

**ADDENDUM TO DOCUMENT: SUMMARY OF
REPRESENTATIONS OF THE REGULATION OF
INTERCEPTION OF COMMUNICATIONS AND
PROVISION OF COMMUNICATION-RELATED
INFORMATION AMENDMENT BILL**

Amendments to Bill proposed by Virgin Mobile



Virgin Mobile South Africa (Pty) Ltd – Submission on the RICA Amendment Bill, 2006

GENERAL EXPLANATORY NOTE:

- [] Words in bold type in square brackets indicate omissions from existing enactments
- _____ Words underlined with a solid line indicate insertions in existing enactments
- italics* Words underlined with a solid line and in italics indicate Virgin Mobile's suggested amendments

BILL

To amend the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002, so as to insert a definition; and to provide afresh for information to be obtained and kept in respect of cellular phones and SIM-cards; and to provide for matters connected therewith.

Amendment of section 1 of Act 70 of 2002

1. Section 1 of the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (hereinafter referred to as the principal Act), is hereby amended-

(a) by the insertion after the heading the following definition²⁰:

“activate’ means to allow a customer to make calls other than calls to the 112 emergency call centre and customer care centre of the telecommunications service provider;” and

(b) by the deletion of the definition of ‘customer’ and the insertion in its place of the

²⁰ Section 1 (Definitions): Inserting a definition of “activate”- Virgin Mobile submit that this definition is necessary to explain the meaning of the restriction placed on telecommunications service providers in s40, which effectively prevents a telecommunications service provider from providing service until a customer has been RICA'd.



following definition²¹:

“‘customer’ means any person, other than a reseller of telecommunications services, to whom a telecommunications service provider provides telecommunications services pursuant to entering into an agreement or otherwise on receipt of payment;” and

(c) by the insertion after the definition of “customer” the following definition²²:

“‘de-activate’ means to prevent a customer from making calls other than to the 112 emergency call centre and customer care centre of the telecommunications service provider;” and

(d) by the insertion after the definition of ‘Directorate’ of the following definition²³:

“‘disclosure direction’ means a direction issued under section 39(3) in terms of which a mobile cellular telecommunications service provider is directed to provide the information set out in section 40(2) in respect of a customer;” and

(e) by the insertion after the definition of “Executive Director” of the following definition:

“ ‘family member’ means–

- (a) a person who is dependant on the customer, or
- (b) a person’s life partner;”

²¹ Section 1 (Definitions): Replacing the definition of “customer”. Without this amendment, the term “customer” could foreseeably operate far more broadly than intended by the legislature. Customers should include prepaid and postpaid customers but in both cases, even where there is no written or signed agreement, the customer is paying for a service, hence we suggest that payment be the determining factor and the nexus for the obligation.

²² Section 1 (Definitions): Inserting a new definition of “de-activate”. As we have inserted a definition of “activate” to give effect to s40, so it is necessary to insert a definition of “de-activate” to give effect to s62.

²³ Section 1 (Definitions): Inserting a new definition of “disclosure direction”. Interception and provision of communications-related directions under RICA follow a formal procedure and are specially provided for. Presently s39(3) allows requests to be made in writing where information is sought from a telecommunications service provider, but we submit that requests should all follow the same format, with the same exceptions (see below), as is the case for directions sought for interception and monitoring. If different procedures are adopted with no obvious reason for this (since if there is an anticipation of great harm or an emergency, then s23 applies) South Africa will clearly be endorsing disproportionate laws, which apply in different ways; and thus cause significant confusion and potential harm to the public interest. See our changes to s23 and 39.



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Substitution of section 39 of Act 70 of 2002

2. Section 39 of the principal Act is hereby amended²⁴-

(a) by the substitution of the following paragraph for subsection (3):

“(3) An applicant may apply to a designated judge for the issuing of a disclosure direction.”; and

(b) by the substitution of the following paragraph for subsection (4):

“(4) Subject to section 23(1), an application referred to in subsection (3) must be in writing and must indicate-

- (a) the telecommunications service provider to whom the direction must be addressed;
- (b) details concerning the customer about whom information is sought from the telecommunications service provider or details concerning the time, date, and location of any calls made by the customer concerned, with reasonable accuracy;
- (c) specify the ground referred to in subsection (5) on which the application is made.”; and

(c) by the insertion of new subsections (5), (6) and (7) as follows:

“(5) Notwithstanding anything to the contrary contained in any other law, a designated judge may, upon an application made to him or her in terms of subsection (4), issue a disclosure direction.

(6) A disclosure direction may only be issued if it appears to the designated

²⁴ Section 39(3)(Information to be obtained and kept by certain telecommunication service providers): Amending section 39(3) to (7)- As indicated above, Virgin Mobile submit there is no reason why requests for information under s40 should be dealt with differently than those for interception or provision of communications-related information, subject to agreed exceptions under s23. We have made amendments to s39 based on s18 which places an administrative onus on law enforcement officers to follow due process. Virgin Mobile has made changes to s18 to simplify and streamline the disclosure requirements for s39, to give effect to the intent behind s40.



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judge, on the facts alleged in the application concerned, that there are reasonable grounds to believe that-

- (a) a serious offence has been or is being or will probably be committed;
- (b) the gathering of information concerning an actual threat to the public health or safety, national security or compelling national interest of the Republic is necessary.

(7) A disclosure direction-

- (a) must be in writing;
- (b) must contain the information referred to in subsection (4)(a),(b) and (c);
- (c) may contain conditions or restrictions relating to the disclosure of information authorized in it; and
- (d) may only be issued for a period not exceeding one day.”

Amendment of section 23 of Act 70 of 2002

3. Section 23 of the principal Act is hereby amended²⁵ -

- (a) by the insertion in subsection (1) of reference to section 39(3);
- (b) by the insertion in subsection (2)(a) of reference to section 39(4);
- (c) by the insertion in subsection (4)(a)(ii) of reference to section 39(6).

Substitution of section 40 of Act 70 of 2002

4. The following section is hereby substituted for section 40 of the principal

²⁵ Section 23 (Oral application for, and issuing of direction, entry warrant, oral direction or oral entry warrant): VM has proposed amendments to s23 to allow law enforcement officers to request and judges to grant disclosure directions on oral application, in cases of emergencies, as is the case presently for interception and provision of communications-related directions.



Act:

“Information to be obtained and kept in respect of SIM-cards

40. (1) A telecommunication service provider who provides a mobile cellular telecommunications²⁶ service shall not, in the case of any customer²⁷—

- (a) activate an MSISDN; or
- (b) allow the use of any cellular phone together with any MSISDN²⁸ that has been provided by that telecommunications service provider.

on its telecommunication system unless subsection (2) has been complied with²⁹.

(2) From the date of commencement of this section a telecommunication service provider must obtain record and store the following information in such a way as to comply with subsection (3)³⁰—

- (a) the mobile subscriber integrated service digital network number (MSISDN-number) ; and
- (b) the full names, identity number, and residential or business or postal address of the customer³¹; and
- (c) in the case where the MSISDN registered to the customer is used with a cellular phone, the international mobile equipment identity number (IMEI) of the cellular phone used.

²⁶ Section 40 (Information to be obtained and kept in respect of cellular phone and SIM-card): Amendment to the phrase “mobile cellular telecommunications service”. This is the correct term in accordance with s1, definitions.

²⁷ Section 40: Virgin Mobile submit that having re-defined “customer” in s1, this is the logical obligation. A person cannot obtain a SIM-card unless they become a customer under this Act.

²⁸ Section 40(1): The purpose of referring to a handset is to contain the use of handsets when bundled with SIM-cards.

²⁹ Section 40(2): The drafting of this obligation is sufficient and proportionate to achieve the purpose of the Act.

³⁰ Section 40(2): The obligation applies, how it is complied with need to determined only under ss4, and the only reason for ss4 is to protect privacy of the information.

³¹ Section 40(2): There is no international precedent that Virgin Mobile is aware of to require more information than set out here, and given the need to apply the law in a proportionate way, we submit that to require more information in SA would not achieve the purpose (the draftsmen are no doubt aware of the pervasiveness of ID fraud, the difficulties of giving residential addresses when one lives in an informal settlement, and the high levels of unemployment in SA).



(3) A telecommunication service provider must ensure that information referred to in subsection (2) is accessible and disclosed only to persons authorised for that purpose by the customer, by that telecommunications service provider and to those authorized pursuant to a disclosure direction³².

(4) Any customer who from the date of commencement of this section sells or in any other manner provides a cellular phone or SIM-card to a person other than a family member, must—

- (a) obtain from such person his or her—
 - (i) full names;
 - (ii) identity number; and
 - (iii) residential or business address;
- (b) notify the relevant telecommunication service provider of —
 - (i) his or her own name and identity number;
 - (ii) the date that the cellular phone or SIM-card was handed to the other person; and
 - (iii) the particulars set out in paragraph (a).

(5) A telecommunications service provider must, upon receipt of the information provided in terms of subsection (4)(b), update the information obtained in terms of subsection (2).

(6) Notwithstanding subsection (1) of section 30, subsections (3) to (7) of that section apply with the necessary changes in respect of a telecommunication service provider who provides a mobile cellular telecommunication service.”

³² Section 40(3): It is important that information be disclosed only to authorized persons and under directions issued in accordance with the Act (see new s39(4) to (7)). Subsection (3) replaces the requirement to store in a facility, which is unnecessary given the primary obligation to disclose according to a direction. This will protect privacy of customers while allowing operators to determine how best to store information on their own specific systems.



Amendment of section 51 of Act 70 of 2002

3. Section 51 of the principal Act is hereby amended –

(a) by the substitution in subsection (1)(a) for subparagraph (i) of paragraph (a) of the following subparagraph:

“(i) contravenes or fails to comply with section 6(2), 7(4), 8(4), 29(8), [40(1), (2) or (3),] 42(1) or 45(1);”;

(b) by the insertion after subsection (3) of the following subsections:

“(3A) Any telecommunication service provider who fails to comply with section 40(1), (2), or (3) or section 62(6)(a),(b) or (c) is guilty of an offence and liable on conviction to a fine not exceeding R100 000 for each day on which such failure to comply continues.

(3B) A customer who fails to comply with section 40(4) is guilty of an offence and liable on conviction to a fine *not exceeding [maximum]*³³.”; and

(c) by the deletion in subsection (5) of the word “or” at the end of paragraph (b) and the insertion after that paragraph of the following paragraph:

“(bA) subsection (3A) does not relieve any telecommunication service provider of the obligation to comply with section 40(1), (2) or (3) or section 62(6)(a), (b) or (c); or.”.

Amendment of section 62 of Act 70 of 2002

4. Section 62 of the principal Act is hereby amended by the substitution for subsection (6) of the following subsection:

“(6) (a) A telecommunication service provider who provides a mobile cellular *telecommunications* service must, within 30 months from the date

³³ Section 51(Offences and penalties): Virgin Mobile is concerned that these penalties are potentially both disproportionate (in the absence of proof that a customer has actually been involved in a crime or intends to be involved – see new s39(4)-(7)).



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of commencement of this section obtain, record and store the particulars of all customers to whom SIM-cards and cellular phones used with SIM-cards that are used on its telecommunications system if such particulars have not already been recorded and stored in terms of section 40.

(b) A telecommunications service provider who provides a mobile cellular telecommunications service shall de-activate a customer even where that customer was receiving a telecommunications service prior to the commencement of section 40, if subsection (a) has not been complied with.

(c) Notwithstanding subsection (1) of section 39, subsections (3) to (7) of that section apply in respect of a telecommunication service provider who provides a mobile cellular telecommunications service.”

Short title and commencement

5. This Act is called the Regulation of Interception of Communications and Provision of Communication-related Information Amendment Act, 2006, and comes into operation on [date] 2006 or on such earlier date as the President may determine by proclamation in the *Gazette*.

ENDS