

RESPONSE OF THE INTERNET SOCIETY OF SOUTH AFRICA TO THE DRAFT CONVERGENCE BILL

This response has been drafted to a request by the Department of Communications to the Draft Convergence Bill that was made public in December 2003.

THE INTERNET SOCIETY OF SOUTH AFRICA

The Internet Society is a non-profit, non-governmental, international organisation. It has more than 16 000 individual members in over 180 nations worldwide who represent a veritable who's who of the Internet community.

The work of the Internet Society focuses on four "pillars:" standards, public policy, education and training, and membership. The Internet Society South Africa chapter (ISOC-ZA) was formed in 1997. In 2004 the Cape Telecommunications Users Forum (CTUF), which had made numerous submissions on previous telecommunications policy, was disbanded in order to establish the Internet Society Cape Town branch. Today there are over 140 members of ISOC-ZA.

THE STRATEGIC LANDSCAPE

1. Information, communications and technology has the potential to stimulate employment, development and wealth creation in all sectors of the South African economy. Drafters of legislation should aim to make the laws governing the country's ICT sector as simple as possible in order to enable this employment creation and skills development, while benefiting South African consumers, who are the backbone of such an industry.

2. Successful expansion in the telecommunications industry has been seen in the areas where competition exists. Over the past 10 years, the cellular telephone industry has seen enormous growth, overtaking the teledensity of fixed line telephone services. During the same period technologies earmarked for exclusive use by certain companies have failed to keep South Africa competitive on the global stage. For example, South Africa's connectivity rating has slipped dramatically when compared to other developing economies.

3. While the Internet Society of South Africa (ISOC) wants to see greater competition in the sector, it also recognizes that total deregulation is not desirable either. Areas where government has a role include the licensing of radio spectrum and other such potentially scarce resources. ISOC believes that less regulation means more development for the ICT sector.

4. Government also has a role in protecting the consumer against unscrupulous business practices, while at the same time putting in place the mechanism to ensure free and fair commercial competition.

WHAT IS GOOD AND WELCOME

5. ISOC, welcomes the Draft Convergence Bill and sees it as an important step in bringing South Africa in line with best international practice. The Bill goes a long way to improving the state of competition within the country's ICT sector.

6. ISOC believes that legislation should be as simple and light as possible that is aimed at lessening the burden on the regulator, ensuring that consumers and providers alike understand their rights while reducing the potential for unenforceable laws. The Society welcomes the increased muscle given the regulator – the Independent Communications Authority of SA (ICASA) – this will help ensure that an impartial and publicly accountable body will be able to ensure free and fair competition, whilst breaking the incumbent monopoly.

7. ISOC applauds the proposal to make ICASA a self funded body with a larger proportion of license fees going to it. A well funded and resourced regulator will markedly increase its abilities to carry out its duties.

8. The introduction of forced interconnection between networks will hopefully mean consumers will not have to pay high interconnection costs. However, ISOC feels that interconnectivity should be achieved by means of encouragement rather than through sanctions.

9. The aspects in the Draft Bill covering a strong and self-funded regulator, consumer protection and interconnectivity are seen as very necessary and welcome developments.

CONCERNS

10. The Convergence Bill appears to be very general in its scope and so does not provide certainty with regard to a multitude of issues. Specifically, the lack of certainty with regard to definition results in a great deal of confusion.

11. This lack of certainty does, in ISOC's opinion, discourage investment in South Africa as investment partners will be wary to invest in a country where the legislative climate is uncertain. For this reason ISOC requests that some indication of the future regulations that will affect communications providers be given at this point.

12. The Bill does not go far enough in simplifying telecommunications regulations and while it does replace certain sections of other Acts, there is still a preference for one over-riding piece of legislation.

NEED FOR PUBLIC PARTICIPATION IN FORMULATING LEGISLATION

13. While ISOC can appreciate the need for flexibility in such a fast moving industry the lack of a requirement (see section 6 of the Bill) for public participation in the formulation of such important regulation is cause for concern.

14. ISOC appreciates the fact that a long and drawn out series of public hearings could hamstring the Minister and ICASA from being able to exercise a flexible and speedy response to new technology.

15. ISOC therefore suggests that the public hearings be mandatory for the development of regulations, but that interim regulations could be made which would be effective immediately and which would operate concurrently with the public hearings. ISOC also suggests that a deadlock prevention mechanism be built into the public hearing process.

LICENSING CONTENT PROVIDERS

16. ISOC is particularly concerned about the apparent need for a website owner or other types of content providers to obtain a licence. Malaysia, a developing with a vibrant and fast growing ICT sector, has adopted similar convergence, legislation, but licences for content providers is not required. ISOC anticipates that the licensing of content providers will have the following effects:

- 16.1. Website owners would move their web sites offshore.
- 16.2. Investment in communications in South Africa would be discouraged.
- 16.3. Free speech would be discouraged.
- 16.4. Further complications would be placed before small business owners.

17. Even if it is the intention of the Minister to exempt web site owners from having to obtain a license, ISOC believes that this intention should be made clear in the legislation and this decision should not remain with the province of the Minister. ISOC submits that it is inappropriate to create the possibility for licensing of web sites only for them to be exempted again.

19. ISOC firmly believes in the fluid and frictionless nature of the Internet and attempts to regulate usage and services by statute may lead to the opposite of what that legislation intends: a chilling effect on the industry, unenforceable laws and disinvestments from South Africa. Special issues such as child pornography, commercial contracting and national security are already dealt with in established statutes or common law.

THE DIFFERENCE BETWEEN INFRASTRUCTURE AND CONTENT PROVIDERS

20. ISOC would like to emphasise the differences between infrastructure providers and content providers. In order to speak intelligently about “infrastructure providers” and content providers” ISOC has been forced to assume what each of these phrases meant as the definitions contained within the Bill were too wide to be of use.

21. Infrastructure providers generally deal with limited resources, such as a limited frequency spectrum for radio waves. As such, there tends to be a finite number of possible infrastructure providers. An independent authority such as ICASA needs to appropriately manage these scarce resources in order to prevent unfair competition and the potential for chaos.

22. Keeping the current monopoly in infrastructure providers, especially in the area of fixed line providers, is disastrous for the consumer. ISOC hopes that this Bill will be used to expand competition in the area of infrastructure providers in a controlled but rapid way, and looks forward to the time when local telephone calls will be on a par with other forward thinking developed and developing economies.

23. In contrast to infrastructure providers, content providers deal with unlimited resources and so the number of websites and other content services in existence are only limited by our imaginations. *The requirement to licence these entities, even at no cost to the licence holder, is seen as an unnecessary barrier to entry and having a chilling effect on the sector with the resultant loss of jobs and unenforceable law. ISOC is strongly opposed to the issuing of licenses in this area of communications.*

CONCLUSION

24. ISOC believes that the Draft Convergence Bill is a welcome development which needs to be refined to make it enforceable and appropriate to South Africa. While a broad approach to communications may be necessary in order to ensure that every communication type is caught in the legislative net, ISOC believes that the current legislation, notwithstanding the need for flexibility, is overbroad and confusing. It is hoped that some of the issues contained in this document could be clarified in order for ISOC, and indeed all of South Africa, to be able to accurately assess the impact of the Bill.

25. The Internet Society of South Africa would like to thank the Department of Communications for their consideration.

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