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Contents

No.		Gazette No.	Page No.
GENERAL NOTICES • ALGEMENE KENNISGEWINGS			
Independent Communications Authority of South Africa / Onafhanklike Kommunikasie-owerheid van Suid-Afrika			
917	Electronic Communications Act (36/2005): Amendment Regulations Governing Aspects of the Procedures of the CCC of ICASA and Reasons Document, 2022	46091	3

GENERAL NOTICES • ALGEMENE KENNISGEWINGS

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

NOTICE 917 OF 2022

AMENDMENT REGULATIONS GOVERNING ASPECTS OF THE PROCEDURES OF THE COMPLAINTS AND COMPLIANCE COMMITTEE OF THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA, 2022

The Independent Communications Authority of South Africa ("**ICASA**" or "**the Authority**") hereby amends the Regulations Governing Aspects of the Procedures of the Complaints and Compliance Committee of the Independent Communications Authority of South Africa, 2010 in accordance with the provisions of section 4 of the Electronic Communications Act 36 of 2005 ("ECA") read with section 4 (3)(j) and 17C (5) of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000) ("**ICASA Act**"), to the extent reflected in the Schedule.

A copy of the Regulations will be made available on the Authority's website at https://www.icasa.org.za/.

DR. KEABETSWE MODIMOENG
CHAIRPERSON
DATE: 23/03/2022

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SCHEDULE

1. DEFINITIONS

In these regulations "the Regulations" means the Regulations published by Government Notice No. R. 886 in Government Gazette No. 33609 of 6 October 2010.

2. Amendment of the "Purpose of the Regulations" Provision of the Regulations

The purpose of the Regulations is hereby amended by the deletion of paragraph (c).

3. Amendment of regulation 1 of the Regulations

Regulation 1 of the Regulations is hereby amended –

(a) by the substitution of the definition "Complainant" for the following definition:

""Complainant" means any person who has lodged a complaint with or referred a dispute to the Authority or the CCC;"

(b) by the insertion after the definition of "CCC" of the following definition:

""**CCC Assessor"** means an employee of the Authority, employed in the office of the CCC, whose job profile includes the assessment and investigation of all broadcasting, electronic communications and postal complaints and disputes on behalf of the CCC";

(c) by substitution of "Day" by the following definition: "**'Days'** means working days unless otherwise specified.";

(d) by the substitution of the definition "Deliver" for the following definition:

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""**Deliver"** means to serve a document on all parties to the complaint by hand or electronically and then file such document, together with proof of service on all parties, with the CCC.";

(e) by the insertion after the definition of "licensee" of the following definition:

""**quorum"** means the minimum number of CCC members at a hearing, pre-hearing or meeting which consists of the Chairperson, Councillor and two (2) CCC members who must be in attendance.";

(f) by the substitution of the definition "vexatious complaint or dispute" for the following definition:

""**vexatious complaint or dispute"** is a complaint or dispute filed by a person who has persistently and/or without any reasonable ground filed a complaint or dispute with the CCC or the Authority against a licensee, whether against the same licensee or against different licensees.".

4. Substitution of regulation 2 of the Regulations

The following regulation is hereby substituted for regulation 2 of the Regulations:

"2. FILING OF A COMPLAINT/ REFERRAL OF A DISPUTE

(1) A complaint is brought to the attention of the CCC by lodging it with the Co-ordinator and may be supported by an affidavit and supporting documents: provided that the Co-ordinator may require more details from the Complainant by way of an affidavit or otherwise before he or she refers the matter to the Chairperson.

(2) A dispute is brought to the attention of the CCC by referring it to the Co-ordinator and it shall be filed in the form of an affidavit. This procedure also applies to the answer and, if applicable, to the reply by the Complainant."

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5. Amendment of regulation 3 of the Regulations

Regulation 3 of the Regulations is hereby amended-

(a) by the deletion of the word "brief" in sub-regulation (3).

(b) by the substitution for sub-regulation (4) of the following sub-regulation:

"In so far as the exercise of its discretion in terms of this regulation is concerned, the Co-ordinator provides the CCC with his or her advice as well as the result of the investigation by the CCC Assessor."

6. Substitution of regulation 4 of the Regulations

The following regulation is hereby substituted for regulation 4 of the Regulations:

"4. DOCUMENTS IN COMPLAINT OR DISPUTE

Documents in Complaint

(1) The Co-ordinator must provide the licensee with a copy of the complaint within five (5) days of receipt of the complaint by the CCC and must notify the licensee in writing that it has fifteen (15) days within which to deliver a response thereto.

(2) If the Complainant wishes to deliver a reply, the Complainant must do so within ten (10) days of receipt of the response.

Documents in Dispute

(3) The Co-ordinator must provide the licensee or the person whom a dispute is declared with a copy of the affidavit within five (5) days of receipt of the dispute by the CCC and must notify the licensee or that party in writing that it has fifteen (15) days within which to deliver an answering affidavit thereto.

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(4) If the Complainant wishes to deliver a replying affidavit, the Complainant must do so within ten (10) days of receipt of the answering affidavit."

7. Insertion of regulation 4A in the Regulations

The following regulation is hereby inserted in the Regulations, after regulation 4:

"4A Close of Pleadings, Withdrawals, Settlements and Postponements

(1) Once the documents are filed by both parties in terms of regulation 4 and/or any further documents where applicable, and the Chairperson directs that a hearing be held, and the Co-ordinator notifies the parties of the hearing date in terms of regulation 5 (1), the pleadings are deemed to have closed unless otherwise stated by the CCC.

(2) A Complainant may withdraw a complaint or dispute by delivering a notice advising the other party and the CCC of his or her intention to withdraw a complaint or dispute.

(3) If the parties reach a settlement agreement before close of pleadings, such settlement agreement must be filed with the CCC within five (5) days of reaching settlement unless otherwise stated by the CCC.

(4) The settlement agreement, in terms of sub-regulation (3), must address the following issues:
(a) The allegations of non-compliance;
(b) Jurisdiction;
(c) Admissions to the allegations of contravention;
(d) Mitigating factors and steps taken by licensee to remedy the complaint and ensure that similar complaints will not be lodged in the future;
(e) Proof of authorisation of legal representatives to enter into settlement agreements on behalf of the parties; and
(f) Any other relevant considerations.

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(5) Where a party has valid reasons for seeking to postpone a hearing or pre-hearing, such party must make an application for postponement with the CCC as soon as reasonably possible but not later than five (5) days before the hearing or pre-hearing. The CCC has the discretion to grant an application for postponement."

8. Amendment of regulation 5 of the Regulations

Regulation 5 of the Regulations is hereby amended by the substitution for sub-regulation (1) of the following sub-regulation:

"(1) The Co-ordinator must give the parties to the complaint or the dispute at least twenty (20) days' notice in writing of the date, time and venue of the hearing. If the Chairperson decides that the matter is urgent, he or she may set a shorter time period."

9. Insertion of regulation 5A in the Regulations

The following regulation is hereby inserted in the Regulations, after regulation 5:

"5A. CCC PROCEDURE AT HEARINGS AND PRE-HEARINGS

Convener of Hearings and Pre-Hearings

(1) The hearings and pre-hearings of the CCC must be convened by the Chairperson of the CCC, who will further determine the procedure at the hearing and/or pre-hearing.

Application to Call Witnesses, Expert Witnesses and an Interpreter

(2) If either party wishes to call witnesses and/or expert witnesses, such party must notify the Co-ordinator by providing a list of names of witnesses, reasons for calling the intended witness/expert witness, the nature and relevance of the witness's testimony and indicate whether witness statements and/or oral testimony will be tendered, within ten (10) days upon receipt of the Co-ordinator's notice in terms of regulation 5 (1). In

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the case of an expert witness, the party must provide the details and nature of the expert witness's experience, skills and expertise.

(3) Where a party requires the services of an interpreter at a hearing or pre-hearing, he or she must make an application with the Co-ordinator within ten (10) days upon receipt of the Co-ordinator's notice in terms of regulation 5 (1).

Legal Representation

(4) Parties are permitted to be assisted by a legal representative or other adviser at a hearing or pre-hearing. If a party wishes to appoint a legal representative, written notice must be given to the other party and CCC within ten (10) days upon receipt of the Co-ordinator's notice in terms of regulation 5 (1).

General CCC Decorum at Hearings and Pre-Hearings

(5) Parties and witnesses summoned to appear before the CCC at a hearing or pre-hearing are expected to attend timeously and adhere to the procedures determined by the Chairperson.

(6) During the hearing or pre-hearing, the parties and witnesses must adhere to the procedures at all times."

10. Amendment of regulation 6 of the Regulations

Regulation 6 of the Regulations is hereby amended –

(a) by the substitution of the heading of regulation 6 of the following heading:

"**URGENT COMPLAINTS OR DISPUTES**";

(b) by the substitution for sub-regulation (1) of the following sub-regulation:

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"(1) A Complainant may request that the complaint or dispute be dealt with on an urgent basis and must file an application motivating the reasons for urgency."

11. Amendment of regulation 7 of the Regulations

Regulation 7 of the Regulations is hereby amended –

(a) by the substitution of the heading of regulation 7 of the following heading:

"**PLACE OF HEARINGS AND QUORUM**";

(b) by the substitution for sub-regulation (1) of the following sub-regulation:

"(1) The seat of the CCC is in Pretoria. The Chairperson of the CCC may, however, on good cause, decide to hold a hearing in the provinces and/or at any other place in the Republic of South Africa.";

(c) by the insertion of sub-regulation (1A) after sub-regulation (1):

"(1A) Either party who wishes for the hearing or pre-hearing to be held via teleconference or virtual hearing, such party must make an application with justifiable reasons with the Co-ordinator, within five (5) days upon receipt of the Co-ordinator's notice in terms of regulation 5 (1), for approval by the Chairperson of the CCC. The Chairperson may take all relevant matters into account, including but not limited to the following:

(a) Access to and understanding of technology, internet and access to an appropriate environment to enable the parties to partake effectively in a virtual hearing, including having access to advice.
(b) The public interest in the expeditious disposal of complaints and disputes.
(c) In instances of *force majeure* and human induced events that may restrict the physical access to the place of the hearing.
(d) Rules, laws and policies that may restrict the physical gathering to the place of the hearing.

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(e) Any prejudice to either party or witness to the complaint or dispute."

(d) by the substitution for sub-regulation (2) of the following sub-regulation:

"(2) A quorum is required to convene a hearing, pre-hearing or meeting of the CCC."

(e) by the deletion of sub-regulation (3).

(f) by the deletion of sub-regulation (4).

(g) by the deletion of sub-regulation (5).

12. Insertion of regulation 8A in the Regulations

The following regulation is hereby inserted in the Regulations, after regulation 8:

"**8A COSTS**

The CCC does not have the jurisdiction to make an order regarding costs and/or delictual claims for damages."

13. Amendment of the Schedule of the Regulations

The Schedule of the Regulations is hereby amended –

(a) by the substitution in paragraph (a) for the word "take" of the word "address".

(b) by the substitution of sub-paragraphs (ii) and (vi) of paragraph (d) by the following sub-paragraphs:

"(ii) handling additional documents that have not been filed"

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"(vi) any other relevant matters; and".

(c) by the deletion of the words "attempt to" in paragraph (e).

14. Short Title and Commencement

These regulations are called the Amendment Regulations Governing Aspects of the Procedures of the Complaints and Compliance Committee of the Independent Communications Authority of South Africa, 2022 and shall come into operation upon publication in the Government Gazette.

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INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

REASONS DOCUMENT

A. ACKNOWLEDGEMENTS

The Authority thanks the following stakeholders who made written submissions in relation to the Draft Regulations published on 26 November 2021:

1. Complaints and Compliance Committee **(CCC)**;
2. ICASA Consumer Advisory Panel **(CAP)**;
3. Internet Service Providers' Association **(ISPA)**;
4. MTN (Pty) Ltd **(MTN)**;
5. Primedia (Pty) Ltd **(Primedia)**;
6. South African Communications Forum **(SACF)**; and
7. Vodacom (Pty) Ltd **(Vodacom)**.

1. INTRODUCTION

1.1. The Independent Communications Authority of South Africa ("the Authority" or "ICASA") acts in accordance with the empowering framework established by the Constitution of the Republic of South Africa[1], the Broadcasting Act[2], the Independent Communications

[1] 1996.
[2] Act 4 of 1999.

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Authority of South Africa Act ("**the ICASA Act**")[3], the Electronic Communications Act ("**ECA**")[4] and Postal Services Act[5].

1.2 The Authority is empowered in terms of section 4 (1) of the ECA *"to make Regulations with regard to any matter which in terms of the ECA or the related legislation must or may be prescribed, governed or determined by regulation".*

Section 4 of the ECA is read together with sections 4 (3)(j) and 17C (5) of the ICASA Act", to make regulations that, *inter alia,* prescribe procedures for the handling of urgent complaints and non-compliance matters.

Section 4 (3)(j) of the ICASA Act provides that:

"…the Authority 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".

1.3. Pursuant to the above framework, the Authority promulgated the Regulations Governing Aspects of the Procedures of the Complaints and Compliance Committee of the Independent Communications Authority of South Africa, 2010 **("the CCC Regulations")**, published on 6 October 2010.

1.4. On 26 November 2021, the Authority published the Draft Amendment Regulations Governing Aspects of the Procedures of the Complaints and Compliance Committee of the Independent Communications Authority of South Africa **("Draft Regulations")**, in Government Gazette No. 45553 (General Notice No. 689 of 2021). Interested parties were invited to submit written representations to the Authority

[3] Act 13 of 2000.
[4] Act 36 of 2005.
[5] Act 124 of 1998.

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within thirty (30) working days subsequent to the publication thereof. On 3 December 2021, the Authority informed the Minister of Communications and Digital Technologies of the published draft Regulations and invited the Ministry to make comments.

1.5. The initial closing date for written submissions was 10 January 2022. However, on 3 December 2021, the Authority received a request for extension from one of the stakeholders. On 15 December 2021, the Authority granted an extension of the closing date for public submissions on the Draft Regulations to 20 January 2022. By the closing date, the Authority received seven (7) written submissions from stakeholders. Five (5) stakeholders indicated their expression of interest in making oral representations at the public hearings. All written representations received from the public hearings, during the above process are available on the Authority's website and can be accessed using the following hyperlink: https://www.icasa.org.za/legislation-and-regulations/regulations-underway/regulations-governing-aspects-of-the-procedures-of-the-ccc

1.6. On 4 February 2022, the Authority published a notice and schedule in Government Gazette No. 45866 (General Notice No. 803 of 2022) in respect to the public hearings to be held on 14 February 2022.

1.7. The Authority conducted public hearings on 14 February 2022. All interested parties except the CCC and CAP, who submitted written representations on the Draft Regulations, participated in the public hearings. At the public hearings, two (2) stakeholders indicated that supplementary written submissions to address various issues arising from their respective presentations would be filed with the Authority on 21 February 2022.

1.8. The Authority has considered and analysed the written submissions, oral representations and additional information provided by the stakeholders and hereby publishes final Regulations.

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2. BACKGROUND

2.1. The CCC Regulations are aimed at prescribing the procedures to be followed when the CCC executes its mandate in accordance with section 17B of the ICASA Act which is to investigate, to hear if appropriate and make findings 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.

2.2. The CCC Amendment Regulations aim to prescribe clear procedures which are current and practical in their application. Such clear guidelines will facilitate and aid the CCC in executing its legislative mandate as a creature of statute.

2.3. This Reasons Document highlights the submissions received from various stakeholders and sets out the relevant considerations and reasons which informed the Authority's decision to publish the final Regulations. This Reasons Document needs to be read in conjunction with the CCC Regulations and the empowering legislation canvassed in paragraph 1.1. above. Where a clause or part thereof is not amended, or the amendment is merely to effect editorial changes, an explanation is not provided.

3. REASONS FOR AMENDMENT REGULATIONS GOVERNING ASPECTS OF THE PROCEDURES OF THE COMPLAINTS AND COMPLIANCE COMMITTEE OF THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA, 2022

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3.1. Purpose of the Regulations

3.1.1. Submissions Received

3.1.1.1. SACF affirmed that the purpose of the CCC is set out in Section 17 of the ICASA Act and the CCC Regulations and that it has not been amended in the Draft Regulations.

3.1.2. The Authority's Decision

3.1.2.1. The Authority deletes paragraph (c) in the purpose of the CCC regulations which provides as follows: "*To provide for an ad hoc appointment by Council of the Chairperson where he or she is unable to sit in a hearing or a meeting and appointment of an ad hoc member where it is impossible to constitute a quorum".* The reasons are canvassed below in the Authority's decision regarding sub-regulations 7 (3) and 7 (4).

3.2. Regulation 1:

3.2.1. Submissions Received

3.2.1.1. CAP agreed with the rational for the changes to the definitions and suggested the inclusion of the definitions "Interested Party" and "Respondent" to replace the definition of a "licensee" to ensure that there is consistent and clear usage of the wording of the regulations.

3.2.1.2. ISPA made the following submissions that the definition of:

1. "Complainant" "is likely to result in continued confusion" and proposed a distinction between a "Complainant" and "licensee".
2. "CCC Assessor" should refer to "electronic communications" instead of "telecommunications."

3.2.1.3. MTN proposed that the definition of "Complainant" be aligned to make specific reference to section 17C (1)(a) of the ICASA Act. MTN

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provided guidance regarding the definition of "quorum" in that the general definition relating to the "minimum number of persons who must be present at a meeting or hearing, or 51% of the membership who must be in attendance" should be considered. MTN suggested the deletion of the word "majority" in the CCC's definition of "quorum".

3.2.1.4. **Primedia** raised concerns regarding the definition of "vexatious complaint or dispute" stating that: "the draft proposed does not make sense…the use of the word "or" is problematic as it entitles the CCC to declare a complaint made on reasonable grounds by a persistent complainer to be vexatious." Primedia proposed the following definition: *"vexatious complaint or dispute" is a complaint or dispute filed with the CCC or the Authority which has no reasonable basis."*

3.2.1.5. **SACF** and **ISPA** highlighted the fact that "Days" is already defined in the ECA and ICASA Act and that it may not be necessary to repeat the definition of "Days" in the Amendment Regulations.

3.2.1.6. **Vodacom** supports the amendment of the definitions and made the following suggestions:

1. The definition of "Deliver" should also include "the filing of a document with the CCC to take place by hand or electronically".
2. The definition of "vexatious complaint or dispute" should be extended to complaints that have already been determined by the CCC or the Authority.

3.2.2. The Authority's Decision

3.2.2.1. The Authority's primary rationale for amending the definition of "Complainant" was to remove the reference to "an inspector appointed in terms of section 17F of the Act, Council, and any committee established under the Act". The Authority is of the view that the definition of a "Complainant" is all encompassing to ensure

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that the person who initiated a complaint or dispute is easily identified as a "Complainant". The Regulations must be user-friendly to all members of the public and any lay person who may not have access to a legal practitioner due to financial constraints. It is not the intention of the Authority to define fundamental parties to a complaint in terms of a specific section of the empowering legislation such as section 17C (1)(a) of the ICASA Act. The Authority is cognisant of the varied levels of interpretation by stakeholders of section 17B and section 17C of the ICASA Act and the need for legislative amendment. Limiting the definition of a "Complainant" to section 17C (1)(a) of the ICASA Act, where complaints regarding non-compliance with the licence terms and conditions, the ICASA Act or the underlying statutes are lodged with the **"Authority"** is not plausible. For example, the Authority can be a Complainant in terms of an election matter, pursuant to the election monitoring process to lodge a complaint against a licensee who contravened the Election Regulations. On the other hand, a radio listener or television viewer from the public can directly lodge a complaint in terms of section 17B of the ICASA Act and such a person is still considered a Complainant. In the case of a dispute between two licensees arising from the ECA, a person whether it is the Authority or a licensee, must be identified as a Complainant.

3.2.2.2. The Authority is of the view that the inclusion of the definition of "Days" cures the defect that previously existed in the CCC Regulations, where "Day" was defined as "calendar days" and not "working days". The Authority wishes to align the definition of days with section 1 of the ICASA Act and ECA. Many questions are posed to the CCC regarding the calculation of "days" in the context of the regulations. Therefore, the Authority deems it prudent to include the definition of "Days" for ease of reference by the reader and a lay person.

3.2.2.3. The motivation for the Authority amending the definition of "Deliver" was to ensure business continuity where it is not always possible to hand deliver documents. Thus, the inclusion of the option of

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delivery of documents "by hand or electronically". This mechanism will allow a person to file a complaint with the CCC, copying the other party in an electronic transmission e.g., by email. Thus, the amendment of "deliver" is adequate to encompass both methods "by hand or electronically."

3.2.2.4. The Authority is of the view that the CCC "quorum" has distinctive and specific attendees that form a quorum i.e., the Chairperson appointed in term of section 17A of the ICASA Act, an ICASA Councillor and two (2) CCC members are the "minimum" members who are required to be in attendance. Whereas, in companies and corporate spheres, the fifty-one percent (51%) requirement of membership forms a quorum, this is not true of the CCC quorum. For example, where four (4) members attend a hearing without the Chairperson and Councillor, the CCC would not be quorate.

3.2.2.5. The Authority's stance regarding the definition of "vexatious complaint and dispute" is to merely effect an editorial change in the context of the definition which is practical in its application by the CCC. It is not the intention of the Authority to paraphrase or expand on the definition of "vexatious complaint or dispute". With the inclusion of "or", it clarifies the position that a vexatious complaint need not be persistent to qualify as a vexatious complaint by the CCC. A vexatious complaint or dispute can either be a complaint that is persistently filed and/or without any reasonable grounds. The CCC retains the discretion in terms of regulation 6 of the CCC Regulations to determine whether a complaint or dispute is vexatious and reject such a complaint by providing the Complainant with reasons for the rejection.

The Authority cannot define a "vexatious complaint or dispute" to include "complaints or disputes that has already been considered and finalised by the CCC or the Authority." The Authority cannot impinge on the *audi alteram partem* rule: let the other side be heard. A complaint can be finalised by the Authority and approve the CCC's recommendation to fine the licensee or order the licensee to desist from not complying with their licence conditions. If the

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licensee fails to abide by the Authority's order, the CCA for instance can refer the non-compliance with the order to the CCC. The CCC can then make a recommendation to the Authority in terms of section 17E (2)(d) of the ICASA Act regarding repeat material violations.

3.2.2.6. The Authority has decided to amend the reference to "Interested person" in sub-regulation 7 (1A) to read "Either party". The ECA uses the term "party." However, the definition of "licensee" must be retained as is. The Authority cannot include "respondent" instead of licensee as the term "licensee" is consistently used in the ICASA Act and the ECA.

3.3. Regulation 2:

3.3.1. Submissions Received

3.3.1.1. ISPA is of the view that "all formal documents forming part of the record of a complaint or dispute should be in affidavit form". The reasons ISPA posits are that affidavits are "a normal part of commercial engagement in South Africa" and that affidavits "reduces the probability of receiving frivolous, vexatious and false complaints".

3.3.1.2. MTN postulates that since sub-regulation 2 (2) specifies that a complaint must be filed in the form of an affidavit, sub-regulation 2 (1) should have the same requirement that complaints must be supported by an affidavit.

3.3.1.3. Primedia suggested that sub-regulation 2 (1) and 2 (2) are "internally incoherent and contradictory". For Primedia, regulation 2 (1) made it clear that it is not necessary for a complaint to be lodged in the form of an affidavit. Whereas sub-regulation 2 (2) made it a peremptory requirement for disputes to be filed in the form of an affidavit.

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3.3.2. The Authority's Decision

3.3.2.1. The Authority's intention is to create a clear separation between the *processes* of "filing of complaint" and "referral of dispute". Given the distinct nature of a complaint and a dispute, the delineation in the Regulations must be apparent to a layman. The CCC Regulations clearly define a complaint as "any complaint alleging non-compliance by a licensee with the terms of conditions of its licence, the ICASA Act or the underlying statutes." Whereas a dispute is defined as "any dispute contemplated in section 25 (8), 37 (4)(c), 40, 43 (5)(c) or 46 (1) of the ECA". From the ordinary interpretation of the aforementioned definitions, a complaint is not interchangeable with a dispute neither are the processes.

The Authority intentionally requires in sub-regulation 2 (1) that a complaint is lodged with the Co-ordinator and **may** be supported by an affidavit and supporting documents. It is not a requirement for complaints to be in the form of an affidavit unless the Co-ordinator exercises such a discretion depending on the merits of the case. The imposition of complaints in the form of an affidavit would be an unreasonable barrier to consumers and excludes indigent members of the public who are not legal practitioners. Furthermore, onerous procedures would discourage and deter members of the public to complain. Not all complainants have access to lawyers, money for transport to go to police stations, banks, or Commissioners of Oaths and even access to internet services.

Sub-regulation 2 (1) is carefully crafted to ensure that the Co-ordinator vets the complaints received. It is a standard operating practice for the office of the CCC to assess the matter and after analysis request further information from the Complainant that may be by way of affidavit before a matter is referred to the Chairperson. This mechanism ensures that complaints that are vexatious or frivolous are rejected by the CCC in terms of Regulation 3. Sub-regulation 2 (1) permits any person including a lay person or someone who may be indigent and not in a position to pay legal

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fees, to lodge a complaint directly with the CCC without the requirement of an affidavit. For example, any member of the public such as a radio listener, television viewer or cell phone end-user can lodge a complaint with the CCC Co-ordinator and narrate his/her facts of their complaint. The Co-ordinator may request the Complainant to file an affidavit where the merit of the complaint is not substantiated by evidence and is hearsay for instance. The office of the CCC always provides the necessary guidance and information where the Co-ordinator requires more details from the Complainant by way of affidavit. The Authority requires that all disputes be referred in the form of an affidavit.

The Authority is committed to regulating in the public interest. The CCC is quasi-judicial administrative tribunal with inquisitorial powers and not a court of law. The purpose of the Regulations is to regularise and simplify the procedures to be followed by the CCC in the execution of its legislative mandate. The Regulations have to be in accordance with the principles of natural justice including the doctrine of *audi alteram partem* rule. Each member of the public must be given a fair and proportionate opportunity to voice their concerns.

3.4. Regulation 3:

3.4.1. Submissions Received

3.4.1.1. **ISPA** proposed that the reference to "insufficient attempts were made at settling the complaint" as a ground for the rejection of a complaint or dispute in sub-regulation 3 (2) be deleted. ISPA suggested that there is no guidance on the constituency of "insufficient attempts" and that parties may use this provision as a delaying tactic.

3.4.1.2. SACF echoed ISPA's sentiments and proposed that the prescription of the elements that constitute sufficient grounds to settle be set out in the Regulations before being referred to the CCC.

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3.4.2. The Authority's Decision

3.4.2.1. The Authority's interpretation of regulation 3 regarding the powers of the CCC to reject a complaint or dispute is clearly set out sequentially in sub-regulations 3 (1) to 3 (4) of the CCC Regulations. Sub-regulation 3 (2) grants the CCC the discretion to reject a complaint that is "vexatious, frivolous or insufficient attempts were made at settling the complaint". Sub-regulation 3 (3) is drafted to ensure that whilst a complaint or dispute may be rejected by the CCC, the CCC exercises this discretion fairly and reasonably in that the CCC **must** "provide brief reasons of rejection". The Authority respects the CCC's independence and discretion to exercise the power to reject complaints and disputes given the facts and merits of each case. The CCC will as in practice, provide reasons to the Complainant for rejection. Furthermore, sub-regulation 3 (4) is amended to ensure that "the Co-ordinator provides the CCC with his or her advice as well as the result of the investigation by the CCC Assessor." The role of the CCC Assessor must be highlighted in the context of regulation 3. The CCC Assessor undertakes a critical analysis, assessment and investigation of the complaint and dispute. Only after such assessment can the recommendation to reject a complaint or dispute be referred to the CCC, to make a fair an informed decision with justifiable reasons.

Given the vast variety, nature and scope of complaints and disputes in the broadcasting, electronic communications, and postal spheres, it would not be practical for the CCC to prescribe a checklist of elements for rejection of a complaint or dispute, whether the matter is vexatious, frivolous, or insufficient attempts were made at settling the complaint. This power lies solely in the CCC's discretion who provides reasons for rejection whilst taking such an administrative action.

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3.5. Regulation 4

3.5.1. Submissions Received

3.5.1.1. **ISPA and MTN** submitted that documents in a complaint or dispute should be in affidavit form.

3.5.1.2. **Primedia** was of the opinion that "the proposed amendments to section 4 of the CCC are retrogressive as they appear to distinguish between a complaint and a dispute. Primedia further postulates that "Sections 17B, 17C (1)(a), 17C (1)(b)(ii) make explicit the CCC's authority to hear complaints against any person who does not comply with the ICASA Act and the underlying statutes and not only a licensee." Primedia recognised that regulation 4 is "confusing" and proposed a paraphrased version of regulation 4, culminating the procedure of documents in a complaint or dispute.

3.5.2. The Authority's Decision

3.5.2.1. The Authority is of the view that a comprehensive distinction between "documents in compliant" and "documents in dispute" is indispensable. The rationale for the above separation is for the same reasons solicited for regulation 2. The Authority does not require that a complaint be filed in affidavit form unless the Co-ordinator requires more details from the Complainant by way of affidavit.

3.5.2.2. In the recent case between *Primedia and ICASA Case Number 420/2021* – The CCC held that section 17E (2) of the ICASA Act specifically identifies individuals or entities against whom orders may be recommended by the CCC i.e., against licensees only (Para 23 - 24).

The following excerpt from the judgment is of relevance:

"[24] As can be seen the whole of section (2) is dedicated to what orders can be recommended in respect of licensees only. The fact that nothing is said about "any other person" is not an oversight. The reason why no

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reference is made to "any other person" in this section is to be found in section 17C (1) (b) (iii) which sets out the manner in which the Authority may deal with complaints concerning a person who is not a licensee.
[25] This militates against the notion in Ms Limplaw's submission that the CCC has jurisdiction to hear complaints against "any other person" including ICASA. It would make no sense for the CCC to hear a complaint against someone and not have the power to recommend an order.
[26] Casting more doubt on the contention that the CCC has jurisdiction to hear this matter is the wording of section 17C (1) (a) and (b) as well as section 17C (2) which in my view leave no doubt that the CCC has jurisdiction to hear complaints only against licensees. It is necessary to quote these sections in full."

3.6. Regulation 4A

3.6.1. Submissions Received

3.6.1.1. **CCC** submitted that it retains the discretion to consider a settlement agreement in terms of section 17E (2)(e) of the ICASA Act. The settlement agreement must address the following issues:

1. Jurisdiction;
2. Admissions to the allegations of contravention
3. Nature, extent and reasons for the non-compliance;
4. Proof of authorisation of legal representatives to enter into settlement agreements on behalf of the parties; and
5. Mitigating factors – steps taken by the licensee.

The issue of sanction lies solely in the purview of the CCC to decide on and make a recommendation to the Authority in terms of section 17E (2) of the ICASA Act.

The CCC submits that once a complaint in respect of non-compliance is received by the Authority or referred to the CCC, the withdrawal of the complaint does not cure the alleged non-compliance.

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3.6.1.2. **ISPA** firstly proposed that the heading should read "Close of Document Exchange" as opposed to "Close of Pleadings". ISPA further posited that "there should not be a discretion for further documents to be exchanged. The documents to be exchanged are those as set out in regulation 4 and no basis is laid out for an exercise of discretion by the CCC regarding additional documents."

ISPA referred the Authority to section 40 (2) and 46 (1) of the ECA regarding disputes which state that a dispute raised may be withdrawn in writing "at any time". ISPA suggested the following amendments to sub-regulations 4A (2) – (3):
"4A (2) A Complainant may withdraw a complaint or dispute at any time prior to the hearing by delivering a notice advising the other party and the CCC of his or her intention to withdraw a complaint or dispute."

4A (3) If the parties reach a settlement agreement before the commencement of the hearing of the matter, they shall immediately inform the CCC in writing of such settlement and provide a copy of the settlement agreement."

3.6.1.3. **MTN** is of the view that a settlement agreement is concluded outside the CCC process and that the CCC should only be informed that the parties have settled the matter. "The Authority does not state what it means to consider a settlement agreement. MTN is not aware if there is any reference in the ICASA Act for the CCC to consider a settlement agreement." MTN suggested the following amendment to sub-regulation 4A (3):
"If the parties reach a settlement agreement before close of pleadings, the CCC must be informed within one (1) day of the conclusion of the settlement agreement."

3.6.1.4. **SACF** is of the view that where parties to a complaint of non-compliance decide to withdraw, the Authority's jurisdiction over the matter will cease. Therefore, SACF advanced that a settlement

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agreement falls outside the jurisdiction of the CCC, as the complaint would no longer exist.

3.6.1.5. **Vodacom** submitted that pleadings should be deemed to be closed after the exchange of documents i.e., before the Chairperson directs that a hearing should be held and the parties are notified of the hearing date. In relation to sub-regulation 4A (2), Vodacom recommended that the Complainant be allowed to withdraw a compliant prior to the complaint being heard. Vodacom recommended that a timeframe be prescribed in sub-regulation 4A (3) which the CCC will revert to parties after it has considered a settlement agreement. Further, Vodacom recommended that a timeframe be prescribed in sub-regulation 4A (4) in which the CCC will revert to any party seeking a postponement after making an application with the CCC.

3.6.2. The Authority's Decision

3.6.2.1. The Authority is satisfied with the reference of "Close of Pleadings" as this common legal concept is specifically explained in sub-regulation 4A (1) for ease of reference by the reader. The CCC is an administrative tribunal that is empowered by section 17B to investigate, and hear if appropriate, and make a finding on all matters referred to it by the Authority, complaints received by it and allegations of non-compliance with the ICASA Act or the underlying statutes received by it. Given the CCC's inquisitorial nature, nothing precludes the CCC from requesting additional information in the course and scope of fulfilling its legislative mandate, be it for clarity, correction, further information or evidence. For example, in a community broadcasting radio matter, the CCC can request an amended Constitution, a broadcast or Annual Financial Statements. If documents referred to in a licensee's response is named but not attached, the CCC can request same.

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3.6.2.2. The Authority is of the view that when a party withdraws a complaint or dispute, such party must deliver a notice in writing to the other party and the CCC.

3.6.2.3. The Authority has amended sub-regulation 4A (2) by removing the word "consideration". The Authority only requires that settlement agreements be filed with the CCC and that settlement agreements must address the requirements as set out in sub-regulation 4A (2). This is to ensure that non-compliance is adequately addressed. The CCC is empowered in terms of section 17E (2) (e) to apply its mind to the content of settlement agreements before making a recommendation to the Authority to "direct the licensee to comply with any settlement." For example, in a settlement agreement reached regarding a broadcasting complaint lodged by the Licensing and Compliance Division of the Authority ("L&C") against a community radio station, the CCC must ensure that the non-compliance raised by L&C is addressed in the settlement agreement.

3.7. Regulation 5:

3.7.1. Submissions Received

3.7.1.1. **ISPA** argued that an amendment regarding proof of service should be included as ISPA is of the view that being able to verify service of documents is a critical element of a quasi-judicial process. Further, that sub-regulation 5 (1) should explicitly reference regulation 6 which deals with urgent complaints or disputes.

3.7.1.2. **Vodacom** suggested that sub-regulation 5 (1) be amended to include "provided that the shorter time period is reasonable in the circumstances." Vodacom further recommended that a provision be included for a party to apply for a new hearing date, "should the circumstances warrant same".

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3.7.2. The Authority's Decision

3.7.2.1. The Authority is cognisant of the office of the CCC's internal processes and procedures that regulate proof of service of notices and documents and does not deem it necessary to include in the Regulations.

The Authority is of the view that the amendment to sub-regulation 5 (1) was to effect editorial changes. Sub-regulation 5 (1) falls under the heading "Hearings and Pre-hearings" and the substance of the sub-regulation is clear in the context of the heading. The Authority need not expand on the issue of urgency or cross reference regulation 6. Regulation 6 sequentially follows and fully canvasses the Chairperson's discretion to determine the procedure and time periods under the heading "Urgent Matters".

The Authority is of the view that sub-regulation 5 (1) provides the parties with 20 days' notice of the hearing. This is ample time for the parties and their legal representatives to determine their attendance at the hearing. Furthermore, with the amendment under sub-regulation 4A (4), parties must make an application for postponement with the CCC, setting out valid reasons for postponement. These regulations should not attempt to codify internal administrative processes that are already in place by the office of the CCC to co-ordinate the hearing dates on the CCC's roll, in direct consultation with the CCC Members.

3.8. Regulation 5A:

3.8.1. Submissions Received

3.8.1.1. **CAP** suggested that the Authority uses the phrase "language interpreter" and stipulate the languages in which the hearings for the CCC are conducted. The Authority should use its own Language Policy developed in terms of the Use of Official Languages Act,

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2012. Sign language is included and that accredited sign language interpreters must be procured.

3.8.1.2. **ISPA** submitted that that witness notices be lodged ten (10) days after the close of exchange of documents and before the date of hearing to enable the assessment of the hearing's duration.

3.8.1.3. **MTN** argued that CCC Chairperson does not have the right to approve the witnesses tendered by a party and suggests the following amendment to sub-regulation 5A (2):
"If either party wishes to call witnesses and/or expert witnesses, such party must **inform** the Co-ordinator by **providing a list of names of witnesses,** reasons for calling the intended witness/expert witness, the nature and relevance of the witness's testimony and indicate whether witness statements and/or oral testimony will be tendered, within ten (10) days upon receipt of the Co-ordinator's notice in terms of regulation 5 (1). In the case of an expert witness, the party must provide the details and nature of the expert witness's experience, skills and expertise."

MTN further proposed the insertion of a new sub-regulation 5A (2)(a):
"The Co-ordinator must issue a notice to witnesses no less than seven (7) days before the hearing, informing them of the date, time and place of the hearing and that the witness is required to attend the hearing to present evidence on behalf of a party to the dispute."

3.8.1.4. **SACF** stated that the rationale for an application for an interpreter does not equally apply to parties calling a witness or expert. SACF suggested that parties submit a list of witnesses and experts that will form part of the proceedings.

3.8.1.5. **Vodacom** recommended that the procedures at the hearing and pre-hearing be communicated to the parties in writing beforehand. Vodacom does not agree with the proposal that a party has to

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obtain approval of the Chairperson before calling witnesses or expert witnesses. Vodacom offers a paraphrased sub-regulation 5A (2) by stating that "a party must **notify** the CCC and the opposing party…by delivering a **summary** of the nature and relevance of the witness…". Vodacom further proposed a provision for the opposing party to be afforded five (5) days to deliver the same notice indicating their intention to call a witness or opposing witness.

3.8.2. The Authority's Decision

3.8.2.1. The Authority notes that the CCC uses English as a medium for conducting hearings and is satisfied that sub-regulation 5A (3) is suitable in its practical application. The application for an interpreter is dealt with on a case-by-case basis to accommodate the applicant's request to present his or her case in one of the official languages including sign language interpretation.

3.8.2.2. The Authority respects the Chairperson's powers to convene the hearing or pre-hearing, hence the insertion of sub-regulation 5A (1). The procedure is subject to change depending on the facts and merits of each case. For example, expert witnesses are not called in all cases nor are points *in limine* raised. Therefore, codifying a generic procedure or written procedure for each case is onerous and unnecessary and would impinge on the Chairperson's discretion. The sequence of the procedure can vary in complaints and disputes.

3.8.2.3. The Authority considered the stakeholders submissions and hereby amends regulation 5A (2) to require that parties must notify the Co-ordinator and provide a list of names of the witnesses. This notification and provision of a list of names of the witnesses will suffice. Every party has the right to call a witness or expert witness and there is no need for an application for witnesses to be approved by the Chairperson. The Authority notes that the CCC is not a court of law that can subpoena a witness via a notice from the Co-

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ordinator, secure the attendance of witnesses or even provide witness protection. However, nothing in the regulations precludes a party to freely call upon a witness, expert witness or other adviser as envisaged in section 17C (3) of the ICASA Act.

3.9. Regulation 6:

3.9.1. Submissions Received

3.9.1.1. **ISPA** submitted that sub-regulation 6 (2) should make it compulsory to deal with an urgency application on affidavit.

3.9.1.2. **SACF** suggested that the Authority include criteria that would deem a matter as urgent.

3.9.1.3. **Vodacom** suggested that clear timeframes be provided for complaints or disputes that will be dealt with on an urgent basis.

3.9.2. The Authority's Decision

3.9.2.1. The Authority is satisfied that the amendment of regulation 6 (1) ensures that the reasons for urgency are canvassed in the Complainant's application for urgency. The Authority does not deem it appropriate to impose that urgency applications be made by way of affidavit. Sub-regulation 6 (2) endows the Chairperson with the discretion to require affidavits to be filed to substantiate or deny allegations of contravention. The Authority's reasons for not imposing mandatory affidavits are solicited above. It is not the intention of the Authority to encumber members of the public with intricate legal procedures that will impede on their right to justice. The Authority is of the informed view that the regulations cannot set out specific criteria and timeframes for urgent matters. Urgent matters can arise from sub-regulation 6 (3) election matters to be read with the Election rules or various other specific scenarios. The notion of urgency is subjective and therefore, it is best left to the

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Chairperson to exercise such powers. Sub-regulation 6 (4) is self-explanatory in that the Chairperson must exercise the discretion to make the determination as to whether a matter is urgent and advise the parties of the procedure and time periods to be followed. Each case is determined on its own facts and merits which makes it inconceivable for the Authority to codify and project narrow criteria and timeframes in the regulations.

3.10. Regulation 7:

3.10.1. Submissions Received

3.10.1.1. CAP suggested that teleconferencing and virtual meetings should not be treated as an exception that must be motivated for but rather to be part and parcel of the process. CAP also applauds the Authority for the inclusion of hearings in the provinces and enlists the provinces that the CCC should conduct physical hearings in.

3.10.1.2. SACF postulated that sub-regulation 7 (3) of the CCC regulations be retained to cater for instances where the Chairperson may be unavailable for protracted periods. Alternatively, SACF suggests that the process for appointing a temporary or interim Chairperson be included. SACF further submitted in their supplementary written submission that "Section 17A (1A) provides for the appointment of the CCC Chairperson by the ICASA Council. Although, 17A does not explicitly provide for a Deputy Chairperson, the ability to appoint an acting Chairperson appears to be implicit in accordance with the principles of good governance and business continuity." SACF suggested that the Authority "has the power to appoint an acting Chairperson for the CCC as it does for any other role within ICASA and its standing Committees."

3.10.1.3. Vodacom does not support the deletion of sub-regulation 7 (3) and (4) and proposes that the Authority prescribe a procedure for hearings to take place should the Chairperson become unavailable,

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should the procedures set out in sub-regulation 7 (3) and 7 (4) not be workable. Vodacom further submitted in their supplementary written submission that in their view, "the Authority has the implied power to appoint an acting chairperson for the CCC, as long as such acting chairperson meets the requirements set out in section 17A (2) of the ICASA Act. Vodacom proposed that sub-regulation 7 (3) and 7 (4) be retained. Vodacom further recommended that should the Authority disagree with their submission, "the ICASA Act should be amended to cater for the appointment of an acting chairperson of the CCC, should it become necessary."

3.10.2. The Authority's Decision

3.10.2.1. The Authority is confident that the amendment of sub-regulation 7 (1) - hearings in the provinces and insertion of sub-regulation 7 (1A) - the provision of teleconferencing and virtual hearings is adequate in its current form. The amendment will foster public inclusivity to access justice and awareness to strengthen the role of the CCC in South Africa.

3.10.2.2. The Regulations are established from the empowering legislation. The Authority cannot act *ultra vires* by crafting Regulations that are in conflict with the ICASA Act. The ICASA Act does not confer lawful powers to the Authority to appoint a deputy or alternate Chairperson. The ICASA Act triumphs sub-regulations 7 (3) and 7 (4) which are in fact *ultra vires*. Upon closer scrutiny of section 17A of the ICASA Act, the Authority is not authorised to appoint a deputy or alternate chairperson in the absence of the Chairperson. The Chairperson (singular) is appointed in terms of section 17A (2) of the ICASA Act which enlists specific pre-requisite qualifications for the Chairperson of the CCC. Section 17A (2) of the ICASA Act provides as follows:

"(2) The chairperson of the Complaints and Compliance Committee must be –

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(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

(c) A magistrate with at least 10 years' appropriate experience, whether in active service or not."

3.10.2.3. Section 17A (3) endows the power on the above appointed Chairperson to manage the work of the CCC and preside at the hearings. The ICASA Act does not provide a specific section dealing with the appointment of a deputy or alternate Chairperson as it does in section 5 (2) of the ICASA Act for Council. Section 5 (2) of the ICASA Act is explicitly clear and states as follows:

"*In the absence of the chairperson, the remaining councillors must from their number elect an acting chairperson, who, while he or she acts, may perform the functions of the chairperson".*

Section 4 (5) enlists the chairperson's functions as follows:

"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."

A CCC member cannot manage the work or preside at the hearings in the position of the legislatively appointed Chairperson. Regulations cannot amend national legislation enacted by Parliament. Therefore, the Regulations will at this juncture not seek to provide for the ad hoc appointment by the Authority of a deputy or alternate Chairperson until the ICASA Act is amended to confer such express powers upon the Authority. ICASA as a creature of statute is bound by the legislative framework. However, the Authority notes the concerns raised by stakeholders with thanks and will consider same when embarking on the legislative amendment of the ICASA Act in the future.

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