

**RESPONSE BY
PRINT MEDIA SA
ON THE
CONVERGENCE BILL
[B9-2005]**

April 2005

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1 INTRODUCTION

- 1.1 Print Media SA ("PMSA") thanks the Portfolio Committee on Communications ("the Committee") for giving it the opportunity to lodge its written representations on the Convergence Bill, published in Government Gazette number 27294 dated 16 February 2005.
- 1.2 PMSA is an association not for gain which has been incorporated as a company in terms of section 21 of the Companies Act 61 of 1973. PMSA was formed to represent the interests of a broad range of media publications, including daily, weekly and community newspapers and consumer, trade, technical, professional and other specialist magazines. As such, PMSA is representative of many of the participants in the print media industry.
- 1.3 In making this submission to the Committee, it is the intention of PMSA to focus only on those aspects of the Convergence Bill which, PMSA believes may have a detrimental impact on the right to freedom of expression protected by section 16 of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution").
- 1.4 In PMSA's view, there is a danger that the manner in which the defined terms of "*content*" and "*content services*" are dealt with in the various definitions set out in section 1 of the Convergence Bill and in section 8(2)(a)(iii) of the Convergence Bill impact negatively on the right to freedom of expression.

2 THE TREATMENT OF CONTENT AND CONTENT SERVICES UNDER THE CONVERGENCE BILL

- 2.1 Before discussing in detail the many constitutional and other difficulties which arise from the use of the terms "*content*" and "*content services*" throughout the Convergence Bill, a careful analysis of the manner in which such terms are treated, is required.
- 2.2 "*Content*" is defined as:-
"any- (a) sound; (b) text; (c) still picture; (d) moving picture; (e) other audio visual representation or sensory representation; or (f) any combination of the preceding, which is capable of being- (i) created; (ii) manipulated; (iii) stored; (iv) retrieved; and (v) communicated but excludes content contained in private communications between consumers;".
- 2.3 The term "*content*" is used as a noun in the definition of "*applications*" and "*content services*". The term "*content*" is also used as an adjective when combined with the word "*service*". In this latter context, a "*content service*" is referred to in the definitions of "*communications*", "*communications network*", "*communications network service*", "*communications service*" and "*subscriber*". A "*content service*" is also referred to in section 8(2)(a) of the Convergence Bill which authorises the Authority to take into account whether the service is intended for the public generally or a limited group and whether the same pertains to the provision of application services; communications

services; or communications network services to broadcast service licensees or providers of content services, when setting the licence terms and conditions for individual and class licences.

- 2.4 A "content service" is defined in section 1 of the Convergence Bill as the:-
 "(a) provision of content; or
 (b) the exercise of editorial control over the content conveyed via a communications network to the public or sections of the public, such as online publishing and information services;"

3 CONSTITUTIONAL CONCERNS

3.1.1 Although, there appears to be an attempt to exclude content services from the licensing regime detailed in Chapter 3 of the Convergence Bill, the manner in which "content" and "content services" are defined and applied in section 1 and elsewhere in the Convergence Bill, creates uncertainty surrounding the licensing of such services and also results in unforeseen technical constraints in the provision of such services. This is due to the fact that content services are defined to form part of an application service¹ and a communications network service² in section 1 of the Convergence Bill, whilst the provision of content is excluded from the definition of a communications service.³

3.1.2 In dealing with content services in this manner, a host of unintended consequences occur, namely:-

3.1.2.1 As the provision of content services is linked to an application service and a communication network service, the implication is that content services can only be provided on a licensed basis. That this is a possible interpretation is further strengthened by the manner in which the term "content services" is referred to in the definition of a "subscriber"⁴ and in section 8(2)(a) of the Bill.⁵

3.1.2.2 Whilst broadcast content, has traditionally been subject to regulation and has been justified on public interest grounds, no such justification exists in respect of other forms of content provision, such as online publishing and information services. Any attempt to subject such services to licensing requirements will be contrary to the constitutional right to freedom of expression in section 16 of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution").

3.1.2.3 Online publishing and the provision of other information services via the Internet, as a form of media, must be distinguished from the provision of broadcast content. Broadcast content is:- (i) distributed to the public at large; (ii) totally controlled by the broadcaster; and (iii) distributed over the frequency spectrum which is a scarce resource. Online content provision, on the other hand, is:- (i) posted and removed on a daily basis by a myriad of end-users; and (ii) private in nature in that the end-user selects the content required and the person to whom

¹ An application which is the essential component of an application service refers to the manipulation, storage, retrieval, distribution, creation and combination of content for the purposes of making such content available to customers.

² A communications network service refers to the use of various conveyance mechanisms such as wire, radio etc used for "content services, including radio and television broadcasting, and cable television, irrespective of the type of information conveyed (to the extent such transmissions systems used for content services are also used for communications services)."

³ The definition of a "communication service" specifically excludes content services in the inclusion of the words "excluding content services" at the end of the definition.

⁴ A "subscriber" is defined in the Convergence Bill as:- "a person who receives a communications service under an agreement with, or according to terms and conditions determined by, the provider of a communications service or a content service". As such, a "content service" would appear to have the same status as a "communication service". The use of the term in the definition is confusing and it is not clear whether in this context the same is to be viewed as an independent service or as a subset of another form of licensed service such as an application service or a communications network service.

⁵ Section 8(2)(a) of the Convergence Bill provides as follows:- "Such standard terms and conditions may take into account- (a) whether the service is intended for the public generally or a limited group such as the provision of- (i) application services; (ii) communications services; or (iii) communications network services, to broadcasting service licensees or providers of content services".

content is distributed. It is these distinctions which have been traditionally accepted as the rationale for the regulation of broadcast content whilst no such justification exists in respect of print and other forms of media, including online publications.

- 3.1.2.4 As the Internet is a unique medium which affords the individual an opportunity to freely engage in a range of expressive activities, any attempt to regulate content published on the Internet by requiring providers of such content to be licensed will constitute a violation of the right to freedom of expression contained in section 16 of the Constitution.
- 3.1.2.5 There can be no justification for requiring prior approval in the form of licensing for the distribution and publication of content on the Internet and such a restriction will amount to a prior restraint. Prior restraints on freedom of expression entail the imposition of restrictions on speech prior to entering the public domain and take the form of government consents, authorisations or licences as a pre-requisite for publication. Prior restraints are subject to a heavy presumption against their constitutionality due to their chilling effects on free speech and encouragement of self-censorship and have been found to be unconstitutional by our courts in a number of cases.
- 3.1.2.6 From a technical point of view, it is simply not feasible to exclude content services from the provision of a communications service as this licensed tier, which involves the emission, transmission and reception of services, is essential for the provision of online content services to end users. Further, as a content service is not in itself a communications facility, it makes no sense for the same to be included in the definition of a communications network service. If these difficulties are not rectified in the Convergence Bill, it will simply be technically impossible to provide online content services. This, in turn, will constitute a further infringement on the right to freedom of expression as it will constitute a restriction imposed on the right to receive and impart information.⁶
- 3.1.2.7 As the definition of "*content*" in section 1 of the Convergence Bill specifically excludes content contained in private communications to consumers, it will not be permissible to provide e-mail services as part of an application service or as part of a communications network service under the Convergence Bill. As the provision and use of applications is key to the provision of e-mail services, it will further not be possible to provide e-mail services under a communications service and as such, the provision of such services will be rendered technically impossible under the Convergence Bill. Once again, this will result in an infringement of the constitutional right to receive and impart information.
- 3.1.2.8 A further absurdity occurs in respect of the manner in which content services is included and excluded from definitions in section 1 of the Convergence Bill. As the term "*communications*"⁷ has been defined in section 1 to exclude content services and is used both in the definitions of a "*communications network service*" and a "*communications service*", a conflict is created between the manner in which the term "*communications*" is to be read when the same is referred to in the definition for a "*communications network service*" and "*communications service*". In this regard, a "*communications network service*" provides for the provision of content services by means of transmission systems and other communications facilities whereas the definition of "*communications*" specifically excludes content. In contrast to this position, a "*communications service*" specifically

⁶ Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation (Attorney-General intervening) 1995 (9) BCLR 1262 (ZSC) and Autronic AG v Switzerland 12 EHRR 485 at 499.

⁷ "*Communications*" is defined in the Convergence Bill to mean "*the- (a) emission; (b) transmission; or (c) reception by circuit-switched and packet-switched or other means, of voice, sound, data, text, video, visual images, signals or a combination thereof, including applications, by means of electricity, magnetism, radio or other electromagnetic waves, optical electromagnetic systems or any agency of a like nature, whether with or without the aid of tangible conductors, but does not include content services*".

excludes content in alignment with the definition of "*communications*" in section 1 of the Convergence Bill.

4 **CONCLUSION**

- 4.1 As the inclusion of definitions for "*content*" and "*content services*" in section 1 of the Convergence Bill is fraught with difficulty, PMSA believes that all references to "*content*" and "*content services*" must be removed from the Convergence Bill and that only broadcast content must be made subject to regulation as has been provided for in Chapter 9 of the Convergence Bill.
- 4.2 PMSA once again thanks the Committee for the opportunity to make written representations and looks forward to participating further in this process.

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