.
- Vodacom has a GSM network which also covers most of South Africa and consists of their masts and towers on which radio equipment is located. They will require an ECNS licence in order to own and operate this network, as well as ECS licence to provide their services – voice, data, SMS, MMS – over this network.
- An ISP wishes to provide internet connectivity to customers. It does not have its own network (although it may own some hardware) but relies on the services of a network owner and operator such as Telkom (i.e. an ECNS licensee) to carry its services to its customers. In this example, the ISP itself does not require an ECNS licence (it does not own and operate the network), it only requires an ECS licence so that it can provide its services to its customers over Telkom's network.

It is helpful to consider the following fundamental distinctions between these licence types:

- **Wholesale vs. Retail:** An ECNS licensee wholesales network capacity to ECS licensees or other ECNS licensees for resale – it does not deal with the public. An ECS licensee, on the other hand, offers retail services to the public (and may also provide wholesale services for resale to third parties).
- **Physical vs. Virtual Networks:** An ECNS licensee operates physical networks made of facilities such as fibre or base stations. An ECS licensee operates virtual networks such as VPNs and MPLS networks.

The ECA breaks down the licence categories into the two subcategories set out in the table below.

The licensing framework is technology-neutral. Thus, for example, while Telkom was restricted to the provision of fixed-line services in terms of the Public Switched Telecommunications Network (PSTN) licence issued to it under the Telecommunications Act, it is under no such restriction in terms of the IECNS and

IECS licences which it now holds. Indeed, Telkom is already providing mobile services while the mobile network operators are self-providing fixed-lines to service their backhaul requirements.

ECNS LICENCES	**Individual ECNS**	This allows the holder to roll out and operate an electronic communications network nationwide or across a province.
	Class ECNS	A class ECNS licence allows the holder to roll out its own network in a district or local municipality. In other words, the licensee will choose to operate in a municipal area and provide access services to consumers in that area. This is the form of licence required by operators wanting to set up their own network focusing on a smaller area. South Africa has 48 district municipalities and 231 local municipalities as well as seven metropolitan municipalities.
ECS LICENCES	**Individual ECS**	This licence allows the holder to provide services to customers over the network of an ECNS licensee, including voice or VoIP services which use numbers taken from the National Numbering Plan. Examples of other services that can be provided include the following: • Internet access • Protocol conversion • Virtual Private Networks (VPN) • Multi-Protocol Labeling Systems (MPLS) The National Numbering Plan is a document drawn up by ICASA setting out all the different kinds of numbers used in South Africa. A distinction is drawn between geographic, where the number is linked to a specific location (e.g. 011 566 3000), and non-geographic, where the number is mobile (e.g. 083 000 0000).
	Class ECS	This licence allows the holder to provide the same services as the Individual ECS licence except for voice services requiring numbers from the national numbering plan. A CECS licensee will need to enter into commercial arrangements with one or more ECNS licensees who have the networks to carry services to the customer. **NB: The Electronic Communications Amendment Act 2014, which came into force on 21 May 2014, states that a class ECS licence shall now be of municipal scope. We will wait to see what ICASA does next to implement that which we regard as ill-advised.**

Table 2: Licensing under the Electronic Communications Act 36 of 2005

Individual ECNS and ECS licences are issued for twenty years. Class ECNS and ECS licences are issued for ten years. All of these licence types can be renewed upon payment of a renewal fee.

Licences may be assigned, ceded or transferred after the approval of an application to ICASA. A transfer application fee is payable.

Service licensing is distinct from two other forms of licensing: type approval and frequency licensing. Where these latter forms of licensing are required, they must be obtained separately. An ECNS licence is required *before* a licensee will be entitled to apply for radio frequency spectrum licensing.

Licence Exemptions

Certain services are regarded as being of limited socio-economic importance and can be provided on a licence-exempt basis, subsequent to an application to ICASA for a licence exemption having been granted.

Electronic Communications Networks	**Private Electronic Communications Networks ("PECNs")**	The Licence Exemption Regulations define a PECN as "an electronic communications network used primarily for providing electronic communications for the owner's own use". The ECA definition provides for "networks used principally for or integrally related to the internal operations of the network owner. Except that where the PECNs' additional capacity is resold, the Authority may prescribe terms and conditions for such resale".
	Small Electronic Communications Networks ("SECNs")	The Licence Exemption Regulations defines SECNs as "an ECN that lies within a limited special area, used by a specific user group, has a specific topology and is not an ECNS of national, provincial, district or local municipal scope, but may be connected to one which is licenced or licence exempt. SECNs are required to make use of licence exempt frequencies (where they are wireless), with common examples of SECNs including LANs and WLANs.
	Resale of Network Capacity	The Licence Exemption Regulations provide that the operator of a PECN may resell, lease or otherwise make available spare capacity on its network to third parties[1].

Electronic Communications Services	**Non-profit ECS**	ECS provided on a non-profit basis and ECS provided to the public for free is licence exempt. Additionally, ECS will be licence exempt where the entity providing the service is a: • non-profit organisation established under an Act of Parliament; or, • non-profit company registered in accordance with the provisions of the Companies Act.
	Resellers	A reseller is broadly defined in the ECA as a person who: • acquires, through lease or other commercial arrangement, by any electronic communications network service or electronic communications service; and, • makes such electronic communications network service or electronic communications service available to subscribers for a fee, whether or not such electronic communications network services or electronic communications services made

[1] PECN operators should ensure that their network remains "principally or integrally related to the internal operations of the network owner.

		available by the reseller: • are identical to the electronic communications network service or electronic communications service acquired; • are packaged, bundled or otherwise re-grouped to form new or varied service offerings; • are combined, linked or used in connection with electronic communications networks or electronic communications facilities owned by the reseller; or, • add value to such electronic communications network services or electronic communications services. The definition of reseller therefore contemplates a scenario in which a reseller obtains ECS from a licensed upstream ECS provider and then on-sells, repackages, bundles and/or regroups the service in combination with its own network and/or facilities which it in turn offers to consumers under its own brand or style.
	Ancillary Services	Defined as "a retail service or bundle of retail services which do not amount to an Electronic Communications Service and includes a necessary but incidental element of ECS, where such ECS elements do not constitute the major purpose, utility or value of the service, including but not limited to tracking, alarm and similar services".

Table 3: Licence Exemptions

See http://www.ellipsis.co.za/licensing/service-licensing/license-exemptions/ for further information.

Annual Licence Fees

Annual licence fees are payable in terms of the ICASA General Licence Fee Regulations 2012 as amended. These regulations set out the manner of calculation of annual licence fees and update the various administrative fees payable for licence applications, amendments and the like.

Formula:
Pa = Payable Annual licence Fee
R = Revenue from licensed services
B = applicable percentage per table below dependent on license revenue in accordance with this schedule read with regulation 3(1).
Pa = R x B

License Revenue (R) (Rand)	Percentage applied (B) (%)
0-50 000 000	0.15
50 000 001 – 100 000 000	0.20
100 000 001 – 500 000 000	0.25
500 000 001 – 1 000 000 000	0.30

1 000 000 001 +	0.35

Licensees are further required to contribute to the Universal Service and Access Fund (USAF) – an entity designed by government to fund development of services in rural areas – amounting to 0.2% of annual turnover derived from licensed services.

Control and Ownership of Licences

ICASA released a Discussion Paper on ownership and control of telecommunications and broadcasting service licences in November 2009. Until such time as this process is completed, the regulations promulgated under the Telecommunications Act, although completely unsuited to the new licensing framework, continue to apply.

Holders of individual licences are required to have a minimum 30% of equity held by persons from historically disadvantaged groups. This term in essence covers people of colour, women and people with disabilities.

Indications are that there will be a move towards a broad-based system of empowerment applicable to licensees over the next three years. The Electronic Communications Amendment Act 2014 takes the first steps in replacing the focus on historically disadvantaged groups or individuals with broad-based black economic empowerment in line with the general empowerment codes. In future, ICASA will draft and finalise new control and ownership regulations to govern transformation in the sector.

Compliance with Licence Terms and Conditions and Applicable Regulation

Holders of service licences issued by ICASA under Chapter 3 of the ECA are required to observe the licence framework as set out in the Compliance Manual Regulations 2011. For more information, please see http://www.ellipsis.co.za/licensee-compliance-framework-finalised/.

Infrastructure Rights

Under Chapter 4 of the ECA, ECNS licensees have broad rights to enter upon land for the purpose of constructing and maintaining electronic communications facilities, subject to environmental and other applicable regulations.

In practise, the exercise of these rights involves extensive negotiation with local government and agencies such as SANRAL, which operates South Africa's national road network. Certain local government bodies have indicated their intention to pass by-laws regulating the access of electronic communications licensees to municipal property.

The Minister of Communications has not yet gazetted guidelines for the rapid deployment and provisioning of electronic communications facilities contemplated under the ECA. Such guidelines would centralise processes for obtaining way-leaves and permissions, facilitating infrastructure deployment and sharing.

Access

The term 'access' incorporates the following:

- interconnection;
- facilities leasing; and

- essential facilities.

Interconnection and Facilities Leasing

Under Chapters 7 and 8 of the ECA, every licensee is obliged to interconnect upon request and every ECNS licensee must provide facilities upon request, on terms negotiated, unless the request is unreasonable (financially or technically). ICASA may exempt licensees from their obligations, but only if they do not have significant market power (SMP).

Interconnection and facilities leasing agreements entered into between licensees must be filed with ICASA and require prior approval by the regulator before they can come into force.

ICASA has finalised the Interconnection Regulations 2010 which will give effect to Chapter 7 of the ECA (Interconnection) and the Facilities Leasing Regulations 2010 which give effect to Chapter 8 (Facilities Leasing & Essential Facilities). These documents also outline out the manner in which disputes relating to the reasonableness of interconnection and facilities leasing requests will be processed.

The setting of pricing principles governing interconnection and facilities leasing is highly contentious but nevertheless essential in facilitating the entrance of competition into the market. Although there is some dispute in this regard, the majority view is that ICASA is required to consider the provisions of Chapter 10 of the ECA before it can impose any kind of pricing regulation. This is discussed in further detail under Markets and Competition.

Call Termination

Call termination is the only market in which ICASA has exercised its powers to impose pro-competitive terms and conditions – including pricing obligations – under Chapter 10 of the ECA. Regulation has been consistently controversial and provides insight into the relative weakness of ICASA in implementing the ECA and the information asymmetries between the regulator and the regulated.

In 2010, ICASA finalised the Call Termination Regulations 2010, imposing a three-year glide path for the reduction of wholesale mobile termination rates (market 1) and wholesale fixed termination rates (market 2). These 2010 Regulations allowed for asymmetry in the rates payable in favour of new entrants – essentially everybody except Vodacom and MTN in the mobile termination market and everybody except Telkom in the fixed termination market. Asymmetry was initially set at 20% and reduced to 10% over the three-year glide path period.

An attempt to impose a further glide path and far more aggressive asymmetry in 2014 was not so successful, with the High Court issuing a scathing judgment against ICASA and the quality of its processes and regulations. In reaching its decision to declare the Call Termination Regulations 2014 (as amended) unlawful, however, the Court held that the public interest demanded that the order declaring the 2014 Regulations unlawful be suspended for six months. This, in theory, gives ICASA an opportunity to develop a proper costing model to underpin its regulations.

As things currently stand, wholesale termination rates until 1 October 2014 are as follows:

Wholesale voice termination rate to a mobile location (market 1)

Period	Rate
1 April 2014 – 30 September 2014	R0.20

Wholesale voice termination rate to a fixed location (market 2)

Period	WON Rate	BON Rate
1 April 2014 – 30 September 2014	R0.12	R0.16

Maximum asymmetry rate in market 1 (mobile)

Period	Maximum Rate
1 April 2014 – 30 September 2014	R0.44

Maximum asymmetry rate in market 2 (fixed)

Period	Maximum Rate WON	Maximum Rate BON
1 April 2014 – 30 September 2014	R0.13	R0.21

Notes:

- Pricing is excluding VAT per minute
- WON means landline calls made within the same area code (e.g. calls from a 021 number to another 021 number). BON means landline calls made from one area code to another (e.g. 011 to 021)

The future of rates after 30 September is uncertain. Updates posted here.

Local Loop Unbundling (LLU)

The local loop is the last-mile copper (and, increasingly, fibre) connection from street level distribution boxes to customer premises equipment in homes or businesses. While it was Government's expressed intention to complete an unbundling process by 2011, it is unlikely that significant progress will be made towards this objective in 2014.

Updates on LLLU

Carrier Select and Carrier Pre-select

Licensees are obliged to offer carrier pre-selection; ICASA has published regulations intended to flesh out compliance with this obligation. In practice, however, ICASA has not regulated origination rates for voice calls and the service is accordingly not available in South Africa. This represents another instance of the inability of ICASA to implement a pro-competitive intervention required by the ECA.

Carrier Select and Carrier Pre-select Resources

Consumer Protection

ICASA is mandated to perform a consumer protection role and to advance the interests of consumers of electronic communications in general. ICASA has not, in general, been effective in this role.

Code of Conduct Regulations

The objective of the Code of Conduct Regulations is twofold: to set acceptable standards of conduct for licensees in their dealings with consumers and to protect the rights of consumers in the electronic communications market.

The Regulations are applicable to all ECS and ECNS licensees to the extent that they deal with consumers (i.e. natural persons including end-users who use and/or receive for their own use the service and/or products of a licensed service).

End-User and Subscriber Service Charter Regulations

The purpose of the Service Charter Regulations is to define the minimum standards to be observed by ECNS and ECS licensees in providing licensed services, standards related to service availability, connectivity failure, the handling of complaints, times for installation and activation, and times for fault clearance. Licensees must report to ICASA every six months concerning their compliance.

Code of Conduct for People with Disabilities

This Code sets out the obligations of licensees providing services to disabled persons. This is currently under review.

Price Controls

The best service ICASA could provide to consumers is to initiate steps to address the high cost of communication in South Africa. Under Chapter 10 of the ECA, ICASA is empowered to address retail price controls as pro-competitive licence conditions in the licences of licensees found to have Significant Market Power (SMP).

The process to be followed is, however, quite convoluted and ICASA has only managed to apply it in respect of the relatively simple voice call termination market.

Radio Frequency Spectrum

The Department of Communications (DoC) is responsible for interaction with the ITU and represents South Africa at the World Radio Communication Conferences convened by the ITU every four years. The Minister of Communications has the ultimate authority over the band plan which sets out the uses to which the various frequency bands can be put by the users thereof. South Africa falls within ITU Region 1 and the band plan will be largely in accordance with that agreed to under the ITU's auspices.

The Minister also controls the use of frequency for security services and other Government uses.

Allocation vs Assignment

An allocation of frequency is a stipulation for the uses to which a particular band can be put. In order to promote efficiency, bands can be allocated to different uses on a primary, secondary or licence-exempt basis, with the latter uses having a duty to mitigate any interference caused to the services of those using the band for its primary allocation.

An assignment of frequency is the awarding of a radio frequency spectrum licence to a user in terms of Chapter 5 of the ECA.

Assignment of Spectrum

The awarding of frequency licences is a competence held by ICASA. To date ICASA has followed a first-come-first-served basis but it will shortly finalise regulations identifying the mechanisms to be employed in assigning frequency in bands where demand exceeds supply. It is anticipated that the regulator will seek to use beauty contests or auctions or a truncated methodology which combines the two. Such assignments will only occur after an ITA has been issued by ICASA.

Spectrum is awarded on a technology-neutral basis subject to the allocation set out in the National Radio Frequency Plan.

The governing regulations are the Radio Frequency Spectrum Regulations 2011.

Licence-Exempt Frequency

ICASA has issued regulations setting out bands which may be used without a frequency licence, subject to certain technical restrictions.

The most important of these bands for telecommunications purposes are the 2.4GHz ISM band, the 5.4GHz Outdoor Hiperlan band and the 5.8GHz ISM band, used extensively for the provision of Wi-Fi services in rural areas.

The relevant bands and applicable restrictions are delineated in Annexure B to the Radio Frequency Spectrum Regulations.

Guide to commonly-used licence-exempt frequency bands in South Africa

Spectrum Licence Fees

ICASA is planning to employ Administrative Incentive Pricing (AIP) in order to promote the efficient use of spectrum under the ICASA Spectrum Licence Fee Regulations 2010, which came into force on 1 April 2012.

Spectrum Trading

South Africa does *not* currently allow any secondary trading in spectrum licences.

Numbering

ICASA is responsible for the management of the National Numbering Plan and the issuing of allocations of numbers to licensees. This is done under the Numbering Plan Regulations 2012.

Only the holders of IECS licences are entitled to allocations of numbers. Such entitlement includes geographic (fixed) and non-geographic (mobile, VoIP) numbers.

No fee is currently payable to ICASA in respect of any application for allocation of numbers.

Number Portability

Both mobile and geographic number portabilities are enabled in South Africa, although there remain challenges to porting certain number ranges (particularly 080x and 086x).

Films and Publications

Registration

The FPB requires all ISPs to register with it, as its latest regulations state that application for registration must be submitted on the prescribed form and must be accompanied by (a) proof of payment of the prescribed fee (currently R529), (b) an original valid tax clearance certificate, and (c) the SA registration number of the business.

Film and Publications Regulations 2014

An applicant ISP must further indicate in its application form all measures taken to ensure that children are not exposed to child pornography or pornography; the FPB may request an ISP to demonstrate that these measures remain in effect.

The regulations explicitly state that "No person may host any website or provide access to the internet as an internet service provider, unless such person is registered with the Board in terms of section 27A of the Act."

Probably the most critical issue for the FPB is the fight against child pornography and the exposure of children to pornography and other inappropriate material. Licence holders need to take their responsibilities here very seriously, ensuring that they take active steps to report child pornography and cooperate with investigations surrounding it.

There are clear indications that the FPB wishes to become more involved in online content regulation.

Child Pornography and the Child Pornography Hotline

The FPB launched the PRO CHILD Hotline in 2008. The primary purpose of the Internet Hotline is to prevent distribution of child pornography (child sexual abuse images) when detected through the internet, engaging an active team of analysts to track child pornography.

The website is also intended to alert ISPs to criminal activities relating to child pornography and sexual abuse images hosted on their servers or distributed through their infrastructure.

The hotline will be available 24 hours a day 7 days a week to enable members of the public to immediately report child pornography (child sexual abuse images) as the Hotline cooperates closely with Law Enforcement Agencies (LEAs).

Interception and Monitoring

The South African Government has passed various laws aimed at assisting the LEAs fight against crime and terrorism by intercepting and monitoring electronic communications. The primary Act is RICA.

RICA's central feature is a prohibition against the interception of monitoring of communications outside of the authorised exceptions. However, it also sets out specific provisions with regard to electronic communications service licensees.

Customer Registration

RICA requires that providers of electronic communications services obtain certain information from subscribers in the sign-up process. This is typical Know-Your-Customer legislation.

Assisting with Investigations

Electronic communications service providers may be approached by the police or another LEA to assist them with a criminal investigation through the interception of live communications or the provision of archived communication information.

There are currently no data retention requirements on South African licensees, other than in terms of laws of general application.

Intermediary Liability

ISPs fulfill a central role in the modern information activity by acting as a conduit and clearing house for the transmission of electronic communications. South African law recognises the special position of ISPs and the need for them to be protected against liability in respect of third party content and activities which take place over their networks.

As is the case in many other jurisdictions, a 'safe harbour' is created for ISPs through the operation of Chapter XI of the ECT Act.

A 'service provider' under the ECT Act is defined as a person providing services including "the provision of connections, the operation of facilities for information systems, the provision of access to information systems, the transmission or routing of data messages between or among points specified by a user and the processing and storage of data, at the individual request of the recipient of the service".

Section 73 of the ECT Act stipulates that a service provider "is not liable for providing access to or for operating facilities for information systems or transmitting, routing or storage of data messages via an information system under its control". This immunity holds only where the service provider:

- is a member of an IRB and has adopted and implemented the code of conduct of that IRB;
- does not initiate the transmission;
- does not select the addressee;
- performs the functions in an automatic, technical manner without selection of the data; and
- does not modify the data contained in the transmission.

The section 73 'mere conduit' immunity does not interfere with the right of the courts to order a service provider to terminate or prevent unlawful activity in terms of any other law which may apply.

Hosting, Caching and Information Local Tools

This legislative immunity also covers hosting of content, caching of content and the provision of tools such as hyperlinks which are designed to assist users find information. In all of these instances there are further requirements set out in the relevant section and which, in essence, stipulate that the provision of the service or performance of the activity must take place at arm's length, in accordance with industry standards, and that the service provider should not have knowledge of unlawful activity.

Take-Down Notice Procedure

Section 77 of the ECT Act creates a procedure which allows a complainant to notify a service provider or its designated agent of unlawful activity in a written notice which identifies the infringed right and the location or nature of the infringing material or activity under the control of the service provider. A service provider is

obliged to act expeditiously to remove or disable access to infringing content, failing which it may lose the immunity it has in respect of hosted content under Section 75 of the ECT Act.

No General Obligation to Monitor

Section 78 of the ECT Act explicitly states that services providers are not under any general obligation to monitor the data which it transmits or stores or to actively seek facts or circumstances indicating an unlawful activity. This is recognition of practical reality: even a small Internet access provider would find it impossible to monitor *all* the content flowing over its systems due to the sheer volume of content and the speed at which this content travels.

Internet access providers are further under a Constitutional imperative to respect the privacy of their subscribers and are prohibited under RICA from any unauthorised interception and/or monitoring of electronic communications.

Annexure A – Strategies in the South African National Broadband Policy

Below is a summary of the four central strategies adopted in the South African National Broadband Policy:

Strategy Intervention	Aspects addressed by the strategy	Intended Outcomes	Indicators
Digital Readiness	• Institutional capacity • Regulation and administrative bottlenecks • Efficiency and effectiveness • Data and analysis for monitoring and evaluation and policy reformulation • Establishment of the National Broadband Council • Rationalisation of SOCs	• An enabling regulatory and administrative environment that facilitates broadband rollout • Broader public interest preserved • Level playing fields with fair market conditions • Dedicated council to advise Minister on policy, planning and implementation • Autonomy, accountability and efficiency of regulator • Access, price and quality of broadband • Time and cost of network build approval • Degree of disruption due to network build • Environmental impact of network builds • Targets met • Coverage price	• Autonomy, accountability and efficiency of regulator • Access, price and quality of broadband • Time and cost of network build approval • Degree of disruption due to network build • Environmental impact of network builds • Targets met • Coverage price
Digital Development	• Pooling of public sector demand • Public sector networks • Open access to network regulation	• High capacity future-proof network procured for key public sector broadband needs at more affordable rates • Government's ongoing operational communications	• Speed, quality and cost of network capacity at Government facilities • Speed of rollout and quality of service • Network reach and price of access

		expenditure reduced through upfront capital expenditure • Risk of investment in network extensions for operators reduced through anchor tenancy	• Increased investment by network operators • Take up of services in public sector, schools and clinics
Building the Digital Future	• Mechanisms for sharing of infrastructure • Coordination of infrastructure rollout • Enhanced use and licensing of spectrum	• Where competition is viable this will produce the best outcomes but infrastructure sharing and cooperation to be enabled on network builds to reduce cost • Economies of scale enabled in medium density and low income areas through government investment and guarantees in network extensions	• Network reach • Cost to communicate • Speed, quality and cost of network capacity • Speed of rollout • Increased investment by network operators • Improved penetration
Realising Digital Opportunity	• Capability and capacity • R&D, innovation and entrepreneurship • Industry development • Local content and applications	• Uptake and use enabled through institutional capacity and individual capability and institutional absorption • More equitable access to higher quality government services • Reduce pressure on scarce public sector facilities by moving resources online • The benefits of broadband in terms of economic growth and enhanced quality of life is realised through relevant content and applications • Promote growth through enabling economic infrastructure and associated industrial development	• Demand stimulation through: • Fund local content • Support apps to market • E-government services • ICT start-ups • Registration of ICT related patents • Increase demand side skills: ICT specialists, engineers, lawyers, economists • Number of PhDs in area of ICT • % of GDP spent on R&D • Increase demand-side skills: e-literacy campaign, ICT in school curriculum

Table 4: Broadband Strategies