

# Direct marketing in the context of privacy regulation

The ever-growing volume of consumer complaints relating to unsolicited and unwanted commercial messages seems to be having a legislative effect, as the issue of privacy and the right to reject and not receive unsolicited commercial messages is a theme in existing pieces of legislation and in the draft [Protection of Personal Information](#) (PPI) law.

 By [Nick Altini](#) 9 Feb 2012

The [Electronic Communications and Transactions Act](#), 2002 (ECT Act) was ground-breaking in that, for the first time, the legislature addressed the issue of spam, or unwanted unsolicited commercial electronic communications.

The ECT Act prescribes that, in the case of electronic unsolicited messages, such as spam emails and SMSes, the sender must include in the message an option for the consumer to cancel their subscription to the mailing list - in other words, to opt out. In addition, the ECT Act provides that, if the consumer requests the parties sending the message must disclose the source from which that person obtained the consumer personal information.

## Failure to comply a criminal offence

Failure to comply with these provisions actually constitutes a criminal offence. Yet, from the advent of the ECT Act to the coming into effect of the [Consumer Protection Act](#), 2008 (CPA) nearly a decade later, it seems as though few, if any, marketers even know of the provisions of the ECT Act, and even fewer have complied with them. There is certainly no readily traceable record of successful prosecutions of errant marketers under this provision.

The fanfare that accompanied the enactment of the CPA drew attention to its provisions. Since the CPA took effect on 1 April 2011, there has been a noticeable attempt at compliance by advertisers with its privacy provisions.

The CPA provides every consumer the right not only to ask direct marketers to desist from engaging in an direct marketing practice (whether electronic or otherwise), but also to pre-emptively block any such communications (other than personal approaches).

## CPA goes much further

The CPA, read with its regulations, goes much further. It is intent on creating a [national registry](#) of pre-emptive blocks and creating a regulatory regimen in terms of which a direct marketer simply will not be able to send direct marketing communications to a consumer unless they have, post 1 April 2011, first obtained the consumer's consent to do so (which only applies to existing customers and is subject always to the right of the consumer to opt out at a later stage).

Alternatively, the direct marketer must have first checked with the National Registry that the consumer has not, in fact, registered a pre-emptive block against the particular mode and type of direct marketing, or the direct marketer itself.

The PPI Bill also seeks to regulate the issue of direct marketing and unsolicited communications. In this case, the bill refers specifically to electronic communications and so there is only a degree of overlap with the provisions of the CPA, but not a complete concurrence.

### **Illegal unless prior consent**

The draft bill does contemplate that the provisions of the ECT Act described above will be repealed and replaced under the bill. What the bill provides is that it will simply be illegal for a direct marketer to seek to engage in direct electronic marketing (which includes by automated calling machine, fax, SMS or email) unless the data subject has given prior consent to the activity and/or the data subject is an existing customer of the marketer.

In this case, the term "existing customer" is defined and the bill makes it clear that one can market directly an existing customer if the contact details of that customer have been obtained in the context of a sale of a product or service for the purpose of marketing similar products or services (ie the details were not taken for some other purpose and the direct marketing function was not disclosed).

The customer must also be given a reasonable opportunity to object, free of charge, to such use of their electronic details at the time when the information was collected and afterwards, in each and every electronic communication sent to the data subject for the purposes of marketing.

### **Made very clear**

It is also made clear that every direct marketing message must contain details of the identity of the sender the party on whose behalf it is sent, and the mode by which the recipient can send a request asking that such communication cease.

The legal landscape for direct marketing, while being consistent with provisions that have already been in place under the ECT Act for some period of time, looks set to become more rigorous in the sense that there is every indication from policy makers and government that compliance with the CPA and the PPI Bill, when it is eventually enacted, will be far more vigorously enforced.

At the same time, the advent of an era of consumer protection under the CPA has created unprecedented levels of awareness on the part of consumers of their rights in law and it is to be expected that consumer activism on its own will account for a considerable lessening of direct marketing activities overall, as consumers find their voice to request that such activities cease.

### **ABOUT NICK ALTINI**

Nick Altini is director and national practice head, competition and regulatory practice, Cliffe Dekker Hofmeyr. He has diverse experience in regulatory work in sectors including airline, courier, banking, dairy, engineering, print media, education, electronics FMCG, gaming and liquor. In particular, he has considerable expertise concerning the Consumer Protection Act, the Protection of Personal Information Act and the Advertising Standards Authority Code of Advertising Conduct. Contact Nick via email [nick.altini@dlaadh.com](mailto:nick.altini@dlaadh.com) or tel +27 (0)11 562 1071. [View my profile and articles...](#)