The Wireless Application Service Providers' Association
info@waspa.org.za
+27 11 314 7751
http://www.waspa.org.za
PO Box 73570
FAIRLAND
2030

Wireless Application Service Providers' Association

Submission on Convergence Bill [B9-2005]

8 April 2005

The Wireless Application Service Providers' Association
info@waspa.org.za
+27 11 314 7751
http://www.waspa.org.za
PO Box 73570
FAIRLAND
2030

1. Introduction

The Wireless Application Service Providers' Association (WASPA) welcomes the opportunity to comment on the Convergence Bill (B9-2005).

1.1. About WASPA

WASPA, the Wireless Application Service Providers Association, is a self-regulatory mobile services industry association formed on 26 August 2004 for *inter alia* the purpose of recognition as an Industry Representative Body in terms of the ECT Act 2002.

The initiative was fully supported by the three GSM networks, Vodacom, MTN and CellC.

WASPs are companies providing value added services to mobile phone users in South Africa.

Currently representing over 50 major players in the mobile services industry, membership of WASPA is growing as more WASPs sign up as members.

A comprehensive constitution based on best practise in South Africa and drawing on elements of similar regulatory bodies in Europe was adopted unanimously at the launch plenary meeting.

The WASPA constitution as adopted on 26 August 2004 provides *inter alia* for promotion of ethical and sound business practices amongst its members and includes a mandatory code of conduct. A Code of Conduct is being produced to take into account the unique requirements of provision of services via mobile devices.

1.2. Structure of this submission

Section 2 of this submission reviews the main issues WASPA has identified in the draft Convergence Bill that may impact on its members and as such require consideration by the Committee.

The Wireless Application Service Providers' Association
info@waspa.org.za
+27 11 314 7751
http://www.waspa.org.za
PO Box 73570
FAIRLAND
2030

2. Issues Of Concern To WASPA

2.1. Application Services

WASPA notes with concern the inclusion in the bill of the terms "Application Service" and "Application," defined in the Definition clause as:

"any technological intervention by which value is added to a communications network service which includes the—

(a) manipulation;
(b) storage;
(c) retrieval;
(d) distribution;
(e) creation; and
(f) combination,

of content, format or protocol for the purpose of making such content, format or protocol available to customers"

Further to this, Section 7 of the bill prohibits anyone from being able to:

"provide any service referred to in sections 5(2) and (3) except under and in accordance with the terms and conditions of an individual or class licence."

As Application Services are included in Section 7, it would effectively mean that any newly developed or even modification of an existing Application Service would first require regulatory approval (possibly a subjective assessment) via licensing.

With reference to this scenario, WASPA believes that any law that would quench the ability of entrepreneurs to provide "Application Services," under market conditions, is undesirable in a country where entrepreneurship is coveted, and freedom of expression – even in the ability to write and compile specific programming code – is guaranteed under the Bill Of Rights (but subject to the limitation clause).

WASPA believe that if the term "Application Services" was included in the Bill for the purpose of controlling any nefarious use of applications deemed undesirable by being capable of being used or manipulated for illegal or undesirable activities or services, that these instances are sufficiently covered under existing South African statutes, and then only on a case-by-case basis. e.g. under the ECT Act, there is a prohibition on applications that may have the effect of allowing hacking.

WASPA respectfully submit that as such, the definition of, and even the existence of the effectively generic phrase, "Application Services" is at best, too onerous and may stifle rapid development of services, and at worst – although WASPA does not believe this to be the case, could be interpreted as amounting to censorship.

WASPA would respectfully submit that any reference to "Application Services" be removed from the Bill.

The Wireless Application Service Providers' Association
info@waspa.org.za
+27 11 314 7751
http://www.waspa.org.za
PO Box 73570
FAIRLAND
2030

2.2. Content

WASPA supports this draft of the Bill where content services and content *per se* are excluded from requiring any type of license.

It notes the inclusion in the current draft Bill definition section of the terms "content" and "content services" ostensibly placed so purely for providing context to the definition of the term "communications" where content is again, ostensibly excluded.

However, this exclusion of content and content services is only obliquely set out via inclusion in the term communications, and as such we would recommend terminology rather be included in the bill that explicitly set out that "no license (whatsoever) shall be required to provide any content service".

Adding this provision would provide needed clarity to those who provide content services.

That said, WASPA also feels that the exclusions provided for under the definition of content, particularly the term that ostensibly excludes "content contained in private communications between consumers" may have the inadvertent effect of in some cases actually requiring that certain content and content services obtain licenses.

For example, in the mobile value added services domain, there are mobile content providers/WASPs who provide SMS chat services, anonymous or otherwise through 'flirting type' facilities. The object of these services is to provide a closed user group where the WASP facilitates the transfer of private messages - on a point-to-point basis via SMS - between like-minded users of the 'flirt' system who agree to the communications. Their messages, so transferred between parties, may at some or any stage during their use of the system be construed as "private".

By excluding these "private" messages from the definition of content however, the exclusion may have the inadvertent effect of requiring that these content services need to acquire "content" licenses, something which the Bill appears to want to avoid insofar as content is concerned.

Further, if the logic in the foregoing dictates that a license is actually required, there is actually no provision in the Bill that explicitly outlines a framework of how a content license should be issued. This may mean these types of service could inadvertently full under another licensing regime in another Act of Parliament, for example the Films and Publications Act.

WASPA believes that the exclusionary terms in the Content definition are thus made redundant, and should be modified to obviate the potential for a content license to be required certain services.

The Wireless Application Service Providers' Association
info@waspa.org.za
+27 11 314 7751
http://www.waspa.org.za
PO Box 73570
FAIRLAND
2030

2.3.Broadcast Services

WASPA is concerned that because of unclear or missing definitions relating to "Broadcasting Services", that there is effective potential for (possibly unintended) back-door content licensing.

WASPA in particular finds ambiguity in the drafted definitions of "broadcasting" and "broadcasting service", as it relates to the associated but undefined terms "unidirectional", "on-demand", and "point-to-point".

From the draft of the Bill, the definition of broadcasting includes "any form of unidirectional communications", with the term further augmented by the definition of a "broadcasting service" as "a broadcast that *"does not include -*

> *(i) a service (including text service) that provides no more than data, or no more than text (with or without associated still images); or*
> *(ii) a service or components of a service that make programmes available on demand on a point-to-point basis, including a dial-up service"*

It is not clear to WASPA whether the sections relating to "Broadcast Services" intend to license services that provide for streaming (or 'broadcast') of content using spectrum allocated to mobile phones for provision of services to mobile phones/devices, or pseudo-mobile services that stream multimedia content to mobile phones using sub-carrier frequencies on frequencies – existing or to be allocated – that belong to radio channels, or intend to license a chimera multimedia service that utilise both radio and mobile frequencies for provision of multimedia services to mobile devices.

In the absence of any clear definition, but assuming for the purpose of this submission that the term "unidirectional" is what one would associate with current radio and free-to-air TV broadcasts, WASPA notes that streaming multimedia services such as those available via second, third and probably subsequent generation mobile technologies also provide this type of "unidirectional" broadcast service to any number of users of mobile services either for free or for a fee.

In addition and again, in the absence of a clear definition of the term "on-demand," it is not clear how and if mobile services are captured in the "on-demand" criteria. In cable TV and other digital TV broadcasts available in other countries, "on-demand" has been taken to mean an ability to obtain multimedia programming *de novo* whenever the user desires it, or possibly access a programme or service even once that programme or service has long begun. Thus various interpretations of "on-demand" are possible. It is not entirely clear from the draft of the Bill whether a user issuing via a return channel (for example via SMS or GPRS technology) back to a type of 'broadcast/multicast originator' a request for particular content is by so doing creating an "on-demand" request for content.

If the content services so requested using the above return channel as a type of TV remote control are not deemed "on demand", and which are not "point-to-point" per se although they are actually multi-casted and selected by a consumer, the Bill may create the need for mobile content service providers and even the mobile networks themselves to obtain broadcasting licenses as these services will then not fall under the exclusions provided for in the definition of "broadcasting service".

Many of the existing mobile content services, in particular but as example those providing streaming live or not of traffic video or some sports clips, are already available to the broad South African public via appropriate mobile devices and, where applicable, also via subscription. These are multicast to a broad range of consumers, or may be "on-demand".

The Wireless Application Service Providers' Association
info@waspa.org.za
+27 11 314 7751
http://www.waspa.org.za
PO Box 73570
FAIRLAND
2030

However, no license has ever been demanded for these streaming multimedia services sent to mobile devices, and WASPA would not be in favour of any broadcasting licensing of these existing or future similar services, as this would amount to (content) licensing where there currently is no framework and would be contrary to what the Bill seeks to (ostensibly) avoid.

An extra layer of complexity may even be introduced when trying to interpret these undefined set of terms to various types of newly developed but as yet unavailable chimera technologies like (DVB-H) Digital Video Broadcast Handheld. DVB-H is also "unidirectional", and is for the most part point-to-multipoint, not necessarily on-demand in the cable TV context, yet seems at this stage of the Bill's passage, to possibly fit into the definition of a "broadcast service".

Without in anyway derogating from technology neutrality the Bill aims to maintain, WASPA would however suggest that to prevent any potential equivocation in these terms - which in the most part are new to South Africa legislation - that ""unidirectional", "point-to-point" and "on-demand" be defined clearly in the Definition clause.

The implication of the absence of clear definitions is that current unlicensed unidirectional streaming of content to mobile devices may now require a license. This may stifle a nascent industry by imposing unnecessary and onerous burdens.

The Wireless Application Service Providers' Association
info@waspa.org.za
+27 11 314 7751
http://www.waspa.org.za
PO Box 73570
FAIRLAND
2030

2.4. Class licence process

Sections 16 to 19 detail that ICASA must be provided with advance notice of any material change to the communication service provided, or the cessation of provision of services.

WASPA believes that since services evolve rapidly according to technology availability and competitive exigencies, that any amendment to a class license under these circumstances would be impractical and unworkable in commercial timeframes.

Class licensees would have to have detailed administrative functionaries checking for any possibly infractions on constant basis, which for many small entrepreneurs in mobile services provision, would be an untenable obligation in the midst of trying to build their businesses.

WASPA thus believes that these provisions should be reworked to take into account commercial realities.

The Wireless Application Service Providers' Association
info@waspa.org.za
+27 11 314 7751
http://www.waspa.org.za
PO Box 73570
FAIRLAND
2030

2.5. Facilities Leasing

WASPA members in the most part are dependent for their commercial existence on the availability of revenue-share and facilities leasing arrangements with any or all the licensed mobile network operators.

The revenue is derived from selling of services using so-called short codes that are (mostly) premium rated access numbers, usually SMS, USSD, or IVR-based numbers where the access numbers are, by arrangement with all three GSM networks, a number common to all three networks, and usually at a common price and of common utility across the three networks.

The revenue shares accruing to a WASP providing a service that is billed by such short codes are determined by each operator, as is the availability at any time of short codes. These revenue shares are not set by ICASA, but by each individual operator.

In addition, any WASP wanting a short code must for a fee, lease a short code at rates set by the individual operator, classed in terms of the Bill as a "Communications Network Service Licensee."

WASAP believes that compared to the WASPS, all the currently licensed mobile networks (but excluding for the most part the newly licensed USALSs), hold Significant Market Power.

In this respect, our attention is drawn to Section 42 which refers to an obligation by Communications Network Service Licensees to lease communications facilities.

"s42(1) A communications network service licensee must, on request, lease communications facilities to any—

(a) other communications network service licensee;
(b) Application Service licensee,
(c) communications service licensee; or
(d) other person authorized to provide services in terms of this Act or the related legislation,

in accordance with the terms and conditions of a communications facilities leasing agreement entered into between the parties for the purposes of delivery of any communications service or any other service authorized by this Act or the related legislation, unless the Authority considers such request to be unreasonable."

WASPA believes that there is scope, possibly under s42(1)(d) of the Bill, that where appropriate and requested, for ICASA to be empowered to:

- Mediate reasonable and acceptable revenue share agreements *inter partes*
- Facilitate the acceleration of allocation of short codes
- Facilitate, accepting that short codes can be classed as a scare resource, the reissuing and thus reuse of short codes allocated to a party but not used within a reasonable time frame or used minimally according to industry norms and volumes.

The Wireless Application Service Providers' Association
info@waspa.org.za
+27 11 314 7751
http://www.waspa.org.za
PO Box 73570
FAIRLAND
2030

3. Conclusion

WASPA thanks the Portfolio Committee on Communications for the opportunity to make comment on this important piece of legislation.

We have attempted to raise a number of critical concerns in this submission and we remain at the Committee's disposal to provide further input as needed.

4. Oral hearings

WASPA requests an opportunity to address the Committee at the planned oral hearings on the Bill.

We believe that there remain a substantial number of critical issues to be resolved in the draft Convergence Bill, and look forward to the public debate of the key issues.

5. WASPA Contact information

Should ICASA require any further input from WASPA, please contact us using any of the details listed below.

Leon Perlman
Chair: WASPA
+27824450433

Elaine Zinn
WASPA Secretariat
info@waspa.org.za
+27 11 314 7751