THE FREE MARKET FOUNDATION
of Southern Africa

progress through freedom

Submission on the Electronic Communications and Transactions Bill 2002

Overview
The declared general motivation behind government's desire to legislate on the subject of e-commerce is to bring South Africa in line with international best practice so as to achieve equal legal status in this field with our trading partners. However, the Bill in its current form attempts to achieve too much in that it attempts to address legal issues that are not yet established as problems. The proposed legislation should be confined to general issues; namely, the issue of legal certainty as it relates to recognition of the terms 'in writing', 'signature' and other acts that may be carried out electronically which would benefit from clarity in law.

This submission therefore highlights two major concerns regarding the Bill:

1. **It puts too much weight on e-commerce as a legal phenomenon.**

2. **The Department of Communication is the wrong department to be legislating on some of the aspects of law that have been incorporated in the Bill.**

Comment is dealt with in four parts:

i. Principles that should be applied to e-commerce
ii. Regulatory Impact Assessments as essential tools of good government
iii. Removal of certain chapters in the Bill
iv. Suggested inclusions in the Bill

The rapid growth of e-commerce in Southern Africa is a vital aspect of economic development in the region and it is therefore essential that the legal framework within which it operates should facilitate and not retard economic growth. We consequently submit that certain aspects of the current Bill need serious review.

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Section 1

Principles that should be applied to e-commerce

1. Certainty with regard to legal requirements

It is unclear why governments are rushing to legislate on e-commerce for the purpose of fostering development when Internet trade statistics already point to phenomenal growth. The only possible justification for any new legislation is to ensure legal certainty for all Internet trade as opposed to consumer transactions of relatively low value. The Bill achieves these objectives as laid out in the Memorandum on the Objects of the Electronic Communications and Transactions Bill 2002, and in the UNCITRAL Model Law on electronic commerce in that, the Bill brings clarification to the legal requirements of:

1. writing
2. signatures
3. documents
4. identification of time and place of dispatch
5. retention

However, these issues relate to commercial activity and not to communications.

2. Dept. of Communications is the wrong department

It remains unclear why the Department of Communications has been called upon to be the architect of legislation that has such far-reaching impact on trade and legal matters. We therefore submit that many areas of the proposed Bill are far better addressed by the departments affected; namely the Department of Trade and Industry and the Department of Justice. Notwithstanding the fact that there may have been consultation between officials of the various government departments involved, there is a danger that the Department of Communications will be attempting to legislate in matters beyond their administrative competence and/or enforcement ability, and certainly beyond their legislative area of responsibility.

Areas of e-commerce that fall under law handled by other government departments should be legislated by those departments, or adopted as amendments to legislation currently falling under their ambit.

We believe this would better satisfy a more general principle which should be adopted by government; that of ***a holistic approach***. For example, the New Zealand government's progress report of November 2001 contained the following information on their e-strategy:

1. *The Electronic Transactions Bill will enable statutory requirements for writing, signature and the retention and production of information to be met using electronic methods. It has been reported back from Select Committee the second reading is pending.*
2. *The Crimes Amendment Bill (No.6) will address computer-related crime. It has been reported back from Select Committee and is awaiting Parliament's consideration of the Committee's report.*
3. *The Telecommunications Bill is designed to create a more efficient and competitive telecommunications market in New Zealand for the benefit of both business and domestic consumers. It has been reported back from Select Committee and is currently awaiting a second reading.*
4. *Work on reform of evidence law, including electronic evidence, is at the policy approval stage.*

E-commerce for New Zealand forms part of a more ***general government strategy*** with relevant departments playing their respective roles, rather than the efforts of a single department. This is further backed up by comments in the UK report ecomm@itsbestUK, which states:

"This report does not seek to challenge the role of individual Government departments, the devolved administrations, or private sector organisations in delivering e-commerce. The PIU acknowledges the importance of ***individual departmental programmes*** *that target specific client groups. It also recognises that, in the highly dynamic markets for e-commerce,* ***industry-led initiatives and self-regulatory structures*** *are much to be preferred"*

There are multiple dangers in having a single government department responsible for the development of electronic communication legislation. Inter-departmental friction or general inertia from personnel can compromise such a strategy. There will be confusion regarding the department under which dissimilar categories of law fall. Rather, each department should be encouraged to explore the deficiencies in their own sphere of legislation as it relates to e-commerce, or create specific legislation that is pertinent to their departmental responsibilities.

3. Less is more

The Bill generally reveals a desire and enthusiasm by the Department to do something substantial, while at the same time it is compelled to concede that nothing substantial is required.

The goals of this Bill and of a general e-commerce strategy should therefore embody the "light touch" regulation that has been adopted by most of South Africa's trading partners. The UK government's vision for being the best in the world states that *"Government intervention is only used as a last resort"* and that there should be *"a presumption for industry self-regulation within a Government backed framework of codes of good practice"*.

There is therefore no need to enact sweeping codifications of common law rules just because people are now using new technology for everyday purposes. In fact, there is a risk in codifying common law rules unnecessarily, because the codification as worded might introduce unintended consequences including injustice. This is the case with the provision of the UNCITRAL Model Law which states that a recipient of an electronic message shall be entitled to regard the message as having been sent by the originator even if it was sent by a person who exploited his relationship with the originator to gain access to the originator's message-identification methods. The Guide to Enactment states that the intention is to make the originator responsible where he was negligent, but the wording in the Model Law does not support this intention.

Further evidence of the general concern about legislating unnecessarily is expressed in the UNCITRAL Working Group Paper. In their questionnaire to several businesses across several countries they found that:

"Many of the responses to the questionnaire have expressed the view that contracts concluded by electronic communication should preferably not be regulated differently from contracts concluded by other means of communication."

It is jurisprudentially unwise to legislate in areas that are already well established in common law when the intention is merely to re-state for e-commerce what is already the case. There is always the risk that judges will misinterpret the legislation as being a requirement to find something different in e-commerce than is true for established business practice, resulting in needless confusion. Courts are obliged by the laws of interpretation to assume that all legislation has legal consequences; that it changes the law that preceded it in some way. If the wording appears not to change the law - as in this case – the courts are obliged to do their best to read meaning into the words. If they are able to do so the effect of superfluous law is to change preceding law in ways unintended by legislators.

We consequently wish to propose the **adoption of the principle** that the real goal for this Bill is to **establish equivalence** in law for e-commerce communication and transacting and that the bar should only be raised to establish this minimum. Any intention to try and create something additional for e-commerce runs the risk of conflicting with laws and precedents already established over hundreds of years. Such a conflict would threaten the certainty of business conducted through electronic means.

We would strongly advise that in all aspects of the Bill, the department adopt the principles of a private sector driven, self-regulatory framework, with government positively attempting to remove barriers of a legal or regulatory nature. The New Zealand government concurs with these sentiments as stated in its progress report on e-commerce in November 2001:

"The e-commerce developments in New Zealand have been successfully led by the private sector because this sector can move faster and is more flexible then the government. The government sees itself as facilitators in e-commerce issues when required. The roles of the New Zealand government are to allow for fair-trading, competition and markets to develop, whilst ensuring consumer protection. Government intervention on any of the issues outlined in this report would be simple and predictable regulation."

4. E-Commerce is still commerce

A key principle stressed in the objectives of the Bill is that it should be technology neutral. However, a larger principle is being missed in that creating legislation specifically targeting e-commerce is no longer neutral as it relates to other forms of communication, such as telephone, fax or mail.

The ubiquitous telephone provides a useful analogy to e-commerce. Its arrival on the business scene certainly had a huge impact on trade, reducing the costs and time to transact business. However, no special laws were required to extend legislation to the phone over and above those that were already active in common law, or promote its use over other forms of communication.

E-commerce is an incremental development of communication techniques that were developed when the telegraph was conceived. There was no event or major paradigm shift that should make us perceive e-commerce as anything new in legal terms. It is just another form of communication.

This being the case, we submit that government resources should not be diverted to promote e-commerce or any other particular technology or economic activity. Any diversion of taxpayers' money to advance this sector will be at the expense of other technologies and business activities.

However, positive encouragement of e-commerce is not necessarily the same as removing regulatory barriers or otherwise restrictive areas of government policy. We encourage a holistic view that takes into account other aspects of governmental policy that may unduly affect the development of e-commerce. For example, the government could look more closely at the liberalisation of telecommunications in South Africa, removing licences and regulatory restrictions in favour of completely open trade.

The UK has also done much to understand what role regulatory restrictions have played in restricting growth in their markets. Following the enactment of the Electronic Communications Act 2000, a document entitled ecomm@itsbestUK comments in several places about the need for competition to achieve universal access. Regarding 'access' it states:

"Much has already been achieved: by competition driving down personal computer and software prices; by Oftel's 'Access to Bandwidth' plans to open the BT local access system to competitive use with new technologies;"

It is clear from the OFTEL experience and from similar evidence in Canada that the way to create universal access is to reduce the regulations affecting the telecomms market, so that private companies can innovate the way in which media are delivered to the consumer. It is open competition in an unrestricted private market that brings costs down and creates economic growth, so we strongly recommend that the Department of Communications revisit the imminent telecommunications legislation, which is restrictive in its licensing and conditions.

Consideration should even be given to the granting of property rights to radio spectrum frequencies, as this will undoubtedly create incentives for better use of this scarce resource. Landlords have always shown an ability to make better use of their property than licence holders, who are nothing more than leaseholders. Such an approach would do much to foster the promotion of electronic communication - especially development in the field of wireless communications - without placing any special obligation on government.

Further, we draw attention to the immigration policies that have hitherto restricted the importation of information technology skills into South Africa. In their progress report on building a strategy for e-commerce, the New Zealand government, in November 2001, state as objectives that they will:

1. *"Develop a co-ordinated international marketing approach to attract people with e-commerce and ICT skills to New Zealand."*
2. *"Monitor and review on an on-going basis immigration policies to ensure the continued supply of people with e-commerce and ICT skills."*

Better development of e-commerce would be achieved if this were a general goal in the policy of government rather than attempting to achieve progress in a single Bill.

Government's role as exemplar

Having said that government should not actively promote electronic commerce over other forms of communication in the private sector, we do suggest that government can assume the role of exemplar as it relates to its own practices. Government can do much to improve the efficiency and cost of its interactions with the South African public by encouraging developments in the areas of:

1. *Public provision of documents to regulating authorities*
2. *Public provision of information relating to departmental requirements*
3. *General procurement*
4. *Inter-governmental communication (local and national)*
5. *Inter-departmental communication (e.g. between Justice and Safety and Security)*
6. *Publication of government services and information delivery (e.g. government gazette, parliamentary proceedings)*

As stated above, it is not for the Department of Communications to undertake such a huge task, as this should be a governmental policy applied to all forms of government, including local administrations. However, we recognise the benefits that dealing electronically would bring to government and the citizen, as it represents another form of choice in the process of interaction.

If government has any role to play in the promotion of electronic commerce then it should be restricted to those areas under its control; namely the arms of its own administration. Laws regulating the private sector should be minimal in order to allow the free and unfettered development of this extended form of communication.

Section 2

Regulatory Impact Assessments as essential tools of good government

An element of good law making, now being applied in many countries, is that of a Regulatory Impact Assessment (RIA) or Cost-Benefit Analysis (CBA). That any regulation will have an impact cannot be disputed. Its very implementation is an attempt to stop or curb a particular practice. No law can therefore be said to be neutral.

Tony Blair of the UK said: *"In August 1998, I announced that no proposal for regulation which has an impact on businesses, charities or voluntary bodies, should be considered by Ministers without a regulatory impact assessment being carried out."*

The New Zealand government has also taken a strong stance on the need for RIA's in its 1999 "Guide to Preparing Regulatory Impact Statements", prepared by the Quality of Regulation team. In this document it states:

1. *All policy proposals submitted to Cabinet which result in government bills or statutory regulations must be accompanied by a Regulatory Impact Statement (RIS), unless an exemption applies.*
2. *The requirement for a RIS has been introduced to improve the quality of regulation making, primarily through ensuring that regulatory proposals are cost-effective and justified.*

The justification for Regulatory Impact Statements was related to its beneficial outcomes:

"A RIS is a tool to assist decision-making. It is a method of systematically and consistently examining potential impacts arising from government action and communicating the information to decision-makers. Both the analysis and communication aspects are important. Completion of a RIS will help provide the government with an assurance that new or amended regulatory proposals are subject to proper analysis and scrutiny as to their necessity, efficiency, and net impact on community welfare. This will enhance the government's ability to make well-based decisions."

There is, therefore, an onus on government to show to its citizens the costs/benefits of any particular regulation or law that is enacted so that it can be debated in a healthy and democratic fashion. Broadly, the process for such assessments should cover the following:

1. Quantification of the problem
Government interventions should be based on clear evidence that a problem exists and that government action is justified. In other words, government must describe what "mischief" is being addressed by the proposed legislation. If possible, this should be defined qualitatively and/or quantitatively. There should be an initial assessment of options, risks, costs, benefits, who will be affected, and why non-regulatory action is deemed to be insufficient.

2. What will it cost to implement
This study would look at the budgetary and staffing impact of the proposed legislation, noting the additional financial burden to be placed on the taxpayer and any other adjustments to government agency budgets that would be required. It would include the costs associated with initial governmental activity, but must also include the enforcement costs as they would apply to citizens who fail to comply with the law. It should be made explicitly clear that government resources have to be diverted from other needs and justify them. This "opportunity cost" should therefore be quantified and appreciated. The government must make an informed decision to the effect that it wants to sacrifice activities a, b or c in order to achieve d.

3. Compliance Costs
Whilst sub-paragraph 2 addresses the public sector costs, the evaluation of the private sector compliance costs can often be more important. Overly burdensome bureaucracy can create enormous costs in the private sector, especially for small, micro and medium enterprises (SMMEs) and private citizens of modest means, which do not show up in the public accounts. These costs also have to be quantified if a complete cost/benefit study is to be attained.

4. Economic Impact

No legislation is neutral in its effect and an economic assessment of the new incentives/disincentives to the private sector should be undertaken. Special care should be taken that acts of encouragement or discouragement do not create significant unintended consequence. Regulatory reviews have an important part to play in this regard, assessing the otherwise unforeseen economic impact of specific legislation over time. Sunset clauses on regulation are an effective way of forcing reviews of the benefits acquired for the costs incurred.

When should an RIA be carried out?

The New Zealand RIA guideline document also defines the requirement for when an RIA (RIS) should be carried out. It states:

"A RIS is required for all policy proposals submitted to Cabinet with legislative implications (leading to government bills and statutory regulations). The RIS should be attached to all Cabinet papers proposing a statutory rule unless the proposal comes within the exemptions listed below."

THE UK government states:

" A full RIA should accompany all secondary legislation submitted to Ministers for approval. A final RIA is needed with UK primary or secondary legislation when presented to Parliament."

Why should an impact assessment be required for this Bill?

In order to improve the quality of the proposed legislation, Regulatory Impact Assessments should be carried out on the separate chapters within the currently proposed Bill. The requirement to "fast-track" the legislation has resulted in a hurried and potentially harmful document that should be reviewed. Further, without an impact assessment report it is difficult for the consultative process between government and private sector stakeholders to take place in any meaningful way. For example, the Bill provides no justification whatsoever for the incorporation of legislation requiring the establishment of a costly bureaucracy to manage the .ZA domain, a function that is currently performed competently and efficiently at no cost to the taxpayer. A clear statement of government's objectives on matters like this, and a clear understanding of the cost implications for the taxpayer are required to justify such governmental action.

Section 3

Removal of certain of the chapters in the Bill

We respectfully submit that the following chapters should be removed from the proposed Bill. The principles outlined above provide arguments as to why it would be better if the Department of Communication - if it proceeds with the Bill at all – should omit premature, superfluous chapters, leaving specific legislation either to the government departments concerned, or alternatively, postpone action to a future date, by which time more information on the e-commerce phenomena would be available.

Our comments per chapter are as follows:

Chapter 2 – Maximising Benefits and Policy Framework
This chapter consists solely of a policy statement. It is not justiciable and therefore not really a law. If this is deliberate, the text should be converted so that it can be published as a departmental policy statement. However, one has to question whether the Department of Communication should be promoting national e-strategy. We advocate that each government department directly addresses its own e-commerce area of responsibility rather than submit its plans to the Department of Communications. The Department of Communication cannot be presumed to have the necessary expertise, resources or motivation, all of which should be in other departments. To establish the necessary resources within the Department of Communication would be disproportionately difficult, costly and manifestly inappropriate.

Further, if "e-strategy" is required– which it is not – it should be managed at Cabinet level through a formal interdepartmental structure. A holistic view of the process could then be maintained with co-ordination taking place on many fronts across many aspects of law.

Though we note government's desire to facilitate e-commerce, we question whether, based on the government's commitment to technology neutrality, it should be actively encouraging the use of one means of communication over another. This is particularly concerning when universal access issues are as relevant to postal services and transport as they are to e-commerce and e-communication in all its forms.

At this stage, no special importance should be attached to e-commerce other than that government should ensure that it does not create entry barriers or impose unnecessary costs on this method of trade. Government should specifically refrain from attempting to promote e-commerce in preference to any other form of trade that suppliers and consumers may choose. Instead, it should promote freedom of choice and competition so as to achieve enduring imperatives towards market optimality.

Regarding the universal access provisions, we caution government about creating socio-economic rights in legislation. In light of the budget reallocations the courts are forcing government to make with regard to housing and health policies, we question whether the government really wants to create another stick by which it may be beaten. This will only lead to more judicial usurpation of the legitimate and constitutional domain of legislative and executive authority.

If Chapter 2 is not a policy statement, are the items listed in the text justiciable? If so, and if the Minister does not develop a national e-strategy, what legal actions can be taken? Can the requirement be enforced and who can bring an action for enforcement against the Minister?

This question is particularly relevant to Part 2 of the Chapter, which, it would appear, is there to force the Minister to act. Does this section in fact have legal consequences? If this is not the intention, then the chapter should be removed from the Bill. If it is intended to have legal consequence then provisions should be included regarding the procedures that should be followed to force the Minister to carry out these obligations. If no procedures are stipulated in the Bill, it is possible that the necessary procedures will have to be established by the courts.

Chapter V – Cryptography Providers
It is strongly suggested that a Regulatory Impact Assessment be carried out to justify the existence of this chapter, both in terms of a problem statement and in regard to the costs associated with management and enforcement. Government should make its intentions clear as to why cryptography providers should be compelled to register their details. Not only are there issues raised as to a citizen's constitutional right (14.b) to privacy – and hence the use of any cryptography product - but more practical concerns such as the utility of such a registration database. If we are to assume that most legitimate creators of encryption products,

such as digital signature manufacturers or electronic money vendors, would have a high profile in the electronic market-place, then it is not difficult to believe that police would be able to track down the encryption product's manufacturer, irrespective of the register. What then remains of the usefulness of such a database? If the data required by the Bill is readily obtainable in the public domain, what possible reason is there to compel encryption producers to go through the unnecessary process of registration? It projects an impression of futile bureaucracy.

However, government needs to carefully assess its approach to the delicate issue of cryptography, and hence the right to privacy. It is certainly the case that in the course of crime investigation, there may be call for the police to ask encryption producers for assistance. However, the baby should not be thrown out with the bath water and it is more likely that 99.9% of all encrypted electronic communications will merely be executing their constitutional right to privacy. Better then to set a tone that will be interpreted as more friendly in international eyes, rather than attempt to follow a 'Big Brother' interventionist approach that will be resented by international investors and businesses.

The following excerpt from the Global Internet Liberty Campaign document on cryptography may assist the department in assessing the relevance of the cryptography chapter in the Bill, as proposed.

"We found that most countries in the world today do not have controls on the use of cryptography. In the vast majority of countries, cryptography may be freely used, manufactured, and sold without restriction. This is true for both leading industrial countries and for countries in emerging markets. We also noted that recent trends in international law and policy suggest greater relaxation in controls on cryptography. The OECD Cryptography Policy Guidelines and the Ministerial Declaration of the European Union, both released in 1997, argue for the liberalization of controls on cryptography and the development of market-based, user driven cryptography products and services. These new multi-national agreements have implications for controls that currently restrict the use of cryptography. In France, for example, it is likely that domestic restrictions will be liberalized as French law is brought in line with the trade requirements of the European Union."

Chapter VII – Consumer Protection

The main argument against including consumer protection in the Bill as contained in this chapter is the fact that it once again places unwarranted special emphasis on e-commerce. The OECD guidelines on e-commerce are that *"Electronic commerce should not be afforded less protection than other forms of commerce"*. This is laudable but it doesn't state that electronic transactions should be afforded more protection than other forms of commerce. Special protection for e-commerce consumers would be highly prejudicial to South African consumers using other means of transacting.

For example, it is not unreasonable to picture a scenario in which a pair of shoes is purchased over a web site or digital television medium, and that the Chapter VII provisions would then apply to the consumer. However, these conditions would not apply to the consumer who walks straight into the local shoe shop and purchases directly. In light of the demographic nature of the electronic consumer in South Africa, it seems unjust that a rich, suburban "surfer" is afforded more rights than the low-income worker buying the same good.

The absence of government regulation (which is not the case with SA consumer protection laws, which are actually quite stringent) does not necessarily mean the absence of consumer protection. If the concern of the department is one of consumer trust in the cyber-economy, then there are many mechanisms by which this trust is created. For example, organisations such as the 'Which?' brand do much to boost consumer confidence. Traders wishing to have the Which? Web Trader logo, have to subscribe to a stringent code of practice governing pricing, advertising and delivery of their goods. Such schemes are usually free, relying on the integrity of the accreditor and a system of honour to regulate the traders. The importance of such integrity in the market place should not be under-estimated as the Anderson group can testify regarding their exposure to the Enron scandal.

There is a danger in creating 'minimum' regulatory protection for any consumer as it debases the market equivalent, that of reputation or goodwill. Firstly, such regulation patronises the intelligence of consumers if it assumes that they do not take into account the reputation of those with whom they trade. If consumers did not value them, corporate branding and goodwill in the market place would not exist. On the contrary, such branding or reputation building takes many years of good service to customers and explains why we now see South Africa's retailers entering the electronic retail-space; they bring reputations with them that Internet start-ups could not generate overnight.

Any regulation of this nature therefore expropriates the reputations built up by credible businesses and transfers it equally to any trader who publishes the regulatory conditions on its web site. In effect, the government now wishes to offer the consumer a public guarantee of service, overriding something that was previously a private guarantee. The net effect will be the very opposite of what is desired. Such regulation allows fly-by-night operators to come into existence and appear to offer the same level of quality and service as reputable brands merely by including a lengthy regulatory statement on their web site. Customers are more at risk when the government attempts to take over the task of guarantor than when they adopt the sage principle of caveat emptor ("buyer beware").

There is a secondary danger in implementing regulatory controls that propose to protect the consumer. When the government makes public statements that laws are now in place to protect the consumer, a false sense of security is engendered. Instead of relying on a healthy dose of scepticism – to be overcome by reputable firms proving their merits – the consumer is now lulled into believing the government is able to protect their interests. As a significant majority of electronic retail trades is being conducted with overseas counterparts – such as amazon.com – South African customers would be wrong to believe that the laws in their own jurisdiction protect them in respect of overseas transactions, as of course they do not. Where time would perhaps have been spent establishing the nature and reputation of the trading partner, the government unwittingly removes the motivation for the customer to check the facts. Subsequently, consumers become more vulnerable in their dealings with overseas parties.

The Consumer Protection law as it appears in this Bill fails five principles of sound law.

1. Firstly, laws of this nature should have general application and not be specific to technology. E-commerce is not new. All existing consumer protection law and consumer protection in common law already applies to all aspects of e-commerce and has done so since its advent more than a century ago. New legislation can legitimately do no more than ensure that existing law applies to the new aspects of this medium rather than reinventing consumer protection law needlessly.

2. Secondly, such laws should not (and probably could not in practice) be enforced by the Department of Communications. Current consumer protection laws fall under the ambit of the Department of Trade and Industry and any extensions to these laws should do the same.

3. Thirdly, there is a real danger that some of the provisions in the Bill are in conflict with the common law of contract, and these sections could lead to reinterpretation of our law by the courts. For example, section 47.2 explicitly defines conditions upon the conclusion of contracts, which, by implication, would not apply to contracts formed by way of other means of communication.

4. Fourthly, it is unclear whether a problem actually exists in the market place and whether legislation is really required. A Regulatory Impact Assessment could establish whether additional legislation is justified by weighing the costs of implementation and compliance against expected benefits to consumers in the form of losses avoided.

5. Finally, the provisions in the Bill are inconsistent with the "light touch" regulatory regime that many of the leading nations have adopted in terms of their e-commerce strategies. We submit that South Africa would benefit substantially by limiting the scope of the Electronic Communications and Transactions Act to the immediate concerns regarding legality of electronic transactions and by leaving specific consumer protection laws to emerge from the actual experience of the cyber-economy.

Chapter VIII – Protection of Personal Information

Many of the arguments relating to Chapter VII are also applicable to Chapter VIII, which deals with the protection of personal information. First of all, it is difficult to establish to what extent e-commerce has affected personal and private information in a manner that is different to information that is paper-based. Possible fears of abuse apply equally to doctors' records or mail order company records that are kept on paper. In fact, however records are kept there could be disclosure that may prejudice the individual. The phenomenon is not peculiar to electronic record keeping and exactly the same rules should apply to all methods of recording personal information.

Secondly, before a requirement is introduced for data controllers to comply with legislation relating to personal information, we strongly recommend that a Regulatory Impact Assessment be carried out to assess the cost implications and the practicability of carrying out the proposed requirements. Section 52.1, for example, requires express written permission for the collection of personal information but this may not be possible in the case of automated agents. A person who has created an electronic agent to seek out the best

possible price for medicinal drugs may not be in a position to give his express written permission for every trade. Likewise, suppliers may be unwilling to contract automatically if they unwittingly prejudice themselves in terms of the law.

A Regulatory Impact Assessment would carefully consider the potential costs and benefits. However, it is suggested that the electronic world be allowed to develop further before such an assessment takes place, so that real-life problems be identified before South African legislation tries to pre-empt problems that may or may not arise, with a strong likelihood of inadvertently creating unintended effects.

Chapter IX – Protection of Critical Databases
It is not clear from the Memorandum on the Objects of the Bill what the true intentions are for Chapter IX. Loose definitions of "national security" and "economic and social well-being of its citizens" are highly discretionary phrases, which are dangerously open to abuse in terms of the powers they grant the Minister. It is questionable whether the text in its current drafting would satisfy the courts as the powers it grants to the Minister to access and control databases deemed "critical" does not appear to satisfy the principles of due process.

Particularly onerous is section 58, which grants the right of inspection to the Minister without the requirement of a search warrant. It is unlikely this will withstand Constitutional scrutiny.

The drafting of this chapter is particularly poor. Section 59.2 defines an offence for non-compliance but there is no mention anywhere of a penalty for transgression.

In order to fast-track the beneficial aspects of the Electronic Communications and Transactions Bill to law, we suggest that this clumsy chapter be dropped until such time as the reasons for its existence are made more clear to the public and the drafting has been significantly improved.

Chapter X – Domain Name Authority and Administration
If ever there was a requirement for a Regulatory Impact Assessment, this chapter defines it.

The department should explain to the South African public why six pages of the Bill are dedicated to the establishment of a new, publicly administered domain name authority, when it is not clear what the current problem is. Further, there have been hints of costs approaching several millions of Rands to replace a system that is currently run by a single man on a single processor personal computer. It is difficult to see therefore, how the department is going to be able to positively address a cost/benefit analysis.

The department owes the taxpayer an explanation as to why it requires the setting up of yet another government bureaucracy to run something that has been working perfectly well in the private sector. We would like to draw the attention of the department to the key principles of regulation established elsewhere in the world.

Firstly, the take-over of the .ZA administration cannot be considered "light touch" legislation. Secondly, it does not establish that a problem exists and does not show how the private sector is failing to adequately solve it. Consequently, the creation of yet another government agency looks wasteful and bureaucratic.

We urge the department to drop this section from the Bill and instead pursue the route proposed by the industry itself (particularly Namespace ZA and the other ISP's); namely that of a self-regulated body with representation from all major players, which would include government.

In this way, we believe government achieves its aim of representation as a large user of the .ZA domain space, yet does so in a way that does not add to the administrative burden of central government. The domain name administrators have remained autonomous in most Internet nations in the world so there appears little need for South Africa, with its relatively small Internet community, to transfer this administration to the public sector.

Chapter XII – Cyber Inspectors
The major criticism of this chapter is the role the Department of Communication wishes to assume in policing. More profoundly, what precisely are cyber inspectors meant to do that is not already the responsibility of established police services? Though there is no concept of the separation of powers as it relates to government departments, it does appear odd that one department is so keen to take on part of the role of another (in this case the Department of Safety and Security). It is analogous to the Department of Agriculture passing legislation on taxi licensing, or the Department of Education setting policy for public housing.

For this reason, we strongly advise the department to remove this section of the legislation from the Electronic Communications and Transactions Bill. This Bill should remain a 'deeming' Bill and should not try to create new departments within departments merely on the basis of a new form of communication. A separate police force was not required when the telephone or the fax machine arrived and neither is one required for the Internet.

If the department does feel the need to create its own 'surfing' police force then the public should know the cost. Again a Regulatory Impact Assessment would provide the information for Parliament to assess the potential benefits against the probable costs to the taxpayer.

Chapter XIII – Cyber Crime

It is simply not clear why the Department of Communication would be legislating on cyber crime. This has to remain the domain of the Department of Safety and Security and should be embodied in a Crime Amendment Bill.

We disagree in principle that Internet-based crime requires extensive new policing legislation. The common law crime of murder did not have to be supplemented by legislation when new ways of killing were invented. Neither do we need a new police force simply because a certain form of communication has become more prevalent.

We also strongly criticise the quality of drafting in this chapter. For example, section 90.3 makes a statement of such obviousness one has to wonder whether it has any legal import. Substituting the main phrase for the symbol 'x', it states that "a person who unlawfully" commits 'x' with unlawful intent actually commits an offence. In other words, committing an unlawful offence by way of an unlawful offence is an unlawful offence. What is this supposed to mean? In what way is this supposed to change existing law? Companies like Microsoft do sell or produce software with the intention of overcoming security measures (for example, their own Excel product), so we are left wondering whether they would fall foul of this section.

This apparent lack of drafting skill may be further evidence of the fact that it is not within the competency of the Department of Communications to draft complex legislation relating to fraud, extortion, and forgery. This remains the domain of the Department of Safety and Security.

In order to fast-track the benefits of the Electronic Communications and Transactions Bill, we submit that it would be in the general public interest for this chapter to be dropped from the current draft of the Bill.

Section 4

Suggested inclusions in Bill

We wish to endorse the following chapters in the Bill and would suggest they be used as the basis for a minimal Electronic Communications and Transactions Act. In this manner the Act may be fast-tracked through Parliament with the benefits of legal certainty and government's commitment to e-commerce being displayed immediately. Delay or confusion regarding the more abstract elements of electronic business, highlighted as concerns in the previous section of this submission, would be to the detriment of the South African public and our international standing as it relates to e-commerce.

Definitions
The complexity of trying to define "electronic commerce" highlights the fact that it is a difficult concept to deal with. Its extent is so wide it should warn legislators that they mess with the general rules underpinning laws applicable to all other trade at their peril.

For example, we would draw attention to the definition of "electronic" as it stands in the current draft. It says: "electronic means digital or other intangible form". Currently, this would embrace forms of speech, which would not be the intention of the drafters at all. We respectfully submit that great care should be taken in finalising the terms to be used within the "Definitions" section.

Chapter III – Facilitating Electronic Transactions
Section 26 intends to deem a data message as being from the originator though in its current wording it states that the message "is that of the originator". It should read: "A data message is deemed to be that of the originator if it was sent by –"

Chapter IV – E-Government
We heartily endorse government's commitment to opening a cheaper and more efficient means of communication between citizens and the state. However, we submit that a proviso should be offered to the effect that government cannot dispense with documents in their traditional sense, as this would be prejudicial to some people. As section 28 currently reads, a government department would be able to move totally to electronic use of documents, creating difficulties for the less electronically orientated members of society.

Chapter VI – Authentication Service Providers
We praise the Department for establishing the 'voluntary' principle in section 36. This will assist in ensuring the promotion of local and international authentication products without requiring the unnecessarily burdensome requirements of registration. Let the market decide which products will become acceptable to consumers and which will not, through the reputation and good standing of the authentication providers concerned.

Chapter XI – Limitation of liability of service providers
The intention of this chapter is clearly to recognise that service providers have equivalent legal status to other carriers of information. For example, the postal service cannot be held responsible for the nuisance of junk mail. Neither can a cell phone company be held responsible for SMS messages of an offensive kind. However, the Department should be careful of creating law that exonerates service providers from actions that are criminally or civilly actionable if perpetrated through other forms of communication.

As the Bill is written, a service provider contracted to provide special care regarding the forwarding of electronic viruses is granted immunity, unfairly, from a negligence case. This clearly should not be allowed. If the post office were to negligently handle parcels of anthrax, which later caused harm, they would remain potentially liable. Distinguishing this form of technology from other carrier concepts is therefore dangerous.

In section 76 the Bill creates a further distinction between recognised service providers and non-recognised service providers so it could be construed that mere registration confers immunity from civil or criminal prosecution, while unregistered service providers would be tried under different law.

With convergence making indistinguishable the carriers or service providers (SMS to PCs, email to cell phones), the Department must be careful to draft this section in such a way as to apply a general principle to all carriers of information. One legal principle is desired, applicable to postal communications, fax, e-commerce or telecommunication transport systems. Belonging to an association or being recognised in some way should not allow escape from law of general application.

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