Comment on The Proposed Guidelines For Recognition of Industry Representative Bodies In Terms Of Chapter XI of the Electronic Communications And Transactions Act 2002 In Terms Of Notice 1951 of 2004

Submission To The Department Of Communications By The Wireless Application Services Providers Association (WASPA)

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1. ABSTRACT

The South African Electronic Communications and Transaction Act 2002 was passed *inter alia* to bring legal clarity and to promote electronic forms of contracting, to provide a basis for consumer protection in electronic transactions, and to provide a modicum of protection for those entities that act as mere transit points for the flow of information.

Based on progenitor e-commerce laws in formulated by the UN and the EU, the ECT Acts' putative Technology neutrality provisions give legal recognition to data messages and Digital Signatures in addition to providing a framework for novel consumer protection for electronic transactions. This includes recognition by the Minister Of Communications of Industry Representative Bodies (IRBs) that represent segments of the electronic communications community.

Although there appears to be a slight bias in some sections of the Act towards the Internet, it is respectfully submitted that the entire Act and in particular the Chapter 11 provisions of the Act apply equally but distinctly to the burgeoning mobile services industry. This industry has its own idiosyncrasies and technical modalities requiring different rules for a Code Of Conduct other those that may apply to service provision under bespoke Internet guidelines.

Recognising this, a mobile industry association, WASPA – The Wireless Application Service Providers Association – was formed on 26 August 2004 for *inter alia* the purpose of recognition as an IRB. WASPA represents over 50 major players in the mobile services industry in South Africa.

While the ostensibly technology neutral ECT Act refers to "information systems" as "a system for generating, sending, receiving, storing, displaying or otherwise processing data messages and includes the Internet," the substantive recommendations in Government Notice 1951 of 2004 however refer to "Internet Services Providers" as representing the entire gamut of information systems, and by implication may inadvertently provide for exclusion of non-Internet related services as being able to apply for recognition of their respective IRBs, including the newly formed WASPA.

WASPA believes that the mobile services industry is distinct from the Internet Services industry and requires its own representative organisation as it does its own set of conduct rules.

This submission serves to:

- Promote the necessity for recognition of Mobile Services as distinct from Internet Services as outlined in Government Notice 1951 of 2004
- Motivate for recognition of WASPA as an IRB representing the mobile services industry
- Indicate that some of the proposed regulations may in any case be practically unenforceable as regards mobile services.

2. THE MOBILE SERVICES INDUSTRY IN SOUTH AFRICA

2.1. The Mobile Technology Evolution

Since its humble beginnings in the 1970's in the US and Scandinavia, mobile telephony has evolved out of its strictures of its genesis as a voice-only 'first-generation' system. Technology advances now allow the inclusion of a plethora of novel data services that extends the mobile phone's utility beyond its original voice design.

2.2. Growth

There are a complex set of mobile technology standards in use throughout the world, but the dominant global standard is GSM with over 17 million users in South Africa and over 1.15 billion worldwide.

By comparison there are under 2 million Internet users in South Africa. It is submitted that by sheer force of numbers, consumers in South Africa have more experience using mobile phones and its associated services than have Internet experience.

2.3. New Technologies

While there is a gradual introduction of newer mobile network designs known as 3G (for third generation systems), most phones in the world however are of the 2G (for second generation) underlying technology type, providing voice and limited data-transfer facilities but with some improvements in display design and data storage and include enhanced messaging (EMS) and multimedia messaging (MMS) which enable the downloading of images, streaming video and data files.

This innovation has spawned an entire industry dedicated to not only metamorphosing the mobile phone into a useful all-in-one gadget, but also as a secure mass-market payment tool for conducting transactions and payments.

2.4. The SMS Success Story

One of the biggest success stories of GSM is its text-messaging component called SMS, for Short Message Service. It is now one of the fastest growing telecommunication segments, with over 450 billion SMS messages sent during 2003.

Over 1 billion SMSs are sent every month across the three GSM networks in South Africa

3. LEGAL ISSUES AROUND MOBILE

3.1 ECT Act 2002

As with the South African ECT Act, legal jurisdictions worldwide have had to rapidly adapt their local laws to keep pace with the innovation spawned by electronic commerce. All have grappled with conundrum posed by applying these generic e-commerce laws to the new frontiers and idiosyncrasies of other emerging technologies, particularly the ubiquitous mobile world.

The ECT Act however aims to promote an all-embracing 'minimalist' approach in the application of legislation to electronic communications and transactions.

3.2 "Technology Neutral" Intention Of The Legislature

While the Act's Definition Clause defines an information system as a "system for generating, sending, receiving, storing, displaying or otherwise processing data messages and includes the ***Internet***," it could never have been the intention of the legislature to define a narrow set of technologies to which the provisions could be applicable.

Section 2(1)(f) of the Act in fact emphasises technology neutrality, the principle that the law should be neutral irrespective of the technology involved in commercial dealings regardless of the device used.

Thus, while it does not establish anything to the contrary, all its provisions are meant to be applicable to any kind of commerce and to any electronic device used for facilitating transactions.

While the ECT Act has only one reference to mobile where it defines WAP in its Definition Clause in s1 as 'Wireless Application Protocol', it is trite that the legislature intended that the Act be technologically neutral, allowing where necessary for lateral interpretation of the ECT Act provision where there is a need to dovetail into any manner of information systems.

It is submitted that to give effect to the intention of the legislature, that the Act be applied equally to other technologies, and not only to Internet/Web-based services as is implied in the Regulations outlined in Government Notice 1951 of 2004. This would include recognition of mobile services as a distinct industry/technology group rather than a subset of "Internet Services".

3.3 Comparative Laws In Other Jurisdictions

South Africa's legislative pace thus far appears to follow the technology regulatory movements of other jurisdictions. The ECT Act No 25 2002 is in most part derived from many of UN model laws on e-commerce and EU Directives, but as with the others, is also faced with the same technological and regulatory issues, particularly as it does not have many specific provisions relating to mobile.

4. RECOGNITION OF A MOBILE SERVICES IRB: WASPA

4.1 Formation of WASPA

A self-regulatory mobile services industry association, WASPA – The Wireless Application Service Providers Association – was formed on 26 August 2004 for *inter alia* the purpose of recognition as an IRB. The initiative was fully supported by the three GSM networks, Vodacom, MTN and CellC.

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

There are an estimated 120 to 150 WASPs in South Africa ranging in size from one person to divisions of the major GSM networks.

4.2 Constitution Based On Chapter 11 of ECT Act 2002

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 sub-committee is being formed to devise the Code of Conduct, taking into account the unique requirements of provision of services via mobile devices.

In all respects therefore, WASPAs objectives and its constitution comply in a substantive and normative sense with the scope, criteria and principles set forth in Chapter 11 of the ECT Act 2002 as well as the recommendations set forth in Government Notice 1951 of 2004

5. MINIMUM REQUIREMENTS FOR A CODE OF CONDUCT

5.1 Practical Requirements

WASPA submits that some of the criteria outlined in the minimum requirement for the code of conduct may be practically unenforceable with respect to mobile and that some latitude must be provided according to which transacting medium is utilised by the consumer.

In particular, we highlight as an example that the "Informational Requirements" in s5.14 of the proposed regulations requires that members of the IRB shall:

- *Prominently display the Membership logo of the IRB, a reference to the Code of Conduct and the contact details for complaint procedures and take-down notices [s5.14.1]*

- *Provide full identificatory details on their web sites, including but not limited to their registered name, electronic contact details, physical address, and telephone and fax details. [s5.14.2)]*

5.2 Informational Requirements And SMSs

Analysis of the mobile industry and services being provided indicates the majority of transactions over mobile are currently done through SMS messaging with its innate 160 character limit.

Over 1 billion SMSs are sent monthly within South Africa across the three mobile networks. This includes Premium Rated SMS services and well as mere informational SMSs such as "Call Me Back". Other methods of communication over mobile devices, like WAP (Wireless Application Protocol) and USSD (Unstructured Supplementary Services Data) are in use for displaying data messages, but are not used to on the same scale as SMS.

Under the requirements of s5.14 of the proposed regulations, no transaction via SMS may be able to fill the comprehensive informational requirements required. [Because of the nature of the industry, the lack of universal access to computers and hence Web sites, many WASPs communicate with their clients *only* via SMS, USSD or WAP services, with no Web site interface.]

If the Regulations are adopted as is proposed, this could mean that every SMS may contravene the Act - with associated punitive measures.

This is clearly impractical and unfeasible and WASPA respectfully submits that s5.14 of the proposed Regulations be amended to reflect this, using proposed guidelines below.

5.3 Use Of Section 11(2) of the ECT Act

Section 11(2) of the ECT Act provides we believe provision for some latitude in the Informational Requirements as it codifies existing common law 'ticket cases', whereby information incorporated into an agreement and that is not in the public domain is regarded as having been incorporated into a data message if such information is referred to in a way in which a reasonable person would have noticed the reference thereto and incorporation thereof.

This means effectively that a critical portion of the "contract" – for example here the Informational Requirements– may have complete legal effect even though none of its actual provisions are part of any critical data messages being viewed.

5.4 Suggested Methodology To Comply With Informational Requirements of ECT Act

It is submitted therefore that because the majority of transactions over mobile are currently done through SMS messaging with its innate 160 character limit, that a reference to a web site at the end of the SMS message may sufficient to satisfy s5.14 of the proposed regulations and s11(2) of the ECT Act.

The end of the message could point consumers to the Terms and Conditions (T&Cs) with a simple Web URL reference. In the case of Company **ABCDEF**, the SMS may end with:

T&C->www.abcdef.co.za

5.5 Best Practice In The European Union

It must be noted that similar issues regarding SMS-based transactions are at the fore in the European Union, and that the message by incorporation model – using the top level web site reference inserted at the end of the SMS message as shown above - has been proposed by the UK Department Of Trade and Industry as being sufficient to satisfy equivalent informational requirements in EU Electronic Commerce Law.

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