

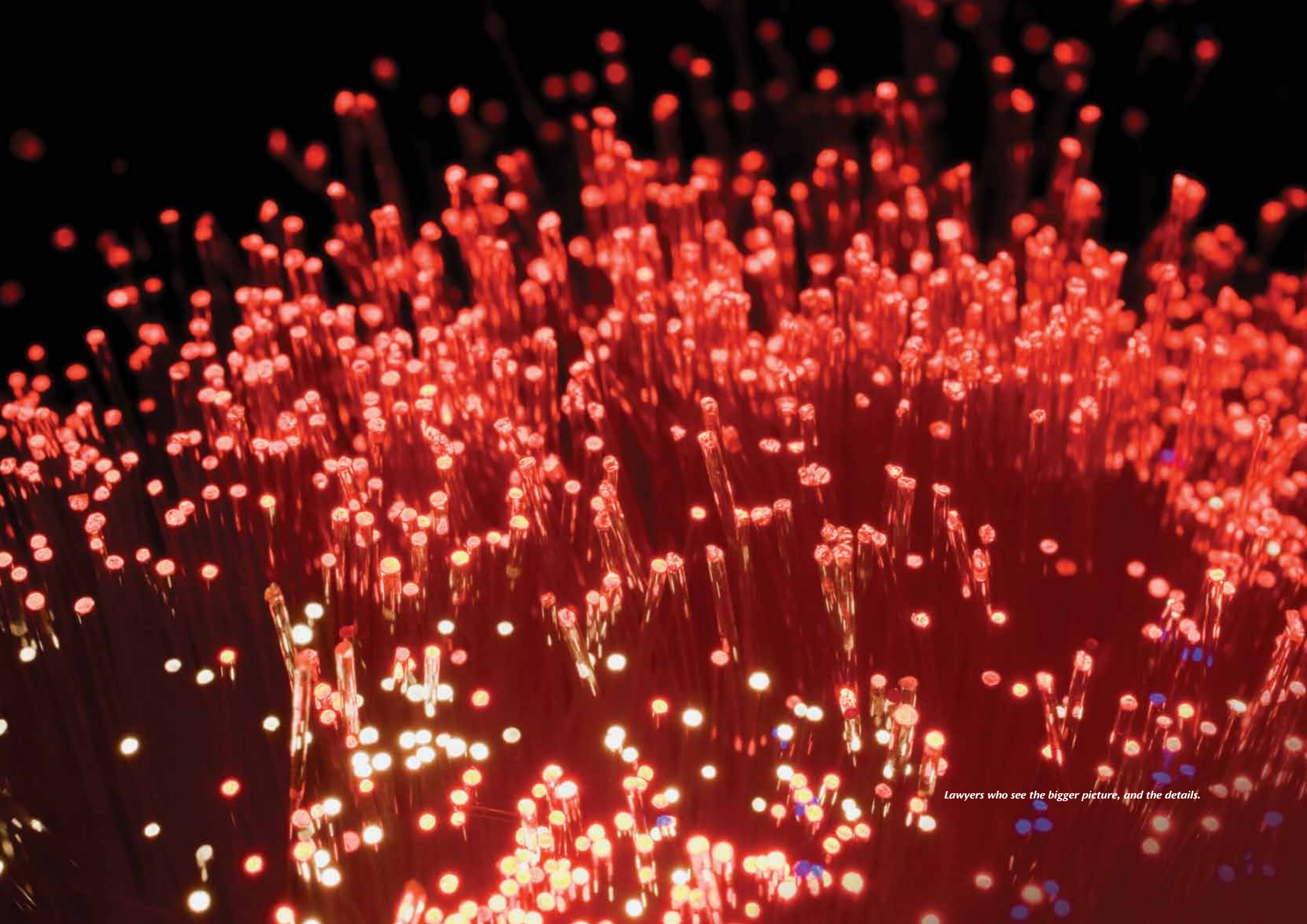
**BG** Bowman Gilfillan

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**TECHNOLOGY, MEDIA AND  
TELECOMMUNICATIONS**



You think  
networks, we  
think how to  
make it work.



*Lawyers who see the bigger picture, and the details.*

*Our Technology, Media and Telecommunications Group*

The Bowman Gilfillan Technology, Media and Telecommunications (TMT) practice group has extensive experience in advising and acting for clients in the telecommunications and broadcasting sectors. The group acts for various telecoms and media clients in mergers and acquisitions in the communications sector, and provides general regulatory advice on telecommunications and broadcasting issues. We also advise clients on technology and outsourcing contracts and data protection and compliance. Our group works closely with the M&A and Commercial practice areas of the firm.

Our TMT group comprises lawyers who are up-to-date with the most recent regulatory developments in the telecommunications and broadcasting sectors. These highly experienced lawyers are able to assist clients who need specialist advice in these areas, both in the context of particular transactions, and in the context of their general regulatory obligations. Through our association with firms in Kenya and Nigeria and our relationships with other firms in Africa through our Africa Group, we are well-placed to provide advice in relation to pan-African, multi-disciplinary transactions.

Our TMT lawyers are familiar with the range of technologies used to provide telecommunications and broadcasting services, including: wireless, fixed-line, satellite, digital terrestrial and Internet Protocol services.

The Bowman Gilfillan TMT group was ranked in the top band in the 2008, 2009, 2010 and 2011 Chambers & Partners Global Guide.

## *The regulatory environment*

Telecommunications and broadcasting are governed by the Electronic Communications Act, 2005 (ECA). Further requirements are imposed on telecoms operators in terms of the Regulation of Interception of Communications and Provision of Communication-Related Information Act, 2002 (RICA).

The regulatory authority, the Independent Communications Authority of South Africa (ICASA), administers the ECA and is primarily responsible for the regulation of the communications sector. The Independent Communications Authority of South Africa Act, 2000, in terms of which ICASA is established, provides that the Minister of Communications is responsible for developing policy for the communications sector and may issue policy directives to ICASA in this regard. ICASA is required by the ICASA Act to function without any political or commercial interference. ICASA is an 'organ of state', and its conduct in considering licence applications and performing other regulatory functions constitutes administrative action. This means that ICASA must act in a lawful, rational and procedurally fair manner in exercising its statutory powers. Should it fail to do so, its actions and decisions may be set aside on review by the High Court.

The ECA takes account of the convergence of telecommunications and broadcasting, which allows for a variety of different services to be provided over a single platform, and establishes a regulatory framework that is in line with new means of providing communications services. The ECA provides that telecommunications services and broadcasting services are required to be licensed, unless exempted by the

regulator. In addition, network operators which make available physical network capacity for the conveyance of communications or the transmission of a broadcast signal, require separate licences to provide those services.

The ECA provides that services and networks may be authorised in terms of either an individual or a class licence. The type of licence which is required depends on the scope of the service or network to be provided. Individual licences are generally required in respect of services that have a significant impact on socio-economic development and will be granted pursuant to a relatively intensive adjudication process. Class licences, on the other hand, are required in respect of services that ICASA finds do not have a significant impact on socio-economic development, necessitating less intensive regulation. Providers of services requiring class licence authorisation are only required to register with ICASA. ICASA has very limited power to refuse such registration.

The ECA establishes a horizontal licensing framework which provides for the separate licensing of networks and services. To facilitate convergence in the sector, the ECA provides for a single licensing framework in respect of all communications networks (regardless of the services provided across them), although a distinction is retained between telecommunications services (referred to as electronic communications services) and broadcasting services.

The ECA provides for a range of measures which ICASA may introduce to facilitate competition in the sector.

## *Recent telecommunication deals and matters*

The TMT group has advised several clients in relation to their M&A activities in the telecoms sector. Our lawyers have extensive experience in providing regulatory advice in relation to licensing requirements and compliance with regulatory obligations and assisting clients to respond to policy and market developments in the sector.

Recent years have seen a marked increase in deal activity in the telecommunications sector in South Africa. Our TMT practice group has acted for clients in a number of these transactions and has wide-ranging expertise in relation to the types of issues which may arise, including ownership and control restrictions and the implications for deal structure, financing and regulatory approvals. The liberalisation of the communications sector in South Africa has also seen a number of new small and medium-sized entrants into the sector, as well as the incorporation of local licensed entities by multinational telecoms companies. The group has assisted a number of clients in this regard.

Major transactions in which the group has been involved include:

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The proposed acquisition by Bharti Airtel, a major mobile operator in India, of a stake in MTN, which is one of the three mobile operators in South Africa with operations in Africa and the Middle East and the acquisition of a stake in Bharti Airtel by MTN

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The establishment of an independent tower company to operate and manage passive infrastructure for use by wireless operators, and the acquisition and construction of towers by the company in South Africa and elsewhere in Africa

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Acting for Verizon Communications in the disposal by its wholly-owned subsidiary, Verizon European Holdings Limited, of its entire

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shareholding in Verizon South Africa (Pty) Limited to MTN

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Advising the French media group Vivendi on its proposed multi-billion dollar acquisition in 2007 of a stake in Oger Telecom Limited, the ultimate holding company of Cell C

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Advising Nexus Connexion on its successful bid for the acquisition of the 19% BEE stake in the second national fixed-line operator, and representing Nexus in litigation with the Minister of Communications arising from her decision to award shares in Neotel to bidders who had been rejected by ICASA.

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Since 1999, our TMT practice group has advised ICASA (and its predecessor-in-law, SATRA) on a range of telecommunications matters, including:

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Local loop unbundling in the context of the applicable regulatory framework

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Proposed regulations in relation to the subsidisation of subscriber equipment

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The continuing application of price control rules to dominant operators.

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We have also advised various public-sector clients, including ICASA, on the drafting of regulations and other legislative instruments. We:

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Advised ICASA on the process for the development of regulations on competition matters in telecommunications markets and market segments

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Drafted by-laws for the City of Johannesburg on the exercise of rights of way by telecoms network operators in the construction of electronic communications networks in the City's municipal area



Untangling the  
legal lines of  
communication.



Drafted regulations regarding the powers of ICASA inspectors exercising monitoring and search and seizure powers in respect of radio frequency equipment and radio apparatus

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Drafted regulations for ICASA setting out the licensing processes and procedures.

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Our telecoms regulatory advice for private-sector clients includes advising:

AT&T on reseller arrangements in South Africa and general licensing requirements and telecoms regulatory obligations

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Various clients, such as Verizon and Bloomberg, on the licensing of telecoms service providers and general regulatory obligations in relation to the services provided by their local subsidiaries

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A major multinational provider of telecommunications services on its submission to ICASA on the proposed regulation of ownership and control in the telecoms sector

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Neotel on a range of matters, including the drafting of submissions on the Draft Electronic Communications Amendment Bill, as well as Neotel's contractual arrangements with Infraco, the drafting of standard terms and conditions of service, international interconnection agreements and transit agreements

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Several clients on the preparation and submission of applications for class licences to provide telecommunications services and to establish electronic communications networks of municipal or more limited scope and for radio frequency spectrum authorisations

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An international consortium on the regulatory aspects of the proposed installation of the EASsy submarine fibre-optic cable around the continent of Africa

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SES-Global, an international satellite operator, on telecommunications regulation in various southern African jurisdictions

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VNU World Directories in respect of the legal aspects of the publication of telephone directories in South Africa

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Various clients on traffic data retention requirements.

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Elsewhere in Africa, we have acted for clients in the following matters:

We advised Telkom on the acquisition of subsidiaries of M-Web in various African jurisdictions

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We drafted legislation providing for the privatization of Botswana Telecommunications Corporation

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We were involved in drafting a new Electronic Communications Act for Tanzania

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We advised Telecom Lesotho on various regulatory and licensing issues, including a tariff dispute with the Lesotho Telecommunications Authority and a judicial review application in the Lesotho High Court concerning encroachment by other licensees on its exclusivity rights under its fixed-line operator licence

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We advised shareholders in telecommunication service licensees in Botswana, Namibia, Zimbabwe and Malawi on a range of regulatory and commercial matters.

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## *Media and broadcasting*

The TMT group advises the regulator, the Independent Communications Authority of South Africa (ICASA) and private media clients in the context of their commercial operations in South Africa and with regard to their regulatory obligations.

In this regard, we have assisted ICASA with the:

Drafting of the digital migration regulations that were published by ICASA in 2010

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Internet Protocol and Video on Demand policy development process conducted by ICASA in 2010

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Drafting of process and procedures regulations for applications for broadcasting service licences.

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We regularly advise ICASA in judicial review proceedings brought against it in the context of broadcasting matters. The matters in which we've been involved include:

A judicial review application to set aside the digital migration regulations

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Judicial review applications brought by various applicants for community radio broadcasting service licences, including Radio Pretoria, Good News Community Radio Pulpit, Campus Bay, Radio Kingfisher and Vaal Community Radio, and by Trinity Broadcasting Network in relation to its community television broadcasting service

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Applications by Caxton and Deukom to set aside aspects of ICASA's decisions in respect of the licensing of satellite subscription television broadcasting services

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An application by the Islamic Unity Convention, which was initiated in 2007, regarding a decision of ICASA's complaints monitoring committee that the Code of Conduct for Broadcasters had been breached.

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We have also advised ICASA on the:

Licensing of new commercial radio stations in the primary markets of Gauteng, the Western Cape and KwaZulu-Natal

Regulation of advertising and infomercials

Processes to be adopted for the assignment of spectrum for mobile video

Regulation of broadcasting activities during the course of local government elections

Various licensing processes for community broadcasting services

Procedures to be followed and the market analysis to be conducted by ICASA in the assessment of the effectiveness of competition in the broadcasting sector and the necessity to impose pro-competitive conditions

Drafting of reasons for ICASA's decisions on the secondary market sound broadcasting licensing process

Licensing process for the award of commercial sound broadcasting licences in secondary markets that was completed in 2007.

Our TMT group has also advised the following clients on media matters:

On Digital Media which was licensed to provide a subscription broadcasting service in 2007 and which launched Top TV in 2010

SES Astra, the provider of satellite transmission services, in the context of its shareholding in ODM

a provider of satellite transmission services on its satellite capacity agreements for South African broadcasters and telecoms operators

Telkom on the disposal of its interest in Telkom Media

the FIFA-appointed host broadcasting company for the 2010 World Cup on South African broadcasting law

the National Film and Video Foundation on regulations setting out procedures for applications for funding and support for South African productions and co-productions

Disney with regard to the introduction of new satellite television channels and digital terrestrial channels in South Africa

Discovery Channel with regard to the broadcasting regulatory requirements applicable to channel providers

NBC Universal in relation to the regulatory requirements and codes of practice applicable to subscription broadcasters

Microsoft with regard to IPTV and broadcasting in South Africa, generally, in light of technological convergence and with regard to online gaming services

various production houses and television producers with regard to their production agreements

various providers of Video on Demand services with regard to their licensing and regulatory obligations, including their obligations to have content classified by the Films and Publication Board.

## Technology and outsourcing

We have extensive experience in advising clients on technology and outsourcing contracts. Our experience in this regard includes advising:

MTN, Neotel and Vodacom on the procurement and implementation of each party's fibre optic network across South Africa

MTN on the conclusion of an agreement with Huawei for the turnkey provision of a fibre optic network in Gauteng

Transnet in relation to a BOT agreement for a new countrywide managed connectivity network

Ericsson in relation to a BOT agreement for a new managed connectivity network

PPS on the outsourcing of its IT infrastructure and other significant IT projects

BIC on the outsourcing of part of its operations to various key suppliers

IBM on the R1billion outsourcing by Safmarine Container Lines of its IT infrastructure to IBM

MTN in the appointment of Atos Origin as systems integrator for a major IT project

The Standard Bank of South Africa Limited in commercial arrangements with Clear To Pay for the provision of an Order Management Solution and City Fios for the provision of a CRM Solution

MTN in compiling an entire suite of procurement contracts for all technology spend

Transtel in concluding agreements for the provision of various services to Transnet following the sale of Transtel to Neotel

Transnet Freight Rail in concluding an IT services agreement with Sybase

General Motors on an agreement regulating the lease of all IT hardware in South Africa from a global IT hardware supplier

EDS on various commercial deals with Mercantile Bank and the National Roads Agency

ADP Dealer Services in IT agreements with BMW, Mercedes Benz and Ifframac, amongst others

Alcatel with regard to an agency arrangement and laws and regulations regarding records retention in South Africa.



Facilitating  
the channels  
of progressive  
dialogue.



## *E-commerce services*

The Electronic Communications and Transactions Act, 2002 (ECTA) governs electronic commerce and deals with, amongst other things, encryption, security, and cyber crime. The Consumer Protection Act, 2008 (CPA) is also relevant to electronic transactions and digital goods and services.

The TMT group has advised various clients in relation to their e-commerce activities, including advising:

Various major mobile device manufacturers in relation to the sale of digital downloads and services to South African consumers

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Southern Sun Hotels, IBM, UBS Warburg, MTN, Bloomberg and AngloGold Ashanti, amongst others, on the interpretation of ECTA and their compliance with its provisions and the provisions of other relevant legislation governing their respective electronic commerce activities

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Listed companies, such as Standard Corporate & Merchant Bank (a division of Standard Bank) and Afrox, on the applicability of ECTA to company law and disclosure requirements.

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A major engineering firm in relation to electronic signatures in the context of engineering drawings

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Various clients on the requirements in relation to the registration of encryption products and services.

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## *Data protection*

Our TMT group advises regularly on data protection requirements in South Africa and has assisted major international telecommunications operators and equipment manufacturers, pharmaceutical companies and financial information companies in this regard. South Africa is in the process of developing specific data protection legislation which is anticipated to be adopted in 2012. This new legislation will establish a data protection authority, impose requirements in relation to cross-border transfers of personal data and impose standards and requirements for the protection of personal data. Until the legislation is adopted and comes into effect, data protection obligations emanate from the Constitutional and common law rights to privacy, which include the right to informational privacy.

### *Lawful interception*

In general, the right to privacy, which is guaranteed in the Constitution and in the common law, requires that communications not be monitored or intercepted. The Regulation of Interception of Communication and Provision of Communication-Related Information Act, 2002 (RICA) provides that, generally, communications may only be intercepted under a direction issued by a judge. RICA excepts certain types of communications from this restriction, including communications in the workplace where interception and monitoring is necessary for a business purpose or where permission is sought for employees' communications to be monitored. Bowman Gilfillan has advised a number of clients, including AngloGold Ashanti, AT&T, Bloomberg, UBS Warburg, IBM and Walt Disney on the implications of this legislation and on related issues, such as the violation of privacy rights.

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