

Are we about to cure the scourge of spam? A commentary on current and proposed South African legislative intervention*

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OPSOMMING

Is ons op die punt om die problematiek rondom “spam” op te los? ’n Kommentaar op die huidige en voorgestelde Suid-Afrikaanse wetgewende ingrepe

Verbruikersbeskerming het fundamentele veranderings ondergaan met die inwerking-treding van onder andere die Wet op Verbruikersbeskerming. Die artikel ondersoek die vraag of die Suid-Afrikaanse verbruikers- en databeskerdingsoplossings in die Wet op Elektroniese Kommunikasies en Transaksies, die Wet op Verbruikersbeskerming en die voorgestelde Konsepwet op die Beskerming van Persoonlike Inligting voldoende is om die problematiek rondom “spam” of ongevraagde elektroniese kommunikasies op te los. Die outeur kom tot die gevolgtrekking dat die bepalings van die Wet op Verbruikersbeskerming insake direkte bemerking en die voorgestelde Konsepwet verbeterings is op vorige wetgewende pogings, maar dat dit wil voorkom asof ongevraagde elektroniese kommunikasies nie holisties aangespreek is nie. Dit het tot gevolg dat die beheer oor die probleem op ’n gefragmenteerde wyse benader word in bogenoemde statutêre maatreëls. Die outeur stel voor dat die huidige wetgewende pogings ten minste die bepalings van die Wet op Verbruikersbeskerming en die voorgestelde Konsepwet met mekaar moet versoen.

1 INTRODUCTION TO ONLINE CONSUMER PROTECTION

In South Africa, online consumer protection was originally regulated in terms of the common law, the now repealed Usury Act,¹ The Credit Agreements Act² and The Consumer Affairs (Unfair Business Practices) Act,³ certain industry specific

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1 73 of 1968.

2 75 of 1980.

3 89 of 1998. The Usury Act and the Credit Agreements Act were repealed by the National Credit Act 34 of 2005 (hereinafter the NCA) and ceased to apply on 1 June 2007. The Consumer Affairs (Unfair Business Practices) Act was repealed by s 121(2)(f) of the Consumer Protection Act 68 of 2008 (hereinafter the CPA) in accordance with incremental implementation set out in Schedule 2.

self-regulatory guidelines and codes⁴ and Chapter VII of the Electronic Communications and Transactions Act.⁵

Online consumer protection is currently regulated by more modern legislation such as the NCA, the CPA and possibly in the future, the proposed Protection of Personal Information Bill [B9-2009].⁶

Unsolicited junk mail and the collection of personal information for direct marketing is not unique to online consumers, but the sheer magnitude, invasiveness and variety of these practices brought about by the advent of computers and the internet, as well as the risks or negative consequences associated with the digital environment, have solicited worldwide consumer and data protection responses.⁷

This exposition therefore aims to examine whether or not South African consumer and data protection responses found in the ECT Act, the CPA and the proposed PPI Bill are sufficient to control the scourge of unsolicited communications or electronic junk mail in the online environment.

2 OVERVIEW AND SCOPE OF APPLICABLE CONSUMER PROTECTION LEGISLATION

2.1 The Electronic Communications and Transactions Act

2.1.1 Overview

In general the ECT Act applies to all electronic transactions and data messages except those excluded by the Act itself or its schedules.⁸ In particular Chapter VII of the ECT Act introduced a number of important protective measures for online consumers over and above those that were normally available for offline consumers⁹ such as the duty on a supplier to provide: the minimum information as listed,¹⁰ a transaction summary display for the consumer to review and correct or withdraw from the transaction,¹¹ a secure payment system,¹² a cooling-off period¹³ and to execute the contract within 30 days of receiving an order.¹⁴

4 Such as The Code of Banking Practice (available at <http://bit.ly/t6sW9Z>); The Direct Marketing Association codes for Interactive and Direct Marketing (available at (<http://bit.ly/sTEWNP>); and The Wireless Application Service Providers Association (WASPA) setting codes of conduct, advertising rules and a dispute resolution mechanism for members and consumers of the mobile services industry, more information available at (<http://www.waspa.org.za/>).

5 25 of 2002 (hereinafter the ECT Act).

6 Protection of Personal Information Bill [B9-2009] published in GG 32495 of 14 August 2009 (hereinafter the PPI).

7 The Data Protection Directive 95/46/EC of the European Parliament of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data; the OECD Guidelines Governing the Protection of Privacy and Trans-border Flows of Personal Data 23 September 1980 etc.

8 S 4 and Sch 1 and 2 of the ECT Act.

9 Buys *et al Cyberlaw @SA II: The law of the internet in South Africa* (2004) 140.

10 S 43(1) ECT Act.

11 S 43(2).

12 S 43(5).

13 Ss 42(1)(r) and 44.

14 S 46.

These provisions were modelled on the European Distance Selling Directive¹⁵ and they set the basic parameters for South African web site owners or electronic traders who have to construct their electronic trading spaces so that they comply with these requirements.¹⁶ A failure to do so gives the consumer the right to cancel the transaction within 14 days of receiving the goods or services under the offending transaction.¹⁷

The reasons most often volunteered for this additional protection is that online consumers face unique issues such as not being able to feel, touch, inspect or test goods in the same way as a consumer could in any other trading environment.¹⁸

2.1.2 Scope of application

Section 42(1) of this Act states that the Chapter VII consumer protection provisions only apply to “electronic transactions”. However, as Eiselen correctly points out, in order to obtain a clear view of the scope of the consumer protection provisions of Chapter VII a person must read section 42 together with the rest of the chapter whereupon it becomes clear that the chapter only applies to “electronic transactions” where one party is a “consumer”.¹⁹ Thus the scope of application hinges on the definitions or interpretations of the terms “electronic transaction” and “consumer”.

Strangely an “electronic transaction” is not defined in the ECT Act, but a “transaction” is either of a commercial or non-commercial nature and it includes the provision of information and e-government services.²⁰ However it is suggested that if one looks at the definitions for “electronic agent”, “electronic communication” or “electronic signature”, with data as the common denominator, one could assume similarly that “electronic transactions” include transactions where the use of data²¹ is an integral element of the transaction.

Chapter VII defines a consumer as “any natural person who enters or intends entering into an electronic transaction with a supplier, as the end-user of the goods or services offered by that supplier”.²²

This definition excludes the operation of the consumer protection provisions in all business-to-business (B2B) transactions where, for example, goods or services are supplied to juristic persons and some business-to-consumer (B2C) transactions where the consumer is a natural person but not the end-user of the goods or services acquired. This would for example be where a sole proprietor or natural person buys the goods, with the intention that they be re-sold to another consumer.²³

It is common cause that small businesses, corporations and other juristic persons are often in the same practical position as a natural person consumer, as an

15 The European Distance Selling Directive (EC) 97/7 [1997] OJ L144/19.

16 Van der Merwe *et al Information and communications technology law* (2008) 180.

17 S 43(3)–(4) ECT Act.

18 Buys *et al* (2004) 140 and Van der Merwe (2008) 181.

19 Eiselen in Van der Merwe *et al* (2008) 181.

20 S 1 ECT Act.

21 S 1 ECT Act definition where data means electronic representations of information in any form.

22 S 1 ECT Act.

23 Eiselen in Van der Merwe *et al* (2008) 182.

end-user, and therefore a strong case could be made for including at least some of these parties in the definition of a consumer as is the case under the CPA.²⁴

The consumer is also a natural person who *intends* entering into an electronic transaction, in other words, consumers who merely browse a website with the intention of possibly entering into a transaction are also entitled to the protection offered by Chapter VII of the ECT Act.²⁵

Some provisions, such as section 42(3), limit the scope of specific provisions (*in casu* Chapter VII) within the Act. The role and meaning of section 42(3) is not at all clear. The section excludes the application of Chapter VII to a regulatory authority established in terms of a law, if that law prescribes consumer protection provisions for electronic transactions.

Eiselen suggests that the section is trying to convey that Chapter VII of the ECT Act will not apply if another Act of Parliament subjects electronic consumer transactions to alternate, and possibly stronger, consumer protection measures.²⁶

With the CPA having taken full effect, the implications of this are worth some consideration. This would mean that any electronic transaction that fell within the scope of the CPA would not be subject to the provisions of Chapter VII of the ECT Act. It also raises the question on how to apply the provisions of the CPA, where the CPA expressly provides for the application of the ECT Act. For example in the CPA it is stated that section 16(1) does not apply to a transaction, if section 44 of the ECT Act applies to that same transaction.²⁷

Hopefully Eiselen is correct in his opinion that section 42(3) cannot be rescued by creative interpretation and that it remains “a dead letter in the Act”.²⁸

Be that as it may, according to the ECT Act, the consumer protection provisions are applicable to commercial or non-commercial transactions that are concluded between a supplier and a natural person consumer, who is also the end-user of the goods or services supplied. The protection should be invoked both when an electronic transaction is concluded partly or completely through the exchange of data or electronic representations of information as well as when there is an intention to enter into the transaction.

In the enforcement of the consumer protection provisions of Chapter VII of the ECT Act, section 49 allows a consumer to lodge a complaint with the National Consumer Commission (established in terms of the CPA),²⁹ for any non-compliance with the consumer protection principles of the ECT Act.

24 Buys (2004) 142 and Eiselen in Van der Merwe (2008) 181. See discussion of application of the CPA in para 2.2.2 where it is stated that the CPA does not apply to a transaction where the consumer is a juristic person whose annual turnover or asset value, at the time of the transaction, equals or exceeds the monetary threshold of two million rand calculated in accordance with the Schedule to the Regulations. The Determination of Threshold in terms of the CPA appeared in GG 34181, GN 294 on 1 April 2011.

25 Buys (2004) 142.

26 Eiselen in Van der Merwe (2008) 183.

27 A similar example can be found in s 19(1)(b) of the CPA in respect of s 46 of the ECT Act.

28 *Ibid.*

29 Sch 1, Part B, para 15 which amends s 1 of the ECT Act.

2.2 The Consumer Protection Act

2.2.1 Overview

The CPA came into effect in stages with Chapters 1 and 5 becoming effective on 29 April 2010 with the rest of the Act taking effect on 31 March 2011.³⁰

The CPA's purpose and policy is clear, in that it wants to promote the social and economic welfare of consumers in South Africa by *inter alia* establishing a legal framework for a fair, accessible, efficient, sustainable and responsible consumer market that promotes fair business practices, encouraging responsible consumer behaviour and providing an efficient system of redress for consumers.³¹

To achieve these aims it introduces a number of fundamental consumer rights³² that may be enforced either by referral to the Tribunal³³ or the applicable Ombud,³⁴ to a provincial consumer court³⁵ or a complaint may be lodged with the Commission³⁶ and thereafter to the courts.³⁷

The redress offered to aggrieved consumers under the CPA, include orders that any offending conduct be changed or stopped, damages may be awarded, and the offender may be liable to severe fines or even a maximum of 10 years imprisonment.³⁸

2.2.2 Scope of application

In essence, the CPA regulates the marketing of goods and services to consumers. It also regulates the relationship between franchisors and franchisees.³⁹

According to section 5(1), this Act applies to every transaction occurring in South Africa and includes the promotion, performance or supply of goods or services, the goods and services themselves as well as goods that are a part of an exempted transaction.⁴⁰

This means that most entities supplying goods or services in South Africa and the transactions that they enter into with the consumers (natural persons and small to medium sized juristic persons who do not exceed the two million rand threshold) will fall within the ambit of the Act.

However to get a precise delineation for the scope of application for this Act, it is necessary to define some of the key concepts used in section 5(1), which

³⁰ Schedule 2 CPA.

³¹ S 3(a)–(h) CPA.

³² Ch 2, Parts A–I, ss 8–67 CPA.

³³ S 69(a) CPA when permitted. The National Consumer Tribunal was established in terms of s 26 NCA. Cf s 1 definition of “Tribunal” in the CPA.

³⁴ S 69(b) CPA if the supplier is subject to jurisdiction of an Ombud.

³⁵ S 69(c)(i)–(iii) CPA.

³⁶ National Consumer Commission established in terms of s 85 CPA.

³⁷ S 69(d) CPA.

³⁸ Ss 76 and 111–112 CPA.

³⁹ S 5(7) CPA.

⁴⁰ S 5(1) CPA. Under s 5(1)(d) and 5(5) if any goods are supplied within the Republic to any person in terms of a transaction that is exempt from the application of the CPA, the goods and importer or producer, distributor or retailer are still subject to ss 60 and 61 which relate to safety monitoring, recall and strict product liability. The exemptions are listed in s 5(2) and relate to goods and services promoted to the State, where the consumer is an exempt juristic person, transactions exempted by the Minister, credit agreements under the NCA, services under an employment contract, etc.

include the terms “transaction”, “goods” and “services” as well as the key role players, namely, the “consumer” and the “supplier”.

“Transaction”

The Act refers to a transaction, in the ordinary course of business, which is an agreement between two or more persons for the supply or potential supply of goods or services, the supply of any goods to or at the direction of a consumer or the performance of any services by or at the direction of the consumer in exchange for consideration.

Consideration would be anything of value, given and accepted, in exchange for the goods or services.⁴¹ For the online consumer it could typically include electronic credit, tokens and tickets, money, property, awards, undertakings, loyalty credit and the rights to assert a claim.⁴²

Under section 5(6) there are certain arrangements that may also be considered “transactions” between a “supplier” and a “consumer” under the Act. These deemed transactions include the supply of goods or services in the ordinary course of the supplier’s business, to any members of a club, trade union, association or society and this is true even if the service or goods are provided free of charge.⁴³

“Goods and services”

Goods include:

- anything marketed for human consumption
- any tangible object including any medium on which anything is or may be written or encoded; any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product;
- a legal interest in land or any other immovable property, other than an interest that falls within the definition of “service” in this section; and
- gas, water and electricity.⁴⁴

Services include work; undertakings; the provision of: education, information, advice, transportation, accommodation, entertainment; access to electronic communication infrastructure, events, premises, activities, facilities; the use, rental, and right of occupancy etc.⁴⁵ In section 1 of the CPA services are defined as, but not limited to:

- “(a) any work or undertaking performed by one person for the direct or indirect benefit of another;
- (b) the provision of any education, information, advice or consultation, except advice that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002);

⁴¹ S 1 CPA.

⁴² S 1 CPA where “consideration” includes cheques, negotiable instruments, credits or debits, electronic chips, labour, barter, coupons, undertakings, promises or agreements.

⁴³ S 5(6) also regulates transactions that relate to franchising agreements. It is assumed by the author that franchise agreements fall outside the typical scope of online consumer law or E-commerce law and therefore the provisions directly applicable to franchising have not been included in this discussion.

⁴⁴ *Ibid.*

⁴⁵ S 1 CPA.

- (c) any banking services, or related or similar financial services, or the undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any such service—
 - (i) constitutes advice or intermediary services that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002); or
 - (ii) is regulated in terms of the Long-term Insurance Act, 1998 (Act No. 52 of 1998), or the Short-term Insurance Act, 1998 (Act No. 53 of 1998);
- (d) the transportation of an individual or any goods;
- (e) the provision of—
 - (i) any accommodation or sustenance;
 - (ii) any entertainment or similar intangible product or access to any such entertainment or intangible product;
 - (iii) access to any electronic communication infrastructure;
 - (iv) access, or of a right of access, to an event or to any premises, activity or facility; or
 - (v) access to or use of any premises or other property in terms of a rental;
- (f) a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental; and
- (g) rights of a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e), irrespective of whether the person promoting, offering or providing the services participates in, supervises or engages directly or indirectly in the service.”

“Consumers and suppliers”

The consumer includes both natural person consumers and small to medium sized juristic person consumers whose asset value or annual turnover, at the time of the transaction, is less than the monetary threshold of two million rand, calculated in accordance with the schedule,⁴⁶ to whom goods or services are marketed, who have entered into transactions with suppliers, in the ordinary course of business of the supplier. It may also include a user, recipient or beneficiary of the goods or services and a franchisee.⁴⁷

On the other hand the supplier is simply put as the person who markets (promotes or supplies) any goods or services, while a service provider is the person who promotes, supplies or offers to supply a service.⁴⁸

Despite the very wide ranging and broad definitions discussed above, the CPA does not apply to everyone or everything. The exemptions to the Act are listed in section 5(2)(a)–(g), section 5(3)–(4) and relate to goods and services promoted to the state, where the consumer is an exempt juristic person, transactions exempted by the Minister, credit agreements under the NCA (the CPA does however still apply to the goods and services sold in terms of a such a credit agreement), services under an employment contract, and the provisions of education, information, advice, consultations, banking services or related financial services that are regulated under the Financial Advisory and Intermediary Services Act,⁴⁹ the Long-term Insurance Act⁵⁰ and The Short-term Insurance Act.⁵¹

46 See fn 24 *supra*.

47 S 1 CPA and Van Eeden *A guide to the Consumer Protection Act* (2009) 41.

48 S 1 CPA.

49 37 of 2002.

50 52 of 1998.

Finally the CPA does not, in general, apply to pre-existing transactions and agreements except to the limited extent set out in item 3 of Schedule 2 to the Act.⁵²

To sum up therefore, both natural persons and small to medium businesses are protected as consumers by the provisions of the CPA when they are involved in a transaction or potential transaction, for consideration, in the ordinary course of the supplier or service provider's business. The suppliers or service providers are bound to adhere to the CPA whenever they are promoting or supplying either goods or services within the extended meaning of marketing to a consumer.

2.3 The Protection of Personal Information Bill

2.3.1 Overview

South Africa is in the process of adopting our first comprehensive data protection legislation initiated by the South African Law Reform Commission who published a discussion paper on privacy and data protection in October 2005.⁵³

The objects of the PPI include *inter alia* the promotion of the protection of personal information processed by public and private bodies; the introduction of information protection principles; the provision for the establishment of an Information Protection Regulator; the provision for the rights of persons regarding unsolicited electronic communications and automated decision making and the regulation of the flow of personal information across our borders.⁵⁴

2.3.2 Scope of application

The PPI applies to the processing of personal information entered into a record by or for a responsible party domiciled in the RSA, or if not domiciled in the

51 53 of 1998. If any goods are supplied within the RSA to any person in terms of a transaction that is exempt from the application of the CPA, those goods, the importer, producer, distributor and retailer of the goods are still subject to ss 60 and 61. Cf s 5(5) CPA.

52 Item 3 of Sch 2 to the Act provides: "Except to the extent expressly set out in this item, this Act does not apply to— (a) the marketing of any goods or services before the general effective date; (b) any transaction concluded, or agreement entered into, before the general effective date; or (c) any goods supplied, or services provided, to a consumer before the general effective date. (2) The sections of this Act listed in the first column of the following table apply, to the extent indicated in the second column, to a pre-existing agreement between a supplier and a consumer, if that pre-existing agreement— (a) would have been subject to this Act if this Act had been in effect at the time the agreement was made; and (b) contemplates that the parties to it will be bound for a fixed term until a date that is on or after the second anniversary of the general effective date: (3) Section 35 applies to any pre-existing loyalty programme, but only with respect to any— (a) offer to participate in that programme, or document setting out such an offer, that is made or published on or after the general effective date; (b) tender by a consumer, on or after the general effective date, of any loyalty credit or award in that programme as consideration for any supply of goods or services; and (c) any supply of goods or services if, on or after the general effective date, the consumer tendered any loyalty credit or award in the programme as consideration for those goods or services. (4) Section 61 applies to any goods that were first supplied to a consumer on or after the early effective date. (5) Any provision of this Act not otherwise contemplated in sub items (2) to (4) applies to any pre-existing conduct, circumstance, transaction or agreement only to the extent required to ensure proper interpretation of, or compliance with and enforcement of, the provisions that are mentioned in sub items (2) to (4)."

53 South African Law Reform Commission *Privacy and data protection* Discussion Paper 109, Project 124, available at www.doj.gov.za/salrc (accessed 05-09-2011).

54 Preamble to the PPI.

RSA, using automated or non-automated means unless those means are used only for forwarding personal information, provided that it forms part of a filing system or is intended to form part thereof.⁵⁵ This Act applies to all public and private bodies.⁵⁶

Of particular importance for the field of application are the definitions for “processing” and “personal information”. Section 1 of the PPI defines “personal information” as

“information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person, including, but not limited to— (a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person; (b) information relating to the education or the medical, financial, criminal or employment history of the person; (c) any identifying number, symbol, e-mail address, physical address, telephone number or other particular assignment to the person; (d) the blood type or any other biometric information of the person; (e) the personal opinions, views or preferences of the person; (f) correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence; (g) the views or opinions of another individual about the person; and (h) the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person”.

“**Processing**” is designated as any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including—

- (a) the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use;
- (b) dissemination by means of transmission, distribution or making available in any other form; or
- (c) merging, linking, as well as blocking, degradation, erasure or destruction of information.⁵⁷

Processing is so widely defined that it clearly intends on covering any action that could possibly be executed in respect of personal information.

However this Act will not apply to the processing of personal information⁵⁸ that is done in the course of a purely personal or household activity; that has been de-identified to the extent that it cannot be re-identified again; processing by or on behalf of the State for reasons of national security, defence or public safety; or where the purpose of the processing is for the prevention, investigation or proof of offences, the prosecution of offenders or the execution of sentences

⁵⁵ S 3 PPI.

⁵⁶ S 1 PPI defines a “private body” as “(a) a natural person who carries or has carried on any trade, business or profession, but only in such capacity; (b) a partnership which carries or has carried on any trade, business or profession; or (c) any former or existing juristic person, but excludes a public body” and a “public body” as “(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or (b) any other functionary or institution when— (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation”.

⁵⁷ S 1 PPI definition of “processing”.

⁵⁸ S 4 PPI.

or security measures, to the extent that adequate safeguards have been established in specific legislation for the protection of such personal information. Processing is similarly allowed for exclusively journalistic purposes by responsible parties who are subject to, by virtue of office, employment or profession, a code of ethics that provides adequate safeguards for the protection of personal information; or by Cabinet and its committees, the Executive Council of a province or a Municipal Council of a municipality; that relates to the judicial functions of a court referred to in section 166 of the Constitution; or that has been exempted from the application of the information protection principles in terms of section 34 of the Act.

3 THE REGULATION OF UNSOLICITED COMMUNICATIONS AND DIRECT MARKETING

3.1 Introduction

Some believe advertising is “the most prevalent and toxic of all mental pollutants”.⁵⁹ In the form of unsolicited electronic communications they are the bane of most Internet users’ lives and account for a disproportionate amount of our Internet traffic.⁶⁰ Accurate figures do not seem to be available, but source dependant, they can range from 45% to 92% of all internet traffic.

Unsolicited communications range from mildly annoying to outright harmful, objectionable and offensive, they are an abuse of recipient resources and they can be a threat to email and internet security.⁶¹ Unsolicited communications are predominately received via email but they are also increasingly being sent to cell phones via short message services (SMS).

3.2 What is Spam?

Although most internet or mobile phone users would be able to identify spam, agree that it is unwanted and should in some manner be regulated, jurists the world over, have varied significantly in a legal definition for spam.⁶² This variance in definitions may to some extent have impacted on the effective control of spam.

In the USA the CAN-SPAM Act was enacted to prohibit the sending of “. . . any electronic mail message, the primary purpose of which, is the commercial advertisement or promotion of a commercial product or service, including email that promotes content on commercial websites”.⁶³

In Australia, section 16 of the Spam Act 129 of 2003 states that “a person may not send, or cause to be sent a commercial electronic message”.⁶⁴

59 Lasn “Culture jam: The uncooling of America” (1999) 59.

60 Cf <http://bit.ly/v6Rz4N>; <http://bit.ly/sPHPEB>; and <http://bit.ly/t9GAYo> (accessed 27-08-2010).

61 Buys (2004) 160 and Van der Merwe *et al* (2008) 190.

62 The word “spam” was first used in 1926, when Hormel Foods introduced a brand of tinned luncheon meat known as spam. For an overview of the history of spam see Mossoff “Spam – Oy, what a nuisance!” 2004 *Berkley Technology LJ* 625 631–632.

63 S 3(2) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (commonly known as the CAN-SPAM Act), available at <http://bit.ly/s2VPJ6> (accessed 21-03-2011).

64 Available at <http://bit.ly/sTeegD>, (accessed 21-03-2011). A similar definition can be found in the New Zealand Unsolicited Electronic Messages Act of 2007 No 7, available at <http://bit.ly/tkITG7>, (accessed 21-03-2011).

Back at home Buys defined it as unsolicited bulk and/or commercial electronic communications and Tladi as unsolicited email or electronic junk mail.⁶⁵

When it comes to South African legislative intervention in the control or prohibition of spam, as will become clearer after reading the paragraphs that follow, there are some serious oversights which will require urgent attention in the near future.

The ECT Act was originally the only legislation directly regulating spam in South Africa and in section 45 it refers to spam as “unsolicited commercial electronic communications sent to consumers”.

However as of 1 April 2011 the CPA became applicable in South African law and has very specific provisions that relate to “direct marketing”. The CPA has not repealed section 45 of the ECT Act and therefore the two Acts concurrently regulate aspects of spam, unsolicited electronic communications, or direct marketing.

If Parliament finally adopts and enacts PPI in its current form, it is envisaged that the PPI will repeal section 45 of the ECT Act,⁶⁶ and replace it with Chapter VIII, sections 66–68, detailing the rights of data subjects regarding unsolicited electronic communications and automated decision making and therefore, it seems as if spam will (in the future), be concurrently regulated by both the CPA and the PPI.

In order to come to grips with the effect of this legislative framework, each of these regulatory facets are briefly analysed in the paragraphs that follow.

3 3 Section 45 ECT Act

3 3 1 *Regulating unsolicited commercial communications*

Section 45 of the ECT Act regulates (does not prohibit) the sending of unsolicited commercial electronic communications to consumers. In terms of this section, senders are firstly required to give the consumer the option to opt-out of the mailing list and secondly, if so requested by the consumer, to reveal the source where the email address or cell phone number was obtained. A failure to comply with these requirements is an offence in terms of section 89(1) with penalties that include fines and imprisonment of up to 12 months.⁶⁷ Finally, it confirms that no agreement is concluded where a consumer fails to respond to the unsolicited communication.⁶⁸

Unsolicited implies that there is no prior relationship between the sender and the recipient and that the recipient has not consented to receive the communication or that the recipient has not previously attempted to terminate such a relationship, by instructing the sender to remove the recipient’s contact details from the mailing list or database.⁶⁹

Commercial is not defined in the ECT Act, but if we look to foreign legislation such as the CAN-SPAM Act, it seems to relate to messages whose primary

65 Buys (2004) 160, Tladi “The regulation of unsolicited commercial communications (Spam): Is the opt-out mechanism effective?” 2006 *SA Merc LJ* 178 179.

66 The Schedule to the PPI – “Laws repealed or amended by section 101”.

67 S 89 ECT Act.

68 S 45(2) ECT Act.

69 Buys (2004) 160.

purpose is to advertise or promote goods or services.⁷⁰ Therefore non-commercial communications such as newsletters, opinion surveys, religious messages, political content, virus warnings and virus hoaxes, urban legends, news, chain letters and hate-mail are not regulated as spam under the ECT Act.⁷¹

The ECT Act did not include the bulk requirement as can be found in some foreign jurisdictions and therefore a single unsolicited commercial communication may be classified as spam.⁷²

Electronic – the spamming provisions of the ECT Act fall under the general application of section 42(1): This dictates that Chapter VII of the ECT Act including section 45 only applies to electronic transactions. Therefore it would follow that spam, in terms of the ECT Act, excludes unsolicited telephone calls but includes e-mail, SMS and other forms of electronic communications.⁷³

Sent to consumers – Section 45(1) indicates that it only applies when the spam is in fact sent to a consumer (any natural person who enters or intends entering into an electronic transaction with a supplier as the end user of the goods or services offered by that supplier).⁷⁴

3 3 2 Criticisms of section 45

These provisions of the ECT Act have been criticised by a number of South African jurists.⁷⁵

They point out that for the opt-out or unsubscribe mechanism to be effective, two things are necessary: firstly that the spammer respects the call to stop sending and secondly that the consumers have faith in using the opt-out mechanism.⁷⁶ Neither of these are realistic in the world of spam.

Some further points of criticism against section 45 include:⁷⁷

The fact that it does not stipulate how the opt-out mechanism should be made available. This means that most spam does not have any sort of opt-out link or if it does, it is often dysfunctional.

Most spammers disguise or falsify their headers (headers being that part of an email that tells us who sent the email, the sender's email address, time, date and subject) and a person cannot opt-out because they are unable to trace or identify the real spammer. This is problematic because this practice is not prohibited or penalised.

If a person uses the opt-out mechanism or they request information on where the spammer obtained the address, all that happens, is that the recipient confirms that the address is alive and functional, with the result that even more spam will be sent, often from a number of new sources.

70 The Federal Communications Commission Consumer Facts: CAN-SPAM Unwanted text messages and E-Mail on wireless phones and other mobile devices. Available at <http://fcc.us/rPts1s> (accessed 04-05-2011).

71 Buys (2004) 160.

72 *Idem* 161.

73 *Ibid.*

74 *Ibid.*

75 Buys (2004) 165, Tladi 2006 *SA Merc LJ* 178.

76 Tladi (2006) 186.

77 *Idem* 186–187.

The onus is always on the consumer to request spammers to stop or to obtain information to lay a complaint which in turn means if the consumers do not exercise their rights, the spammers can continue to send the spam and remain unsanctioned.

Finally, most spam originates from outside the South African jurisdiction, which makes enforcement of these rights very difficult, and the result is that few (including under-resourced law enforcement offices) will take the time, effort or money to locate and litigate against an offender for a maximum penalty of 12 months in jail. Instead it is probably much easier and cheaper for a consumer to purchase spam filter software, delete the messages from inboxes or to set the various junk mail settings.

It is therefore clear that the opt-out mechanism and section 45 of the ECT Act is ineffective in dealing with the problems of spam and we therefore need to look to the CPA and the PPI.

3 4 Direct marketing under the CPA

On the marketing of goods or services, the CPA has placed a great deal of emphasis on honest, fair and responsible conduct.

“**Direct marketing**” is defined in the CPA as an approach to a person, either in person or by mail or electronic communication for the direct or indirect purpose of promoting, offering to supply, in the ordinary course of business, any goods or services or to request a donation of any kind.⁷⁸

An “**electronic communication**” for the purposes of “direct marketing” is a communication by means of electronic transmission including telephone, fax, sms, wireless computer access, email or similar technology or device.⁷⁹

Specifically section 11 of the CPA sets out the consumer’s right to restrict unwanted direct marketing. Under the CPA Regulations, Regulation 4 finally establishes the practicalities for controlling direct marketing communications.⁸⁰

In essence the section relating to the consumers right to restrict unwanted direct marketing is welcome relief and long overdue. It sets down that a consumer has the right to refuse to accept, require another person to discontinue or pre-emptively block any approach or communication if the approach or communication is primarily for the purpose of direct marketing.⁸¹

78 S 1 CPA.

79 It is perhaps pertinent to note that this definition of electronic communication in the CPA differs from that of the ECT Act where it is defined as communication by means of data messages which is data that is generated, sent, received or stored by electronic means and includes voice where it is used in an automated transaction and a stored record. The reason for this differentiation may be that under the CPA, the legislator would clearly like to include direct marketing via the telephone and postal services within its protective provisions. Under the ECT Act, communication via telephone, is according to Van der Merwe *et al* 148–150, not strictly included as an electronic communication because it is a direct method of communication to which the information theory is applied for the determination of the time and place for the conclusion of a contract, whereas the ECT Act deals exclusively with indirect forms of communication such as telexes, faxes, SMSs, emails and interaction with websites to which the reception theory is applied. Cf ss 22 and 23 ECT Act.

80 The regulations appeared in GG 34180 as GN 293 of 1 April 2011.

81 S 11(1)(a)–(c) CPA.

In order to facilitate this, the Commission will establish a registry where a person may register a pre-emptive block against direct marketing communications and any person authorising, directing or conducting any direct marketing must implement appropriate procedures to facilitate demands to stop further communications.⁸² Furthermore, section 12, read with the Regulations, determines the times that the supplier may contact a consumer for direct marketing purposes. The Notice on the “Prohibited Time for Contacting Consumers” sets the prohibited time for contacting consumers as Sundays and Public Holidays, Saturdays before 09:00 and after 13:00 and all other days between the hours of 20:00 and 08:00 the following day.⁸³ Regulation 3(c)(iv) affords the consumer an opportunity to register a pre-emptive block for any time of the day or any day of the year if the operator of the registry so allows.⁸⁴

The registry is established in regulation 4(3) that will allow consumers to register their details in order to block direct marketing. For this purpose, regulation 4(3)(c) provides that a consumer may register –

- (a) his or her name, identification number, passport number, telephone number, facsimile number, email address, postal address, physical address, a website uniform resource locator (“URL”);
- (b) other global address for any website or web application or site on the World Wide Web;
- (c) any combination of the media or addresses contemplated in paragraphs (i) and (ii) above;
- (d) a pre-emptive block for any time of the day or any day of the year; or
- (e) a comprehensive prohibition for any medium of communications, address or time whatsoever in his or her sole discretion, as the factor which triggers the pre-emptive block contemplated in section 11(3) of the CPA.

Most importantly a direct marketer must, without exception, assume that a comprehensive pre-emptive block has been registered by a consumer unless the administrator of the registry has in writing confirmed that the pre-emptive block has not been registered.⁸⁵

Section 32(2) of the CPA contains a dire warning for direct marketers in that when any person who has marketed goods and left these goods with the consumer without requiring or arranging for payment, those goods become unsolicited goods to which section 21 applies. Section 21 allows consumers under certain circumstances to keep the goods without an obligation to pay.⁸⁶

3 5 Regulating unsolicited electronic communications under the PPI

3 5 1 Sections 66–68 PPI

It is envisaged that the PPI will repeal among others section 45 of the ECT Act,⁸⁷ and replace it with Chapter VIII, sections 66–68, detailing the rights of data

⁸² S 11(2)–(4).

⁸³ The CPA Regulations of 1 April 2011.

⁸⁴ *Ibid.*

⁸⁵ Reg 4(3)(g).

⁸⁶ S 21 CPA.

⁸⁷ Schedule to PPI.

subjects regarding unsolicited electronic communications and automated decision making.

The reader should keep in mind that the final wording of this Act, which will only be adopted after it has completed its legislative journey, may differ in certain respects from the provisions of the PPI Bill discussed below.

Despite the heading for Chapter VIII being the Rights of Data Subjects Regarding Unsolicited Electronic Communications and Automated Decision Making, it is clear from section 66 of the PPI that the provisions actually prohibit the processing of personal information of a data subject for the purpose of direct marketing (not defined in the PPI) by means of automatic calling machines,⁸⁸ facsimile machines, SMSs (not defined in the PPI) or electronic mail.

Electronic mail includes any text, voice, sound or image message sent over a public communications network⁸⁹ which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient.

The PPI is an improvement over section 45 of the ECT Act, in so far as it prohibits the processing of personal information for direct marketing purposes unless the data subject has given consent to the processing (i.e. an opt-in system); or is, subject to subsection (2), a customer of the responsible party.

In terms of section 66(2), a responsible party may therefore only process the personal information of a data subject who is a customer of the responsible party, if the responsible party (a) has obtained the contact details of the data subject in the context of the sale of a product or service; (b) for the purpose of direct marketing of the responsible party's own similar products or services and (c) if the data subject has been given a reasonable opportunity to object, free of charge and in a manner free of unnecessary formality, to such use of electronic details either (a) at the time when the information was collected; or (b) on the occasion of each communication with the data subject for the purpose of marketing if the data subject has not initially refused such use.⁹⁰

Section 66(3) of the PPI also requires any communication for direct marketing to contain the details of the identity of the sender or the person on whose behalf the communication has been sent; and an address or other contact details to which the recipient may send a request that such communications cease.

The data subject who is a subscriber to a printed or electronic directory of subscribers that is available to the public or obtainable through directory enquiry services, in which his, her or its personal information is included, must be informed, free of charge and before the information is included in the directory—

- (a) about the purpose of the directory; and
- (b) about any further uses to which the directory may possibly be put, based on search functions embedded in electronic versions of the directory.

⁸⁸ S 1 PPI defines an "automatic calling machine" as "a machine that is able to do automated calls without human intervention".

⁸⁹ *Ibid* where "public communications network" means an electronic communications network used wholly or mainly for the provision of publicly available electronic communications services.

⁹⁰ S 66(2) PPI.

They must furthermore be given a reasonable opportunity to object to the use of the personal information or to request verification, confirmation or withdrawal of such information if the data subject has not initially refused such use.⁹¹

Subject to section 68(2), no one may be subject to a decision to which there are legal consequences attached, or which affects them to a substantial degree, that has been taken solely on the basis of the automated processing of personal information intended to provide a profile of certain aspects of his or her personality or personal habits.

The provisions of subsection 68(1) do not apply if the decision has been taken in connection with the conclusion or execution of a contract, and:

- the request of the data subject in terms of the contract has been met; or
- appropriate measures have been taken to protect the data subject's legitimate interests; or
- it is governed by a law or code in which appropriate measures are specified for protecting the legitimate interests of data subjects.

The appropriate measures referred to above must:

- allow for an opportunity for a data subject to make representations about such a decision; and
- require a responsible party to provide a data subject with sufficient information about the underlying logic of the automated processing of the information relating to him or her so that representations in this respect can be made.

3.5.2 *Commentary on sections 66–68 PPI*

According to the Report of the OECD task force on Spam, there is no simple solution to stop spam from being sent because

“the openness and decentralised nature of the Internet, which are the main reasons for its success, have also created the conditions leading to a number of vulnerabilities that are increasingly exploited by spammers and other online offenders. The lack of centralised control enables users to hide their identity. In addition, the low cost of accessing Internet and e-mail services allows spammers to send out millions of spam messages every day at an extremely low marginal cost so that only a small response rate is required to attain high profits”.⁹²

The opt-in model adopted by the PPI Bill is definitely an improvement to the ECT Act opt-out model, as are the provisions on databases and automated decision making.

It is noted with disappointment, however, that in a working draft of the PPI Bill made available by the Direct Marketing Association, that there is a suggestion that direct marketers be allowed to approach a data subject once, in order to

⁹¹ S 67(1) and (2) PPI, but in terms of s 67(3), s 67(1) and (2) do not apply to editions of directories that were produced in printed or off-line electronic form prior to the commencement of this section and in terms of s 67(4), if the personal information of data subjects who are subscribers to fixed or mobile public voice telephone services have been included in a public subscriber directory in conformity with the information protection principles prior to the commencement of this section, the personal information of such subscribers may remain included in this public directory in its printed or electronic versions, after having received the information required by s 67(1).

⁹² Report of the OECD task force on Spam: Anti-Spam Toolkit of Recommended Policies and Measures of 19 April 2006 6, available at <http://bit.ly/vr1ie5> (accessed 21-03-2011).

obtain the data subject's consent for receiving direct marketing material. This approach is strongly opposed due to its scope for abuse and because in essence it reverts back to an opt-out model.⁹³ It is also contrary to the position established in the CPA where a direct marketer must without exception assume that a comprehensive pre-emptive block has been registered by a consumer.⁹⁴

There are a number of key concepts in these sections of the PPI that are at odds with other legislation such as the CPA or the ECT Act, that are not defined or that are inconsistent within their immediate context.

The definitional variances between the ECT Act for electronic communication⁹⁵ and information system,⁹⁶ the CPA for electronic communication⁹⁷ and SMS⁹⁸ and the PPI for electronic mail⁹⁹ and public communications network¹⁰⁰ should be carefully considered and harmonised as far as possible. Two examples will suffice to illustrate the point. The first example is with reference to the term "electronic communication" where under the ECT Act it was considered wide enough to include electronic mail and SMSs in the recent case of *Jafta v Ezemvelo KZN Wildlife* [2008] 10 BLLR 954 (LC). The second example concerns the phraseology of section 66 of the PPI where it reads that "the processing of personal information of a data subject for the purpose of direct marketing by means of automatic calling machines, facsimile machines, SMS or electronic mail is prohibited". As it currently stands, this would mean that processing of personal information for direct marketing via MMS¹⁰¹ would be permissible and therefore, it would make far more sense to use a device- or format-neutral phrase such as "electronic communication".

The lack of definitions for certain concepts will also lead to uncertainty and an inability to effectively enforce the provisions. For example section 66 of the PPI

93 In a newer working draft of the PPI released by the Direct Marketing Association entitled "Working draft: 24 February 2011: Protection of Personal Information Bill" available at <http://bit.ly/vXk8cH> (accessed 12-09-2011).

94 Reg 4(3)(g).

95 S 1 ECT Act: "electronic communication" means a communication by means of data messages.

96 *Ibid*: "information system" means a system for generating, sending, receiving, storing, displaying or otherwise processing data messages and includes the Internet.

97 S 1 CPA where an "electronic communication" means communication by means of electronic transmission, including by telephone, fax, SMS, wireless computer access, email or any similar technology or device.

98 *Ibid*: "sms" means a short message service provided through a telecommunication system.

99 S 1 PPI: "electronic mail" or "e-mail" means any text, voice, sound or image message sent over a public communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient.

100 *Ibid*: "public communications network" means an electronic communications network used wholly or mainly for the provision of publicly available electronic communication services.

101 According to the website <http://bit.ly/s0DKbB>, an MMS is a multimedia messaging service that is "an extension of the SMS protocol, making its usage familiar to existing SMS users. An MMS message is a single entity, not a collection of attachments. One of the main practical differences between MMS and SMS is that whilst SMS messages are limited to 160 bytes, an MMS message has no size limit and could be many Kbytes in size, or even larger. MMS requires a third generation (3G) network to enable such large messages to be delivered, although smaller messages can be sent even with second generation networks using GPRS" (accessed 22-10-2011).

prohibits the processing of personal information of a data subject for the purpose of direct marketing. Direct marketing is not defined in the PPI, yet it is an important concept for the application of the section.

In respect of the inconsistencies, the heading for Chapter VIII identifies the chapter as the “Rights of Data Subjects Regarding Unsolicited Electronic Communications and Automated Decision Making”, but it is clear from section 66 of the PPI that the provisions actually prohibit the processing of personal information of a data subject for the purpose of direct marketing. The legislator needs to give some thought as to whether or not it wants to protect data subjects against the “processing of personal information for an unsolicited electronic communications” or the “processing of personal information for direct marketing” and adjust the sections accordingly.

A number of the points of criticism raised around section 45 of the ECT Act have also not been adequately addressed in either the PPI or CPA. For example section 66(3) does not stipulate what, how or where contact details should be displayed for the purposes of requesting a sender to cease sending any further communications and neither do either of them outlaw the disguising of headers in electronic communications, as is the trend in other jurisdictions. Finally consideration should be given to extraterritorial reach of national laws.

4 CONCLUSION

The current provisions of chapter VIII of the PPI were not part of the original Discussion Paper on Privacy and Data Protection, containing a draft Bill on the Protection of Personal Information, published by the SALRC. Their addition to the Bill is welcome and should be brought in line with the Directive on Privacy and Electronic Communications.¹⁰²

However, it would seem that these additional provisions in the PPI have not been afforded the same meticulous research and comparative analysis as the rest of the Bill. It would also seem as if the scourge of spam has not been given holistic attention and thus we find a fragmented approach between the ECT Act, CPA and the PPI.

In order to effectively address the problems of controlling spam it is suggested that the legislature obtain a comprehensive, holistic and comparative overview of current trends in legislative interventions. At the least, a concerted effort should be made to harmonise the PPI and the CPA taking into account the criticisms of previous attempts to control spam.

102 The Directive on Privacy and Electronic Communications 2002/58/EC of the European Parliament and Council of 12 July 2002.