



7 December 2012

Department of Communications

Attention: Ms P Legoze

The Director, Cyber Security

Per email: palesa@doc.gov.za

Dear Madam

**ISPA SUBMISSIONS ON THE ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT
AMENDMENT BILL 2012**

1. ISPA refers to the Electronic Communications and Transactions Amendment Bill, 2012, published for comment in Government Gazette 35821 on 26 October 2012 ("the Bill") and sets out below its response thereto.
2. ISPA welcomes the publication of the Bill. Some ten years after the coming into operation of the Electronic Communications and Transactions Act, 25 of 2002 ("the Act"), it is evident that there are aspects of the Act which need to be updated and improved.

ISPA Management Committee:

Graham Beneke, Ant Brooks*, Marc Furman, David Gentleman,
Jenny King, Duncan Martin, Jaap Scholten, Mike Silber, Elaine Zinn* (*ex officio)

PROPOSED AMENDMENTS TO CHAPTER XI OF THE ACT

3. As an Industry Representative Body (IRB), recognised by the Minister under Chapter 11 of the Act, ISPA has a substantial and direct interest in the proposed amendments to this Chapter.

Proposed amendments to the take-down procedure

4. The Memorandum notes that the Minister considers that the take-down procedure should allow for a right of reply so as to ensure that such procedure conforms to the principle of administrative justice and the *audi alteram partem* rule.
5. ISPA supports this view and submits that an effective mechanism that allows for a person who is the ultimate recipient of a take-down notice (referred to below as “the respondent”) to be heard prior to the take-down being effected would assist in redressing the apparent unconstitutionality of the current procedure.
6. ISPA submits, however, that the mechanism proposed in the Bill is flawed.
7. The proposed process can be summarised as follows:
 - 7.1. A complainant must lodge a first notice addressed to the service provider or its designated agent which conforms with the requirements of section 77(1)(a)-(h).
 - 7.2. The service provider is required to respond to this first notice. This must be done within ten working days or such reduced period as may be justified where irreparable or substantial harm is anticipated if the complaint is not resolved within a shorter period as set out in the proposed section 77A. It is presumably within the discretion of the complainant to decide whether or not circumstances exist justifying a reduced time period and, if so, what such reduced period should be. The service provider is further as a minimum response required to respond to the averments in the first notice relating to the identification of the right allegedly infringed, the identification of the material or activity that is claimed to be the subject of unlawful activity and the remedial action required to be taken the service provider. The service provider is to have a discretion as to whether to include any further material in its response which is relevant to the complaint and the first notice.
 - 7.3. The complainant is thereafter required to give “due consideration” to the service providers’ response.

- 7.4. If the complainant, notwithstanding such response, regards the complaint as remaining unresolved, or if no response is received from the service provider, then the complainant may proceed to lodge a final take-down notice with the service provider. This must be done within ten business days of the response being received or at the expiry of the ten day period allowed for the service provider's response where no such response is forthcoming from the service provider, or in accordance with the reduced time periods set out in the first notice.
- 7.5. The service provider is required to comply with this final notice within ten business days or in such reduced period as may be set out in the first notice.
- 7.6. A failure to so comply may result in the service provider being "liable for a related offence".
8. ISPA submits that the proposed amendments are incorrect in seeking to focus on the service provider as the respondent to take-down notices.
 - 8.1. The service provider is an intermediary which by definition has no direct involvement in the unlawful activity or infringement of rights alleged by the complainant. It is involved in the take-down process due to the fact that a correctly-identified service provider will itself be in a position to affect the resolution required by the complainant.
 - 8.2. The respondent is the party which has published or made available the allegedly infringing material or which is undertaking the allegedly infringing activity.
 - 8.3. The respondent is accordingly the party whose rights may potentially be impacted upon by the take down of the allegedly infringing material or the cessation of the allegedly infringing activity.
 - 8.4. It follows that it is the respondent to which an opportunity must be afforded to be heard if the *audi alteram partem* rule is to be observed.
 - 8.5. The proper role of the service provider is to act as a conduit for the communication of a take-down notice to its subscriber and to otherwise act in accordance with the provisions of Chapter XI.
 - 8.6. ISPA therefore requests that the Minister review the proposed amendments to the take-procedure with a view to ensuring that the correct roles of the service provider and respondent are identified and provided for.

9. ISPA requests that the Minister give due consideration to the deletion of the words “related offence” where these occur in the proposed section 77A(4).

9.1. A service provider who fails to comply with a final take-down notice will lose any claim to the exemptions from liability set out in sections 73-76 of the Act. It will therefore be open to the complainant to proceed directly against the service provider for relief.

9.2. It is accordingly not clear to ISPA why there is a need to stipulate further that such a service provider may be “liable for a related offence”. ISPA understand the term “offence” in this context to imply an illegal act in respect of which a criminal sanction may apply.

9.3. No provision is made in the Bill for any such sanction. No proposed sanction is noted in the table which sets out the proposed rationalisation of offences and sanctions annexed to the Memorandum.

9.4. ISPA submits that subsection 77A(4) should be redrafted to remove the reference to a “related offence” and make it clear that the consequence for non-compliance with a final take-down notice is a loss of the protections afforded by the operation of Chapter XI.

Deemed recognition of Industry Representative Bodies

10. ISPA refers to paragraph 12.2 of the Memorandum:

“In the past applications have been made without response from the Department. We have recognised this as being an obstacle to the application of the Act. Once a representative body has requested recognition and received no response from the Minister within a period of 12 months, the industry body will be deemed to be recognised.”

11. ISPA welcomes the sentiment motivating the proposed amendment, but submits that the better approach would be for the Department to ensure that it has sufficient capacity to respond to requests from industry bodies timeously.
12. The difficulty which ISPA identifies in the proposed amendment to section 71 of the Act is that recognition of an IRB in terms of section 72 of the Act requires the Department to vet the application against the criteria set out in the Guidelines for the Recognition of Industry Representative Bodies of Information System Service Providers¹ (“the IRB Guidelines”). In particular the Department is required to satisfy itself that the applicant body is capable of monitoring and enforcing its Code of Conduct adequately as required by subsection 72(2)(d).
13. ISPA submits that the Act requires a positive act of recognition to be provided by the Minister. A situation where recognition is deemed to be afforded to an applicant that does not in fact meet the requirements set out in the IRB Guidelines should be avoided.

¹ GG29474, 14 December 2006

Expansion of the scope of application of Chapter XI to include wireless application service providers

14. ISPA notes the rationale laid out in paragraph 12.3 of the Memorandum:

“12.3 This chapter provided initially for the Internet Service Provider and at the time did not take into consideration Wireless Application Service Providers (WASPs). Amendments to the section now enable the application of it to WASPs as well. We have amended the section to refer to "information systems" and amended that definition as well. Although on the face of it the section may not apply to licensees under the ECA who are not "service providers", they should not be liable simply because they are categorized as licensees. Amendments are made in this regard so that any person providing service of the type that these service providers may or do provide, should fall within the section. This will require licensees wishing to benefit from the provisions to register with an industry body that is recognised by the Minister.”

15. ISPA submits that the amendments are not necessary as the existing provisions already allow for a body representing wireless application service providers to make application to the Minister for recognition as an Industry Representative Body (IRB). This flows from the existing definition of “information system services”, viz.:

“information system services” includes the provision of connections, the operation of facilities for information systems, the provision of access to information systems, the transmission or routing of data messages between or among points specified by a user and the processing and storage of data, at the individual request of the recipient of the service;

15.1. ISPA does not believe there is room for argument that a wireless application service provider (WASP), in the sense that that term is used to describe members of WASPA, does not fall within the definition of “information system services” as it currently exists or as it is proposed in the Bill.

15.2. The IRB Guidelines explicitly recognise this:

“3 Objectives and scope

Applicability to all Information System Service Providers:

As stated above, these guidelines have been prepared for a specific category of Information System Service Providers i.e. Internet Service Providers. These guidelines will, however, also serve as a guideline for other categories of Information System Service Providers and should

be applied mutatis mutandis. Practical restrictions may, however, prevent other Information System Service Provider from complying in full due to the use of different technology. Such Information System Service Providers should propose, in its application to the Minister for recognition, how it can achieve the same objectives in a different way. A Wireless Application Service Provider, for instance, may not have a website where it can comply with the informational requirements in paragraph 5.14.1. to provide a link to the IRB's Code of Conduct. That Wireless Application Service Provider can propose to comply with said requirement by ending all its own SMS messages with:

Code of Conduct-)www.nameofirb.co.za"

(ISPA's emphasis)

16. ISPA submits further that the proposed definition of "wireless application service" is overly broad.

16.1. The Bill proposes the insertion of the following definitions:

"wireless application service" means applications that use wireless technologies and includes Internet access from a wireless device;

"wireless application service provider" means any person engaged in the provision of a wireless application service to any member or members of the public who concludes an agreement with a licensee authorizing and enabling the provision of such services;"

16.2. ISPA's view is that the proposed definition of "wireless application service provider" reflects a narrow understanding of the term which is in line with the commercial use of the term in South Africa.

16.3. The WASP industry in South Africa is self-regulated through WASPA, which was formed in 2004 with the support of the then existing mobile network operators (MNOs) for this purpose. Each MNO requires that WASPs become members of a self-regulatory body – WASPA is the only relevant body – before they will be entitled to terminate traffic onto the MNO's network.

16.4. The current version of the WASPA Code of Conduct sets out the following definition of wireless application service provider:

*“2.28. A **wireless application service provider** is any person engaged in the provision of a mobile service, including premium-rated services, who signs a WASP contract with a network operator for bearer services enabling the provision of such services.”*

16.5. While this definition is circuitous for present purposes in that it in part rests upon the signing of a WASP contract, it must be noted that such contract is for the provision of bearer services by the network operator.

16.6. It may also be helpful to consider business practise amongst the MNOs regarding WASPs. MTN provides the following definition²:

“WASP stands for Wireless Application Service Provider. Basically, a WASP is any person or company that provides mobile services like Bulk SMS, USSD, IVR, PRSMS and MMS to the public.”

16.7. Cell C lists the following as WASP services³:

- **IVR Di-con (Interactive Voice Response)**

This service is mainly used for Call Centre Operations. Cell C issues a 10-digit 084 number and routes the number to any Telkom fixed line in South Africa. IVR Di-con generates revenue for all incoming voice and data calls. Cell C Callers pay a flat rate per minute for calls to the IVR Di-con numbers, while callers from any other Network will pay VAS rates based on their cell phone package at the relevant network.

- **PRSMS (Premium Rate SMS)**

PRSMS can be used for competitions and information services. The SMS sent from the consumers' handsets (Mobile Originating or MO) is Premium Rated, ranging from R1.00 to R30.00 per SMS. There can be a reply SMS (Mobile Terminating or MT) linked to the relevant competition or information service. WASPs will set these services up in accordance with the WASPA Code of Conduct and the Advertising Guidelines and Cell C will act as a conduit for the transmission of the SMSs.

- **Bulk SMS**

Bulk SMS enables a WASP, through its connections to Cell C, to send marketing or notification SMS's to multiple Cell C subscribers at once, at costs much lower than that of a conventional SMS, on behalf of businesses.

² <http://www.mtn.co.za/Partners/WASPs/Pages/WASPsOverview.aspx>

³ <http://www.cellc.co.za/explore/additionalinfo/get-a-wide-range-of-wireless-services-with-wasp>

- **OBS (Online Billing Service)**

OBS enables WASPs to bill Cell C subscribers for content subscription services on a recurring basis. Once subscribed, the subscriber may be billed daily, weekly or monthly, depending on the service they have subscribed to. Unlike PRSMS, OBS enables the WASP, through Cell C's network infrastructure, to interrogate the subscriber's cell phone account to verify whether or not there are funds available for billing; and to bill the subscriber according to the service subscribed to. OBS carries a maximum value of R50.00 per transaction.

- **USSD (Unstructured Supplementary Service Data)**

The most common form of USSD services today are airtime purchases and the Please Call Me Back service. Other services such as flight arrival and departure times, weather and traffic services can also be extended to the vast majority of cellphone users across all networks in SA. USSD text messages can be up to 125 characters in length (including spaces). USSD will time-out if the customer takes longer than two and a half minutes to complete a transaction. Cell C does not currently bill for USSD sessions. This will be implemented early in 2012.

- **Bulk Multimedia Messaging Services (MMS)**

This service will allow a WASP to deliver images, pictures & videos to multiple consumers' handsets. Similar to Bulk SMS the cost for these MMS's will be substantially lower than that of a conventional MMS."

16.8. In South Africa the majority of WASPs are aggregators of bulk or Application-to-Person (A2P) SMS traffic which they terminate onto each of the four mobile networks in terms of a WASP bind or bulk SMS agreement ("WASP Agreement") entered into between the WASP and each such network. There is currently no clear position on whether such a relationship constitutes "interconnection" as that term is defined in the ECA such that a WASP would require a licence or a licence exemption from ICASA before entering into a WASP agreement.

16.9. Typically the WASP prepares a database of SMS messages and end user MSISDNs and delivers these to an MNO's short messaging service centre (SMSC). The MNO then provides the service of distributing these to the relevant end user terminal devices.

16.10. The proposed definition of "wireless application services", however, reflects a far broader meaning that in general includes all parties that provide application over wireless networks. The definition as proposed would include devices such as mobile phones and tablets which can and which are widely used to provide wireless access to the Internet. This is an instance

of the provision of electronic communication services and not the provision of wireless application services within the South African context.

17. ISPA submits that the proposed definitions of the terms “wireless application services” and “wireless application service provider” should be deleted from the bill on the basis that they are not required. In the same vein ISPA submits that references to wireless application services in Chapter XI in the Bill should also be deleted.

18. In the alternative, ISPA submits that the proposed definition of “wireless application services” should be deleted from the Bill for the reason that it is overly broad.

MISCELLANEOUS SUBMISSIONS

19. ISPA wishes to highlight the below matters as a contribution to the improvement of the Bill.

Unsolicited commercial communications

20. ISPA welcomes the recognition in the Bill of the benefits of an opt-in model in regulating commercial electronic communications and appreciates that it can now align the opt-in requirement of its own Code of Conduct with that set out in the Act.

Electronic signatures and advanced electronic signatures

21. ISPA notes that the effect of the proposed amendments to the definition of the terms “electronic signature” and “advanced electronic signature” is to make the two terms essentially identical other than that the latter will have been accredited by the Accreditation Authority and will, explicitly, be admissible in legal proceedings.

22. ISPA is concerned that the implication is created that an “electronic signature” will not be admissible in legal proceedings. Decisions as to admissibility of evidence lie within the domain of the courts. The use of encryption in this form is extremely limited in South Africa.

Definitions not used

23. The following definitions are proposed but not used in the Bill:

23.1. “commercial communication”,

23.2. “commercial electronic transaction”,

23.3. “non-commercial electronic transaction” and

23.4. “third party”.

Amendments to sections 73 and 74

24. The proposed amendment to the term “information systems” explicitly incorporates “electronic communications networks used for electronic communications network services”. It follows that the

proposed amendments to section 73 and 74 are not necessary insofar as they have been affected only to specify application to “electronic communications networks” in addition to “information systems”.

Substitution of the definition of “Internet”

25. ISPA notes the proposed new definition of the term “Internet” and the reasons advanced therefore.

“Internet” means the data communicated through a worldwide network made up of electronic communications facilities using packet switching technology and communicating through TCP/IP or other Identified protocols and includes future versions thereof.

26. ISPA has the following reservations regarding this proposal:

26.1. The Internet does not run over only packet switched networks. It can be run over token ring network, avian carrier networks, phased switched networks etc. We would strongly advise that the network technology used be left out of a definition, i.e. that the definition be technology neutral.

26.2. The Internet does not consist only of binary code and the data passed through it should certainly not be regarded as part of the network itself. This could lead to a situation, where rights owners, simply by making their intellectual property available in a data format on the Internet, risk such intellectual property becoming part of the Internet.

26.3. The term “electronic communications facilities” should be utilised with caution. ISPA does not believe that the definition set out in the ECA accords with the intended meaning of the term in the proposed definition set out above. Certainly it is not accurate to state, as this definition does, that the Internet is made up of electronic communications facilities.

26.4. ISPA suggests that the Department consider the definition adopted by the United States Federal Networking Council and endorsed by some of the original creators of the network:

“Internet” refers to the public global information system that --

(i) is logically linked together by a globally unique address space based on the Internet Protocol (IP) or its subsequent extensions/follow-ons;

(ii) is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite or its subsequent extensions/follow-ons, and/or other IP-compatible protocols; and

(iii) provides, uses or makes accessible, either publicly or privately, high level services layered on the communications and related infrastructure described herein."⁴

Amendment of the definition of “information system” and “information system services”

27. The Bill proposes new definitions for the terms “information system” and “information system services”:

““information system” means a system for generating, sending, receiving, storing, displaying or otherwise processing data messages and includes the Internet and electronic communications networks where electronic communications networks are used in the provision of electronic communications network services;”

“information system services” includes the provision of connections, the operation of electronic communications facilities for information systems, the provision of access to information systems and electronic communications networks, the transmission or routing of data messages between or among points specified by a user and the processing and storage of data messages fat the individual request of the recipient of the services];”

28. ISPA is not certain that the use of the terms “electronic communications network”, “electronic communications network services” and “electronic communications facilities” – bearing the meaning ascribed to them in the Electronic Communications Act 36 of 2005 (“the ECA”) – is correct within the context of the proposed definitions. Certainly the proposed use of these terms imports a substantial degree of complexity to the interpretation to given to “information system” and “information system services”.

29. It is ISPA’s understanding that there is a clear distinction between the scope of application of the Act – being content – and the scope of application of the ECA – being the carriage of that content, and that this is desirable. The Bill appears to endorse this through its proposals to remove provisions relating to universal access and to excise other matters relating to electronic communications networks.

⁴ http://www.cnri.reston.va.us/what_is_internet.html#xv

CONCLUSION

30. ISPA thanks the Minister and the Department for their consideration of these submissions and trusts they will prove to be of assistance.

Regards

INTERNET SERVICE PROVIDERS' ASSOCIATION

Per:

ISPA Joint Chairs

(the above intended as an electronic signature)