

OPINION – PROJECT DUE DILIGENCE (LEGAL)

Client: The Department of Education (“DoE”)

Project: Department of Education e-Education Initiative

Subject: Legal Due Diligence Report

1. **INTRODUCTION**

- 1.1. The purpose of this report is to conduct a legal due diligence on the option(s) considered and to respond to questions and/or legal issues, which have arisen during the course of this e-Education Initiative.
- 1.2. The six (6) pillars of the e-Education Initiative, namely, ITC infrastructure, network Connectivity, Professional Development, Curriculum and Content Development, Research Content and Human Resource Systems will be separately considered in light of the existing legislative and regulatory instruments. The main questions to be dealt with in respect of each pillar, where relevant, are as follows:-
 - 1.2.1. Which organ(s) of state is entrusted with the institutional functions referred to in each pillar?
 - 1.2.2. Which organ of state is competent in law to implement a procurement process to procure a private party to undertake the service?
 - 1.2.3. Can the institutional functions referred to in each pillar of the e-Education Initiative be performed by a private party?; and
 - 1.2.4. Can an institution procure a private party to perform the institutional function on its behalf?
- 1.3. There are additional legal questions that may be peculiar to each pillar or option considered and such questions will be considered in the relevant section of the report.

2. **ICT INFRASTRUCTURE**

2.1. **Which organ(s) of state is entrusted with the institutional functions to procure ICT Infrastructure?**

The Constitution

2.1.1. The Constitution of the Republic of South Africa Act, 108 of 1996 (“the Constitution”) defines the word *organ of state* in section 239 to mean, among other things, any department of state at the national and provincial sphere of government, exercising its power or performing its functions in terms of , *inter alia*, :-

- 2.1.1.1. the Constitution;
- 2.1.1.2. the Provincial Constitution,
- 2.1.1.3. any legislation.

2.1.2. Organs of state also include any other functionary or institution that is exercising its power or performs its functions in terms of the Constitution, provincial legislation and/ or any legislation¹.

2.1.3. The implication of the aforesaid is that the national Department of Education or provincial Department of Education together with its schools as its functionary or institution fall within the word “*organ of state*”.

2.1.4. Schedule 4 of the Constitution, which deals with functional areas of concurrent national and provincial legislative competence, states that education at all levels, excluding tertiary education, as one of the functions falling within concurrent national and provincial legislative competence.

The Schools Act, 84 of 1996(as amended) (“the Schools Act”)

¹ Sec 239 of the Constitution.

- 2.1.5. The Education Amendment Act, 31 of 2007 has amended the South African Schools Act, 84 of 1996 (“the Schools Act”) by inserting section 5A, which deals with Norms and Standard for basic infrastructure and capacity in public schools.
- 2.1.6. Section 5A of the Schools Act states that the Minister may after consultation with the Council of Education, by regulation prescribe minimum uniform norms and standards for, inter alia, :-
- 2.1.6.1. school infrastructure;
 - 2.1.6.2. the provision of learning and teaching support material.
 - 2.1.6.3. According to section 5A(2) of the Schools Act the norms and standards referred to in section 5A(1) must provides for:-
 - 2.1.6.4. in respect of school infrastructure, the availability of, among other things, –
 - 2.1.6.4.1. laboratories for science, technology;
 - 2.1.6.4.2. electronic connectivity at school, and
 - 2.1.6.4.3. perimeter security.
 - 2.1.6.5. in respect of provision of learning and teaching support material, the availability of, among other things,-
 - 2.1.6.5.1. stationary and supplies;
 - 2.1.6.5.2. teaching material and equipments;
 - 2.1.6.5.3. electronic equipments;
 - 2.1.6.5.4. school furniture; and other school equipments.

- 2.1.7. The legal implications of the aforesaid is that schools are not at liberty to procure electronic equipments that are not and to implement school connectivity that are contrary to the uniform norms and standards as prescribed by the Minister in terms of section 5A of the Schools Act as amended.
- 2.1.8. The Schools Act provides, among other things, in section 20 that the School Governing Body (“the SGB”) must:-
- 2.1.8.1. promote the best interest of the school and strive to ensure its development;
 - 2.1.8.2. support the principal, educators, and other staff of the school in the performance of their professional functions; and
 - 2.1.8.3. administer and control the school property, and the building and the grounds occupied by the school.
- 2.1.9. Section 21 of the Schools Act states among other things, that the SGB may apply to the Head of Department to be allocated with the following functions:-
- 2.1.9.1. to maintain and improve school property;
 - 2.1.9.2. to pay for services to the school; and
 - 2.1.9.3. to purchase textbook, educational material or equipment for the school.
- 2.1.10. The Schools Act states in section 12(1) that the Member of Executive Council (“ MEC”) must provide public schools for the education of the learners out of funds appropriated for that purpose by the provincial legislature.

Conclusions

2.1.11. The national Department of Education (“nDoE”) and provincial Department of Education (“pDoE”) is entrusted with the constitutional mandated to provide education to learners.

2.1.12. The MEC is entrusted with the duty to provide public schools for the education of the learners out of funds appropriated for that purpose by the provincial legislature².

2.1.13. The Minister of Education, according to section 5A of the Schools Act, is entrusted with a function to make regulations that prescribe norms and standards that relates to, among other things, technology and electronic connectivity at schools. At the time of writing this report the regulations referred to in section 5A were not available.

2.1.14. Although there is no provision in the Schools Act that specifically state that a specific organ of state or entity is entrusted with the responsibility to procure ICT infrastructure for public schools, there is nothing in the School Act or in law that prohibits such procurement by the nDoE and / or pDoE.

2.1.15. The functions of SGB listed in section 20 of the Schools Act do not states that SGB is entrusted with the function of procuring ICT Infrastructure. However, schools that are governed by SGBs that are allocated with functions listed under section 21 (1) are impliedly enabled to procure ICT Infrastructure in that SGBs:-

2.1.15.1. may purchase educational material or equipments for the schools, and

2.1.15.2. may pay for services to the schools.

2.2. Can the institutional function of providing ICT Infrastructure service be performed by a private party?

² Sec 12(1) of the Schools Act.

The Constitution

- 2.2.1. The provisions of section 217(1) of the Constitution provides, among other things, that:-

“When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contract for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.”

- 2.2.2. The aforesaid provisions do not only prescribe how an organ of state should contract for goods and services, it also implies that organs of state are competent to contract for goods and service.

The Public Finance Management Act, 1 Of 2000 (“the PFMA”)

- 2.2.3. The PFMA states in section 38(1) relation to the responsibilities of accounting officers, that an accounting officer for a department, among other things, must ensure that a department has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent competitive and costs- effective.

- 2.2.4. An accounting officer may not, according to the PFMA, commit a department to any liability for which money has not been appropriated³.

- 2.2.5. The above provisions implies that any department, including nDoE and pDoE, are competent in law to contract for goods and service to enable it to meet its constitutional and statutory mandate, provided there are no legislative impediments.

National Treasury Regulation 16 (“Treasury Regulation 16”)

³ Sec 38(2) of the PFMA.

2.2.6. The Treasury Regulation 16 had been published in terms of the PFMA. The provisions become relevant when a procurement process is to be conducted in terms of the Public Private Partnership (“PPP”).

2.2.7. Treasury Regulation 16 defines the word “*institutional function*” to mean:-

(a) *a service, task, assignment or other function that an institution is entitled or obliged to perform-*

(i) *in the public interest; or*

(ii) *on behalf of the public service generally; or*

(b) *any part or component of or any service, task, assignment, or other functions performed or to be performed **in support of such a service, task, assignment or other functions.**” (own emphasis)*

2.2.8. In a PPP procurement environment, a private party may not only perform an institutional function, it may also perform functions in support of the institutional function. The private party may only perform institutional function where there are no legal prohibitions.

State Information Technology Agency Act. 88 of 1998 (“SITA Act”)

2.2.9. The long title of the SITA Act states that this Act is to establish a company responsible for the provision of information technology services to the public administration.

2.2.10. The object of SITA as an agency is to improve service delivery to the public through the provision of information technology, information systems and related service in a maintained information systems security environment to departments.

2.2.11. Section 7(1) of the SITA Act states the mandatory services that must be rendered by SITA. The mandatory services are:-

- 2.2.11.1. The provision or maintenance of a private telecommunication network or a value added network;
 - 2.2.11.2. The provision or maintenance of transversal information system, and
 - 2.2.11.3. the provision of data-processing or associated services for transversal information systems.
- 2.2.12. Section 7(4) of the SITA Act states that a department that wishes to acquire services that are referred to in section 7(1)(a), it must :-
- 2.2.12.1. acquire the services from SITA in accordance with the business and service level agreement, or
 - 2.2.12.2. procure that service through SITA, if SITA indicates in writing that it is unable to provide such service itself.
- 2.2.13. It is peremptory for the nDoE and pDoE to use the services of SITA in procuring ICT infrastructure as contemplated in section 7(1)(a) of the SITA Act.
- 2.2.14. According to section 7(2) of the SITA Act, the provisions of private telecommunication network by SITA must be construed as a provision of that network by the State for purpose principally or integrally related to the functions of the State.
- 2.2.15. It is apparent that provision of education to schools and FET Colleges is a constitutional and statutory mandate of nDoE and pDoE and the provision of network as contemplated in the e-Education Initiative should be viewed as principally or integrally related to the operations of the State.
- 2.2.16. However regulations published in terms of SITA Act provides that where procurement is done on PPP basis, applicable regulations must be followed.

State Information Technology Act, 1998: General Regulations (“SITA Regulations”)

2.2.17. The Minister for Public Service and Administration has passed regulations in terms of section 23 of the State information Act, 88 of 1998 and those regulations are referred to herein as SITA Regulations.

2.2.18. SITA Regulations 17.7.1 states that when a department wishes to acquire information goods or services by means of a PPP, the applicable legislation made under the PFMA must be applied.

2.2.19. A SITA representative must be appointed to the PPP project task team to arrange standard certification in respect of all information technology goods or service acquired in terms of PPP⁴.

Conclusion

2.2.20. The SITA Act applies to nDoE and pDoE and therefore the mandatory services provided by SITA must be procured by SITA or through SITA. The ICT infrastructure service can be provided by a private party through SITA.

2.2.21. The SITA Act does not apply to public schools. Although SITA Act does not apply to public schools, it is advisable to have the involvement of SITA as the latter’s object is in line with the improvement of service delivery to the public.

2.2.22. A private party can be procured to undertake ICT infrastructure services to schools where a PPP is chosen as a procurement choice.

2.3. Which organ of state is competent in law to implement a procurement process to procure a private party to undertake the provision of ICT infrastructure?

⁴ Regulation 17.1.3 of the SITA Regulations.

- 2.3.1. If the provision of ICT infrastructure falls within the peremptory provisions of the SITA Act⁵, the implementation of the procurement process should be done through SITA.
- 2.3.2. Save for what is stated herein above, there is nothing in law that prevent nDoE and/or pDoE from implementing a procurement process to procure a private party to undertake the provision of ICT Infrastructure.
- 2.3.3. In the event that a PPP is chosen as procurement choice, nDoE and/or pDoE is competent in law to implement a procurement process to procure a private party to undertake ICT Infrastructure service.
- 2.3.4. There is nothing in law that prevents a public school from implementing a procurement process to procure a private party to undertake ICT Infrastructure services to schools.

3. **NETWORK CONNECTIVITY**

- 3.1. Which organ(s) of state is entrusted with the institutional functions to procure Network Connectivity?

Public Service Act

- 3.1.1. The long title of Public Service Act, 1994 states, among other things, that the Act to provide for the organisation and administration of the Republic.
- 3.1.2. Section 3 of the Public Service Act states, among other things, that the Minister for Public Service and Administration may exercise the powers and shall perform the duties entrusted to her by this Act or any other law.
- 3.1.3. Where it is a requirement of this Act or of any other law that any executive authority or other person shall act in consultation with the

⁵ Sec 7(1)(a) of the SITA Act.

Minister, the Minister may express her concurrence with the Act in question or refuse to express it.

- 3.1.4. Section 3 (2)(a) (v) of the Public Service Act provides that the Minister may deal with any policy relating to among other things, information management and information technology in the public service.
- 3.1.5. The Minister for Public Service and Administration may make regulations regarding, among other things, the management of information and the utilisation of the information technology.
- 3.1.6. It is apparent from the aforesaid that the Minister for Public Service Administration has a role in the management and the utilisation of information technology to government department or public administration.

Public Service Regulations, 2001(" Public Service Regulations")

- 3.1.7. The Minister for Public Service and Administration has published regulations that states, among other things, planning, work organisation and reporting.
- 3.1.8. Part III E.1 (b) and (c) of the Public Service Regulations a head of the department shall establish, among other things,:-
 - 3.1.8.1. an information infrastructure plan that supports the information plan of the department;
 - 3.1.8.2. an operational plan that enables the implementation of the infrastructure plan and information management.
- 3.1.9. It is apparent from the public service regulations that head of department are accountable for information plan, information infrastructure plan and operational plan.

SITA

3.1.10. The SITA Act was considered under the pillar of ICT infrastructure and the conclusions drawn in that section herein above is relevant for this section.

3.1.11. It is apparent that the SITA Act has peremptory provisions where the government department are obliged to use SITA in order to :-

3.1.11.1. to provide or maintain a private telecommunication network or value added network service in accordance with telecommunication act 1996;

3.1.11.2. provide or maintain a transversal information systems; and

3.1.11.3. provide a data processing or associated services for transversal information system.

3.1.12. To the extend that the network connectivity sought for the purposes of the e-Education initiative is falling within the mandatory services to be rendered by SITA, the latter is entrusted with the responsibility to provide ICT infrastructure, which may include network connectivity.

SITA Regulations

3.1.13. According to SITA Regulations, when a government department wishes to procure information technology goods or services by means of PPP, National Treasury Regulation 16 of the PFMA will be applicable.

3.1.14. The basis of SITA Regulation 17.7.1 a government department can initiate and implement the procurement of information technology goods or services.

Electronic Communications Act 36 of 2005 ("the ECA")

3.1.15. The long title of ECA provides, among other things, that the Act is to make new provision for the regulations of the electronic communications services, electronic communications network services.

Further the Act to provide for granting of new licences and new social obligations.

3.1.16. The ECA falls under the control of the Minister responsible for Communication⁶.

3.1.17. The object of ECA is, among other things, to promote and facilitate the development of interoperable and interconnected networks, the provisions of the services contemplated in ECA and to create a technologically neutral licensing framework. It is also aimed promoting the universal provision of electronic communications networks and electronic communications services and connectivity for all.

3.1.18. In respect of ministerial and policies and policy direction, section 3 (1)(f) of ECA provides that the Minister for Communication may make policies on matters of national policy applicable to the ICT sector, consistent with the object of ECA and of the other related legislation in relation to:-

3.1.18.1. Universal service and access policy, and

3.1.18.2. the promotion of universal service and electronic communications services in under serviced areas.

3.1.19. The Electronic Communications Act, 37 of 2007, signed by the President of the Republic on 21 December 2007 provides among other things in section 3 (1A) that the Minister may after having obtained Cabinet approval, issue a policy direction in order to –

3.1.19.1. initiate and facilitate intervention by government to ensure strategic ICT infrastructure investment;

3.1.19.2. provide for a framework for the licensing of public entity by Independent Communications Authority of South Africa ("ICASA").

⁶ Sec 1 of ECA

3.1.20. The provisions referred to herein above clearly indicate that the Minister for Communication is responsible, among other things, for the policy direction in order to initiate and facilitate intervention by government to ensure strategic ICT infrastructure investment.

3.1.21. The words *electronic communication network* is defined in section 1 of ECA as :-

“any system of electronic communications facilities (excluding subscriber equipment), including without limitation-

(a) satellite systems;

(b) fixed systems (circuit- and packet- switched);

(c) mobile systems;

(d) fibre optic cables (undersea and land-based);

(e) electricity cable systems (to the extent used for electronic communications services; and

(f) other transmission systems used for conveyance electronic communications.”

3.1.22. Section 5 of ECA provides licensing frameworks and states among other things that ICASA is authorised to grant individual and class licenses⁷. ICASA may, upon application, grant licenses for:-

3.1.22.1. electronic communication services;

3.1.22.2. broadcasting services; and

3.1.22.3. electronic communication network service.

⁷ See sec 5(1) of ECA

3.1.23. The Minister of Communication, in consultation with the Minister of Education, shall establish an entity to operate an educational network (EDU-NET). This is in terms of a policy direction issued by the Minister of Communication.

Conclusion

3.1.24. It is clear from the provisions of ECA that the Minister responsible for communication is the custodian of policies and policy direction for the ICT sector. ECA does not state that the Minister of Communication is entrusted with the responsibility of procuring network connectivity for and on behalf of government department.

3.1.25. Although the Minister may, after having obtained Cabinet approval, issue a policy direction in order to initiate and facilitate intervention by government to ensure strategic ICT infrastructure investment, we were advised that the policy direction contemplated in section 3(1A) of ECA has not been issued. It is therefore not clear who may initiate and facilitate intervention on behalf of government as the policy is not yet issued.

3.1.26. To the extent that network connectivity falls within section 7(4) of the SITA Act, the nDoE and pDoE are obliged in law to use the services of SITA.

3.1.27. In the event that PPP is a preferred procurement choice, the National Treasury Regulation 16 enables nDoE and pDoE to procure network connectivity in support of their institutional function.

3.1.28. There is no legislation, save for the SITA Act, which prescribe or assigned the institutional function of network connectivity to a specific government department. The role of EDU-NET which appears to have been establish by the Minister of Communication should be considered.

3.1.29. It is advisable therefore that an interface with SITA and the Department of Communication be maintained during the implementation of the e-Education Initiative.

3.2. Which organ of state is competent in law to implement a procurement process to procure a private party to undertake the Network Connectivity?

3.2.1. If the provision of network connectivity falls with the peremptory provisions of the SITA Act⁸, the implementation of the procurement process should be done through SITA.

3.2.2. Save for what is stated herein above, there is nothing in law that prevent nDoE and/or pDoE from implementing a procurement process to procure a private party to undertake the provision of network connectivity.

3.2.3. In the event that PPP is chosen as procurement choice, nDoE and/or pDoE is competent in law to implement a procurement process to procure a private party to undertake network connectivity service.

3.2.4. There is nothing in law that prevents a public school from implementing a procurement process to procure a private party to undertake network connectivity services to schools. It is worth noting that section 5A(1) of the Schools Act refers to regulations which prescribe minimum uniform norms and standards for school infrastructure which include electronic connectivity at schools.

3.2.5. The publication of the regulations as contemplated herein⁹ will inform the e-Education Initiative in respect of providing clarity on which organ of state is entrusted of the responsibility of procuring a private party to undertake network connectivity for schools.

3.3. Can the institutional function of providing Network Connectivity be performed by a private party?

3.3.1. There is nothing in law that prevent a government department from procuring a private party to perform an institutional function of network connectivity services.

⁸ Sec 7(1)(a) of the SITA Act.

⁹ This refers to the regulations contemplated in terms of section 5A of the Schools Act.

- 3.3.2. Save for the provisions of section 7(4) of the SITA Act there are no statutory impediment that could prevent a private party from providing network connectivity service to government department.

Broadband Infraco Act. 33 of 2007 ("the Infraco Act")

- 3.3.3. The main objects and powers of Infraco are to expand the availability and affordability of access to electronic communications, including but not limited to the under developed and under serviced areas, in accordance with ICA through the provision of :-

3.3.3.1. electronic communications network services; and

3.3.3.2. electronic communications services.

- 3.3.4. The existence of the Broadband Infraco (Pty) Ltd as indicated in the Infraco Act provides an option, among other things, to government department in the event that electronic communications network services and electronic communications services are required.

Sentech Act No 63 of 1996 ("the Sentech Act")

- 3.3.5. The long title of the Sentech Act states among other things, that Act is to convert Sentech (Pty) (Ltd) from being a private company to be a public company, Sentech Limited ("Sentech").

- 3.3.6. The main object and business of Sentech as captured in section 5 of the Sentech Act, is to provide electronic communications services and electronic communications network services in accordance with ECA.

- 3.3.7. The existence of both Broadband Infraco (Pty) Ltd and Sentech reinforces the view that electronic communication services and electronic communication network services can be provided by a private party.

3.3.8. In fact the existence of service providers like Infracore and legislation regulating its main objects, suggest that a private party is not prohibited from undertaking network connectivity for nDoE and/or pDoE or schools.

The Electronic Communications Act

3.3.9. The Electronic Communication Act provides for, among other things, licensing frameworks and regulations in respect of electronic communications facilities, electronic communications network services and electronic communication services.

3.3.10. The words *electronic communication network* is defined in section 1 of ECA as :-

“any system of electronic communications facilities (excluding subscriber equipment), including without limitation-

- (a) satellite systems;*
- (b) fixed systems (circuit- and packet- switched);*
- (c) mobile systems;*
- (d) fibre optic cables (undersea and land-based);*
- (e) electricity cable systems (to the extent used for electronic communications services; and*
- (f) other transmission systems used for conveyance electronic communications.”*

3.3.11. The Options Analysis has recommended option three in respect of section Wide Area Network (WAN) Backbone¹⁰. Option three states that Schools and FET Colleges connect to the existing WAN Backbone

¹⁰ See page 164, paragraph 5.5.1.3 of the Options Analysis.

through a single or multiple Virtual Private Networks (VPNs) that connects to the internet over a newly established dedicated WAN Backbone.

3.3.12. After considering the SITA Act, there are no provisions which prohibit the implementation of option three either on PPP basis in terms of SITA Regulation 17.7.1 or in terms of section 7(1) of the SITA Act. As it is anticipated that, according to option three, VPNs will connect to the existing Education Network which is hosted on the Government Common Core Network (“GCCN”) operated by SITA, the involvement of SITA appears to be apparent and logical as there will be a connection to their system.

3.3.13. In respect of “Last Mile” Connectivity option, there are no provisions in law, which prohibit the implementation of the “Last Mile” Connectivity. A PPP procurement choice in terms of SITA Regulations 17.7.1 or the procurement choice as contemplated in terms or section 7(1) of the SITA Act could be implemented.

3.3.14. In respect of Local Area Network (‘LAN’) the norms and standards for basic infrastructure in public schools, particularly, norms and standards that relate to technology and electronic connectivity in public schools the provisions of section 5A of the South African Schools Act and the regulations in that regard should be observed. Certainly LAN connectivity services can be provided by a private party to schools.

The Application or E-rate in Internet Services

3.3.15. Section 73(1) of ECA states that internet services provided to all public schools and FET Colleges, must be provided at a minimum discounted rate of 50% off the total charge levied by the licensee providing internet services to such institution.

3.3.16. The discount is applicable of the total charge levied by the licensee which include but not limited to the following¹¹:-

¹¹ See sec 73(2)

- 3.3.16.1. Any connectivity charge for access to internet;
- 3.3.16.2. Charges for any equipments used for or in association with connectivity to the internet; and
- 3.3.16.3. All costs made to an internet service provider.

4. **PROFESSIONAL DEVELOPMENT**

4.1. Which organ(s) of state is entrusted with the institutional function of Professional Development?

South African Council for Educators Act 31 of 2000 ("SACE Act")

- 4.1.1. The long title of SACE Act states among other things, that the Act is to provide for the functions of the South African Council for Educators ("SACE").
- 4.1.2. The objects of the Act are among other things, to promote the professional development of educators¹².
- 4.1.3. Section 4 of the SACE Act provides for the continuation of SACE as a juristic person.
- 4.1.4. Section 5 of the SACE Act deals with the powers of the functions of SACE and it states, among other things, that with regard to the promotion and development of the education and training profession SACE:-
 - 4.1.4.1. must research and develop a professional development policy;
 - 4.1.4.2. must promote in-service training of all educators; and

¹² Sec 2 (b) of SACE Act

4.1.4.3. may develop resource materials to initiate and run, in consultation with the employer, training programmes, workshops, seminars and short courses that are design to enhance profession.

4.1.5. It is apparent from the aforesaid that SACE is entrusted with statutory duty to promote in-service training for all educators and design resource materials to enhance the profession.

4.1.6. There is nothing in law, which states that only SACE has an exclusive duty in law to promote professional development of educators. However reasons will have to be stated justifying not using SACE to avoid defeating the purpose of the SACE Act.

4.1.7. It is therefore our view that nDoE, pDoE or schools may initiate a professional development programme provided it is consistent with the nDoE's and/or pDoE's policies in that regard.

4.2. Can the institutional function of providing Professional Development be performed by a private party?

4.2.1. SACE as it is a juristic person is competent in law to enter into a contract with a private party (service provider) for purposes of delivering materials and/or professional development programmes.

4.2.2. There is nothing in law that prevents SACE or nDoE or pDoE or public schools from procuring a private party to deliver professional development programmes or materials, provided such services are consistence with the policies of the government.

4.3. Which organ of state is competent in law to implement a procurement process to procure a private party to undertake the Professional Development?

4.3.1. The SACE Act clearly place the responsibility of professional development with SACE. SACE may therefore implement the

procurement process to procure a private party to undertake professional development on its behalf.

- 4.3.2. nDoE and pDoE, including public schools, are not prohibited in law to implement a procurement to procure a private party to deliver professional development programmes and/or materials.

5. **CURRICULUM INTERGRATION**

- 5.1. **Which organ(s) of state is entrusted with the institutional function of Curriculum Integration?**

National Education Policy Act 27 of 1996 ("NEPA")

- 5.1.1. The long title of NEPA states that the Act is to provide for the determination of national policy for education.
- 5.1.2. In respect of determination of national education policy by the Minister of Education, the Minister shall determine national policy for, among other things, curriculum frameworks, co-syllabuses and education programmes.
- 5.1.3. The development of policies regarding curriculum remains the competence of the Minister of Education and to such extent curriculum integration should be informed by such policies.
- 5.1.4. The nDoE in our view has to provide policies and guidelines to integrate ICT skills in all content areas for schools and FET curricular. The White Paper on e-Education is one of the policy documents which is worth considering in respect of the pillars of the e-Education Initiative, which includes curriculum integration.
- 5.1.5. There is nothing in law which prevent nDoE and pDoE from taking steps towards development of applications and systems that will enable them to implement their institutional function.

5.2. Which organ of state is competent in law to implement a procurement process to procure a private party to undertake development of applications and systems for Curriculum Integration?

5.2.1. The nDoE is, among other things, tasked with the function of developing policy framework for curriculum, core syllabuses and education programmes. It could consider the procurement of a private party to develop application and systems for curriculum integration.

5.2.2. There is nothing in law which prohibit pDoE from procuring a private party to undertake development of applications and systems to enable itself to deliver a education as envisaged within the e-Education Initiative.

5.3. Can the institutional function of developing systems and applications in respect of Curriculum Integration and Curriculum Content be performed by a private party?

5.3.1. The Options Analysis report has made a distinction between ICT applications and educational content. The ICT applications refers to, among other things, software applications developed for a wide range of functions, including operating systems, office software, EMIS applications, data base portals¹³.

Proprietary Software and the Copyright Act

5.3.2. An application system is referred to as a software that manages the sharing of the resources of a computer and provides end-users with an interface to access those resources. The operating system forms a platform for other system software and for application software. It is stated that there are two different types of operating systems offered to users. These are proprietary operating systems or open source operating systems.

¹³ See page 180 of the Options Analysis report

5.3.3. The proprietary operating systems are systems that are developed and owned by a commercial entity. Copyright Act 98 of 1978 defines the word *computer program* to mean a set of instructions fixed or stored in any manner and which, when used directly or indirectly in a computer, directs its operation to bring about a result.

5.3.4. Section 1 of the Copyright Act defines the word *author* in relation to a computer program to mean the person who exercise control over the making of the computer program.

5.3.5. The Copyright Act list works which are eligible for copyright protection and computer programs is listed as one of the works. The requirements that qualify work to be eligible for copyright protection are:-

5.3.5.1. originality¹⁴,

5.3.5.2. written down, recorded, represented in a digital data or signal or reduced to a material form¹⁵; and

5.3.5.3. a qualified person¹⁶.

5.3.6. Section 11B of the Copyright Act list nature of copyright in computer programs and the vesting of exclusive right enables the author to, among other things,:-

5.3.6.1. reproducing the computer program in any manner or form;

5.3.6.2. publishing the computer program if it was hitherto unpublished; and

5.3.6.3. letting, or offering or exposing for hire by way of trade, directly or indirectly, a copy of the computer program.

¹⁴ See sec 2(2) of the copyright Act

¹⁵ Same as above.

¹⁶ See sec 3 of the Copyright Act

- 5.3.7. Ownership of any copyright conferred by the Copyright Act shall vest in the author of the work¹⁷. Copyright may be assigned and the assignment must be in writing and signed by or on behalf of the assignor¹⁸.
- 5.3.8. Section 23 of the Copyright Act deals with infringement of copyright by any person, not being the owner of a copyright, who, without the licence of such owner, does or cause any other person to do, in the Republic, any Act which the owner has exclusive right to do or to authorise.
- 5.3.9. It is apparent from the aforesaid that operating and application systems must be used in terms of the licensing conditions and authorisation permitted by the owner of the software.
- 5.3.10. It will be advisable, in respect of website development, that the web site development agreement be entered into between the web site developer (the person who exercise control over the making of the computer program), who is the author and the owner. This will assist in avoiding disputes where possible.
- 5.3.11. A source code, which is part of software and website, is protected by the Copyright Act either as a computer program, or literary work or artistic work. It is advisable that the website owner and the website developer who normally maintain and support the source code to enter into an escrow agreement, where the source code will be placed in escrow, usually a third party that specialises in escrow account¹⁹.
- 5.3.12. There is nothing in law which prevent nDoE and pDoE from taking steps towards procuring a private party to develop applications and systems that will enable them to implement their institutional function.

Free Open Source Software

¹⁷ Sec 21 (1)(a) of the Copyright Act.

¹⁸ Sec 22(3) of the Copyright Act.

¹⁹ See Reinhardt Buys et al, Cyberlaw @ SA II, page 10-11.

- 5.3.13. An Open Source Software is a computer software for which the source code is made available under copyright licence that meet the open source definition.
- 5.3.14. There is a government policy on Free Open Source Software use for South African government approved by the Cabinet²⁰ ("the Policy") and same policy should guides nDoE and pDoE.
- 5.3.15. The Policy states that the South African government will implement Free Open Source Software ("FOSS") unless proprietary software is demonstrated to be significantly superior.
- 5.3.16. Further the Policy states that the South African government will migrate current proprietary software to FOSS whenever comparable software exists.
- 5.3.17. Furthermore the policy states all new software develop for or by South African government will based on open standards, adherent to FOSS principles and licensed using a FOSS license where possible.
- 5.3.18. The South African government, according to its policy, will ensure that all government content and content developed using government resources is made Open Content, unless analysis on specific content shows that proprietary licensing or confidentiality is substantially beneficial.
- 5.3.19. Further, the South African government will, according to the Policy, encourage the use of open content and open standard within South Africa.
- 5.3.20. It is clear from the aforesaid that operating systems preferred by the South African government is open source operating systems.

²⁰ The Free Open Source Software document was retrieved from the website of the Department of Public Service and Administration

5.3.21. There is nothing in law which prevent nDoE and pDoE from taking steps towards development of applications and systems that will enable them to implement their institutional function.

5.3.22. The SITA Act does not oblige a department that wishes to acquire an application software development to acquire same through SITA²¹.

5.3.23. The development of application software for schools should be consistent with the minimum uniform norms and standards as contemplated in section 5A of the Schools Act.

6. **MONITORING, EVALUATION AND RESEARCH**

6.1. **Which organ(s) of state is entrusted with the institutional functions to Research and Monitoring services?**

6.1.1. The National Education Policy Act 27 of 1996 states in section 3 (4) that the Minister shall determine policy for, among other things, monitoring, evaluation and research in education.

6.1.2. There is no legislation that prescribe that research, evaluation and monitoring should be done by specific entity. There is nothing in law which may prohibit any other institution from conducting and evaluation, monitoring and research in education.

6.1.3. It is therefore our view that nDoE, pDoE and/or public schools are competent in law to conduct a monitoring, evaluation and research if it wishes to do so.

6.2. **Can the institutional function of providing Research and Monitoring be performed by a private party?**

6.2.1. The institutional function of conducting research, monitoring and evaluation by nDoE or pDoE or public schools can be performed by a private party.

²¹ Sec 7(1)(b)(ii) of SITA Act

- 6.2.2. There is nothing in law which prohibits organ of state, including schools from procuring a private party to undertake research, monitoring and evaluation for its benefit.

7. **HUMAN RESOURCE SYSTEM**

7.1. **Which organ(s) of state is entrusted with the institutional function of Human Resource Systems service?**

The Schools Act.

- 7.1.1. The Schools Act provides a legal framework that enables the pDoE and public schools to appoint non-educators staff²². The legal framework can be used to appoint ICT literate or competent employees to give mentorship and guidance to educators.
- 7.1.2. Educators that are ICT skilled may be appointed by schools and/or pDoE in terms of sections 20(i) and 20(4) of the Schools Act. This legal framework may also be used towards realising the e-Education Initiative.

Further Education and Training Colleges Act 16 of 2006 (“the FET Act”)

- 7.1.3. The FET Act provides for, among other things, for appointment of lectures and support staff²³.
- 7.1.4. It is within this legislation framework that employees with ICT skills may be appointed to advance the interest of the e-Education initiative.

Conditions of Service

- 7.1.5. The Employment of Educators Act 76 of 1998 (“the Employment Act”) provides for, among other things, the regulations of conditions of service

²² See sec 20(5) and sec 20(1) (j) of the Schools Act.

²³ Sec 20 of FET Act

of educators. It is also deals with appointments and promotions of educators.

- 7.1.6. It is our view that the introduction of e-Education Initiative at schools and FET Colleges is not likely to have an adverse impact on the terms and conditions of employment of educators unless it entails a change to the essential nature of the job.

A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA and Others

- 7.1.7. In the Labour Appeal Court case of *A Mauchle (Pty) Limited t/a Precision Tools v NUMSA and others (1995) 16 ILJ 349 (LAC)* (“the *Precision Tools case*”) the Appellant company instructed its employees who were machine operators to start operating two machines instead of one machine per operator employee. The disgruntled employees (“the Respondents”) refused to comply to the instructions on the grounds that:-

7.1.7.1. the introduction of the second machine amounted to a unilateral change of terms of contract; and

7.1.7.2. Appellant company failed to negotiate with them.

- 7.1.8. The Appellant company succeeded at court on the basis that employees do not have a vested right to preserve their working obligations completely unchanged as from the moment they first begin to work²⁴. Judge Myburgh further held that:

“A description of the work to be performed as that of “operator” should not, in my view, be construed inflexibly provided that the fundamental nature of the work to be performed is not altered.”²⁵

- 7.1.9. Myburgh J further held that as it was not a term of contracts of employment that an operator was obliged to operate one machine only,

²⁴ See page 357 of the Precision Tools case.

²⁵ Ibid.

there was no requirement in law or fairness for the Appellant company to negotiate with the union²⁶.

7.1.10. What was required of Appellant company, as a matter of sound industrial practice and fairness, was to attempt to persuade the Respondents to cooperate and to accept the change in practice (operating one machine)²⁷. The Appellant company did precisely that when it held meetings with the Respondents.

7.1.11. It was further held only if the changes are so dramatic that they require the employees to do an entirely different job, can they refuse to change their existing working practices.

7.1.12. It is our view that the introduction of e-Education Initiatives, which will require ICT skills from educators, is not likely to amount to variation or unilateral change of contract as the description of the work to be performed by educators should not be construed inflexibly provided the fundamental nature of the work to be performed is not altered.

7.1.13. As a matter of fairness and sound industrial practice, the nDoE and/or pDoE may consult with the representatives of educators, for educators to cooperate and to accept change in practice.

7.1.14. It is further our view therefore that the implementation of the e-Education Initiative is not likely to amount to unilateral change of terms of contract, and to the extent that educators are affected adversely by the e-Education Initiatives, a consultative process should be considered.

Provision of salaries, wage and allowances to educators

7.1.15. The e-Education Initiative is likely to present an opportunity to educators to develop curriculum content for benefit and use of other educators, nDoE and/or pDoE. The legal question is: is there any legal framework

²⁶ See page 359 of the Precision Tool case.

²⁷ See page 360 of the Precision Tools case.

that will incentivise such educators by compensating them for their excellent contribution?

7.1.16. The Public Service Act, particularly section 3(3)(c) the Minister of Public Service and Administration may, subject to the provision of this Act, make determination regarding, among other things, the scales of salaries, wages or allowances of all the various classes, ranks and grades of officers and employees as well as salary ranges in respect of particular classes, ranks, grades of officers and employees.

7.1.17. Section 37 of the Public Service Act states among other things, that officers and employees shall be paid the salaries, wages and allowances in accordance with the scales determine by the Minister

7.1.18. The Minister for Public Service and Administration is empowered to make regulations regarding, among other things, sound labour relations and any other matter which the Minister may consider essential²⁸.

7.1.19. The Public Service Regulations states in Part V, E.1 that the Minister shall determine, among other things, compensatory practices, work facility practices and allowance for employees through the bargaining process.

7.1.20. The Public Service Regulations provides in Part V, E.2 that the Minister may make a determination regarding the application of a service benefit, a compensatory practices and work facility practices.

7.1.21. It is our view that there is a legislative framework the enables the Minister for Public Service and Administration to make determination on compensation of educators may develop learner support material.

7.1.22. Different salaries and conditions of service may be determine by the Minister of Education in respect of different ranks and grades for educators.

²⁸ Sec 41(1)(e)(ix)and(x) of the Public Service Act.

7.1.23. A determination envisaged in section 4(2) of the Employment of Educators Act, 76 of 1998 (as amended) which may involve expenditure from the National Revenue Fund, may only be made with the concurrence of the Minister of Finance.

7.1.24. Further it is our view that there is nothing in law which prohibit the Minister of Education from developing a policy that will enable compensation of educators who are showing creativity in developing learner support material.

8. **ELECTRNIC COMMUNICATION POLICY AND RIGHT TO PRIVACY**

8.1. **Right to Privacy**

The Constitution

8.1.1. Section 14 of the Constitution, which deals with right to privacy, states that:-

“Everyone has the right to privacy, which include the right not to have –

(a) their person or home searched;

(b) .their property searched; and

(c) the privacy of their communication infringed.”

8.1.2. The implementation of the e-Education Initiative is likely to impact the constitutional right to privacy of educators, learners, managers and administrators. The electronic communication systems will provide devices through which information may be collected, monitored, distributed and/or stored. Such information could be confidential in nature and therefore requires to be protected.

8.1.3. The electronic communication systems are likely to be abused when the users of the electronic devices access information that is not related to work or using the ICT systems unlawfully.

8.1.4. Although right to privacy is entrenched in the Bill of Rights, section 36(1) of the Constitution has a limitation clause that is likely to limit the right to

privacy as such a right is not absolute in its application. That will be demonstrated by legislation that has been enacted in respect of privacy.

Common Law

- 8.1.5. Right to privacy is recognised as an independent personality right in South Africa,²⁹ and the infringement of same can only be an acquaintance with personal facts by outsiders contrary to the determination and will of the person whose right has been infringed, and such acquaintance can take place by ways of intrusion and disclosure³⁰.
- 8.1.6. For an aggrieved person to claim successfully on infringement of right to privacy, wrongfulness and intent must be proven for the wrongdoer to be liable³¹.
- 8.1.7. It is our view that nDoE and/or pDoE is not likely to be held liable, on common law basis, where information was disclosed unless the aggrieved party proves wrongfulness and intent (that is the direction of will by the perpetrator towards violation of privacy, knowing that such violation will be wrongful)³² on the part of the employee or official.
- 8.1.8. However the nDoE and/or pDoE is likely to be to be liable, on basis of vicarious liability, for conduct of educators acting in pursuance of relevant legislation and acting within the course and scope of employment,³³ provided wrongfulness and intent is proven. Vicarious liability is imposed on innocent employers by a rule of delictual law.
- 8.1.9. In the case of *Bezuidenhout No v Eskom 2003 (3) SA 83 (SCA)*, the employee (Oelofse) acted contrary to the standing orders, being not to use the motor vehicle for conveyance of passengers. Whilst he conveyed the passenger (Roux), the employee lost control of the

²⁹ See S v A 1971 2 SA 293 (T)

³⁰ See Neethling et al, Law of Personality, page 243.

³¹ See Jansen van Vuuren v Kruger 1993 4 SA 842 (A) at 849 and 856-856

³² See Neethling at al at page 277.

³³ See Masuku and Another v Mdlalose and Others 1998 ((1) SA 1 (SCA) at page 20.

vehicle and it overturned. The dependent of the deceased passenger sued the employer for loss of income. Herber JA stated that:

“Accordingly, although Oelofse owed a legal duty to Roux to drive without harming him, that duty arose only because he was accepted as a passenger outside the scope of employment. For the appellant’s success, as I have said, that duty ought to have risen within the scope of Oelofse’s employment. A crucial element of employment was absent”³⁴.

8.1.10. According to the *Bezuidenhout* case, the nDoE and/ pDoE may be liable for unlawful and intentional conduct of violating privacy where educator’s conduct is closely associated with the duty of furthering the interest of the employer.

8.1.11. In the case of *Ess Kay Electronics Pte Ltd and Another v First National Bank of Southern Africa Ltd 2001 (1) SA 1214 (SCA)* Howie JA stated that the question is always: were the acts in the case under consideration in fact authorised; were they in fact performed in the course and scope of employment?³⁵

8.1.12. Howie JA in the *Ess Kay Electronics* case held that the employee having acted outside of his scope of his actual authority and outside of the course of his employment would be sufficient to warrant dismissal of the claim.³⁶

8.1.13. The nDoE and the pDoE, in light of *Ess Kay Electronics* case, are like not to be held liable for on basis of vicarious liability where an employee acted in a frolic of his own, unless it was incidental to his or her employment.

8.2. Electronic Communication Policy

³⁴ See page 97 of the *Bezuidenhout* case.

³⁵ *Ess Kay Electronics* case at page 1222.

³⁶ *Ess Kay Electronics* case at page 1221.

The Regulation of Interception of Communication and Provision of Communications and provisions of Communication-Related Information Act, 70 of 2002

8.2.1. The introduction of e-Education Initiative at schools and FET colleges will call for the nDoE and pDoE to establish an electronic communication policy. The *Regulation of Interception of Communications and provision of Communication- Related Information Act, 70 of 2002* (as amended) (“ RICA”) provides that the Act is, among other things, to regulate the interception of certain communications, the monitoring of certain signals and radio frequency spectrums.

8.2.2. Section 2 of RICA states that:-

“Subject to the Act, no person may intentionally intercept or attempt to intercept, or authorised or procure any other person to intercept or attempt to intercept, at any place in the Republic, any communication in the course of its occurrence or transmission.”

8.2.3. There are two exceptions to the general rule listed in section 2 of RICA, and those are (1) obtaining a prior consent in writing from the data subject in terms of section 5(1) of RICA, and (2) monitoring of communication in the course of business in terms of section 6 of RICA..

8.2.4. Section 6 of RICA, which deals with interception of indirect communication in connection with carrying on of business, states that:-

“(1) Any person may in the course of carrying on of business, intercept any indirect communication-

(a) by means of which a transaction is entered into in the course of that business;

(b) which otherwise relate to that business;

(c) which otherwise takes place in the course of carrying on of that business,

in the course of its transmission over a telecommunication system.”

- 8.2.5. The system controller, according to section 6(2)(d), must make reasonable efforts to inform **in advance** a person, who intends to use the telecommunication system concerned, that indirect communications transmitted by means thereof may be intercepted, or if such indirect communication is intercepted with the express or implied consent of the person who uses telecommunication system.
- 8.2.6. A system controller is defined in the section 1 of RICA and it refers to director-general, head, executive director, or equivalent officer in relation to national department, provincial administration or organisational component. In relation to a public body, the chief executive officer, or equivalent officer.
- 8.2.7. A communication policy, will have to be develop which will address, among other things, the following aspects:-
- 8.2.7.1. the electronic communications system (email and telephony) is provided for business use;
 - 8.2.7.2. stating that limited private use is allowed, but make it clear that offensive materials, such as pornographic material, and attachment of certain sizes will not be allowed; and
 - 8.2.7.3. stating that their e-mail will be monitored in compliance with applicable laws of the South Africa.
- 8.2.8. Employees must be warned in writing that the monitoring system is in place and a confirmation be obtained that they have received and understand the information communicated to them. The policy must be applied consistently to all employees.

Promotion of Access to Information Act, 2 of 2000(as amended)
("PAIA")

8.2.9. PAIA was promulgated to give effect to the constitutional right of access to any information held by the State and another person and that is required for the exercise or protection of any rights³⁷.

8.2.10. Although PAIA has been passed to give effect to a constitutional right of access to information, it is important to note the limitations placed by it. For instance section 34(1) of PAIA states that:-

“subject to subsection (2), the information officer of a public body must refuse a request to a record of the body if its disclosure will involve the unreasonable disclosure of personal information about a third party, including a deceased person.”

8.2.11. The e-Education Initiative will advance the interest of public bodies in facilitating compliance with PAIA in that records will be accessed with relative ease. However the protection of privacy of third parties must be observed.

Protection of Personal Information Bill (“the Bill”)

8.2.12. The objectives of the Bill states, among other things, to give effect to the constitutional right to privacy:

8.2.12.1. by safeguarding a personal information when processed by public and private bodies;

8.2.12.2. in a manner which balances that right with any other rights, including the rights in the Bill of Rights, particularly the right to access to information;

8.2.12.3. subject to justifiable limitation, including, but not limited to effective, efficient and good governance and the free flow of personal information, particularly transborder transfers³⁸.

³⁷ See the long title of PAIA.

³⁸ Sec 1(1) of the Bill.

8.2.13. It is further the objective of the Bill to establish a voluntary and mandatory mechanism or procedure which will be in harmony with international prescript and which will, while upholding the right to privacy, at the same time, contribute to economic and social development in an environment in which technology increasingly facilitate the circulation and exchange of information.

8.2.14. Furthermore, the Bill states in its objectives, that it is to promote transparency, accountability and effective governance of all public and private bodies by, including, but not limited to, empowering and educating everyone to understand their rights in terms of this Bill.

8.2.15. The Bill defines the word *personal information* to mean information about an identifiable, natural person, and in so far as it is applicable, an identifiable juristic person, including, but not limited to, among other things,-

8.2.15.1. The information relating to **the education**, or medical, criminal or employment history of the person or information relating to financial transactions in which the person have been involved.

8.2.15.2. The address, fingerprints or blood type of a person; and,

8.2.15.3. The views of another individual about the parson.

8.2.16. Section 3 of the Bill states that this Act applies to, among other things, the fully or partly automated processing of personal information entered in a record or intended to be entered therein and the processing of personal information by or for responsible parties established in and outside South Africa and.

8.2.17. The Bill states in section 7 of the that personal information must be processed in accordance with the law and in a proper and careful manner in order not to intrude upon the privacy of the data subject to an unreasonable extent.

8.2.18. The Bill refers to principles that inform the flow of personal information, and security safeguards is one of those principles aimed at ensuring integrity of information.

8.2.19. There will³⁹ be an obligation in law on the responsible party to implement appropriate technical and organisational measures to secure the integrity of personal information, and to prevent unauthorised unauthorised or unlawful access to or processing of personal information.

8.2.20. When this Bill becomes an Act of Parliament in the manner it is drafted, it will not, in our view, be an impediment to the implementation of the e-Education Initiative.

9. **ENVIRONMENTAL LEGISLATIVE FRAMEWORK FOR ELECTRONIC WASTE.**

9.1. It is worth noting that that there is no dedicated legislation that deals with electronic waste (“e-waste”) Numerous pieces of legislation will have to be consulted to address a specific challenge presented by e-Education Initiative.

9.2. The Environmental Conservation Act, 73 of 1989 (“the Environmental Act”) states in its long title that the Act is to provide for the effective protection and controlled utilization of the environment and matters incidental thereto.

9.3. The Environmental Act defines the word *waste* in section 1 to mean:-

“any matter, whether gaseous, liquid, or solid or any solution thereof, which is from time to time designated by the Minister by notice in the Gazette as an undesirable and superfluous by product, emission, residue or remainder of any process or activity”

9.4. In respect of control of environmental pollution, section 19 of the Environmental Act sates that:-

³⁹ The Bill does not have force of law until it is promulgated by the President of South Africa.

“ No person shall discard or dump or leave any litter on any land or water surface, street, road or site in or any place to which the public has access, except in a container or at a place which has been indicated, provided or set apart for such purpose.”

- 9.5. The word *disposal site* is defined in section 1 of the Environmental Act as a site used for the accumulation of waste with the purpose of disposing or treatment of such waste.
- 9.6. In respect of waste management, section 20(1) of the Environmental Act states that no person shall establish, provide, or operate any disposal site without a permit issued by the Minister of Water Affairs and the Minister responsible for Environmental Affairs.
- 9.7. The e-Education Initiative will lead to the availability of electronic end-user devices at schools and FET Colleges and it is therefore advisable that a policy direction be put in place in relation to e-waste.
- 9.8. The National Environmental Management Act, 107 of 1998 (as amended) (“NEMA”) provides, among other things, for co-operative environmental governance by establishing principles for decision making on matters affecting the environment.
- 9.9. NEMA provides for integrated environmental management and the objectives of it is, among other thing, to promote the integration of the principles of environmental management, and to ensure that effect of activities on the environment receive adequate consideration before actions are taken in connection with them.
- 9.10. Section 24 (2)(a) of NEMA states that the Minister responsible for environmental affairs, may with concurrence of the MEC, and every MEC with concurrence of the Minister, in a prescribed manner, identify activities which may not be commenced without prior authorisation from the Minister or MEC.
- 9.11. Management of e-waste is not one of the activities that the Minister has identified in terms of section 24(2) of NEMA. It is our view that an integrated environmental management, in terms of the principles stated in section 2 of

NEMA should be developed which address aspects of disposal and recycling of the components of the ICT end-user devices.

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