



## **WASPA Submission**

**on the**

### **Consumer Protection Bill of 2008**

#### **1. Introduction**

The Wireless Application Service Providers' Association welcomes the opportunity to make this submission concerning the proposed Consumer Protection Bill.

**WASPA respectfully requests an opportunity to make an oral presentation to the Committee, concerning the Bill.**

#### **1.1. About WASPA**

The Wireless Application Service Providers' Association is an unincorporated industry association comprised of members providing wireless application services. It was established by its members as an independent body and voluntary association acting in the interests of those who provide mobile application services over public networks in South Africa and generally dealing with matters related to the provision of mobile services and information in RSA and Southern Africa.

WASPA has adopted a Code of Conduct as a code of practice governing the members of WASPA. It is binding on all WASPA members and contains accepted procedures to be followed in the event of a complaint lodged against any WASPA member. Membership of WASPA is voluntary, with members required to have an existing business relationship with one or more of the mobile network operators. Members are also required to accept the WASPA Code of Conduct and related procedures as binding.

The primary objective of the Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services. The Code of Conduct aims to equip customers and consumers with a mechanism for addressing any concerns or complaints relating

to services provided by WASPA members, and a framework for impartial, fair and consistent evaluation and response to any complaints made.

The three mobile networks have made either membership of WASPA or adherence to its Code of Conduct, compulsory for all WASPs connecting to its network.

## **1.2. Structure of this submission**

WASPA's comments on the proposed regulations are divided into five sections:

- this Section 1;
- Section 2, which contains some general comments on the Bill;
- Section 3, which contains our 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. "Bill" means the Consumer Protection Bill of 2008;

1.3.4. "Committee" means the Portfolio Committee on Trade and Industry;

1.3.12. "WASP" means a Wireless Application Service Provider; and

1.3.13. "WASPA" means the Wireless Application Service Providers Association.

## **2. General Comments on the Bill**

WASPA notes its appreciation of the opportunity to comment on the Bill, prior to the promulgation thereof. There are a number of issues that are of concern to WASPA and its members and the opportunity to raise these with the Committee is appreciated.

### **2.1. Promotional Competitions**

WASPA has noted the intention, in terms of Section 36 of the Bill, to move the regulation of so-called “promotional competitions” under the Bill and repeal the relevant provisions of the Lotteries Act and the regulations promulgated in terms thereof.

WASPA agrees with this intention in the Bill, however would appreciate an opportunity to interact further with the Committee to hone the provisions of Section 36 and in particular:

- The reference in Section 36(3)(a) to “an entry form or device” is superfluous and can be simplified to refer to an “entry”;
- WASPA understand the intention of the reference in Section 36(3)(a) to “the reasonable costs of posting or otherwise transmitting an entry” as being to limit promotional competitions which have an excessive cost of entry, having the effect of indirectly amounting to a payment for the right to enter.

However, reference to a reasonableness test does not take the matter much further. WASPA suggest the Committee considers the provisions of the Gambling Act 2005 in Great Britain. Section 8 to Schedule 1 of such Act provides:

#### **Choice of free entry**

*8 (1) For the purposes of section 11 and this Schedule an arrangement shall not be treated as requiring a person to pay to participate if under the arrangement—*

- (a) each person who is eligible to participate has a choice whether to participate by paying or by sending a communication,*
- (b) the communication mentioned in paragraph (a) may be—*
  - (i) a letter sent by ordinary post, or*
  - (ii) another method of communication which is neither more expensive nor less convenient than participating by paying,*
- (c) the choice is publicised in such a way as to be likely to come to the attention of each person who proposes to participate, and*

*(d) the system for allocating prizes does not differentiate between those who participate by paying and those who participate by sending a communication.*

This will have the effect of allowing the convenience of multiple entry mechanisms (such a premium rated SMS) while promoting consumer choice.

- WASPA submits that premium rated SMS has significant advantages over “standard rated” SMS as a competition entry mechanism as:
  - All entrants pay the same rate, irrespective of whether they are contract or pre-paid customers and regardless of whether they come from Sandton or Soweto;
  - There are additional service guarantees on premium rated SMS; and
  - A greater degree of equity is introduced.

WASPA according proposes the following amendments to the current version of Section 36 as it appears in the version of the Bill before the Portfolio Committee. Changes are marked with an underline:

### 36. Promotional competitions

- (1) In this section –
  - (a) **“participant”** means a person who enters, competes in or is otherwise eligible to win, a promotional competition;
  - (b) **“prize”** includes a reward, gift, free good or service, price reduction or concession, enhancement of quantity or quality of goods or services, or other discounted or free thing;
  - (c) **“promoter”** means a person who directly or indirectly promotes, sponsors, organizes or conducts a promotional competition, or for whose benefit such a competition is promoted, sponsored, organized or conducted;
  - (d) **“promotional competition”** means any competition, game, scheme, arrangement, system, plan, or device for distributing prizes by lot or chance if –

- (i) it is conducted in the ordinary course of business for the purpose of promoting a producer, distributor, supplier, or association of any such persons, or the sale of any goods or services; and
  - (ii) any prize offered exceeds the threshold prescribed in terms of subsection (11)  
  
irrespective whether a participant is required to demonstrate any skill or ability before being awarded a prize.
- (2) A person must not directly or indirectly inform another person that the other person has -
  - (a) won a competition, if -
    - (i) no competition has in fact been conducted;
    - (ii) the person has not in fact won the competition;
    - (iii) the prize for that competition is subject to a previously undisclosed condition; or
    - (iv) the person is required to offer further consideration for the prize, after the results of the competition have been announced; or
  - (b) a right to a prize -
    - (i) to which the person does not in fact have a right;
    - (ii) if the prize was generally available or offered to all similarly situated persons or class of persons; or
    - (iii) if, before becoming eligible to receive the prize, the person is required to offer further consideration for the prize or to purchase any particular goods or services.
- (3) The promoter of a promotional competition -

- (a) must not require any consideration to be paid by or on behalf of any participant in the promotional competition, other than the reasonable costs of posting or otherwise transmitting an entry;
- (b) must not award a prize in a competition to -
  - (i) a winner of the competition if it is unlawful to supply those goods or services to that prize winner, but this sub-paragraph does not preclude awarding a prize to a person merely because that person's right to possess or use the prize is or may be restricted or regulated by, or otherwise subject to, any public regulation; or
  - (ii) any person who is -
    - (aa) a director, member, partner, employee or agent of, or consultant to the promoter or any other person who directly or indirectly controls, or is controlled by, the promoter; or -
    - (bb) a supplier of goods or services in connection with that competition; and
- (c) must -
  - (i) prepare competition rules before the beginning of the competition;
  - (ii) make the competition rules available to the National Consumer Commission, and to any participant, on request and without cost; and
  - (iii) retain a copy of the competition rules for the prescribed period after the end of the competition.
- (4) For greater certainty in applying subsection (3)(a), but without limiting the generality of that paragraph, a promoter must be regarded as having required or received consideration in respect of a promotional competition if –

- (a) a participant is required to pay any consideration, directly or indirectly for the opportunity to participate in the promotional competition, for access to the competition, or for any device by which a person may participate in the competition; or
  - (b) participation in the promotional competition requires the purchase of any goods or services, and the price charged for those goods or services is more than the price, excluding discounts, ordinarily charged for those or similar goods or services without the opportunity of taking part in a promotional competition.
- (5) For the purposes of subsection 3(a) an arrangement shall not be treated as requiring the payment of consideration by a participant if under the arrangement—
- (a) each person who is eligible to participate has a choice whether to participate by paying or by sending a communication;
  - (b) the communication mentioned in subsection 5(a) may be—
    - (i) a letter sent by ordinary post, or
    - (ii) another method of communication which is neither more expensive nor less convenient than participating by paying.
  - (c) the choice is publicised in such a way as to be likely to come to the attention of each person who proposes to participate, and
  - (d) the system for allocating prizes does not differentiate between those who participate by paying and those who participate by sending a communication.
- (6) An offer to participate in a promotional competition must clearly state –
- (a) the benefit or competition to which the offer relates;
  - (b) the steps required by a person to accept the offer or to participate in the competition;
  - (c) the basis on which the results of the competition will be determined;

- (d) the closing date for the competition;
- (e) the medium through or by which the results of the competition will be made known; and
- (f) any person from whom, any place where, and any date and time on or at which -
  - (i) a person may obtain a copy of the competition rules; and
  - (ii) a successful participant may receive any prize.
- (7) The requirements of subsection (6) may be satisfied either -
  - (a) directly on any medium through which a person participates in a promotional competition;
  - (b) on a document accompanying any medium contemplated in paragraph (a); or
  - (c) in any advertisement that –
    - (i) is published during the time and throughout the area in which the promotional competition is conducted; and
    - (ii) draws attention to and is clearly associated with the promotional competition.
- (8) The right to participate in a promotional competition is fully vested in a person immediately upon -
  - (a) complying with any conditions that are required to earn that right; and
  - (b) acquiring possession or control of the medium, if any, through which a person may participate in that promotional competition.
- (9) The right to any benefit or right conferred on a person as a result of that person's participation in a promotional competition is fully vested immediately upon the determination of the results of the competition.

- (10) A right contemplated in subsection (7) or (8) must not be -
- (a) made subject to any further condition; or
  - (b) contingent upon a person -
    - (i) paying any consideration to the promoter for the prize; or
    - (ii) satisfying any further requirements than those stipulated in terms of subsection (5).
- (11) Section 35 (5), read with the changes required by the context, applies equally in respect of any prize or right to a prize conferred on a person as a result of that person's participation in a promotional competition.
- (12) The Minister may prescribe –
- (a) a monetary threshold for the purpose of excluding competitions with low value prizes from the definition of “promotional competition” and until such threshold amount is prescribed, the amount of R10 000,00 (ten thousand Rand) shall constitute such threshold;
  - (b) minimum standards and forms for keeping records associated with promotional competitions; and
  - (c) audit and reporting requirements in respect of promotional competitions.

## **2.2 Industry Codes of Conduct**

WASPA has considered 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:

- WASPA has a Code of Conduct and a proud tradition of responding to consumer complaints regarding its members and their activities. In its short existence, WASPA has resolved more than 4 500 formal and informal complaints (since October 2005). Resolution has in some cases involved strict punishments for members, including

suspension from the mobile networks (effectively shutting down the member's business for a period of time) and fines totalling hundred of thousands of Rands;

- WASPA is considering an application for recognition as an industry representative body in terms of Chapter XI of the ECT Act;
- Some of WASPA's members hold licences in terms of the Electronic Communications Act of 2005 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 Electronic Communications Act of 2005.

WASPA 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. WASPA 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.

In addition, WASPA notes the process for prescribing an "industry code" in terms of Section 82 of the Consumer Protection Bill. WASPA amends and alters its Code of Conduct frequently to respond to the rapidly changing WASP market and is concerned that the procedure is unnecessarily cumbersome, particularly in the mobile content sector, 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.

#### **4. Contact information**

Should the Committee or any other relevant Committee require any further input from WASPA, please contact us using any of the details listed below:

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