



ISPA'S SUBMISSION ON
THE
CONSUMER PROTECTION BILL
BILL 19 OF 2008

ISPA Management Committee:

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1. INTRODUCTION

ISPA welcomes the opportunity to submit comments in respect of the Consumer Protection Bill.

ISPA would also greatly appreciate an opportunity to present at any public hearings that may be held in respect of the Consumer Protection Bill.

1.1. About ISPA

The Internet Service Providers' Association is a South African Internet industry body, duly constituted not for gain. ISPA currently has over 148 members, comprised of large, medium and small Internet service and access providers in South Africa. Formed in 1996, ISPA has historically served as an active industry body, facilitating exchange between the different independent Internet service providers, the Department of Communications, ICASA, operators and other service providers in South Africa.

1.2. Structure of this submission

ISPA's Submission on the Consumer Protection Bill is divided into three sections:

- this Section 1;
- Section 2 sets out ISPA's submissions on the Consumer Protection Bill;
- Section 3 contains ISPA's contact details.

1.3. Definitions

In this submission the following expressions and words have the meanings assigned to them and derivative expressions and words will have a corresponding meaning:

1.3.1. "**EC Act**" means the Electronic Communications Act No 36 of 2005;

1.3.2. "**ECT Act**" means the Electronic Communications and Transactions Act, Act 25 of 2002;

1.3.3. "**ICASA**" means the Independent Communications Authority of South Africa;

1.3.4. "**ISPA**" means the Internet Service Providers' Association.

2. SUBMISSIONS

ISPA welcomes the publication of the Consumer Protection Bill. This is an important piece of legislation and ISPA applauds the Department of Trade and Industry and the Portfolio Committee for their progressive approach to protecting South African consumers. As an industry representative body focused on both the interests of the Internet service provision industry **as well as** the protection and promotion of the interests of users of the Internet, ISPA is aware of the current legal and regulatory deficits under which consumers face exploitation and agrees that the Consumer Protection Bill will go a long way to resolving many of these inequities.

ISPA has attempted to provide constructive assistance to improve the Consumer Protection Bill currently before the Portfolio Committee and to avoid polemic in its approach.

2.1. Electronic Transactions and the ECT Act

ISPA has had the opportunity to consider the representations of Mr Wim Mostert of Mostert Opperman Goodburn Incorporated regarding his suggestion that the Consumer Protection Bill repeal Chapter VII of the ECT Act and the Consumer Protection Bill be updated to include the electronic transactions currently dealt with in Chapter VII of the ECT Act.

ISPA concurs with Mr Mostert's submission and urges the Portfolio Committee to consider favourably his recommendation that the provisions currently included in Chapter VII of the ECT Act are more appropriately dealt with in the Consumer Protection Bill. In addition, ISPA is of the view that this will present an opportunity to revise some of the less successful provisions of Chapter VII of the ECT Act.

In this regard ISPA notes that the provisions of Section 45 of the ECT Act dealing with unsolicited electronic communications have been virtually ineffective in dealing

with the increasing scourge of unsolicited bulk electronic mail, an issue which costs our members a significant amount of time, money and lost capacity. As it stands at present, Section 11 of the Consumer Protection Bill, read in conjunction with the definition of "direct marketing" seems to have a greater potential of success than Section 45 of the ECT Act.

ISPA would however suggest that the provisions of Section 11 of the Consumer Protection Bill be expanded to allow a recipient of direct marketing to request the source from which the direct marketer obtained the recipients address details and the direct marketer being obliged to provide same.

It may also be appropriate to consider making a failure to comply with a request for the origin of direct marketing or a request to desist from transmitting same, constitute an offence in terms of the Bill.

Further input regarding international initiatives to combat unsolicited bulk electronic mail will be provided at any oral hearings which may be held, should the Portfolio Committee believe this will be useful.

2.2. Strict Product Liability

ISPA notes the innovative approach of the Consumer Protection Bill regarding strict product liability in Part H of Chapter 2 of the Consumer Protection Bill.

While ISPA's members are generally not focussed on the supply of goods but rather services, ISPA's members will often supply hardware or peripherals together with a service – usually network routers, switches, modems and the like.

ISPA's members recognises that goods of suitable quality must be supplied, however with sophisticated electronic equipment of this nature, the equipment does have a limited life span and is subject to failure. It is for this reason that ISPA's

members enter into support and service level agreements with their customers to allow for the repair and replacement of such equipment within agreed time periods.

ISPA notes the proposed provisions of Section 61 of the Consumer Protection Bill, with some concern. These are far reaching provisions and while ISPA acknowledges the laudable intention of Section 61, it is likely to lead to an increase in the retail pricing of goods to consumers as suppliers pass on the cost of additional liability insurance.

However, ISPA notes **an apparent drafting error in Section 61(6)(c) of the Consumer Protection Bill**. This drafting error was discussed and confirmed with the Bill's drafters. At present, Section 61(6) provides that:

- (6) Harm for which a person may be held liable in terms of this section includes –
- (a) the death of, or injury to, any natural person;
 - (b) illness of any natural person;
 - (c) any loss of, or physical damage to, any property, irrespective whether it is movable or immovable; and
 - (d) any economic loss that results from harm contemplated in paragraph (a), (b) or (c).

The intention is to render a supplier of goods liable for death, injury, physical damage and pure economic loss caused by unsafe goods or a product failure.

What is now contemplated is that a supplier could be liable for pure economic loss occasioned by damage to the good itself. This was certainly not the intention of the drafters and goes far beyond what is reasonably necessary in the circumstances.

While ISPA understands the intention to render a supplier liable for damage caused by goods it supplies, this must, of necessity, exclude damage to the goods themselves. Otherwise the potential liability would be extortionate and the legal remedy beyond that which is reasonable.

To give a practical example, if a supplier supplies a motor vehicle and that motor vehicle is unsafe or experiences a failure, which in turn causes an accident, the supplier would be liable for the death, injury or damage caused in such accident, including pure economic loss (for example where an injured person is unable to work due to their injuries). However, if that motor vehicle fails (such as a mechanical breakdown, which will not allow the vehicle to start), the supplier's liability **MUST** be limited to its obligations in terms of Section 56 of the Consumer Protection Bill, which does not include liability for pure economic loss. The supplier should not be liable for loss of income merely because the vehicle will not start and such a broad right should only arise if the goods actually cause death, injury or physical damage to a person or property.

ISPA Recommends that Section 61(6)(c) be amended to read:

“any loss of, or physical damage to, any property **other than the goods themselves**, irrespective whether it is movable or immovable; and”

(proposed inserted underlined and bold)

ISPA submits that this was the original intention of the drafters of the Bill and is fair to both suppliers and consumers.

2.3. Industry Codes of Conduct

ISPA has taken cognisance of the provisions of Part B of Chapter 4 of the Consumer Protection Bill, read in conjunction with Section 5(3) of the Bill. In this regard:

- ISPA currently has a Code of Conduct and a proud tradition of responding to consumer complaints regarding its members and their activities;
- ISPA has furthermore applied for recognition as an industry representative body in terms of Chapter XI of the ECT Act, which application is currently being processed by the Department of Communications;
- the majority of ISPA's members hold licences in terms of the EC Act and such members will be subject to the Code of Conduct and will be required to finalise their own Consumer Service Charters, as mandated by ICASA in terms of the EC Act.

ISPA recognises that it will be possible for ICASA to apply for exemption in terms of Section 5(3) of the Consumer Protection Bill for the industry ICASA regulates, namely Electronic Communications Network Services, Electronic Communications Services, Broadcasting Services and certain licence exempt Electronic Communications Network Services, Electronic Communications Services and Broadcasting Services. ISPA submits that as an industry representative and self-regulatory body, it should be entitled to make such application for exemption and this should not be restricted to statutory regulatory authorities alone.

However, certain of the services offered by ISPA's members fall outside of these services regulated by ICASA. This also creates the possibility of a *lacuna*, which would be detrimental to both consumers and ISPA's members. ISPA would appreciate an opportunity to clarify this issue with the Portfolio Committee and explore possible mechanisms to avoid the creation of such a *lacuna*.

In addition, ISPA notes the process for prescribing an "industry code" in terms of Section 82 of the Consumer Protection Bill. ISPA is concerned that the procedure is unnecessarily cumbersome, particularly in the electronic communications sphere

where rapidly changing technology and business practices require flexibility and responsiveness to the fluid environment. The current process is likely to take months if not years, with changes taking a similarly long period of time, potentially causing more harm to consumers.

In addition, ISPA is concerned that changes the Commission may require to its Code of Conduct could directly contradict the provisions of Chapter XI of the ECT Act, causing ISPA to lose its status as an industry representative body in terms of the ECT Act. ISPA accordingly recommends that the Commission be obliged to consult with other relevant regulatory bodies or organs of State (in the case of the ECT Act, the Minister of Communications) in fulfilling its role in terms of Section 82 of the Consumer Protection Bill.

3. CONTACT INFORMATION

Should the Portfolio Committee require any further input from ISPA, please contact us using any of the details listed below:

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