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AN EXAMINATION OF HOW THE PROTECTION OF
PERSONAL INFORMATION ACT 4 OF 2013 (POPI) WILL
IMPACT ON DIRECT MARKETING AND THE CURRENT
LEGISLATIVE FRAMEWORK IN SOUTH AFRICA

A DISSERTATION PRESENTED

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DECLARATION OF ORIGINALITY

I hereby certify that I am the sole author of this dissertation and that no part of this dissertation has been published or submitted for publication.

I declare that this is a true copy of my dissertation including any final revisions and that this dissertation has not been submitted for a higher degree to any other University or Institution.

I declare that this dissertation is my own unaided work. To the best of my knowledge and belief, this dissertation contains no material previously published or written by another person except where due reference is made in the dissertation itself.

This project is an original piece of work which is made available for photocopying and for inter-library loan.

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ABSTRACT

The commercial practice of direct marketing has evolved tremendously with the advent of technology and therefore has both advantages and disadvantages associated with it. It has the advantage of assisting marketers in the running of their businesses by gaining valuable customer support, as well as providing a source of income for those employed by such marketing companies. It also contributes considerably to the economy by fuelling the chain of supply and demand.

Direct marketing has an adverse effect when it is unsolicited and thereby intrudes on the privacy of consumers. It is therefore imperative that a balance be struck between the need for direct marketing as a commercial tool and the exploitation of the privacy rights of consumers.

At present, the practice of direct marketing is primarily regulated by statute in the form of the Consumer Protection Act, the Electronic Communications and Transactions Act and the newly promulgated Protection of Personal Information Act. As will be discussed, there are various inconsistencies in the legislation which allow for truant direct marketers to circumvent the law.

In light of the above, the aim of this dissertation will be to consider the current regulatory framework concerning direct marketing, and will go on to examine the impact that the Protection of Personal Information Act will have on the practice. The analysis will further draw a comparison of the regulation of direct marketing in two foreign jurisdictions, and will finally conclude with suggestions to improve on the regulatory system in South Africa.

Chapter 1: Introduction and overview

1.1.Introduction

The right to privacy in South Africa (SA) is jealously protected by the judicial system¹ and is considered to be a salient entitlement which all individuals should be afforded. As a result, the right to privacy is provided for in both the common law² and statutory law³ and the Constitution⁴ specifically entrenches the right to privacy in the Bill of Rights.⁵

The crucial issue this dissertation will explore relates to the exploitation of personal information through the practice of direct marketing and the subsequent violation of the right to privacy.⁶ In response to this, SA has produced various pieces of legislation which deal with the treatment of personal information in respect of direct marketing. These include⁷ the Consumer Protection Act (CPA),⁸ the Electronic Communications and Transactions Act (ECTA)⁹ and the more recently promulgated, Protection of Personal Information Act (POPI).¹⁰

1.2.Outline of research problem

The world in recent years has seen a significant advancement in technology and this technological boom has bolstered the processing of personal information, which in turn means that data such as contact numbers may be extracted and exploited with ease.¹¹ Furthermore, in light of ever-expanding social media platforms, individuals have made it effortless for their personal details to be freely accessible to anyone who wishes to acquire

¹Minister of Police and Others v Kunjana 2016(2) SACR 473 (CC) 32.

²See the detailed discussion of the common law protection of the right to privacy in paragraph 2.2.

³See the detailed discussion of the statutory protection of the right to privacy in chapter 4 in terms of the CPA, ECTA and POPI.

⁴The Constitution of the Republic of South Africa 1996 (hereafter referred to as “the Constitution”).

⁵s 14 of the Constitution.

⁶See discussion in chapter 4.

⁷There are other pieces of legislation which deal with the treatment of personal information such as s 74 of the National Credit Act 34 of 2005. Due to the limited scope of this dissertation, only the focal legislation will be considered.

⁸Act 68 of 2008.

⁹Act 25 of 2002.

¹⁰Act 4 of 2013.

¹¹C Mathies ‘Unpacking the POPI Act: The ins and outs of protecting personal information’ (2014) available at http://www.itweb.co.za/index.php?option=com_content&view=article&id=71001 accessed on 30 August 2015.

them.¹² The practice of direct marketing becomes problematic when marketers misuse the personal information of consumers and thereby infringe on their right to privacy.

In analysing this problem and seeking to propose solutions, it is essential to examine the current legislative framework together with the common law and existing precedent. Furthermore, it will be interesting to see how the enforcement of POPI (and the regulations thereto) by the Information Regulator,¹³ attempts to improve the situation and promote the right to data privacy.

1.3.Statement of purpose

The purpose of this dissertation is to examine the current regulatory framework in respect of direct marketing and to determine how POPI will impact on such a framework when it is fully operational.¹⁴ A comparison will also be drawn with foreign law so as to examine whether SA can learn from its international counterparts. Moreover, a cost-benefit analysis will be drawn between the importance of data protection legislation and the need for access to personal information for business reasons - the purpose of which is to balance both needs and ascertain a middle ground that is mutually beneficial to all stakeholders involved.

Finally, the ultimate purpose of this dissertation after having examined the regulatory framework, is to provide solutions or recommendations for a way forward in respect of the difficulties faced by consumers as a result of the abuse of the practice of direct marketing.

1.4.Rationale for this research

SA is moving toward becoming a consumer-centric society which complies with related international standards.¹⁵ In this light, it is essential to examine how POPI will affect consumers, businesses and the economy, and in particular, the practice of direct marketing. Since POPI is a newly promulgated piece of legislation, there is a dearth of scholarly writing

¹²PS Abril ‘Recasting Privacy Torts in a Spaceless World’ (2007) *Harvard Journal of Law and Technology* 5.

¹³The Information Regulator is established by chapter 5 of POPI and is responsible for enforcing compliance with the Act amongst other things.

¹⁴Although POPI has been enacted, there are only a few provisions that are currently operative. These include the definitions section (s1); Part A of Chapter 5 which establishes the Information Regulator; the regulations section-(s112) and s113, which sets out the procedure for making regulations. The implementation of the rest of its provisions has been suspended until the President announces that they are operational via the government gazette.

¹⁵T Woker ‘Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act’ (2010) *Obiter* (31).

considering its implications. This dissertation will therefore aim to contribute to the dialogue on POPI.

1.5.Research questions

- a) How is the right to privacy currently regulated in South Africa?
- b) What is direct marketing? And what are the advantages and disadvantages thereof?
- c) What is the current South African framework regulating direct marketing?
- d) How will POPI impact on direct marketing and the current regulatory framework in South Africa?
- e) What are the foreign and international positions with regard to data privacy and direct marketing, and how do they contrast with South African law?
- f) Will POPI be effective in achieving its mandate to promote and protect the right to data privacy?
- g) What are the functions of the Information Regulator? And how can the Information Regulator improve the regulation of direct marketing in South Africa?

1.6.A brief overview of the legal framework addressing direct marketing in South Africa

For the purposes of creating a backdrop against which we can understand the protection of data privacy, this dissertation will begin by examining the common law after which the statutory and constitutional rights shall be considered. The analysis will conclude by drawing a comparison between domestic and international data protection and direct marketing laws.

In respect of the common law position on the protection of privacy, the *actio iniuriarum* is a delictual common law remedy which protects the right to dignity, amongst other entitlements. Dignity in this form includes the right to privacy¹⁶- therefore privacy does not exist as a separate or distinct right under the common law.

The right to privacy also enjoys constitutional protection and in this regard section 14 of the Constitution entrenches the right to privacy, however like its common law counterpart, it is not absolute and may be limited in terms of a law of general application.¹⁷ It thus has to be

¹⁶See for example *Jansen van Vuuren v Kruger* 1993(4) SA 842(A) 849.

¹⁷s 36 of the Constitution.

balanced with other rights in a manner that is reasonable and justifiable in an open and democratic society.¹⁸ Examples of such rights in the context of data privacy and direct marketing, would be a direct marketer's right to choose their trade, occupation or profession freely,¹⁹ freedom of expression²⁰ and access to information.²¹

With regard to the statutory protection of the right to privacy in light of direct marketing, section 11 of the CPA regulates the consumer's right to restrict unwanted direct marketing and the consumer has the right to refuse to accept direct marketing communications, to require the marketer to discontinue its marketing, or to apply to pre-emptively block such marketing. It therefore creates an opt-out mechanism²² for consumers. Similarly, section 45 of ECTA also provides consumers with an opt-out mechanism by stipulating that senders may send out any electronic communication provided that it is a commercial communication and the sender must also give the consumer an option to opt-out of receiving further communications.

The aforementioned opt-out mechanisms are not as effective as they aim to be, as it simply means that a consumer may be laboriously inconvenienced by direct marketing until they take the initiative to opt-out of the communications. These and other issues will however be closely examined in chapter 4.

As mentioned above, the status quo in respect of the CPA and ECTA reflects an opt-out regime. POPI on the other hand, seeks to fundamentally change the status quo to create an opt-in mechanism, in that a consumer's consent would need to be obtained before direct marketing communications are sent to them. In this light, section 69 of POPI regulates the processing of personal information of a data subject²³ for the purpose of direct marketing by means of any form of electronic communication, including automatic calling machines, facsimile machines, sms's or e-mail. The aforementioned is prohibited unless the data subject has given his or her or its consent (opted in) to the processing or is a customer of the marketer

¹⁸s 36 of the Constitution.

¹⁹s 22 of the Constitution.

²⁰s 16 of the Constitution.

²¹s 32 of the Constitution.

²²An "opt-out" mechanism is one which allows the consumer to require the marketer to cease communications.

²³s 1 of POPI defines "data subject" as the person to whom personal information relates. In the context of this dissertation, a data subject would be a consumer or recipient of direct marketing.

(responsible party²⁴). More importantly, the responsible party need only obtain consent from a data subject once, provided they have not previously withheld consent.

This shift from an opt-out regime to an opt-in system is indeed a welcomed change as it illustrates that the legislature is desirous of awarding consumers more control over their data privacy rights by placing the power to consent squarely within their domain. However, as with most things, there are both advantages and disadvantages to the opt-in mechanism, which will be considered further in paragraph 4.4.5.

1.7. An international perspective on data privacy

Internationally, there are various instruments which deal with the right to data privacy. Examples of these include the Council of Europe's 1981 Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data (COE Convention)²⁵ and the 1981 Organisation for Economic Cooperation and Development's Guidelines Governing the Protection of Privacy and Trans-border Data Flows of Personal Data (OECD Guidelines).²⁶

In 1995, the European Union (EU) endorsed the Data Protection Directive²⁷ (EU Directive) so as to synchronize the legislative framework of its member states. The EU member states have adopted a set of legally binding data processing rules known as the "binding corporate rules".²⁸ In promulgating POPI, the drafters have taken guidance from the EU in that POPI expressly sanctions the binding corporate rules.²⁹

This dissertation will also draw a comparative analysis between the laws of the United Kingdom (UK) and New Zealand (NZ), so as to consider any lessons that may be learnt from these foreign jurisdictions which may be incorporated into the South African legal framework.

²⁴s1 of POPI defines a "responsible party" as a public or private body or any other person who determines the purpose of and the means for processing personal information. In the context of this dissertation, a responsible party would be a direct marketer.

²⁵Council of Europe Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data ETS No. 108 Strasbourg, 1981.

²⁶Organisation for Economic Co-operation and Development "Guidelines Governing the Protection of Privacy and Transborder Data Flows of Personal Data" Paris, 1981.

²⁷Directive 95/46/EC of the European Parliament and of the Council 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.

²⁸A Roos 'Core principles of data protection law' (2006) *CILSA* 34.

²⁹P Stein 'South Africa's EU-Style Data Protection law' (2012) *Without Prejudice* 48-49.

1.8.Concluding remarks

In order to engage with the issues surrounding direct marketing, this dissertation will consider in detail, the common law, constitutional and statutory regulation of the practice. In particular, the CPA, ECTA and POPI will be closely examined so as to assess the extent to which data privacy is entrenched in these pieces of legislation, and whether they actually fulfil their respective mandates or not. Moreover, the analysis will conclude with a view to provide recommendations to improve on the current legislative difficulties faced by consumers.

Chapter 2: An analysis of the right to privacy in South Africa

2.1 Introduction

All individuals require a certain level of privacy as a necessary facet of one's personality.³⁰ The right to privacy can be described as quite simply the right "to be left alone"³¹ and a breach of this right is a transgression on the inner sanctum³² of a person.³³ The Constitution has also expressly entrenched the right to privacy as a fundamental human right.³⁴

As a concept, privacy has traditionally been difficult to define.³⁵ The following definition by Neethling³⁶ was accepted in *National Media Ltd v Jooste*:³⁷

"Privacy is an individual condition of life characterised by exclusion from the public and publicity. This condition embraces all those personal facts which the person concerned has determined himself to be excluded from the knowledge of outsiders and in respect of which he has the will that they be kept private".

The aforementioned definition illustrates that factors such as an individual's conduct and role in society will influence the scope of what his private information would entail and the extent to which such private information will be protected by law. One must also demonstrate the need to have such information kept private, and a failure to do so insinuates that one does not have an interest in the protection of that aspect of their privacy.³⁸

Furthermore, in recent judicial decisions such as *Media 24 (Pty) Ltd and others v Department of Public Works and others*,³⁹ *Craig Smith and Associates v Minister of Home Affairs and*

³⁰J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* 2 ed (2005) 29.

³¹SD Warren & LD Brandeis 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193.

³²*Bernstein v Bester* 1996(2) SA 751 (CC) 788-789.

³³Neethling's Law of Personality (note 30 above) 29.

³⁴South African Law Reform Commission Discussion paper 109 (Project 124) *Privacy and Data Protection* (2009)16 (hereafter referred to as the SALRC Discussion Paper).

³⁵I Currie 'The concept of privacy in the South African Constitution: reprise' (2008) *TSAR* 3.

³⁶J Neethling *Die Reg op Privaatheid* (LLD thesis UNISA 1976) 287.

³⁷1996(3) SA 262(SCA).

³⁸See *National Media Ltd v Jooste* (note 37 above) 271.

³⁹2016(3) All SA 870 (KZP). In this case, the applicants were media houses who sought access to the disciplinary proceedings instituted by the first respondent against eleven of its employees in relation to the upgrades made to the President's Nkandla residence. The court had to weigh the applicants right to freedom of expression against the privacy rights of the respondent and its employees and the court held that the right to freedom of expression, in this particular instance was a justifiable limitation placed on the right to privacy.

*others*⁴⁰ and *Minister of Police and others v Kunjana*,⁴¹ the courts have stressed that in order to determine whether a violation of the right to privacy has occurred, the right to privacy must be weighed against all competing interests. Such decisions have further illustrated that the right to privacy is jealously protected and will not be overridden without proper justification.

Advanced technology has made it effortless for an individual's personal information to be exploited to the extent that data users such as direct marketers are able to use sophisticated techniques to access the personal information of individuals often in a manner that is unsolicited.⁴² Mason⁴³ submits that privacy is often threatened because individuals are not even aware that their personal information is held by another, what such information entails and for what purposes it is being used.

This chapter will examine the right to privacy in its common law and constitutional forms, as well as consider the international treatment of the right to privacy in order to gauge an understanding of the extent of protection offered to an individual's personal information in SA. The right to privacy in the context of direct marketing will be further considered in chapter 4 in terms of the CPA, ECTA and POPI.

2.2 The common law right to privacy

The purpose of considering the common law position in detail despite the existence of statutory remedies is that the common law was in existence prior to the enactment of the various statutes and therefore has arguably laid a solid foundation on which the regulatory framework could be built. Furthermore, the common law provides a self-standing remedy for the infringement of privacy (to be considered below) which may still be relied on by consumers should statute not offer sufficient protection.

⁴⁰2015 (1) BCLR 81 (WCC). In this case, the applicants were a law firm suspected of committing fraudulent activities and the respondents were acting based on warrants obtained to search the applicant's premises for evidence in this regard. The court held that the applicant's right to privacy had to be weighed against the respondents right to search and seize evidence. An order was crafted to allow the applicants premises to be searched within reason and in compliance with their right to privacy which simultaneously satisfied the need for justice.

⁴¹Note 1 above. In this case, the court held that warrantless searches conducted by police officials in terms of the Drugs and Drug Trafficking Act 140 of 1992, where no urgency exists, breaches the right to privacy of an individual and accordingly declared section 11(1)(a) and (g) of the act to be unconstitutional.

⁴²J Burchell 'The Legal Protection of Privacy in South Africa: A Transplantable Hybrid' (2009) *EJCL*11.

⁴³M Mason 'Consumer Protection and the right to privacy' (1982) *CILSA* 137.

The *actio iniuriarum* is a delictual common law remedy which protects the right to dignity. Dignity in this form includes the right to privacy⁴⁴ and so privacy does not exist as a separate right under the common law. In the landmark case of *O'Keeffe v Argus Printing and Publishing Co Ltd*,⁴⁵ Watermeyer AJ interpreted the common law concept of *dignitas* to include that of privacy and it has since been recognised as an independent right of personality in several other decisions.⁴⁶

Broadly, the common law invasion of privacy can be divided into interferences with an individual's private life and disclosures of private information.⁴⁷ According to Neethling, the unauthorised collection or storage of personal information should be considered to be in principle *contra bonos mores* and thus *prima facie* wrongful⁴⁸ as individuals have the inherent right to have their information kept private.

In the context of direct marketing, an intrusion of privacy would be for example when a direct marketer, without the consent of a consumer, approaches them at home to market products despite the consumer requesting that such marketing should cease. A disclosure in breach of the right to privacy would be for example, when a direct marketer discloses the personal information of a consumer to other direct marketers (or any other person) on an unauthorised basis.

2.2.1 Requirements of the *actio iniuriarum*

The requirements of the *actio iniuriarum* will be considered briefly below in the context of direct marketing:

a) A factual violation of privacy

The first requirement to be satisfied is that there must be an act (commission) or omission (failure to act) present so as to satisfy the "conduct" requirement.⁴⁹

⁴⁴See for example *Jansen van Vuuren v Kruger* (note 16 above) 849.

⁴⁵1954 (3) SA 244(C).

⁴⁶See for example *Bernstein v Bester* (note 32 above) and *H v W* 2013 (5) BCLR 554 (GSJ).

⁴⁷C.M. Van der Bank 'The right to privacy – South African and comparative perspectives' (2012) (1) *European Journal of Business and Social Sciences* 86.

⁴⁸Neethling's Law of Personality (note 30 above) 274.

⁴⁹M Loubser & R Midgley *The law of Delict in South Africa* 2ed (2012) 63.

With regard to direct marketing, an act in the form of unlawfully sending a consumer communications when the consumer has demanded that such communications should cease would fulfil the conduct requirement. An example of an omission would be the failure to prevent an unauthorised disclosure of a consumer's personal information.

b) Wrongfulness

The second requirement is that the conduct in question must have been wrongful. The enquiry into wrongfulness is policy based and takes into consideration the *boni mores* of society which is premised on the general criterion of reasonableness.⁵⁰ It is essentially an objective analysis and is a twofold enquiry.

The first leg to establish is whether in fact a legally protected interest, in this case, privacy, has been infringed with the result that the plaintiff has suffered harm.⁵¹

The second leg entails examining whether such a violation or harm was caused in a legally reprehensible manner to the extent that public policy would regard the conduct as being *contra bonos mores*.⁵²

In the context of direct marketing, the legally protected interest of the consumer i.e. the right to privacy, must be factually violated and the direct marketer must act in a legally reprehensible manner. Thus for example, if a direct marketer badgers the consumer for marketing purposes after the consumer has made it known that such conduct is unsolicited and should cease, the consumers right to privacy will be construed as being infringed upon in a legally reprehensible manner.

c) Animus iniuriandi

The third requirement is that the conduct must have been intentional or in other words, *animus iniuriandi* must be present. It is important to note that as soon as wrongfulness is

⁵⁰Loubser and Midlgey (note 49 above) 144.

⁵¹Loubser and Midlgey (note 49 above) 147.

⁵²Neethling's Law of Personality (note 30 above) 274.

established, a rebuttable presumption of *animus iniuriandi* becomes operative.⁵³ The onus then shifts onto the defendant to rebut this presumption.⁵⁴

This element requires that the direct marketer should have intended to invade the privacy of the consumer by for example, sending unsolicited communications or by intentionally distributing the consumer's personal information to other marketers. It appears therefore that a complainant will not be able to rely on the common law if a marketer negligently discloses his information as the fault element would be lacking.⁵⁵ Accordingly, individuals will have to rely on statutory and constitutional rights and in particular on the rights encapsulated in POPI.

2.2.2 Defences available to direct marketers under the common law

A defendant marketer will be able to employ the usual defences that are traditionally available under the common law remedy. Such defences aim to exclude fault or wrongfulness⁵⁶ and include, but are not limited to: consent given by the plaintiff for the use or disclosure of his personal information; a lack of intention on the part of the direct marketer; disclosures made in the public interest and the necessity⁵⁷ to have access to the personal information of others for business purposes.⁵⁸ Additionally, the defendant may have a legal right to use an individual's personal information by way of a court order or if legislation requires so.⁵⁹

In making use of such defences to negate the wrongfulness requirement, a balancing of rights needs to be performed in terms of which the marketer must prove that the infringement of the consumer's privacy was reasonable and justifiable in the circumstances, and was therefore not *contra bonos mores*.

⁵³ *Kidson v SA Associated Newspapers Ltd* 1957(3) SA 461 (W) 468.

⁵⁴ H Scott 'Liability for the Mass Publication of Private Information in South African Law: *NM and others v Smith and others (Freedom of Expression Institute as Amicus Curiae)*' (2008) 12.1 *EJCL* 2.

⁵⁵ Burchell (note 42 above) 11.

⁵⁶ Neethling's Law of Personality (note 30 above) 240-253.

⁵⁷ A Roos *The law of data (privacy) protection: A comparative and theoretical study* (LLD thesis UNISA 2009) 574, 589.

⁵⁸ *Jansen van Vuuren NO v Kruger* (note 16 above) – the Appellate Division held that a doctor was not justified in relaying information about his patient's HIV-positive status to another doctor during a game of golf.

⁵⁹ *Bernstein v Bester* (note 32 above) – directors summoned for interrogation under the Companies Act of 1976 had no reasonable expectation of privacy in respect of the information they were required to divulge.

It is important to note that the aforementioned common law remedies are in addition to the statutory remedies⁶⁰ currently offered to consumers. It is however likely once POPI is fully effective, that most violations relating to data privacy will be dealt with by the Information Regulator in accordance with POPI rather than relying on the common law.

2.3 The constitutional right to privacy

2.3.1 Overview of section 14 of the Constitution

The supremacy of the Constitution is a value that is enforced in all aspects of the law and any law or conduct that is inconsistent with it is invalid.⁶¹ Section 14(d) of the Constitution stipulates as follows: "*Everyone has the right to privacy, which includes the right not to have the privacy of their communications infringed*".

It is trite that constitutional rights are not absolute and thus the right to privacy may be limited in accordance with the limitations clause,⁶² if it is in the particular circumstances reasonable and justifiable to do so.⁶³

The state must respect, protect, promote and fulfil the right to privacy.⁶⁴ It can therefore be seen that the very entrenchment of the right to privacy in the Constitution is indicative of the importance that it holds in South African society. Such an entrenchment can even be said to impose on the state a positive obligation to take steps to afford neglected aspects of the right to privacy more robust protection, such as data privacy.⁶⁵

It is submitted that the aforementioned obligation has certainly begun to be fulfilled in light of the investigation into data privacy in the form of the SARLC Discussion Paper⁶⁶ and the consequent promulgation of POPI. It is however further submitted that government and the Information Regulator continually evaluate the progress being made in aspects concerning

⁶⁰Statutory remedies to be examined in chapter 4.

⁶¹s 2 of the Constitution.

⁶²s 36 of the Constitution.

⁶³For example, in the aforementioned case of *Media 24 (Pty) Ltd and others v Department of Public Works and others* (note 39), the court limited the right to privacy against the right to freedom of expression for public benefit as it was reasonable and justifiable in the circumstances to do so.

⁶⁴s 7(2) of the Constitution.

⁶⁵A Roos 'Data Protection: Explaining the international backdrop and evaluating the current South African position' (2007) SALJ 423.

⁶⁶See note 34 above.

the protection of data privacy so as to ensure that the regulatory framework is consistently relevant to trends in society.

2.3.2 Limitation of the constitutional right to privacy

A direct marketer may evade liability for the infringement of the right to privacy if such an infringement can be justified in terms of section 36 of the Constitution. It follows that if the marketer is alleging that his infringing conduct was not unlawful, the onus is on him to prove that the infringement was reasonable and justifiable on a balance of probabilities.

In the context of direct marketing, an individual's right to privacy will have to be balanced with the right of the direct marketer to conduct his business for financial gain. It is submitted that although access to personal information is important for businesses to operate, this need for information cannot be satisfied at the cost of an individual's privacy.

In order to give effect to the constitutional right to privacy, the legislature has promulgated various pieces of legislation which address the right of an individual to have their personal information kept private which includes the ECTA, CPA and POPI to be examined in further detail in chapter 4.

2.4 An international perspective on the right to privacy

The increased processing of personal information and emergence of the global market in the 1980s led to many countries adopting data privacy legislation⁶⁷ especially in relation to the transmission of information across national borders.⁶⁸

In an effort to harmonise data protection laws internationally, two fundamental international instruments evolved, namely the COE Convention and the OECD Guidelines.

The rationale behind wanting to consolidate a legal framework for data protection was to ensure that when personal data is passed between countries, both states protect the information on an equal or better level, so that the rights of data subjects are respected and protected across borders.

⁶⁷Roos (note 65 above) 402.

⁶⁸Roos (note 65 above) 403.

The international data privacy instruments to be discussed below contain similar data protection principles which are extremely reminiscent of the principles contained in POPI, and so they will be discussed further in paragraph 4.4.4.

2.4.1 The COE Convention

The COE Convention has had an enormous impact on the enactment of data privacy legislation around the world as it obligates its member states to enact relevant domestic law, however it does not allow the individual to derive direct rights from it.⁶⁹ The COE Convention is the only binding international instrument in terms of data privacy.⁷⁰ Chapter 2 of the convention sets out various data protection principles that must be complied with.

The convention has had a tremendous influence on SA as POPI has been expressly drafted on the basis of the EU directive, which itself had initially been drafted on the basis of the COE Convention.⁷¹

2.4.2 The OECD Guidelines

Several years ago, Burchell⁷² was of the opinion that even though SA is lagging behind in promulgating comprehensive data protection legislation, the advantage of this delay would be that it would be able to draw from the experience of other countries and formulate legislation that would be compatible with the OECD Guidelines. It is submitted that such assessment, in hindsight was on point as POPI has been drafted with due consideration of the OECD Guidelines.

Chapter 1 of the instrument contains 8 principles which member and non-member states are encouraged to comply with and these principles mirror those contained in POPI. It is however important to note that the OECD Guidelines are merely persuasive and are not binding on member states. Despite it not being mandatory, many countries have taken them into

⁶⁹P De Hert and V Papakonstantinou ‘Three scenarios for international governance of data privacy: towards an international data privacy organization, preferably a UN agency?’ (2013) 9 *A Journal of Law and Policy for the Information Society* 271–324, 275.

⁷⁰European Union Agency for fundamental Rights et al *Handbook on European data protection law available at http://fra.europa.eu/sites/default/files/fra-2014-handbook-data-protection-law-2nd-ed_en.pdf 2014)* accessed on 13 November 2015 16.

⁷¹SALRC Discussion Paper (note 34 above) 149.

⁷²Burchell (note 42 above) 14-15.

consideration in drafting domestic legislation.⁷³ Furthermore, the guidelines do not prescribe how they are to be enforced by member states, and so enforcement is left to the states themselves. As a result, member states procure their own methods of enforcing the guidelines⁷⁴ and it is possible that this may sometimes lead to a certain level of inconsistency across borders.

In light of the above, and as will be discussed further in paragraph 6.2.2.2, the Information Regulator is equipped with investigative powers⁷⁵ which it may use to draw on the trends and experiences of other jurisdictions. In this regard, it is submitted that the Information Regulator take advantage of such powers so as to ensure that SA does not develop similar discrepancies or inconsistencies, but rather that our regulatory framework remains congruent with the best level of protection available.

Another important aspect of the guidelines is that it may also be adopted by the private sector.⁷⁶ It is therefore possible for the direct marketing industry to adopt these guidelines directly instead of waiting on government to enact legislation.

2.4.3 The EU Directive

In 1995, the EU endorsed the EU Directive so as to synchronise the legislative framework of its member states. The EU Directive has been strongly influenced by the OECD Guidelines and the COE Convention, although it itself offers a greater level of protection to data subjects.⁷⁷ The purpose of the directive is to ensure the free flow of information between member states as well as to maintain an equivalent level of protection of data between all member states.⁷⁸

The members of the EU are obligated to implement its provisions into their domestic law and consumers may rely on the directive to enforce their rights.⁷⁹ This means that the directive is

⁷³SALRC discussion paper (note 34 above) 145.

⁷⁴Victorian Law Reform Commission Information Paper *Privacy Law: Options for Reform* (2001) 23.

⁷⁵s40 of POPI.

⁷⁶I Walden 'Data protection-Computer Law' (1995) 442, 447 available at

<http://kavehh.com/my%20Document/KCL/computer%20law/other%20course%20material/Data%2520Protection%2520%2528Jan%2520Walden%2529%5B1%5D.pdf> accessed on 28 October 2016.

⁷⁷Roos (note 65 above) 405.

⁷⁸Article 1 of the EU Directive.

⁷⁹See for example European Court of Justice, 24 November 2011, ASNEF and FECEMD v. Administración del Estado, Joined Cases C-468/10 and C-469/10 [2011] ECR I-0000; European Court of Justice, 20 May 2003, Rechnungshof, Joined Cases C-465/00 and C-138/01 [2003] ECR I-4989.

legally binding on member states and also gives rise to direct rights, unlike the COE Convention. The directive also influences data transfers to non-member states, as do the OECD Guidelines.⁸⁰ Moreover, the EU Directive prohibits trans-border transfers to non-member states that do not provide an adequate level of data protection and this is a crucial attribute that POPI has endorsed as well.⁸¹

Articles 6 and 7 of the EU Directive sets out data protection principles which must be complied with. These principles are similar to those contained in the OECD Guidelines, the COE Convention as well as those contained in POPI and it is submitted that the reason for such similarity is to create globally uniform standards of data protection which may facilitate effective cross-border transmissions of personal information.

Recent judicial decisions pertaining to EU data protection laws have illustrated the strict enforcement of such laws. For example, in 2014,⁸² the court of justice of the EU ruled that a Spanish complainant whose personal data in the form of an auction notice of his repossessed home, which was still searchable on Google Spain's content even after the relevant proceedings against him had been resolved, had the right "to be forgotten". Accordingly, the search engine had in fact infringed his privacy rights. The court held that even though the physical server of Google Spain was located outside Europe, in the United States of America, EU rules still applied to it since it had a branch in a member state that promoted the selling of advertising space offered by the search engine. Accordingly, Google Spain could not escape liability. Such judgements are illustrative of the territorial reach that EU data protection laws have and the extent to which a data subjects rights are entrenched in these pieces of law.

2.4.4 Impact of the EU Directive on South Africa

Article 25 of the EU Directive provides that third countries (countries which are not members of the EU), will not be allowed to transact personal information with member states if they do not have adequate data protection laws. It is the European Commission (EC) who will make a

⁸⁰Article 25 of the EU Directive.

⁸¹s 72 of POPI.

⁸²Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González, C-131/12. See also Tietosuojavaltuutettu (Finnish Data Protection Ombudsman) v SatakunnanMarkkinaporssiOy and SatamediaOy ,C-73/07- in which the court had to balance the right to freedom of expression against the right to privacy in accordance with article 9 of the EU directive.

determination as to whether a particular country has “adequate” data protection laws and this determination will be final and must be complied with.⁸³

SA has substantial trading relations with members of the EU⁸⁴ and it follows that if it wishes to continue transacting with member states, it will have to ensure that its data protection framework is on par with that of the EU.⁸⁵ This requirement should not be seen as an impediment, but rather as an opportunity for the country to implement legislation that is compliant with the highest global standard of data protection. In any event, once POPI is fully operative, in my view, SA will be in compliance with this standard of protection and in the interests of expediting this process, it is hoped that POPI will be proclaimed to be fully operational soon.

2.5 Concluding remarks

It can be seen that in order to vindicate the right to privacy, an individual will be able to rely on several sources of law for various remedies. It must be noted that with the common law protection of privacy, a remedy is only available to the individual for intentional acts of the direct marketer that are wrongful. In response to this, a consumer is not left entirely without protection. They may rely on section 14 of the Constitution as well as statutory law relating to direct marketing, especially POPI.

With regard to the aforementioned components of EU law, Kuner comments that it is “*only this mixture of respect for fundamental rights and flexibility towards the variety of data protection systems that exist around the world that can provide the conditions under which an international legal framework for data protection can eventually develop*”.⁸⁶

These instruments have quite obviously impacted on the drafting of POPI as the conditions for lawful processing in POPI expressly conform to the principles contained therein.⁸⁷ This means that when POPI becomes fully operative, direct marketers will be able to transfer

⁸³ Articles 25(4) & (6) of the EU Directive.

⁸⁴ United Nations Conference on Trade and Development Discussion Paper No. 141 ‘Free Trade between South Africa and The European Union -A Quantitative Analysis’ (1999) 3.

⁸⁵ Roos (note 65 above) 408.

⁸⁶ C Kuner ‘The European Union and the Search for an International Data Protection Framework’ (2014) 2 *Groningen Journal of International Law, Privacy in International Law*.

⁸⁷ Stein (note 29 above) 48-49.

personal information to their international branches/counterparts should the law in those foreign countries meet the required standard.

However, despite the existence of the various international instruments, they are sometimes not comprehensive enough to provide consumers with an immediate remedy⁸⁸ as they tend to serve the purpose of an over-arching law that ought to be filtered down to states via additional legislation. Furthermore, most international instruments are only binding on member states, thus a non-member state usually bears no implications for non-compliance.

It is submitted however, that the notion of creating a single piece of internationally binding data protection legislation, is a good one, but is extremely difficult to put into practice.⁸⁹ This is because it will be difficult to obtain consensus as to what standard of law should be implemented as different states have different ideas of what is acceptable or not.⁹⁰ Secondly, there is dispute as to which international body should be the regulator of such a law.⁹¹ As such, it does not seem probable that one comprehensive global data protection framework will be practical. In the absence of such, it is nevertheless in SAs interests to comply with the EU data protection framework and the promulgation of POPI is indicative that the legislature is aware of this fact.

POPI's preamble specifically acknowledges the constitutional right to privacy and that this right "*includes a right to protection against the unlawful collection, retention, dissemination and use of personal information*". It is therefore clear that the legislature's intention was to give effect to the Constitution and not merely promulgate self-standing data protection legislation. It is submitted that this is indicative of a new frontier in the protection of personal information which empowers the consumer and which entrenches the notion of data privacy as a pertinent aspect of modern life.

⁸⁸Kuner (note 86 above) 56.

⁸⁹Kuner (note 86 above) 59.

⁹⁰L Bygrave 'Data Privacy Law: An International Perspective' (2014) 2272.

⁹¹Ibid.

Chapter 3: An analysis of direct marketing as a business practice in South Africa

3.1 Introduction

It is likely that we have all experienced direct marketing in at least one of its forms. Either a random phone call from a financial service provider asking us whether we would like to partake in a newly launched insurance product, or from a chain store offering us further benefits if we opt to increase our credit limit.

On its own, direct marketing need not be portrayed as an entirely consumer-unfriendly practice.⁹² In this regard, some researchers are of the opinion that direct marketing practices have the effect of awakening consumers to their data privacy concerns.⁹³ It also plays a crucial role in making consumers aware of products and services. It is rather the abuse of direct marketing that leads to an undesirable impact on consumers.⁹⁴

Technology has evolved exponentially, and this in turn has bolstered a boom in the direct marketing industry.⁹⁵ Compared to several years ago, it is at present much easier to market products and services to consumers.⁹⁶ Often consumers will have no idea as to how their personal information was obtained by marketers who contact them. In this regard, it is submitted that there are specific agencies (or persons) which exist that compile lists consisting of the personal information of consumers.⁹⁷ These lists are accordingly made available to direct marketers for a price.⁹⁸ There are also other unlawful methods of gathering the personal information of consumers and these include spoofing, harvesting, dictionary attacks, spyware, cookies and phishing.⁹⁹

This chapter will consider direct marketing solely as a form of business practice in SA. An analysis of direct marketing in light of statutory law shall be considered in detail in chapter 4.

⁹²C R Mafe & SS Blas ‘Buying through direct methods: benefits and limitations from the consumer point of view’ (2007) *Esic market* 97-98.

⁹³AJ Campbell ‘Relationship marketing in consumer markets: a comparison of managerial and consumer attitudes about information privacy’ (1997) 11(3) *Journal of Direct Marketing* 44-57.

⁹⁴K.A Forcht & D.S Thomas ‘Information compilation and disbursement: moral, legal and ethical considerations’ (1994) 2(2) *Information Management & Computer Security* 23-8.

⁹⁵G.R Milne, J Beckman & M.L Taubman ‘Consumer attitudes toward privacy and direct marketing in Argentina’ (1996) *Journal of Direct Marketing* 10(1) 22-33.

⁹⁶Ibid.

⁹⁷Mason (note 43 above) 146 - where he states “Mail advertisements are a reminder that there are agencies somewhere about which the consumer knows nothing, but which know something about him”.

⁹⁸Ibid.

⁹⁹See B Hamann & S Papadopoulos ‘Direct marketing and spam via electronic communications: An analysis of the regulatory framework in South Africa’ (2014) 1 *De Jure* 46-47, for a comprehensive explanation as to what each of these terms mean.

3.2 Forms of direct marketing

Direct marketing can take the form of personally approaching a consumer or it can fall within the ambit of electronic communications such as telephonic or email and/or short message service communications (SMS).¹⁰⁰ The former is relatively simple to understand as it involves the marketer physically approaching the consumer to sell their product or service. The latter, i.e. direct marketing via electronic communication, can take several forms. These include:¹⁰¹

- a) multimedia messages (MMS's) and SMS's which are sent directly to an individual's mobile phone;
- b) applications for mobile electronic devices often contain pop-up marketing advertisements;
- c) marketing via email;
- d) the use of meta-tags (keywords written in computer code) to optimise the likelihood of a website appearing as priority results on an internet search engine;¹⁰²
- e) pay-per-click advertising, where certain keywords are paid for by advertisers/marketers, and such payment ensures a prominent placement in the search results;
- f) social media marketing, for example, advertisements placed on Facebook;¹⁰³
- g) affiliate marketing, where affiliates endorse products and services reciprocally and get some form of satisfaction (usually money) upon the happening of a specified event;¹⁰⁴
- h) banner advertising, where static banners and pop ups make appearances when consumers are surfing the internet;
- i) voicemail marketing, where an advertisement is recorded on a personal voice mailbox;
- j) couponing, where retailers make daily coupon deals available online for consumers and in order to have access to them, consumers must sign up with their information in order to be able to receive notices about daily deals; and
- k) spam, which will be examined in greater detail in paragraph 3.3 below.

¹⁰⁰Mafe and Blas (note 92 above) 97-102.

¹⁰¹Hamann & Papadopoulos (note 99 above) 45.

¹⁰²Ibid.

¹⁰³ R Stokes 'eMarketing – The Essential Guide to Digital Marketing' (2011) 334 available at: <http://bit.ly/173skTv> (accessed on 5 August 2015).

¹⁰⁴Stokes (note 103 above) 224.

It is important to note that direct marketing, regardless of the form it takes can either be solicited, or unsolicited. In most cases, unsolicited electronic direct marketing constitutes spam.¹⁰⁵

There is a fine line differentiating spam and direct marketing, in that spam is construed as being one of the forms of direct marketing. Not all spam will constitute direct marketing, and not all direct marketing will constitute spam,¹⁰⁶ however with the rise of electronic direct marketing tactics, this distinction often becomes blurred and will be explained further below.

3.3 What is spam?

There is no settled legal definition of spam other than the interpretation put forth and accepted by the parties in the case of *Ketler Investment CC t/a Ketler Presentations v Internet Service Providers' Association*¹⁰⁷ (the Ketler Judgement) in which spamming was defined as “*the sending of bulk unsolicited emails or the sending of bulk commercial emails*”.¹⁰⁸

Further, several academics have varying interpretations of the term, for example, Tladi has defined spam as “*unsolicited email or electronic junk mail*”,¹⁰⁹ and Buys defines it as “*unsolicited bulk and/or commercial electronic communications*”.¹¹⁰ The difference between the aforementioned definitions is that the former seems to include non-commercial communications, whereas the latter excludes it. In this regard, Geissler submits that spam should not be defined solely on the basis of whether it is commercial or not, but other factors should also be considered such as the nature of the communications.¹¹¹ It is therefore submitted that the definition used in the Ketler Judgement eliminates discrimination between commercial and non-commercial communications and is accordingly a good departure point for investigations into spam related matters.

¹⁰⁵ Opinion 5/2004 on unsolicited communications for marketing purposes under Article 13 of Directive 2002/58/EC (2004) 4-6; S Monty ‘The Span of Spam’ (2013) *Without prejudice* 39-40.

¹⁰⁶ Hamann & Papadopoulos (note 99 above) 44.

¹⁰⁷ 2014 (2) SA 569 (GJ).

¹⁰⁸ See paragraph 41 of the Ketler Judgement.

¹⁰⁹ S Tladi ‘The Regulation of Unsolicited Commercial Communications (SPAM) - Is the Opt-Out Mechanism Effective?’ (2008) 125(1) *SALJ* 178-179.

¹¹⁰ F Cronje & R Buys *Cyberlaw @SA II: The law of the internet in South Africa* 2 ed (2004) 160.

¹¹¹ M L Geissler *Bulk unsolicited electronic messages (spam): A South African perspective* (LLD thesis, University of South Africa, 2004) 388.

Further to the above, Hamann and Papadopoulos submit that:

*“It is more inclusive than direct marketing, and can include, fraudulent and deceptive content, hoaxes, virus warnings, urban legends, jokes, chain letters, newsletters, opinion surveys, requests for support or donations and hate mail, that is, non-commercial electronic communications as well as it can be used to transmit viruses and malicious code”.*¹¹²

Spam has been described as being “the bane of the existing information age”¹¹³ and most people identify spam by it being communications that are deceptive for example, receiving a random email from an unknown source saying that you have won the lottery and in order to claim your prize, you will need to provide your banking details. It is at this point that direct marketing becomes distinguishable from spam, as direct marketers aim to sell you their products and/or services, whereas spammers generally want to deceive their recipients out of money, personal information or both.

There are three main types of spam: “unsolicited electronic messages” (UEM); “unsolicited commercial electronic messages” (UCE) and “unsolicited bulk electronic messages” (UBE).¹¹⁴ ECTA, along with the CPA and POPI, regulates UCE, although it is important to note that the CPA restricts itself to a much narrower form of UCE being direct marketing.¹¹⁵ Such a narrow definition of UCE as per the CPA excludes a considerable scope of communications, which although are not commercial in nature, still constitute spam and which may take the forms outlined by Hamann and Papadopoulos above.

This means that consumers are left unprotected from communications which do not constitute UCE and not only does this greatly inconvenience consumers, it further does not cure the scourge of spam.¹¹⁶ It is however submitted that POPI is a significant improvement on the aforementioned pieces of legislation as it aims to protect personal data regardless of the form that it takes¹¹⁷ especially because it does not limit its protection to commercial electronic communications only.

¹¹²Hamann & Papadopoulos (note 99 above) 47.

¹¹³S Papadopoulos ‘Online consumer protection’ in S Papadopoulos & S Snail (eds) *Cyberlaw@SA II: The law of the internet in South Africa* (2012) 85.

¹¹⁴Geissler (note 111 above) 28-32.

¹¹⁵Hamann & Papadopoulos (note 99 above) 47.

¹¹⁶M Reddy *An analysis of the Protection of Personal Information Act 4 of 2013 in the context of unsolicited electronic communications* (LLM thesis, University of KwaZulu-Natal, 2016) 18.

¹¹⁷s 2 of POPI.

As this dissertation is focussed on direct marketing, spam will only be considered to the extent that it constitutes direct marketing. This means that in taking into account the opt-in mechanism that POPI creates (as will be further examined in paragraph 4.4.5), spammers will no longer be able to send spam, unless an individual has consented to it.

3.4 The advantages and disadvantages of direct marketing

As with any commercial practice, there are both positive and negative components to it. Direct marketing is no exception, and its pertinent advantages and disadvantages will be considered below.

3.4.1 Advantages of direct marketing

- a) By our very nature, human beings will consume and desire things that are most often provided by some external source. The need for such things is satisfied by the financial drive to supply them by manufacturers and suppliers. This process is the fundamental lifeblood of the economy, and if carried out responsibly, it can prove to be a very useful tool for SA's emerging economy.¹¹⁸
- b) Employment opportunities are created and this in turn sustains the livelihoods of those employed by direct marketing companies, as well as contributes to the economy and upliftment of society as a whole.¹¹⁹
- c) Certain marketing strategies such as email marketing, are a cost effective and efficient way of contacting consumers and facilitating businesses.¹²⁰
- d) Direct marketing contributes to the free flow of information both domestically and internationally. This facilitates the process of economic growth and stability, as those who wish to engage in the practice, have the will to do so knowing that they have a responsive market within which to start up their businesses.¹²¹

¹¹⁸MC Cant, JW Strydom & CJ Jooste *Marketing Management* (2009) 87.

¹¹⁹Direct Marketing Association of South Africa written submission to the National Council of Provinces on the Consumer Protection Bill 19 of 2008 (2008).

¹²⁰AT Jones, A Malczyk & J Beneke *Internet Marketing-A highly practical guide to every aspect of internet marketing* (2011)4.

¹²¹M Heyink 'Protection of Personal Information Guideline for law firms' (2013) Law Society of South Africa available at <http://www.lssa.org.za/upload/documents/Protection%20of%20Personal%20Information%20Guideline%202013v3%20final.pdf>, accessed on 22 October 2015 19.

3.4.2 Disadvantages of direct marketing¹²²

- a) Unsolicited direct marketing encroaches on the privacy of consumers and in this way infringes a consumer's right to have their personal information kept private.¹²³
- b) It is also bothersome to a consumer as consequently, the consumer who was never interested in the communications in the first place has to now take the time, cost and effort to opt out of the communication.¹²⁴
- c) Unsolicited marketing and spam further jeopardises the internet security of an individual as their personal data is left unprotected and unduly accessible.¹²⁵
- d) Consumers are often inundated with information when they consume products and services to the extent that they sometimes unknowingly permit the transmission of their personal information for the purposes of direct marketing.¹²⁶ Once a consumer does this, their information can be used for purposes that they had never intended it to be used for.

3.5 Concluding remarks

Direct marketing in itself is not an unsavoury practice as it is useful in facilitating the chain of supply and demand, creating employment opportunities and thereby contributing to economic stability in SA.

The practice becomes undesirable when direct marketers circumvent the law to infringe on the rights of consumers. Not only does unsolicited direct marketing greatly inconvenience consumers, it simultaneously violates their right to have their personal information kept private. Furthermore, the blurred distinction between direct marketing and spam creates considerable confusion for consumers as they are unlikely to vindicate their statutory rights simply because they are unaware of what these rights may be and what they are in relation to.

¹²² J Copper ‘Advantages and disadvantages of direct marketing’ available at <http://www.marketmagnet.co.za/advantages-and-disadvantages-of-direct-marketing/> (accessed on 6 September 2015).

¹²³ Mathhes (note 11 above).

¹²⁴ E George ‘Fair Exchange: Effective direct marketing to consumer — oxymoron or engaging strategy?’ Available at <http://www.marklives.com/2015/07/fair-exchange-effective-direct-marketing-to-consumer-oxymoron-or-engaging-strategy> accessed on 10 November 2016 & D Van der Merwe ... et al *Information and communication technology law* (2008)190.

¹²⁵ Ibid.

¹²⁶ E.M. Conradie ‘Knowledge for sale? The impact of a consumerist hermeneutics on learning habits and teaching practices in higher education’ (2011) 76(3) *Koers* 423-446.

It is however submitted that the broad view taken by POPI to regulate all uses of personal information will considerably clear up such confusion experienced by consumers, provided that consumers educate themselves about the changing legislative landscape and the Information Regulator facilitates the process of consumer awareness in relation to data privacy rights.¹²⁷

Moreover, in order for direct marketing to be holistically and commercially beneficial to all stakeholders involved, an improved system of regulation is needed. This issue will however be further considered in chapters 4 and 6.

¹²⁷s 40(1)(a) of POPI.

Chapter 4: An examination of the regulatory framework regarding direct marketing

4.1 Introduction

The rationale for the promulgation of data protection legislation in SA lies in the inherent respect for the privacy of an individual as entrenched in our Bill of Rights.¹²⁸ Privacy is also at the core of our democratic values and is respected as a rightful entitlement across all cultures and nations.¹²⁹

In this context of consumer-centric privacy legislation, direct marketing is a business practice which may intrude on the privacy of an individual should it be unsolicited.¹³⁰ Examples of South African legislation which address the practice of direct marketing include the ECTA, CPA and POPI, and these statutes shall be considered in further detail below.

4.2 Electronic Communications and Transactions Act

ECTA became effective in SA on 30 August 2002 and was considered to be at the forefront of communications and information technology law.¹³¹ Its primary objective is “*to facilitate electronic communications and transactions in the public interest*”.¹³² The drafters of ECTA elected to regulate and not prohibit unsolicited UCE and in this regard, its application is wider than that of the CPA, as it focuses on direct marketing, which is a narrower form of UCE.¹³³

Section 42(3) of ECTA provides that Chapter VII (Consumer Protection) does not apply to a regulatory authority established in terms of a law if that law prescribes consumer protection provisions in respect of electronic transactions. This has been construed by some authors to mean that if another piece of legislation subjects electronic consumer transactions to superior consumer protection laws, then Chapter VII of ECTA will not apply.¹³⁴

¹²⁸Neethling’s Law of Personality (note 30 above) 29.

¹²⁹J Kang ‘Information Privacy in Cyberspace Transactions’ (1998) 1193 *Stanford Law Review* April 1212-20.

¹³⁰Y Jordaan ‘Information privacy issues: implications for direct marketing’ (2007) *International Retail and Marketing Review* 43.

¹³¹S Papadopoulos ‘An introduction to cyberlaw’ in Papadopoulos & Snail (note 113 above) 4.

¹³²s 2(1) of ECTA.

¹³³Hamann & Papadopoulos (note 99 above) 47.

¹³⁴Van der Merwe et al (note 124 above) 183.

The plain meaning of the word “unsolicited” means that the consumer did not consent to receiving a particular communication,¹³⁵ and the plain meaning given to “commercial” involves something that is business related.¹³⁶ Thus, if a communication is not commercial in nature such as a hoax email, it will not be classified as a UCE in terms of ECTA.¹³⁷

4.2.1 Noteworthy definitions contained in ECTA

It is interesting to note that ECTA does not define direct marketing. Conversely, the concept is defined in the CPA and POPI and it is submitted that consumers may use these definitions as a guideline to decipher the precise meaning of the term.¹³⁸

It is submitted that the lack of such a definition in ECTA may lead to a blurred distinction between UCE and direct marketing. The aforementioned distinction is imperative as not all direct marketing constitutes UCE or spam and vice versa.¹³⁹ For example, a consumer may receive emails about sales from a particular retailer and this would constitute direct marketing and would be lawful under ECTA until such time the consumer opts-out of the communication. It does not then mean that since this communication was unsolicited, that such will constitute spam as the consumer may very well accept the communication.

A “consumer” is defined 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*”.¹⁴⁰ The emphasis on “end user” implies that the section will not apply to a consumer who for instance re-sells a product or service to other consumers. Some authors are of the opinion that this definition should be extended to include juristic persons as businesses find themselves in very similar positions to natural persons in the context of receiving electronic communications.¹⁴¹

The term “personal information” is given quite a comprehensive definition. Briefly, it refers to the information about an identifiable individual including race and information relating to

¹³⁵Geissler (note 111 above) 24-25.

¹³⁶The Federal Communications Commission Consumer Facts: CAN-SPAM Act ‘Unwanted text messages and e-mail on wireless phones and other mobile devices’ Available at <http://fcc.us/1fGlrur> (accessed 5 October 2015).

¹³⁷Hamann & Papadopoulos (note 99 above) 48.

¹³⁸s 1 of the CPA & POPI.

¹³⁹Hamann & Papadopoulos (note 99 above) 44.

¹⁴⁰s 1 of ECTA.

¹⁴¹Papadopoulos & Snail (note 113 above) 85.

the educational or medical history of the individual amongst several other things.¹⁴² This definition does appear to be broad enough to encompass those details of a consumer which may be used for the purposes of direct marketing.

4.2.2 Chapter 8 of ECTA

Chapter 8 of ECTA stipulates that a data controller¹⁴³ must obtain the express written permission of the data subject¹⁴⁴ for the collection, collation, processing or disclosure of any personal information relating to the data subject,¹⁴⁵ and must disclose in writing the specific purpose for which any personal information is being requested, collected, collated, processed or stored.¹⁴⁶

In the context of direct marketing and spam, it envisages that the marketer must obtain the consent of the consumer before making use of their personal information and must outline what marketing practices their information will be used for. As mentioned in chapter 2, in practice, many consumers are often unaware that their information is being processed in the first place,¹⁴⁷ and this appears to be a fundamental flaw of this provision. For example, if a consumer is unaware that their information is being used - such a consumer is unlikely to exercise their rights under this provision in ECTA in any event.

4.2.3 Section 45- The regulation of commercial electronic communications

Section 45 of ECTA provides that:

- “(1) Any person who sends unsolicited commercial communications to consumers, must provide the consumer*
- (a) with the option to cancel his or her subscription to the mailing list of that person; and*
 - (b) with the identifying particulars of the source from which that person obtained the consumer's personal information, on request of the consumer”.*

¹⁴²s 1 of ECTA.

¹⁴³s 1 of ECTA defines a data controller as “any person who electronically requests, collects, collates, processes or stores personal information from or in respect of a data subject”.

¹⁴⁴s 1 of ECTA defines a data subject as “any natural person from or in respect of whom personal information has been requested, collected, collated, processed or stored”.

¹⁴⁵s 51(1) of ECTA.

¹⁴⁶s 51(3) of ECTA.

¹⁴⁷See paragraph 2.1.

It is therefore clear that ECTA affords consumers an opt-out mechanism and it is submitted that this provision is flawed and its drawbacks will be discussed in paragraph 4.2.5 below. The primary concern, as will be seen, is that consumers may be inundated with communications until they have requested that such communications should cease. Moreover, ECTA does not specifically state how the opt-out function should be made available and so direct marketers use this as a means to circumvent the law.

In respect of clause 45(1)(b) above, it is submitted that ECTA is more onerous in its application than the CPA for example, which does not put forth such a requirement. However, a possible downfall of this provision is that should a consumer query as to how a direct marketer obtained their contact details, in doing so they confirm the correctness and availability of such information.¹⁴⁸ This may then result in even more unsolicited communications being sent to that consumer.

Until recently, there has been a lack of judicial interpretation regarding spam in SA. However, in 2014, the landmark Ketler Judgement was handed down relating to spam and section 45 of ECTA - it essentially held that the Internet Service Providers' Association (ISPA) did not comply fully with section 45 in that it did not reveal the source from which it had obtained its data from. This case will however be examined in further detail below.

4.2.4 Analysis of the Ketler Judgement

The Ketler Judgement was the first South African case to be decided in relation to spam.¹⁴⁹ Ketler, the applicant, contended that the respondent, ISPA, had engaged in defamatory conduct by listing it on its website page entitled "*Hall of Shame*", which was reserved for the senders of spam. Ketler was a sender of bulk emails and it used an independent internet service provider to do so.

Ketler instituted action to remove its name from the "Hall of Shame" listing, as well as to interdict the re-listing of its name. It put forth the following arguments in support thereof:¹⁵⁰

¹⁴⁸Tladi (Note 109 above) 186-187.

¹⁴⁹T Pistorius and S Tladi 'The Hall of Shame-Double standards for spam' (2014) 26 SA MERC LJ 690.

¹⁵⁰Ketler Judgement paragraph 7.

- a) By engaging in spam, it did not act unlawfully as spamming is permitted in SA provided there is compliance with section 45 of ECTA, which according to Ketler, it had complied with.
- b) As ISPA is a self-regulatory, voluntary body, Ketler, who was not a member thereof, was accordingly not subject to its code of conduct and could therefore not be subject to its “Hall of Shame” listing. It contended that even if it was a member of ISPA, it would still not be entitled to list its name as there was compliance with the law.
- c) An undertaking not to spam, which was signed by Ketler, had no legal force and effect as it was not a member of ISPA.

ISPA invoked several defences including truth, public interest and consent, and essentially averred that as per the defences, it was permitted to list Ketler on its “Hall of shame” for spamming.

The court held that Ketler had not complied fully with section 45 of ECTA, as subsection 3 requires a sender of spam to reveal the source from which it had obtained a recipient’s personal data from, if so requested. In the courts view, Ketler had failed to do so and accordingly did not comply with ECTA.

The judgement is significant because it illustrates that provided there is compliance with section 45, spamming is lawful in SA. It is however submitted that when POPI becomes fully operational and replaces the opt-out regime in ECTA with its opt-in regime, that this aspect of the judgement will become redundant.

Further significance of the judgement relates to the pioneering of the importance of self-regulatory approaches to spamming, which could extend to the direct marketing industry as well. This is because ECTA establishes a self-regulatory framework and in terms of section 71, an industry body for service providers may be recognised by the Minister of Communications provided that certain requirements are met, being - membership of the body must be subject to adequate criteria; the codes of conduct must be adequate and the representative body must be capable of monitoring and enforcing compliance with its codes.¹⁵¹ ISPA is recognised as such a representative body under ECTA and accordingly the court found that its code of conduct is part of the self-regulatory framework sanctioned by

¹⁵¹s 71 of ECTA is to be read with the definition of “service provider” in s 70.

ECTA.¹⁵² Furthermore, ISPA's code of conduct was recognised as being in the public interest in so far as dealing with spam was concerned.¹⁵³

Some authors are of the opinion that the Ketler Judgement has invited uncertainty as to the place of self-regulation in SA and has “revealed an industry practice as clear as dishwater”,¹⁵⁴ as it is unclear how statutory regulation and self-regulatory approaches to spamming coincide. Pistorius and Tladi submit that industry specific self-regulatory practices and national legislation need to be aligned so as to have an effective system of co-regulation. This issue will however be considered further in paragraph 6.4.

4.2.5 Drawbacks of section 45¹⁵⁵

The section does not stipulate how the opt-out mechanism should be made available and so often direct marketers either do not provide a mechanism to opt-out, or if they do, it is either dysfunctional, falsified or hardly visible in the communication.¹⁵⁶ This leads to tremendous abuse of the provisions of ECTA, and it is the unsuspecting consumer who then bears the brunt, especially in relation false contact details, as this practice is not prohibited by ECTA.

The burden of opting out remains on the consumer. This means that the consumer becomes inundated with direct marketing until they take the effort to opt-out. Not only is this inconvenient for the consumer, it does not actually curb the problem of unsolicited direct marketing.¹⁵⁷

It is further submitted that the legislature's decision to only regulate spam and not prohibit it via ECTA, encourages spammers as the only instance in which communications become unlawful, is when the recipient has opted-out, and the spammer or marketer persists.¹⁵⁸ Perhaps the rationale was to promote the free flow of information, however such intention is being overridden by circumvention and abuse of ECTA. POPI will in any event render this

¹⁵²P Maheep *Electronic spamming within South Africa; a comparative analysis* (LLM Thesis, University of KwaZulu-Natal, 2014) 25.

¹⁵³Ketler Judgement paragraph 71-83.

¹⁵⁴Pistorius & Tladi (note 149 above) 688.

¹⁵⁵Tladi (note 109 above) 186-187.

¹⁵⁶Ibid.

¹⁵⁷S Dolnica & Y Jordaan ‘A market-oriented approach to responsibly managing information privacy concerns in direct marketing’ (2007) *Journal of Advertising* 121-146.

¹⁵⁸R Buys *Cyberlaw@SA II: The Law of the Internet in South Africa* 2 ed (2004) 160.

flaw insignificant as it will require opt-in consent to be obtained before communications can be sent to consumers.¹⁵⁹

It is important to note that ECTA does not regulate other forms of direct marketing, such as unsolicited telephone calls to consumers.¹⁶⁰ It is at this point that ECTA must be supplemented with the CPA and POPI. Furthermore, in light of the aforementioned drawbacks of section 45, it is submitted that ECTA falls short of the standard of protection required to adequately shield consumers from spam and unwanted direct marketing.¹⁶¹

4.2.6 Non-compliance with ECTA

A failure to comply with the relevant provisions will constitute an offence and the truant sender of communications can face penalties which include fines and imprisonment of up to twelve months.¹⁶² However, seeing as though most marketers are able to circumvent its provisions, in any event, they simultaneously circumvent the sanctions contained therein. Furthermore, to date, it is unheard of that a marketer has been imprisoned for sending unsolicited communications which further illustrates that the penalties have far more bark than bite.

4.3 Consumer Protection Act

The rationale behind the promulgation of the CPA lies in the fact that the state recognised there was a severe need for the regulation of consumer markets and for the general protection of consumers.¹⁶³ As a result, the CPA was promulgated and became effective on 31 March 2011.

4.3.1 Purpose and application of the CPA

The CPA applies to all transactions which materialise in SA and to the promotion of any goods or services, unless they are so exempt by the Act.¹⁶⁴ As will be discussed below, this restrictive application may sometimes be to the detriment of the unsuspecting consumer who receives communications from beyond the borders of SA.

¹⁵⁹See discussion in paragraph 4.4.5.

¹⁶⁰The definition of “electronic communication” in section 1 of ECTA provides that the definition only relates to a communication by means of data messages.

¹⁶¹G Ebersöhn ‘An Analysis of Spam Legislation’ (2004) 12(3) *Juta’s Business Law* 134-142.

¹⁶²s 89 of ECTA.

¹⁶³Woker (note 15 above).

¹⁶⁴s 5 of the CPA.

4.3.2 Noteworthy definitions in the CPA¹⁶⁵

The CPA's definition of a consumer is considerably wide and includes both natural and juristic persons whose asset value or annual turnover at the time of the transaction is less than two million rand. In this regard, the CPA has a wider application than ECTA, as ECTA applies only to natural persons.

There are two methods of direct marketing in the definition, i.e. either directly and in person to the consumer, for example door to door marketing; or indirectly, by post or electronic communications. As will be discussed later on, the CPA's definition of the term is mirrored in POPI.¹⁶⁶

4.3.3 A consumer's right to restrict unwanted direct marketing

Section 11 of the CPA regulates the consumer's right to restrict unwanted direct marketing. The consumer has the right to refuse to accept direct marketing attempts, to require the marketer to discontinue its marketing, or to apply to pre-emptively block such a marketing attempt.¹⁶⁷ This section effectively creates an opt-out mechanism for consumers similar to the mechanism contained in ECTA.

Some authors are of the opinion that section 11 is ineffective in dealing with the difficulties relating to spam and electronic direct marketing for the same reasons as why section 45 of ECTA is ineffective.¹⁶⁸

If a consumer wishes to opt-out of any communication, they must demand, during, or within a reasonable time after the receipt of such communication, that the marketer discontinues contacting them,¹⁶⁹ and once such a demand is met, or if the consumer has registered a pre-emptive block¹⁷⁰ against the marketer, the marketer must refrain from contacting the consumer.¹⁷¹

¹⁶⁵s 1 of the CPA.

¹⁶⁶See paragraph 4.4.3.

¹⁶⁷s 11(1) of the CPA.

¹⁶⁸See discussion on ECTA at paragraph 4.2.5.

¹⁶⁹s 11(2) of the CPA.

¹⁷⁰A pre-emptive block is a mechanism which allows a consumer to have their details placed onto a national opt-out registry, to be established by the Consumer Commission. This serves as a "block" to further communications, and so marketers will be prevented from contacting those consumers.

¹⁷¹s 11(4)(b) of the CPA.

4.3.4 The national opt-out registry

The CPA states that the Consumer Commission (CC) may establish, or recognise a registry in which a consumer may register a pre-emptive block against any direct marketer.¹⁷² To date, the CC has not yet established such a registry. Furthermore, the lack of peremptory language in drafting this section by the use of the word “may” indicates that there is no obligation on the CC to establish the registry. The delay in the establishment of the registry has left consumers without a vital mechanism for a considerable period of time, however in any event, there is unlikely to be a need for the registry now since POPI will convert the status quo to an opt-in regime.¹⁷³

4.3.5 The Direct Marketing Association of South Africa (DMASA)

In the absence of the national opt-out registry discussed above, the DMASA has stepped in to create an opt-out register.¹⁷⁴ The DMASA will be discussed in further detail in chapter 6 of this dissertation,¹⁷⁵ however it will be useful to examine the mechanics of the opt-out register it creates in this chapter.

The DMASA website¹⁷⁶ provides a national opt-out register in which consumers may indicate their preference not to be the recipients of direct marketing by certain businesses. The DMASA will then provide the details of the consumers who have opted out to its members who join the association on a voluntary basis, and the members will have to refrain from contacting these consumers.¹⁷⁷

The effectiveness of this opt-out register is however questionable. This is because the register only applies to the members of the DMASA, and this means that non-members may still continue to contact consumers.¹⁷⁸ Furthermore, a member may still simply resign when they do not wish to comply with the set down rules, and this is indicative of a lack of enforcement

¹⁷²s 11(3) of the CPA.

¹⁷³See discussion in paragraph 4.4.5.

¹⁷⁴www.dmasa.co.za accessed on 11 October 2015.

¹⁷⁵See discussion in 6.3.1.

¹⁷⁶www.nationalopt-out.co.za accessed on 11 October 2015.

¹⁷⁷www.nationalopt-out.co.za accessed on 11 October 2015.

¹⁷⁸C Gladwin and A Civin ‘The CPA-Direct Marketing’ (2014) *De Rebus*.

capacity by the DMASA and the difficulties of self-regulation illustrated by the Ketler Judgment.¹⁷⁹

4.3.6 When may a consumer be contacted for direct marketing purposes?

The CPA prescribes particular times at which consumers may not be contacted, and they are as follows:¹⁸⁰

- a) Sundays or public holidays;
- b) Saturdays before 9 am and after 1 pm; and
- c) all other days between 8pm and 8am.

The exception to the aforementioned times is when the consumer has agreed expressly or impliedly otherwise.¹⁸¹ From the perspective of the direct marketer, they will not be in breach if they comply with the time period but for some reason the communication is received by the consumer during the prohibited times.¹⁸² In this case the onus of proof to show that the communication was sent during permitted times rests on the direct marketer.¹⁸³

4.3.7 Non-compliance with the CPA

Non-compliance with the provisions of the CPA bears extremely grave consequences for truant direct marketers. They may face a criminal sanction of up to 12 months imprisonment¹⁸⁴ and/or an administrative penalty that is either 10% of the marketer's annual turnover in the preceding financial year or R1 million,¹⁸⁵ whichever is greater. As with the criminal sanctions in ECTA, it is unheard of that a marketer has been imprisoned for non-compliance with the CPA.

¹⁷⁹See discussion in paragraph 4.2.4.

¹⁸⁰s 12(1) of the CPA.

¹⁸¹s 12(1) of the CPA.

¹⁸²R Olivier 'The CPA-Direct Marketing' available at <http://www.edutrain.co.za/> accessed on 21 September 2015.

¹⁸³Ibid.

¹⁸⁴s 111 of the CPA.

¹⁸⁵s 112 of the CPA.

4.4 Protection of Personal Information Act

POPI was the brain child of the South African Law Commission's investigation into a lack of data privacy legislation in SA.¹⁸⁶ On insistence by the Minister for Justice and Constitutional Development, the commission produced its preliminary findings in the form of discussion paper 109,¹⁸⁷ and thereafter its final findings and recommendations together with a draft POPI Bill in 2009.

It is important to note that both the discussion paper and the draft POPI Bill relied heavily on EU data protection laws as a source from which SA could base its data protection framework of.¹⁸⁸

POPI was thereafter signed into law by the President on the 26th of November 2013. As stated previously, although it has been promulgated, it is not yet fully operational as there are limited sections that have taken effect. Since then, progress has been made in so far as establishing the Information Regulator is concerned as the National Assembly approved the appointment of certain members on 7 September 2016 who will commence office as of 1 December 2016.¹⁸⁹

Section 114 of POPI regulates the transitional arrangements relating to the Act and stipulates that when POPI becomes fully operative, companies will then be given a year's grace period to comply, unless this grace period is extended by the Minister on request or of his own accord and after consultation with the Information Regulator.¹⁹⁰ Such extension may not however exceed a period of three years.¹⁹¹ This section further creates exclusions, for example, processing of information that is subject to prior approval by the Information Regulator as outlined in section 57 of POPI that is taking place on the date of commencement of the Act, need not comply with the notification requirements set out in section 58. Such provisions are indicative of the legislature's intention to make the transition by all parties into

¹⁸⁶ D Van der Merwe ... et al *Information and communication technology law* 2ed (2016) 434.

¹⁸⁷ SALRC Discussion Paper (note 34 above)

¹⁸⁸ B A Makulilo 'Privacy and data protection in Africa: a state of the art' (2012) 2(3) *International Data Privacy Law* 163.

¹⁸⁹ Update on POPI available at

<https://www.saica.co.za/Technical/LegalandGovernance/Legislation/ProtectionofPersonalInformationAct/tabid/3335/language/en-ZA/Default.aspx> accessed on 27/11/2016.

¹⁹⁰ s 114 (1) and (2) of POPI.

¹⁹¹ Ibid.

compliance with POPI as efficient as possible. Furthermore, POPI will replace section 45 of ECTA.¹⁹²

4.4.1 The purpose of POPI

Broadly, the purpose of POPI is to give effect to the constitutional right to privacy by protecting personal information and regulating the free flow and processing of personal information,¹⁹³ and such purpose signifies the legislature's recognition that SA was in need of specialised data protection legalisation that would give effect to this right.¹⁹⁴

The drafters of POPI took care to explicitly mention that it aims to provide rights to data subjects in terms of unsolicited communications and automated decision making. Neither the CPA, nor ECTA provides so in their preambles. This is significant as it demonstrates that POPI does not aim to merely regulate data processing, but to do so for the purposes of protecting the right to privacy as enshrined in the Constitution.

The preamble of POPI quite succinctly encompasses what it is that SA needs in terms of data protection. It acknowledges that we live in a society that is always evolving with regard to technology and that in response to such changes, the data protection framework "*requires the removal of unnecessary impediments to the free flow of information, including personal information*".¹⁹⁵ Furthermore, the preamble also acknowledges that our data protection framework needs to match international standards, so as to encourage the free flow of information across borders.

4.4.2 Application of POPI

POPI applies to the processing of personal information entered into a record by or for a responsible party by making use of automated or non- automated means.¹⁹⁶ It will also apply to both public and private bodies. Furthermore, it applies to the exclusion of any other

¹⁹²See amendment schedule to POPI.

¹⁹³s 2 of POPI; see also Van der Merwe et al (note 186 above) 434.

¹⁹⁴F S Cronje 'A synopsis of proposed data protection legislation in SA' (2009) 4(4) *Journal of Digital Forensics, Security and Law* 44.

¹⁹⁵See preamble to POPI.

¹⁹⁶s 3 of POPI.

legislation unless such legalisation offers more protection to the lawful processing of personal information than POPI itself.¹⁹⁷

It does however contain some exclusions which can be found in sections 6 and 7. Of particular significance is the exclusion relating to the processing of personal information solely for the purpose of journalistic, literary or artistic expression to the extent that such exclusion is necessary to reconcile, as a matter of public interest, the right to privacy with the right to freedom of expression.¹⁹⁸

The Act provides in respect of the above section that a balancing of rights needs to occur¹⁹⁹. Moreover, the exclusion would only be available if the journalist for example, proves that the data subjects' right to privacy is outweighed by the interests of the public in having access to the data subject's private information.²⁰⁰ In the context of direct marketing, it may be contended by the marketer that they are simply exercising their right to freedom of expression as contained in the Constitution²⁰¹ because their communications constitutes commercial advertising which can accordingly be construed as commercial expression as set out in the Constitution.²⁰² On the other hand, the data subject may rely on their right to privacy, and it is submitted that it is the right to privacy that will prevail over the right to commercial expression.²⁰³

4.4.3 Noteworthy definitions contained in POPI²⁰⁴

The definition of consent provides that three elements must be present in order for a direct marketer to adequately obtain the consent of a data subject. The consent must be free of any form of undue influence or duress, and so must be given freely and voluntarily by the consumer. Secondly, the consumer must give specific consent to a particular direct marketer for specific communications, and thirdly it must be an informed expression of will, meaning

¹⁹⁷s 3(2) (a-b) of POPI.

¹⁹⁸s 7(1) of POPI & F Coetzee 'The Press and POPI' (2014) 14(4) *Without Prejudice* 11.

¹⁹⁹s 7(3) of POPI.

²⁰⁰Van der Merwe et al (note 186 above) 440.

²⁰¹s 16 of the Constitution.

²⁰²M Jones and H Schoeman 'The South African Constitution and Electronic Commerce' ISSA Information Security South Africa 3rd Annual Conference, Sandton (2004) (Unpublished) available at <http://eprints.mdx.ac.uk/12693/1/The%20SA%20Constitution%20and%20Electronic%20Commerce.pdf> a accessed on 11 August 2015.

²⁰³Ibid.

²⁰⁴s 1 of POPI.

that a consumer must consent, having had the capacity to understand what they are consenting to.

The definition of direct marketing is mirrored as in the CPA and refers to commercial communications as does ECTA, however it is wider than the definition in ECTA as it also caters for attempts to request donations from the data subject. It can be construed from this definition, that a recipient will not be protected under POPI if they should receive non-commercial communications, unless that communication requests some sort of donation “of any kind”.

POPI’s definition of “*electronic communication*” is considerably dissimilar than the CPA’s and ECTA’s definitions, and is defined as “*any text, voice, sound or image message sent over an electronic communications network which is stored in the network or in the recipient’s terminal equipment until it is collected by the recipient.*” This is because the CPA covers telephonic direct marketing, whilst POPI does not, and ECTA includes “voice”, only where it is used in an automated transaction, whereas POPI includes it as any electronic communication. Furthermore, because of the requirement that the communication must be stored in *the network or in the recipient’s terminal equipment until it is collected by the recipient*, a direct marketing attempt via a telephone call will probably not be covered by POPI, as such a call is unlikely to be stored as required by POPI.²⁰⁵

The definition also does not include situations in which direct marketers may obtain a data subjects’ personal information through online means such as software. In this regard it is submitted by Hamann and Papadopoulos, that the definition of electronic communication in POPI is far too narrow, even more so than the definitions in the CPA and ECTA, and they accordingly comment that the latter’s definitions should be used instead.²⁰⁶

The definition of personal information contained in POPI is fairly comprehensive²⁰⁷ and is applicable to both natural and juristic persons and encompasses information that relates to an identifiable juristic or natural person, which includes but is not limited to information such as gender to contact details for example.²⁰⁸ This position differs from ECTA, as it only applies to natural persons. With regard to the CPA’s definition of “consumer”, it indicates a

²⁰⁵Maheeph (note 152 above) 36.

²⁰⁶Hamann & Papadopoulos (note 99 above).

²⁰⁷E De Stadler & P Esselaar *A guide to the Protection of Personal Information Act* (2015) 5.

²⁰⁸s 1 of POPI.

monetary threshold requirement that juristic persons must meet in order for the CPA to apply to them - POPI indicates no such requirement. Thus, it can be said that POPI has somewhat of a wider application than the CPA and ECTA as POPI recognises that juristic persons may also have a right to privacy in particular circumstances.²⁰⁹

POPI's definition of "processing" is fairly wide and when analysed, seems to encompass any possible action that can be taken in relation to personal information and includes collecting, storing, altering, distributing and the destruction of such information amongst other things.²¹⁰ It is submitted that the actions taken by direct marketers in sourcing, storing and contacting consumers would accordingly be construed as "processing" such information.

4.4.4 Conditions for lawful processing

POPI is premised on eight key conditions which direct marketers and other business will have to comply with.²¹¹ As mentioned in chapter 2, these conditions bear striking resemblance to the principles contained in the COE Convention, the OECD Guidelines and the EU Directive.²¹² This is because the drafters of POPI appear to have taken care to ensure that POPI was in line with a globally accepted standard of best practice in respect of data protection.²¹³ Briefly, the principles are as follows:²¹⁴

- a) Accountability²¹⁵ - direct marketers have an obligation to ensure that there is compliance with POPI in respect of the processing of personal information and may not process such information recklessly.²¹⁶ Furthermore, marketers will remain accountable even if such information is passed onto third party users.²¹⁷
- b) Processing limitation²¹⁸ - personal information must be collected directly from the data subject to the extent applicable;²¹⁹ must only be processed with the consent²²⁰ of the data subject and must only be used for the purposes for which it was obtained.²²¹

²⁰⁹Van der Merwe et al (note 186 above) 436.

²¹⁰De Stadler & Esselaar (note 207 above) 4-5 & Van der Merwe et al (note 186 above) 435.

²¹¹Chapter 3 of POPI.

²¹²See paragraph 2.4.

²¹³F Cronje & D Taylor *Questions and answers about the Protection of Personal Information Act* (2014) 56.

²¹⁴See chapter 3 of POPI; W Moss 'The imminent end of unsolicited marketing messages' (2010) *Corporate Governance*, 26-27.

²¹⁵s 8 of POPI.

²¹⁶L Swales 'Protection of Personal Information: South Africa's answer to the global phenomenon in the context of unsolicited electronic messages (SPAM)' (2016) 28 *SA MERC LJ* 61.

²¹⁷Reddy (note 116 above) 42.

²¹⁸s 9 of POPI.

- c) Purpose specification²²²- personal information must only be processed for the specific purpose for which it was obtained²²³ and must not be retained for any longer than it is needed to achieve such purpose.
- d) Further processing limitation²²⁴- further processing of personal information must be compatible with the initial purpose for which the information was collected.²²⁵ Should a direct marketer wish to use a consumer's information for a purpose for which the consumer did not consent to, they must obtain further permission from that consumer.
- e) Information quality²²⁶- the direct marketer must ensure that information held by them is accurate and updated regularly and that the integrity of the information is maintained by appropriate security measures.²²⁷
- f) Openness²²⁸- there must be transparency between the consumer and the direct marketer, in so far as processing the consumers' information for direct marketing purposes is concerned and the marketer must ensure that all documented processing of data is properly maintained.²²⁹
- g) Security safeguards²³⁰- direct marketers must take reasonable steps to ensure that adequate safeguards are in place to ensure that personal information is being processed responsibly and is not unlawfully accessed.²³¹ It is especially important to have a digital system of checks and balances, so as to eliminate human error.²³²
- h) Data subject participation²³³- the consumer must be alive to the fact that their information is being processed and must have provided their informed consent to such processing. They further have a right to request whether their information is held by a

²¹⁹This is the case unless the exception in s 12(2)(a) of POPI exists. For example, if the information is in the public domain.

²²⁰As per s 11(2)(a) of POPI, the burden of proof with regard to proving that consent is present is on the responsible party/direct marketer. Furthermore, such consent may be withdrawn at any time subject to certain conditions in s 11(2)(b).

²²¹Swales (note 216 above) 61.

²²²s 13-14 of POPI.

²²³De Stadler & Esselaar (note 207 above) 13.

²²⁴s 15 of POPI.

²²⁵Swales (note 216 above) 63.

²²⁶s 16 of POPI.

²²⁷De Stadler & Esselaar (note 207 above) 22-23.

²²⁸s 17 of POPI.

²²⁹Roos (note 28 above) 116; De Stadler & Esselaar (note 207 above) 18, 30.

²³⁰s 19-22 of POPI.

²³¹De Stadler & Esselaar (note 207 above) 34.

²³²Moss (note 214 above) 26-27.

²³³s 23-25 of POPI.

direct marketer, to request the details of what such information constitutes and to request that their information be deleted from a marketers records.²³⁴

The aforementioned conditions for lawful processing of information are generally regarded as being the globally accepted principles of data protection,²³⁵ and as a result these principles in POPI are congruent with that of the EU data protection framework, the COE Convention as well as the OECD Guidelines, illustrating that POPI is in fact on par with the best level of protection possible. It is therefore hoped that such principles are strictly implemented by direct marketers, and that enforcement of these principles are effectively carried out by the Information Regulator.

4.4.5 Section 69 of POPI- The regulation of direct marketing

POPI provides that the processing of personal information of a data subject for the purpose of direct marketing by means of any form of electronic communication, including automatic calling machines, facsimile machines, SMSs or e-mail, is prohibited unless the data subject has given their consent, or is a customer of the responsible party.²³⁶

Section 69(1) (b) further provides that subject to subsection 3,²³⁷ personal information may be processed if the data subject is an existing customer of the responsible party. POPI therefore draws a distinction between a “prospective customer” and “an existing customer” of a responsible party.²³⁸ This distinction is significant as in the case of a “prospective customer”, explicit opt-in consent must be obtained for the processing of personal information and in the case of an “existing customer”, implicit consent will suffice so long as the data subject had previously consented to communications from that responsible party.²³⁹ The consent in

²³⁴Swales (note 216 above) 64-65.

²³⁵ Article to: South Africa: Data Protection Laws of the World Handbook: Second Edition - South Africa available at <http://www.mondaq.com/southafrica/x/231626/data+protection/Data+Protection+Laws+of+the+World+Handbook+Second+Edition+South+Africa>.

²³⁶s 69(1) (a-b) of POPI.

²³⁷Subsection 3 provides that a responsible party may only process the personal information of a data subject who is a customer of the responsible party in terms of subsection (1)(b)— (a) if the responsible party 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 his, her or its electronic details— (i) at the time when the information was collected; and (ii) 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.

²³⁸Reddy (note 116 above) 53-54.

²³⁹s 69(3) of POPI.

respect of an existing customer is however subject to further qualifications being that such consent must have been obtained in the context of a sale of goods and/or services; the new communications must be in respect of the marketers own goods and services and the data subject is given sufficient opportunity to object to receiving such communications.²⁴⁰

It is clear that it was the legislature's intention to reverse the opt-out regimes of the CPA and ECTA, and create a new opt-in mechanism in POPI. In light of this change, direct marketers may not send communications to data subjects unless they have consented and in so far as spam is concerned, the new system renders spamming unlawful.

This change is very much influenced by Chapter II of the EU Directive and is certainly welcomed as it shifts the burden of opting-out from the consumer and places it on the marketer to obtain consent before sending through communications.²⁴¹

POPI does however only require the direct marketer to obtain consent from the consumer once, provided they have not previously withheld consent, and that the communications are related to the business of the direct marketer which the consumer had consented to.²⁴² This new requirement is bitter-sweet, as on one hand consumers will not be continuously badgered by marketers to obtain their consent, however on the other hand, once the marketer has obtained the consumers consent, they may inundate the consumer with communications until the consumer makes mention that they do not want to be contacted further.

In this way, the opt-in mechanism if abused, may simply end up being a glorified opt-out mechanism, as the data subject will have to opt-out of communications which they have consented to once before by a particular marketer if they are being badgered by that marketer.²⁴³

Section 69(2) of POPI appears to conflict with the pre-emptive block regime as set out in the CPA.²⁴⁴ This is because if marketers are allowed to contact consumers who have not previously withheld their consent, they may be able to do so even if the consumer had registered a pre-emptive block against them simply because POPI does not attempt to

²⁴⁰s 69(3)(a)-(c) of POPI.

²⁴¹M Sipe 'The Need for New Federal Anti-Spam Legislation' (2013) Vol. 31:55 *Yale Journal on Regulation*.

²⁴²s 69(2)(a) of POPI.

²⁴³Hamann & Papadopoulos (note 99 above) 59.

²⁴⁴Maheeph (note 152 above) 43.

accommodate the CPA in this aspect.²⁴⁵ It is submitted that this section be amended to incorporate the pre-emptive block system, in that consumers who have registered blocks should not be approached for their consent regardless of whether or not they have previously withheld consent.²⁴⁶

POPI provides that the consumer must also be given a reasonable opportunity to object, free of charge and in a manner free of unnecessary formality, to the use of their or its electronic details.²⁴⁷ Yet again, POPI demonstrates the emphasis that it places on the rights of the data subject, in that the individual is not expected to bear unnecessary difficulty and inconvenience should they object to having their information used.

Direct marketing communications must also contain the identity and contact details of the sender, so as to allow the data subject to halt the communications if they wish to do so.²⁴⁸ In comparison to the opt-out mechanisms in the CPA and ECTA, the above stated provision attempts to give the consumer recourse, should they wish to opt-out. However, as with any piece of law, truants will find a route to circumvent it. There is a possibility that marketers may still falsify their headers and contact details, disallowing the consumer to contact them. In this regard, it is the data subject who needs to report fraudulent details, so that fraudsters may face penalties for non-compliance. Like with ECTA and the CPA, POPI also does not stipulate how such contact details should be made available, and it is thus likely that the same problems will arise in the context of POPI.²⁴⁹

In terms of the regulation of direct marketing, it is expected that since POPI did not repeal the sections relating to direct marketing in the CPA, both pieces of legislation would apply concurrently.²⁵⁰ De Stadler submits that in so far as investigating matters related to direct marketing is concerned, agreement will have to be reached between the Information Regulator and the CC on the way in which claims and investigations will be handled and in this regard comments that thus far, the CC has been reluctant to broker such agreements.²⁵¹ It

²⁴⁵E De Stadler ‘Direct marketing: Opt-in or opt-out’ available at <http://www.esselaar.co.za/legal-articles/direct-marketing-opt-or-opt-out> accessed on 8 September 2016.

²⁴⁶E De Stadler & E Van Zyl ‘Fundamental consumer rights’ in T Naude & S Eiselen (eds) *Commentary on the Consumer Protection Act*(2014) paragraph 32.

²⁴⁷s 69(3)(c) of POPI.

²⁴⁸s 69(4) of POPI.

²⁴⁹See discussion in paragraph 4.2.5.

²⁵⁰E de Stadler ‘Direct Marketing: Does the CPA or POPI apply?’ (2016) available at

<http://www.novcon.co.za/articles/direct-marketing-does-popi-or-cpa-apply> accessed on 3 August 2015.

²⁵¹Ibid.

is hoped that such concurrent application of the CPA and POPI is effectively managed by both regulators so as to ensure that consumers are sufficiently protected from truant marketers.

4.4.6 Cross border transfers

Chapter 9 of POPI regulates cross border transfers of personal data. The Act stipulates that a responsible party may not transfer a data subject's personal information to a recipient in a foreign jurisdiction, unless such a recipient is subject to a law, binding corporate rules, or a binding agreement, which offers an adequate level of protection for such data.²⁵² It further provides that such "adequate protection" means that the law relating to data processing in the foreign jurisdiction, must be substantially similar to the conditions for lawful processing as contained in POPI.²⁵³

Cross border transfers are also permitted if the data subject consents to the transfer, if it is required for the performance of a contract between the data subject and responsible party, or the responsible party and a third party for the benefit of the data subject or the transfer is beneficial to the data subject, and his consent could not be reasonably obtained.²⁵⁴

Thus in the context of direct marketing, a marketer for example, may not send a consumers' details to its subsidiary in another country, unless such a company is able to demonstrate that the subsidiary complies with the aforementioned conditions.

With regard to direct marketing communications that are received by consumers from foreign jurisdictions, it is unclear how such communications will be dealt with by POPI simply because POPI does not extend its application to foreign jurisdictions.²⁵⁵ It is submitted in this regard that perhaps the legislature underestimated the amount of and the impact of communications from foreign jurisdictions in SA,²⁵⁶ and it is further submitted that the legislature consider how such issues will be regulated.

For example, the legislature could consider engaging and negotiating with other countries so as to formulate co-operative agreements for the regulation of direct marketing

²⁵²s 72(1)(a) of POPI.

²⁵³s 72(1)(a)(i) of POPI.

²⁵⁴s 72(1)(b)-(e) of POPI.

²⁵⁵s 3 of POPI.

²⁵⁶S L Gereda 'Electronic Communications and Transactions Act' (2003) 284.

communications that pass over national borders, with a view to avoid creating a vacuum within which foreign unsolicited communications may exist simply because domestic legislation does not apply to it.²⁵⁷

4.4.7 Non-compliance with POPI

The penalties for non-compliance with POPI are extremely robust and some authors are of the opinion that they are far too grave.²⁵⁸ It is therefore in their own interest that direct marketers comply with the provisions of POPI, or they may face a criminal sanction of imprisonment between 12 months and 10 years, or a fine of up to R10 million.²⁵⁹ Furthermore, section 100 of POPI provides that any person who obstructs or unlawfully influences the Information Regulator or any person acting on behalf of the Information Regulator is guilty of an offence. This demonstrates the independence and impartiality with which the legislature intended the Information Regulator to operate with.

However, as stated in the case of both the CPA and ECTA, criminal sanctions are quite difficult to enforce in respect of violations of data privacy rights, as the police service simply may not take such violations as seriously as they would other crimes. Furthermore, to date and under the CPA and ECTA, it has been unheard of that a direct marketer has been imprisoned for violating these laws. It does however remain to be seen whether the Information Regulator turns the tide in this regard, and does in fact utilise its powers to implement harsh sanctions.

4.4.8 Impact of POPI on direct marketers

In as much as POPI aims to protect data subjects and their personal information, it also aims to balance the interests of direct marketers. For example, the emphasis that POPI places on security measures that a business ought to have is indicative that POPI also aims to cater for the needs of the marketer. POPI demands that direct marketers align their strategies in

²⁵⁷See for example Memorandum of Understanding on mutual enforcement assistance in commercial email matters among the following agencies of the United States, the United Kingdom and Australia: The United States Federal Trade Commission, the United Kingdom's Office of Fair Trading, the United Kingdom's Information Commissioner, her Majesty's Secretary of State for Trade and Industry in the United Kingdom, the Australian Competition and Consumer Commission and the Australian Communications Authority, available at <http://www.ftc.gov/os/2004/07/040630spammoutext.pdf> accessed on 5 September 2016.

²⁵⁸R Luck 'POPI- is South Africa keeping up with international trends?'(2014) *De Rebus*, 44-46.

²⁵⁹Chapter 11 of POPI.

compliance with its provisions, so as to offer goods and services to those consumers who should want it, and not to those who do not.²⁶⁰

In light of the changes that POPI will effect to the direct marketing industry, it is submitted that direct marketers take the following steps to be POPI compliant:²⁶¹

- a) Perform a regular audit of their database to determine when “opt-in” consent will be required from a consumer;
- b) ensure that where necessary, consumers have actually opted-in and delete personal information of those consumers who have not consented to direct marketing or who have opted-out of such communications;
- c) obtain the necessary advice to assist with the implementation of policies to protect and process personal information in line with POPI; and
- d) implement or tighten existing security measures so as to ensure that stored personal information is not unlawfully accessed or used for unauthorised purposes.²⁶²

4.5 Commentary

It is submitted that POPI is an improvement on the opt-out mechanisms afforded by the CPA and ECTA. However, the requirement that the direct marketer may only contact the data subject once becomes problematic as it is likely to be abused. In this regard, Hamann and Papadopolous comment that even though POPI is an improvement on the existing legislation, section 69(2) “*reverts back to an opt-out model and is reduced to a second level protection mechanism. That is, it only becomes relevant after the approach has been made*”.

Furthermore, the discrepancies between the three pieces of legislation as discussed in this chapter need to be synchronised so as to disallow any particular situation from falling within the highlighted inconsistencies.

The opt-in provision also appears to conflict with the CPA which states that direct marketers must assume that a pre-emptive block has been registered against them. POPI ignores this provision and it is submitted that this lack of clarification by the legislature makes it unclear

²⁶⁰ Van der Spuy and Partners ‘Direct marketing: How POPI has redrawn the battle lines’ available at <http://www.vdslegal.co.za/NewsPublications/NewsArticle.aspx?CategoryID=1&articleId=1198#.V-ZuBPkrLIU> accessed on 11 September 2015.

²⁶¹Ibid.

²⁶²De Stadler & Esselaar (note 207 above).

how the opt-out registry and the opt-in mechanism in POPI is to coincide, and that further clarification be provided in this regard.²⁶³

In terms of application, it is intended that all three pieces legislation apply concurrently to the extent that they can.²⁶⁴ However, in certain aspects, it is expected that POPI will prevail over the CPA and ECTA²⁶⁵ and in the event of a conflict it is generally accepted that the laws which offer the most protection for consumers will apply.²⁶⁶

For example, POPI does not cater for instances of personal direct marketing and on this occasion, the CPA will apply. More importantly, the CPA will always apply to the content of direct marketing, whereas POPI applies merely to the regulation of the process of extracting consumer personal information for purposes of direct marketing.²⁶⁷ This then means that should a consumer have a complaint about the content of the direct marketing communications that they are receiving, the consumer must approach the CC for relief, and not the Information Regulator.²⁶⁸

In respect of the receipt of direct marketing communications from foreign jurisdictions, it is submitted that a significant criticism of POPI is that it does not extend its application to such communications. As mentioned above in paragraph 4.4.6 it is recommended that the legislature give this aspect due consideration so as to afford consumers the best possible protection.

Furthermore and as will be discussed in paragraph 6.2.2, the success of POPI will depend largely on the effectiveness of the Information Regulator to perform its functions in so far as enforcing compliance with the Act is concerned. It is hoped that the Information Regulator will take due advantage of its allocated powers and duties so as to contribute to the protection of personal information and the effective regulation of direct marketing.

Overall, POPI is a fundamental change to the status quo as it is SAs first piece of consolidated legislation relating to data protection. It further attempts to tip the scales in favour of the consumer so that the consumer is left feeling more empowered than before. It is submitted that this is the favoured position considering that SA is moving toward becoming a

²⁶³De Stadler & Van Zyl (note 246 above) 32.

²⁶⁴De Stadler (note 245 above).

²⁶⁵For example, the opt-in regime contemplated in section 69 is expected to override the opt-out mechanism in the CPA and ECTA.

²⁶⁶s 3(2) (a-b) of POPI.

²⁶⁷De Stadler (note 245 above).

²⁶⁸De Stadler (note 245 above).

consumer-centred society based on the values of informed consent, respect for the autonomy of the consumer and accountability of the market.

Chapter 5: The regulation of direct marketing in foreign jurisdictions

5.1 Introduction

In an effort to determine whether SA is internationally compliant in so far as data protection is concerned, this chapter will consider data protection legislation in two foreign jurisdictions, namely, the UK and NZ to the extent that such legislation is applicable to direct marketing. As a conclusion, a comparison will be drawn between the aforementioned legal systems, and that of SA's so as to draw lessons that may be useful in so far as improving our data protection framework is concerned.

5.2 United Kingdom

5.2.1 Introduction

As previously alluded to in chapters 2 and 4, POPI is extremely reminiscent of EU data protection laws,²⁶⁹ and it will therefore be seen that the UK data protection framework is similar to POPI. The UK's system of regulation can be described as being one that is largely centred on statutory regulation²⁷⁰ and one that does not have a written constitution or does not codify a constitutional right to privacy as does SA in the Bill of Rights.²⁷¹

In this light, the salient pieces of legislation applicable to direct marketing in the UK will be considered below so as to draw a comparison between the regulatory trends of the UK and SA.

5.2.2 The Data Protection Act of 1998 (DPA)

The UK, as a result of its EU membership, implemented the EU Directive in the form of the DPA.²⁷² It is enforced through the Information Commissioner's Office (ICO) and is the focal legislation in respect of data privacy. The provisions of the DPA were drafted in close

²⁶⁹SALRC Discussion Paper (note 34 above) 62.

²⁷⁰H Burkert 'Privacy: data protection: A German/European perspective' (1999) available at www.co.ll.mpg.de/sites/www.coll.mpg.de/files/text/burkett.pdf accessed 5 October 2016.

²⁷¹K O'Regan 'Checks and Balances Reflections on the Development of the Doctrine of Separation of Powers Under the South African Constitution' (2005) *PER/PELJ* 123.

²⁷²G Scali & W Long 'United Kingdom' (2014) 1 *The Privacy, Data Protection and Cyberlaw Security Review* 254.

consideration of the COE Convention so that the UK could align itself with an internationally consistent standard of data protection.²⁷³

5.2.2.1 Purpose and application of the DPA

The DPA places obligations on data users before and during their use of such data and awards certain rights to individuals in respect of information held about them by such data users.²⁷⁴

The purpose of POPI goes further than the above, in that the legislature chose to specifically carve out that POPI's purpose is to give effect to the entrenched constitutional right to privacy. This is possible because SA has entrenched the right to privacy in the Constitution, whereas the UK does not expressly make provision for the right to privacy in the same way.²⁷⁵

The DPA applies only to the personal data of natural persons, whereas POPI applies to both natural and juristic persons, thereby illustrating that POPI has a wider application than the DPA. It is submitted in this regard that perhaps the drafters of POPI took cognisance of the fact that in the age of evolving technology and a growing market, both juristic and natural persons are exposed to direct marketing and should be afforded similar protection.

There is no requirement in the UK for organisations to appoint a data protection officer²⁷⁶ whereas POPI makes this appointment compulsory.²⁷⁷ This position is however likely change in light of article 35 of the proposed EU regulation,²⁷⁸ which makes the appointment of a data protection officer mandatory.

5.2.2.2 Fundamental Principles of the DPA

The DPA is premised on eight data protection principles which bear strikingly similar resemblance to the conditions for lawful processing in POPI. These principles can be said to have filtered their way down from the COE Convention and the EU Directive to the DPA, and similarly to POPI, as the drafters of POPI, were strongly guided by UK data protection

²⁷³P Carey & B Treacy *Data Protection-A practical guide to UK and EU Law* 4ed (2015); S Allison 'The concept of personal data under the data protection regime' (2012) 48 *Edinburgh Student Law Review* 51.

²⁷⁴I Taylor 'The Data Protection Act 1998: Challenges and Benefits for record management' (2011) ARST2 516.

²⁷⁵Burchell(note 42 above) 3.

²⁷⁶ DLI Piper Data Protection Laws of the World- United Kingdom 346 available at http://www.dlapiperdataprotection.com/#handbook/law-section/c1_GB/c2_GB accessed on 01 November 2015

²⁷⁷s 56 of POPI.

²⁷⁸ On 25 January 2012, the EC proposed a reform of the EU directive available at <http://ec.europa.eu/justice/data-protection/document/review2012/com201211en.pdf> accessed on 28 October 2015.

law.²⁷⁹ It is submitted that in light of the strong influence of the UK data protection framework on the South African framework, SA could lean on the experiences of the UK to ensure the effective enforcement of POPI. This is especially significant since POPI gives the Information Regulator the power to conduct investigations into trends in foreign jurisdictions that may be useful to SA.²⁸⁰

5.2.2.3 Cross-border transfers of personal information

Cross-border transfers of personal information may only occur if the foreign jurisdiction provides adequate data protection²⁸¹ or if the transfer is catered for in standard contractual clauses accepted by the EC, or if it is subject to an organisation's binding corporate rules.²⁸² In addition, the ICO has published certain guidelines which can be used to assess whether a specific country offers "adequate protection" to personal information.²⁸³

POPI contains similar conditions but goes further and explains what is meant by "adequate protection" by stipulating that the laws must be substantially similar to the conditions for lawful processing.²⁸⁴

The DPA further states that transfers of personal data out of the European Economic Area²⁸⁵ may only occur if it is consented to by the data subject; if it is essential to carry out a contract either between the data controller²⁸⁶ and the data subject,²⁸⁷ or a third party for the benefit of

²⁷⁹ Cronje & Taylor (note 213 above) 56.

²⁸⁰ s 40 of POPI.

²⁸¹ Schedule 1, Part II paragraph 13 of the DPA provides that when considering whether there is 'an adequate level of protection' for the purposes of the eighth principle, the level of protection must be one which is "adequate in all the circumstances of the case".

²⁸² DLI Piper Data Protection Laws of the World- United Kingdom available at http://www.dlapiperdataprotection.com/#handbook/law-section/c1_GB/c2_GB accessed on 01 November 2015 347.

²⁸³ ICO Privacy and Electronic Communications Regulations- Direct Marketing available at <https://ico.org.uk/media/for-organisations/documents/1555/direct-marketing-guidance.pdf> accessed on 12 October 2015.

²⁸⁴ s 72(1)(a)(i) of POPI.

²⁸⁵ The agreement on the European Economic Area entered into on 1 January 1994, brings together the EU Member States and the three EEA EFTA States — Iceland, Liechtenstein and Norway — in a single market, referred to as the "Internal Market" governed by the same basic rules. These rules aim to enable goods, services, capital, and persons to move freely about the EEA in an open and competitive environment, a concept referred to as the four freedoms. Explanation available at <http://www.efta.int/eea> accessed on 11 November 2015.

²⁸⁶ POPI's definition of data controller mirrors that of the DPA's definition.

²⁸⁷ The DPA defines "data subject" as an individual who is the subject of personal data.

the data subject; if it is required by law or for the public interest; or if the data is publicly available.²⁸⁸

The above conditions are similar to those contained in POPI, save for the latter three. This illustrates that the drafters of POPI perhaps did not intend for the latter three conditions to be reason enough to transfer data to a foreign jurisdiction, should it not have adequate data protection laws.

5.2.2.4 Enforcement of the DPA

The ICO is responsible for the enforcement of the DPA, and in the event that a data controller breaches the DPA, the ICO may issue an enforcement notice, compelling the data controller to rectify the breach.²⁸⁹ Should the data controller fail to do so, this will constitute a criminal offence and the offending party may be liable for fines up to £500,000 for serious breaches.²⁹⁰

Examples of recent sanctions enforced by the ICO include a penalty of £120,000 issued to a credit brokerage company called Digitonomy Limited on 13 February 2017 for sending a large amount of marketing texts without proper consent; and on 25 November 2016, the ICO fined a company named Silver Tech Limited an amount of £100,000 for sending spam.²⁹¹ It can therefore be seen that the DPA contains fairly serious sanctions that are to date being executed by the ICO which further supports the UK's strict approach to data protection.²⁹² Following from the UK in this regard, is POPI, with its similarly extreme penalties as examined in chapter 4.²⁹³

5.2.2.5 The regulation of direct marketing under the DPA

Direct marketing in the context of section 11 of the DPA means "the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals". This definition is considerably expansive, and can be said to include any possible method of communication to a data subject.

²⁸⁸Principle 8 in Schedule 1 of the DPA.

²⁸⁹s 40 of the DPA.

²⁹⁰T Wessing 'An overview of UK Data Protection Law' 4 available at www.taylorwessing.com accessed on 11 November 2015.

²⁹¹Cases available at <https://ico.org.uk/action-weve-taken/enforcement/> accessed on 5 March 2017.

²⁹²See ICO in the UK 'Personal injury claims company fined £80,000 by the ICO for unsolicited nuisance calls', available at <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2015/04/personal-injury-claims-company-fined-80-000-by-the-ico-for-unsolicited-nuisance-calls/>, accessed on 15 October 2016.

²⁹³See paragraph 4.4.7.

The DPA provides that an individual is entitled to require a data controller to cease, or not begin the processing of their personal data for the purposes of direct marketing, via notice in writing.²⁹⁴ Should the data controller fail to comply with the notice, the court may make any order it deems appropriate in the circumstances.²⁹⁵

It can be seen that the DPA is similar to the CPA and ECTA in this regard, in that it essentially creates an opt-out mechanism for data subjects, and it is dissimilar to POPI's opt-in regime. The requirement of written notice goes a step further than the CPA and ECTA, as the DPA specifically stipulates how the opt-out mechanism should work. This is perhaps a lesson which SA can learn from the UK, considering that the opt-out mechanisms in the CPA and ECTA are riddled with inconsistencies.²⁹⁶

The DPA does however provide a distinction between non-sensitive and sensitive data in that opt-in consent must be obtained for any direct marketing which involves the processing of sensitive personal data such as race, ethnicity, or medical conditions.²⁹⁷ The CPA and ECTA does not draw such a distinction, but POPI on the other hand, does.²⁹⁸

5.2.3 The Privacy and Electronic Communications Regulations 2003 (PEC regulations)

The PEC regulations operate alongside the DPA in that it states that "*nothing in these Regulations shall relieve a person of his obligations under the DPA in relation to the processing of personal data*".²⁹⁹ It can therefore be construed as supplementing the DPA and is aimed at enhancing the protection afforded to individuals with regard to electronic communications.³⁰⁰

The PEC regulations regulate direct marketing in the form of automated calling systems,³⁰¹ facsimile,³⁰² unsolicited calls,³⁰³ and electronic mail,³⁰⁴ and is said to create a "soft

²⁹⁴s 11(1) of the DPA.

²⁹⁵s 11(2) of the DPA.

²⁹⁶See discussion in chapter 4.

²⁹⁷s 7 of the DPA.

²⁹⁸See chapter 3-part B of POPI.

²⁹⁹s 4 of the PEC Directive.

³⁰⁰Information Commissioners Office, Guide to PECR, available at <https://ico.org.uk/for-organisations/guide-to-pecr/introduction/what-are-pecr/> accessed on 11 August 2014.

³⁰¹Regulation 19.

³⁰²Regulation 20.

³⁰³Regulation 21.

³⁰⁴Regulation 22.

opt-in” system,³⁰⁵ as it does not explicitly give a data subject the opportunity to opt-out, nor does it explicitly require a data subject to opt-in. Generally, opt-in consent is required for marketing emails sent to individual subscribers, unless the “soft opt-in” provisions mentioned above apply.³⁰⁶ As with the DPA, the restrictions on marketing by email only apply to natural persons.

In addition to the above regulations, the directive also stipulates that communications may not be sent to data subjects if the identity and contact details of the sender, which a data subject may use to request that communications should cease, are concealed, disguised or has not been provided.³⁰⁷

The PEC regulations also set out to ensure that the consent received from the data subject is informed and indicate a positive expression of will³⁰⁸ by for example, the marketer providing the data subject with several methods (email, post, telephone calls) to receive communications once they have opted-in.³⁰⁹ These are guidelines suggested by the ICO,³¹⁰ and it is submitted that when the Information Regulator does commence enforcement of POPI, that it takes lead from the ICO in promulgating guidelines to ensure the effectiveness of the opt-in regime and its mechanics.

5.2.4 The Direct Marketing Association (DMA)

As with SA, the UK also has a self-regulatory DMA which was founded in 1992.³¹¹ It aims to raise the standards of practice in the industry and to set codes of practice which is consistent with legislation. The DMA has also set up the direct marketing authority to monitor compliance with its codes. However, as with SA, its membership is entirely voluntarily and so if a particular marketer does not wish to abide by its rules, it simply will not become a member of the DMA.

As will be discussed in chapter 6, the effectiveness of such self-regulatory bodies is questionable, as it is not a mandatory regulatory framework and therefore direct marketers

³⁰⁵ ‘10 things you should know about ... email marketing’ available at <http://www.seqlegal.com/blog/10-things-you-should-know-about-email-marketing> accessed on 16 November 2015.

³⁰⁶ Ibid.

³⁰⁷ Regulation 23.

³⁰⁸ Regulation 2(2) of the PECR, Section 1 of the DPA, EU Directive 95/46/EC.

³⁰⁹ Reddy (note 116 above) 73-74.

³¹⁰ ICO Marketing guidance 2013 available at <https://ico.org.uk/media/for.../1555/direct-marketing-guidance.pdf>, accessed on 3 November 2015.

³¹¹ Ibid.

circumvent its rules simply by not becoming members or by resigning from the organisation when it suits them.

5.3 New Zealand

5.3.1 Introduction

In drafting data protection legislation, the NZ law commission commented that it is not so much the promulgation of laws that are of paramount importance, but rather that these laws should be as effective as possible.³¹² In contrast to this approach, SA, perhaps with good intent, promulgated several pieces of legislation, and this is not always to the benefit of the consumer as sometimes legislation conflicts with each other.³¹³ Furthermore, providing consumers with too much information often leads to them being more confused than informed.³¹⁴

5.3.2 The common law right to privacy

The NZ common law does not specifically cater for the right to privacy as South African common law does. Instead, the protection of personal information in the common law is protected in other torts such as breach of contract, breach of confidence, negligence, copyright, defamation, malicious falsehood and the tort of passing off.³¹⁵

5.3.3 The constitutional right to privacy

Unlike SA, NZ does not have an explicitly codified constitution however it does have a constitutional document known as the Bill of Rights Act of 1990.³¹⁶ It also does not expressly provide for the right to privacy but it does implicitly regulate privacy.³¹⁷ Despite the fact that there is a lack of explicit codification of a constitutional right to privacy, the Bill of Rights Act does recognise that privacy may be a justifiable limitation, which can be placed on other

³¹²New Zealand Law Commission Study Paper *Privacy Concepts and Issues* (SP19) (2008) paragraph 3.53 available at <http://www.lawcom.govt.nz/our-projects/privacy?id=637> accessed on 2 October 2015.

³¹³M Trebilcock, C Rickett & T Tefler *International Perspectives on Consumers Access to Justice* (2003)70-77.

³¹⁴Ibid.

³¹⁵New Zealand Law Commission Study Paper *Privacy Concepts and Issues* (note 312 above).

³¹⁶A Roos ‘Personal data protection in New Zealand: lessons for South Africa?’(2008) 4 *Potchefstroom Electronic Law Journal* 71.

³¹⁷s21 and s5 of the PA.

expressly recognised rights³¹⁸ and this means that in so far as data privacy is concerned, data protection will not necessarily be overridden in the furtherance of other rights.³¹⁹

5.3.4 The Privacy Act of 1993 (PA)

The PA is not a generic piece of law as it aims to regulate data privacy exclusively. As NZ is a member of the OECD, the purpose of the PA is to protect the right to privacy in accordance with the OECD Guidelines, and as a result, the PA contains similar provisions to those contained in POPI.

The PA applies only to natural persons and not juristic persons, as explicitly provided for in the definitions of “personal information” and “individual”.³²⁰ The PA also provides for 12 information privacy principles³²¹ which bear immense resemblance to the principles contained in the OECD Guidelines, save for the twelfth principle, which is not contained in the guidelines and which states that unique identifiers such as passport and identity numbers are not to be provided to agencies, unless such provision is necessary for the agency to fulfil its function.

The first four principles deal with the collection of personal information, whilst principles 5 to 8 deal with the storage of personal information, principles 9 and 10 deals with the use of information, and lastly principles 11 and 12 deal with the disclosure of such information.

SA does not distinguish between different stages of processing in this way and it is submitted that this differentiation be improved to follow EU style legislation that encompasses all possible actions with regard to personal data as “processing of personal information”.³²² Roos submits that this is because “in the modern online environment the distinction between collecting, storing, processing and transfer of data becomes blurred.”

The PA does not provide for a distinction in the treatment of “sensitive information” such as information relating to race, health and political information as POPI does, and it is submitted that this is perhaps incongruent with other data protection regimes.³²³ This is because

³¹⁸s5 of the Bill of Rights Act.

³¹⁹Roos (note 316 above) 73.

³²⁰s2 of the PA.

³²¹s6 of the PA.

³²²Roos (note 316 above) 79.

³²³See for example s2 of the UK DPA, and chapter 3, part B of POPI.

sensitive information ought to be subject to more stringent safeguards, and cannot be treated in the same way as any other type of personal information.³²⁴

5.3.4.1 Cross border transfers

The PA unlike POPI, does not specifically prohibit cross-border data flows to foreign jurisdictions, however the Privacy Commissioner is given the power to prevent data flows in respect of information that has been received from another jurisdiction if the transfer of information is likely to be to another jurisdiction which does not have comparable safeguards to the PA and the transfer would likely lead to a contravention of the basic principles of national application set out in part two of the OECD Guidelines and Schedule 5A of the PA.³²⁵ POPI however appears to go a step further, to specifically provide that foreign jurisdictions must have laws which are substantially similar to the conditions for lawful processing.³²⁶

5.3.4.2 Direct Marketing under the PA

The PA does not specifically regulate direct marketing, however it is submitted that an individual may assert their rights in terms of it should a particular direct marketer invade their privacy, and so direct marketers will have to comply with the 12 data protection principles contained therein.³²⁷

It is submitted that this is a vital flaw of the PA as the direct marketing sector is a specialised industry, and simply relying on generic data privacy legislation may not necessarily result in the adequate protection of consumers. It follows then that the regulatory framework in SA offers far more specialised treatment of the direct marketing industry than NZ.

5.3.4.3 Enforcement of the PA

The PA is enforced by the Privacy Commissioner who is seen to be its “statutory guardian”³²⁸ and its primary function is to receive and resolve complaints in relation to violations of the PA.

³²⁴K McCullagh ‘Data Sensitivity: Proposals for Resolving the Conundrum’ (2007) *Journal of International Commercial Law and Technology* 10.

³²⁵ DLA Piper Handbook ‘Data protection laws of the world’ (2012) available at http://information.dla.com/information/published/DPLaw_World_Handbook_2012.pdf

³²⁶s 72(1)(a)(i) of POPI.

³²⁷S Kellet ‘Legislative Definition of Spam for New Zealand’ (2005) *VUWLR* 627.

³²⁸S Mount ‘The Privacy Act 1993’ 1992-1995 *Auckland University Law Review* 408-413.

Examples of law enforcement by the Privacy Commissioner include mediating a dispute between a complainant who had consented to the publishing of his email address that resulted in him receiving spam, and the management company to whom he had provided his details.³²⁹ The Privacy Commissioner had established consent on the part of the complainant but was still able to mediate the situation by requesting that the management company remove the complainants email address from their website, which resulted in both parties being satisfied with the outcome. A further example relates to the incorrect disclosure of a complainant's health records by the District Health Board to the complainant's insurer.³³⁰ The Privacy Commissioner established that such disclosure was incorrectly made and ordered that compensation be payable to the complainant and that the staff of the District Health Board undergo further training in so far as disclosing and processing individuals personal information is concerned.

Perhaps one of the most important aspects of the Privacy Commissioners' function is the power to issue codes of conduct for specific industries that materialise into law.³³¹ The effect of issuing a code under the PA is that the particular code alters the operation of the PA for that specific industry and makes compliance with the code mandatory.³³² This is an incredible power, as compliance with the PA can be tailored to a specific industry such as the direct marketing industry.³³³

Furthermore, the codes may be modified or repealed by the Commissioner with ease, and this ensures that the codes are able to stay relevant as a form of flexible regulation.³³⁴ The emphasis on the usefulness and practicality of such codes of conduct is indicative of the importance that the NZ system places on self-regulation as an effective method of the regulation of direct marketing.³³⁵

³²⁹ Case note 256547 (2015) available at <https://www.privacy.org.nz/news-and-publications/case-notes-and-court-decisions/case-note-256547-2015-nz-privcmr-4-man-complains-he-received-spam-emails-after-council-published-his-submission-online/> accessed on 5 March 2017.

³³⁰ Case note 246939 (2015) available at <https://www.privacy.org.nz/news-and-publications/case-notes-and-court-decisions/case-note-246939-2015-nz-privcmr-7-shared-regional-access-to-dhb-medical-records-results-in-information-being-wrongly-disclosed/> accessed on 5 March 2017.

³³¹ s 46(1) of the PA.

³³² s 46(3) of the PA.

³³³ s 147 of the PA.

³³⁴ Roos (note 316 above) 88.

³³⁵ D Robinson 'Self-Regulation Report: New Zealand' International Journal for Non-profit law available at http://www.icnl.org/research/journal/vol1iss1/sr_nz.htm accessed on 11 September 2016.

5.3.5 The NZ Marketing Association (NZMA)

The NZMA is a self-regulatory industry which bases itself on voluntary memberships as do most self-regulatory bodies.³³⁶ It has been in existence for over 40 years, and it has a membership of over 6500 businesses.³³⁷ It has developed a code of practice which regulates direct marketing, and which all marketers must comply with.³³⁸ The fact that the NZMA has been existence for such a long period of time, and that its membership spans to such a large number is indicative of the fact that NZ fosters self-regulation as a respected and useful tool in so far as the regulation of direct marketing is concerned.

5.4 Commentary

Although POPI has been drafted in a manner that takes due cognisance of EU data protection laws, which are inextricably reflected in that of the UK and NZ data protection regimes, there are some notable comparisons between the laws in these jurisdictions which are as follows:

- a) SA is described as a constitutional democracy and the right to privacy is entrenched in both the Bill of Rights and the common law.³³⁹ In contrast, the UK and NZ does not specifically entrench the right to privacy, and instead the right to privacy is regulated in various pieces of legislation. In this regard it is submitted that SA's approach to the protection of privacy allows for there to be a clearer placing of the right to privacy, i.e. that it is a constitutional imperative, and that POPI is meant to give effect to this right.
- b) It can be seen that POPI has a wider application than the legislation in NZ and the UK as it applies to both natural and juristic persons, whereas the legislation in the latter two jurisdictions apply only to natural persons. It is submitted that this is perhaps because these laws were promulgated several years ago in comparison to POPI, and it was perhaps thought that direct marketing affects mostly natural persons, and so provision need not be made for juristic persons. In the age of modernisation,

³³⁶‘Championing the practice of professional marketing and the role of marketers in building a better New Zealand’

Available at https://www.marketing.org.nz/About_Us accessed on 11 October 2015.

³³⁷Ibid.

³³⁸ Code of Practice for Direct Marketing in New Zealand- updated February 2014 available at https://www.marketing.org.nz/Folder?Action=View%20File&Folder_id=72&File=Direct%20Marketing%20Code.pdf accessed on 1 August 2015.

³³⁹See Chapter 2.

establishment of small business and the advancement of technology, businesses are becoming more exposed to direct marketing than before, and POPI caters for this change in the dynamic.

- c) There appears to be some inconsistency in the way that direct marketing is regulated in the UK as the DPA provides for an opt-out mechanism, whereas the PEC regulations adopt the opt-in approach. It is submitted that the opt-in approach be used as a consistent standard, as done so with POPI. This will not only create legal certainty, but will also conform to the globally accepted, preferred approach of the opt-in regime.³⁴⁰
- d) In so far as the regulation of direct marketing in NZ is concerned, it can be seen that although the PA does not specifically provide for direct marketing, the power of the Privacy Commissioner to convert direct marketing codes of practice into law compensates for this lack of specification and it is submitted that the Information Regulator lean on the strength of the Privacy Commissioner in this regard.
- e) The ICO in the UK, as discussed, plays a considerable role in so far as enforcing the data protection regime in the UK is concerned. It is submitted, that when the Information Regulator becomes fully operational, that it should take guidance from the ICO in respect of developing a strict stance against violations of POPI, and also in terms of putting forth guidelines about how the opt-in mechanism ought to function and how informed consent should be obtained.
- f) Despite the DMA in NZ being a voluntary body as is the case with the UK and SA, the codes promulgated by the DMA in NZ, if accepted by the Privacy Commissioner, may very well become peremptory law even for non-members and this is a significant loop-hole that is avoided by NZ law, that is present in the regulatory framework in the UK and SA.

5.5 Concluding remarks

It can be seen that each jurisdiction has its own traits, which come with both advantages and disadvantages. The UK's data protection framework appears to be a system that heavily relies on government regulation and in as much as this creates stability, it may create rigidness in some instances. The legal framework in NZ can be said to be a system of regulation which SA can aspire to emulate in certain aspects. This is evident from the fact that NZ had

³⁴⁰Swales (note 216 above) 78.

recognised the need for comprehensive data protection legislation over twenty years ago, whereas SA only recognised this need in 2013 with POPI. Furthermore, NZ strikes a healthy balance between self-regulation and state regulation, and this is evident from the vast membership of the over 40-year-old DMA.

It is suggested that perhaps the Information Regulator could make use of its powers of investigation into data protection trends by investigating the laws in the UK and NZ, so as to take away helpful insights into the most effective ways of regulating direct marketing. A pertinent lesson to be learnt from NZ for example is that the Privacy Commissioner is given great powers to be able to convert direct marketing codes of practice into law. This is certainly a strength that the Information Regulator could draw on and emulate so as to create peremptory codes of conduct for direct marketing in SA. In relation to the UK, a vital characteristic that the Information Regulator could imitate is the ICO's strict and effective enforcement capacity in relation to compliance with its data protection regime.

Chapter 6: An analysis of the various forms of regulation in South Africa

6.1.Introduction

Direct marketing is largely regulated in SA by statute in the form of the CPA, ECTA and POPI. Despite the existence of these statutes, it is evident from the discussion in chapter 4 that the practice still encounters abuse and as a result, it is the consumer who bears the inconvenience of unsolicited direct marketing. The extent to which the state is expected to go to protect consumers must be compared to that of having a free market system³⁴¹ that is left to regulate itself entirely, with a view to find a middle ground between these polar systems of regulation.

This chapter will therefore consider the three forms of regulation prevalent in SA i.e. state regulation, self-regulation and co-regulation,³⁴² and will aim to determine which form will be best suited for the regulation of direct marketing. It is important to note at the outset that both the CPA³⁴³ and POPI³⁴⁴ recognise all three systems of regulation.

6.2.Statutory regulation

Government regulation refers to “a rule of order having the force of law, prescribed by a superior or competent authority, relating to the actions of those under the authority's control.”³⁴⁵ This means that government promulgates legislation which then binds individuals and non-compliance with such legislation results in the enforcement of sanctions and penalties.

The CPA has established the CC to address consumer complaints which violate the CPA and the NCA,³⁴⁶ however the effectiveness of the CC is a much debated topic. This is because it is often extremely difficult to get a hold of the CC due to a non-responsive call centre, and/or

³⁴¹NN Agbeko ‘On the characteristics of the free market in a cooperative society’ (2015) 1- where the author states that the fundamental trait of a true free market economy is that market exchanges are entirely voluntary and that currencies should emerge from the voluntary exchange of goods and services.

³⁴²SALRC Discussion Paper (note 34 above) 432-465 & J Duncan Presentation to the Press Freedom Committee, 30 January 2012 ‘Press self-regulation, statutory regulation or co-regulation?’ available at <https://www.ru.ac.za/media/rhodesuniversity/content/highwayafrica/documents/presentations/Press%20self-regulation%20statutory%20regulation%20or%20co-regulation.pdf> accessed on 5 November 2016.

³⁴³Chapter 4 of the CPA.

³⁴⁴Chapter 7 of POPI.

³⁴⁵Definition available at <http://www.lexisnexis.co.za/our-solutions/private-sector/research-solutions/dictionary-of-legal-words-and-phrases.aspx> accessed on 11 October 2015; R Baldwin, M Cave & M Lodge *Understanding Regulation: Theory, Strategy, and Practice* (2012)11.

³⁴⁶s 85 of the CPA.

a backlog of complaints to deal with.³⁴⁷ Professor Woker³⁴⁸ has remarked that the CC lays out a difficult process for consumers to follow should they seek relief. For example, if a consumer has purchased a defective product, they must first approach the supplier of that product for relief. In the event that the consumer has no success with the supplier, they must then approach either a relevant ombud, alternative dispute resolution forum or consumer court, of which there aren't many across SA.

If all the aforementioned remedies fail, it is only then can a consumer approach the CC. In this regard, Professor Woker submits that consumers often get confused as to how to go about solving their problems, and those who do not, simply do not wish to put the time and effort into following such a long and drawn out process.³⁴⁹

Nonetheless, despite there being weaknesses in the enforcement capacity of the CC, the establishment thereof was indicative that SA had realised that there was a need to cater for the concerns that consumers face, and it is submitted that some form of recourse is preferable to none at all. This is perhaps an opportunity for the Information Regulator to set a precedent which the CC can draw on in respect of enforcement of the CPA.

From the discussion in chapter 4, it is evident that direct marketing is densely regulated by statute and it is therefore submitted that at present, it appears that although SA has the opportunity to indulge in some form of self-regulation or co-regulation (to be considered below), it rather appears to have adopted a strict system of statutory regulation in relation to direct marketing.

³⁴⁷Y Mupangavanh 'An Analysis of The Dispute Settlement Mechanism Under The Consumer Protection Act 68 of 2008' (2012) (15)5 PER/PELJ 325 & 'Is the consumer commission alive?' available at <http://www.news24.com/Archives/City-Press/Is-the-consumer-commission-alive-20150429> accessed on 2 August 2015.

³⁴⁸Mupangavanh (note 347 above) 332-336 & 'Effectiveness of CPA faces many hurdle's - 15 June 2011 iol.co.za - independent online'

Available at <http://www.blacksash.org.za/index.php/media-and-publications/black-sash-in-the-media/242-effectiveness-of-cpa-faces-many-hurdles-15-jun-2011-iolcoza-independent-online> accessed on 30 November 2015.

³⁴⁹M A Du Plessis 'Enforcement and Execution Shortcomings of Consumer Courts' (2010) *SA Merc LJ* 517-531 & 'Effectiveness of CPA faces many hurdles - 15 June 2011 iol.co.za - independent online'

Available at <http://www.blacksash.org.za/index.php/media-and-publications/black-sash-in-the-media/242-effectiveness-of-cpa-faces-many-hurdles-15-jun-2011-iolcoza-independent-online> accessed on 30 November 2015.

6.2.1. The advantages and disadvantages of statutory regulation

The advantages of statutory regulation are as follows:³⁵⁰

- a) With regulation in place, there is the benefit of adjudication. Once decisions have been made by the courts, a precedent is set and this allows for other consumers to rely on such judgments.
- b) Legislation is drafted and passed in accordance with public policy. This means that a particular piece of legislation will usually be representative of what society wishes at a particular point in time.
- c) Legislation creates legal certainty.
- d) Legislation represents the force of law and those who do not comply will have to face the wrath of the law.
- e) It also prescribes minimum standards of behaviour which may not be derogated from. In the context of direct marketing, examples of such standards include the opt-out and opt-in mechanisms created by the CPA and POPI respectively.

The disadvantages of statutory regulation are outlined by Baldwin and Cave³⁵¹ as follows:

- a) Legislation is often inflexible, rigid and unresponsive to change. This means that it is more difficult to regularly amend legislation, and that legislators are unlikely to incorporate every single change in the industry into legislation.
- b) There is often also a long delay before the regulations take effect, and so this will leave the industry unregulated for a gap period. As can be seen with POPI, regulations have not yet been promulgated despite the activation of the provisions relating to the creation of regulations.
- c) Enforcement of legislation is costly and is administratively a burden as in most disputes, the solution is linked to litigation.³⁵² With many courts, there is a back-log with cases and this may lead to a consumer waiting for a long period of time in order to seek judicial redress.³⁵³
- d) Many consumers require instant solutions to their issues as opposed to following lengthy processes of exercising their rights as pointed out above.

³⁵⁰T Woker *The franchise relationship under South African law* (2012) 59.

³⁵¹Baldwin & Cave (note 345 above).

³⁵²I Ramsay *Consumer Law and Policy Frameworks and forms of regulation of consumer markets* 3ed (2012) Ch3.

³⁵³Ibid.

- e) Compliance with legislation can also deter businesses and people from entering the market. This alters the chain of supply and demand and it is the consumer who then has limited access to goods and services.³⁵⁴
- f) It sometimes provides a minimum standard and does not require industries to go any further than that. Businesses therefore do not aim to comply with the spirit of the law, but rather just to meet minimum compliance.
- g) Part of the process of criminal sanction requires the matter to be reported to the police. This causes inconvenience and the situation is most likely not going to be given the needed attention, as the police service may not necessarily attribute the same amount of importance to a truant direct marketer, as they would to a serial killer on the loose for example.

Although the CPA was promulgated over 7 years ago, the pre-emptive block registry has not yet been established, and although in light of POPI there may not be a need for it to be established anymore, this delay is illustrative of how legislation is not always effectively implemented. The regulations to POPI have also not yet been promulgated, nor is POPI fully effective as yet, despite it being promulgated in 2013. These are perhaps some of the major downfalls of statutory regulation, as in the midst of all these delays, it is the consumer who is left unprotected.

Overall, statutory regulation is indeed required for the effective functioning of the direct marketing industry as having legal certainty and the force of law represents a stable regulatory framework.³⁵⁵ On its own however, it may prove to be far too rigid to provide the best protection for consumers. It is submitted that it be supplemented with certain attributes of self-regulation to be considered below, so as to create a softer middle ground for effective regulation.

6.2.2. The Information Regulator

6.2.2.1. Introduction

The Information Regulator has been established by POPI³⁵⁶ and is responsible for regulating both POPI and the Promotion of Access to Information Act.³⁵⁷ It is an independent body,

³⁵⁴T Van der Merwe *Alignment of the supply and demand within a supply chain: A qualitative study* (LLM thesis, University of Pretoria 2006) 2.

³⁵⁵H Falkena ‘Financial Regulation in South Africa’ (2001) 18 publication available at <http://www.resbank.co.za> accessed on 12 September 2016.

³⁵⁶The Information Regulator is provided for in Chapter 5 of POPI.

which exercises its powers impartially and without fear, favour or prejudice over both the public and private sector.³⁵⁸ In creating the Regulator, it is clear that the drafters of POPI had recognised the need for a specialised body that would be responsible for the regulation of data protection as a customised area of law.³⁵⁹

6.2.2.2. Powers and functions of the Information Regulator

Chapter 5 of POPI sets out the functions of the Information Regulator which include providing education in respect of compliance with POPI, dealing with complaints related to violations of the legislation, monitoring compliance with POPI, the creation of codes of conduct to regulate industries, consulting with interested parties on matters relating to data protection and aiding trans-border data flows and enforcement of the right to privacy.³⁶⁰

POPI also provides for an enforcement committee to be established, which will be responsible for enforcing compliance with it.³⁶¹ Individuals are expected to address their complaints in writing to the Information Regulator,³⁶² and such complaints may then be investigated accordingly.³⁶³ Should the outcome of the investigation yield that an individual has not complied with POPI, the Regulator may issue the truant party with an enforcement notice.³⁶⁴

The Regulator is authorised to create codes of conduct which it may do either at its own discretion, or if an application is made by a body that is sufficiently representative of the class of bodies,³⁶⁵ industry, profession, or vocation as defined in the code.³⁶⁶ This provision allows industries to formulate their own codes of conduct, which may then be approved and guided by the Regulator should they comply with the standards set out in POPI.³⁶⁷

³⁵⁷ Act 2 of 2000.

³⁵⁸ s 39 of POPI.

³⁵⁹ M De Bruyn ‘The Protection of Personal Information Act – Impact on South Africa’ (2014) 13 (6) *International Business and Economics Research Journal* 1316.

³⁶⁰ s 40 of POPI.

³⁶¹ s 50 of POPI.

³⁶² s 75 of POPI.

³⁶³ s 81 of POPI.

³⁶⁴ s 95 of POPI.

³⁶⁵ This will be decided at the discretion of the Information Regulator.

³⁶⁶ s 61 of POPI.

³⁶⁷ s 65 of POPI.

One of the pertinent powers of the Regulator relates to its ability to undertake research into and monitor developments in matters relating to data protection, so as to ensure that any such development or change is continuously covered by the data protection principles in POPI.³⁶⁸ This power is especially important, considering that technology is an aspect of life that is continually advancing, and it is comforting to know that the Regulator has the power to mitigate any possible threats to data privacy that evolves.³⁶⁹

It is submitted that the Information Regulator take advantage of its aforementioned powers by researching the trends and developments of the direct marketing industry and perhaps also researching the successes and failures of foreign jurisdictions such as the UK and NZ so as to be able to issue codes that are expertly drafted on the basis of industry best practice. This will ensure that the framework relating to direct marketing is continually relevant and efficient.

POPI also provides for the appointment of an information officer³⁷⁰ by industries and state bodies who will be responsible for encouraging compliance with POPI, and who will be expected to work closely with the Information Regulator in so far as achieving its functions is concerned. The appointment of the information officer is mandatory, and this is perhaps indicative of the strict stance that POPI aims to take in facilitating the protecting of personal information within businesses. In the case of direct marketers, this aims to ensure that from an internal level, there is no place for ignorance or circumvention of the provisions of POPI.

As examined in paragraph 4.4.7, POPI's penalty of a maximum of up to 10 years in prison and/or an administrative fine of up to R10 million appears to illustrate that the Information Regulator is meant to take a strict approach in respect of violations of the legislation. This is of course theoretical at this point, and it remains to be seen whether the Information Regulator will in fact act in accordance with the strict stance provided for in POPI.

³⁶⁸s 40(1)(b)(ii) of POPI.

³⁶⁹Reddy (note 116 above)) 40.

³⁷⁰s 55 of POPI.

6.2.2.3. Commentary

The success of POPI will depend greatly on the effectiveness of the Information Regulator to perform its functions in so far as enforcing compliance with the Act is concerned. It is hoped that the Regulator will take due advantage of its allocated powers and duties by for example conducting comprehensive research into the regulation of direct marketing both in SA and foreign jurisdictions to determine areas for improvement and lessons to be learnt in respect of data protection. Moreover, the only way to deter truant direct marketers from circumventing the provisions of POPI is for the Regulator to adhere to its strict sanctions and penalties, perhaps following the example of the ICO in this regard.

6.3.Self-regulation

Self-regulation refers to when industries and businesses formulate their own rules, regulations, codes and practices that are specific to their industry.³⁷¹ These usually include setting standards for unacceptable behaviour, providing mechanisms to identify delinquent behaviour and formulating incentives to ensure that such behaviour is changed.³⁷² It also creates penalties for non-compliance, albeit to that particular industry's approval. In order to be effective, the industry must develop codes of conduct and ways to manage and implement them.³⁷³

Self-regulation may occur through government setting standards of regulation, and then regulating its compliance through industry bodies, or the bodies themselves may set standards and then take charge of their compliance, whilst government simply approves the set standards.³⁷⁴ Additionally, the bodies may either regulate the entire industry or merely regulate those members who have joined them voluntarily.³⁷⁵

6.3.1. The Direct Marketing Association of South Africa (DMASA)

The DMASA³⁷⁶ is a self-regulatory body which has been established in accordance with the CPA.³⁷⁷ Its membership is voluntary and it assists consumers by providing a hotline for

³⁷¹ AC Page 'Self-Regulation and codes of practice' *Journal of Business Law* 1980 24-31.

³⁷² DP Strachan 'An evaluation of the Self-Regulation of Promotional Competitions in South Africa' *PER/PELJ* 2016(19) 4.

³⁷³ Woker (note 350 above) 57.

³⁷⁴ Baldwin & Cave (note 345 above).

³⁷⁵ *Ibid.*

³⁷⁶ www.dmasa.co.za.

³⁷⁷ s21 of the CPA.

consumer complaints. Furthermore, the DMASA's website³⁷⁸ provides a national opt-out register, in which consumers may indicate their preference not to be the recipients of direct marketing by certain businesses. The DMASA will then provide the details of the consumers who have opted out to its members, who are so on a voluntary basis, and the members will have to refrain from contacting these consumers. In the absence of the opt-out registry by the CC, this is the only available option to consumers at present.

The effectiveness of this opt-out register is however questionable as previously outlined in paragraph 4.3.5. This is illustrative of the lack of enforcement capacity that the organisation possesses, simply because it is not supported by some form of state intervention.³⁷⁹

The DMASA also comprises committees which consist of experts from various direct marketing industries who meet regularly to discuss pertinent developments in their particular line of business.³⁸⁰ It is submitted that this aspect of self-regulation is indeed a valuable one, as it ensures that the industry codes are continually updated and made relevant to society within a specific period.

In the landmark Ketler Judgment as discussed in chapter 4,³⁸¹ a salient triumph was made for self-regulatory bodies in that despite Ketler not being a member of ISPA, its code of conduct was still recognised as being in the public interest and was applicable to Ketler.³⁸² Post the judgement, it is however unclear how statutory regulation and self-regulation coincides,³⁸³ but nevertheless, it is submitted that this case has indeed highlighted the importance of industry regulation and put forth a possibility of the existence of a co-regulatory framework in the near future.

³⁷⁸The DMASA'S National opt-out register is available at www.nationalopt-out.co.za accessed on 18 October 2015.

³⁷⁹Swales (note 216 above) 74.

³⁸⁰www.dmasa.co.za

³⁸¹See paragraph 4.24.

³⁸²See paragraph 4.24.

³⁸³Pistorius & Tladi(note 149 above) 688.

6.3.2. The advantages and disadvantages of self-regulation

The advantages of self-regulation are as follows:

- a) It is cost effective and more flexible for an industry to regulate themselves.³⁸⁴ This is because there is no need to formally draft legislation, instead it is left to the industry to do it at their own pace and within their own cost framework.
- b) In the event of non-compliance the industry will be able to respond more efficiently and will not have to wait for legislative redress.³⁸⁵
- c) Rules and codes can be easily revised.³⁸⁶ This is because the drafters of these codes are directly involved in the day to day activities within the industry and they are best positioned to amend or change the codes as they see fit.
- d) Use of the courts are minimised and this reduces the need for costly litigation.³⁸⁷
- e) Lastly, the very people who will be formulating the rules are most often than not experts in their respective fields.³⁸⁸ They are therefore better equipped to make rules as they are likely to have a greater appreciation for the mechanics of the direct marketing industry than legislators for example.³⁸⁹

The disadvantages of self-regulation are as follows:

- a) Membership of the industry bodies are usually voluntary and this means that some businesses may very well be excluded from the spectrum of regulation, and so they will be left to operate the way they wish to, which in most cases, is in a manner that is inconsistent with the industry codes.³⁹⁰
- b) Industry codes can be easily changed and revised and this may sometimes lead to confusion and a lack of legal certainty in the consumer market.³⁹¹

³⁸⁴C Scott & J Black *Craston's Consumers and the law* 3 ed (1984) 31-64.

³⁸⁵Woker (note 350 above) 57.

³⁸⁶PJ Hustinx 'Co-regulation or Self-regulation by Public and Private Bodies - the Case of Data Protection' Published in Freudengabe fur Alfred Bullesbach 2002 Umbruch von Regelungssystemen in der Informationsgesellschaft accessed at <http://www.dutchdpa.nl/documenten/en> on 1 November 2016.

³⁸⁷Falkena (note 355 above) 8.

³⁸⁸N Melville & J Yeates "Section 82" in Eiselen S and Naudé T (eds) *Commentary on the Consumer Protection Act* (original service) (Juta Claremont 2014) 82-1 – 82-6.

³⁸⁹Ibid.

³⁹⁰Swales (note 216 above) 74.

³⁹¹G Hepbum 'Alternatives to Traditional Regulation' (2006) available at <http://www.oecd.org/gov/regulatory-policy/42245468.pdf> accessed on 16 November 2015.

- c) Enforcement of the codes depends entirely on the body's ability to do so.³⁹² If it lacks the power and capacity to enforce its rules and sanctions, then even having the best codes of practice will not make a difference to the regulation of the industry.
- d) Businesses are very likely to take care of their interests over any other issues. This then jeopardises the objectivity of the regulations and whether or not they will be enforced for the true protection of consumers.³⁹³
- e) The regulatory bodies are usually underfunded so consumers are often unaware of their existence.³⁹⁴ This then hinders their enforcement capacity and consumers are unaware that such redress is even at their disposal.
- f) Lastly, even if the industry bodies do have sanctions in place, it is unlikely to be anything persuasive enough to ensure compliance and should a business not comply, in most cases such a business will simply resign instead of enduring the sanction.³⁹⁵

According to Professor Woker, in order for self-regulation to be effective, two things must be present; namely, there must be an industry body that has the capacity to regulate the industry, and secondly, laid down sanctions must be severe enough to ensure compliance.³⁹⁶ She gives an example of the Advertising Standards Authority and comments that it is one of the most effective industry bodies at present due to two reasons; namely, that the chief role players in the industry belong to the body; and secondly that the main sanction of withholding advertising time and space is indeed a powerful deterrent to ensure compliance with the industry codes.³⁹⁷

Thus, it is submitted that self-regulation, entirely on its own, is unable to offer the direct marketing industry sufficient stability, which is needed to protect consumers. In this regard, a balance needs to be struck between government and industry regulation, and it is submitted that such balance could take the form of co-regulation to be considered below.

³⁹²Falkena (note 355 above) 7-11.

³⁹³Woker (note 350 above) 59.

³⁹⁴ P Vella 'Regulating the ICT industry: too little too late?' available at <http://hsf.org.za/resource-centre/focus/focus-60-january-2011-making-south-africa-work-rules-of-the-game/PVella.pdf/download>. accessed on 2 October 2016.

³⁹⁵Swales (note 216 above) 74-75.

³⁹⁶Woker (note 350 above) 57.

³⁹⁷ASA Code of Advertising Practice ix.

6.4.Co-regulation

Co-regulation is a hybrid of self-regulation and state regulation.³⁹⁸ It complements legislation and is therefore not an alternative to legislation.³⁹⁹ It recognises that industries have the invaluable expertise to be able to regulate themselves, but that they still need a safety net in the form of state oversight.⁴⁰⁰

Both the CPA and POPI recognise a system of co-regulation and state that both the CC⁴⁰¹ and the Information Regulator⁴⁰² have the authority to recognise industry codes of conduct which must comply with the relevant legislation, and which can become binding on the industry as a whole.⁴⁰³ To date, the CC has missed the opportunity to enforce the codes of conduct of the DMASA nationally, and it is hoped that the Information Regulator does not follow suit.

In the event that the DMASA's industry codes are recognised by both the CC and the Information Regulator or the Information Regulator creates its own industry codes, it is submitted that a solid framework of co-regulation will come into existence as there will still be government oversight in the form of POPI, but the recognised or created industry codes will form the basis of an industry specific approach to the regulation of direct marketing.

In respect of the discussion of the regulatory framework in NZ in chapter 5, it is submitted that the Information Regulator draw on the enforcement powers of the Privacy Commissioner to recognise industry codes as peremptory law. In this way and for example, non-members of the DMASA will not be able to circumvent the industry codes, as it will apply across the board, regardless of membership. It is submitted that this approach is definitely capable of being implemented in the near future as the Ketler case⁴⁰⁴ has set the frontier for the recognition of industry codes as mandatory law.

³⁹⁸E. Best 'Alternative Regulations or Complementary Methods? Evolving Options in European Governance' (2003) *Eipascope* 1, 3.

³⁹⁹Ibid.

⁴⁰⁰L Senden 'Soft Law, Self-Regulation and Co-regulation in European Law: Where do they meet?' *Electronic Law Journal of Comparative Law* (2005).

⁴⁰¹s 82 of the CPA.

⁴⁰²s 60-62 of POPI.

⁴⁰³See discussion of the Ketler case in chapter 4 and in Pistorius and Tladi (note 149 above).

⁴⁰⁴See discussion of the case in chapter 4.

6.5.Commentary

From the above discussion of the statutory and self-regulatory approaches to the regulation of the direct marketing industry in SA, it can be seen that both these forms appear to be on two extreme polar ends, each with its unique advantages and disadvantages. It is submitted that the most appropriate form of regulation lies somewhere in the middle of state intervention and industry specific regulation, which takes the form of co-regulation. A form that is equipped with having the stability, certainty and force of the law whilst simultaneously being flexible enough to stay relevant to evolving society and technology and which is able to expertly regulate the practice of direct marketing.

It is submitted that the sanctions contained in POPI, coupled with the appointment of an information officer within each direct marketing business, and the power of the Information Regulator to potentially recognise or be guided by the DMASA's codes of practice as binding across the board, are elements if present together, which can lead to the effective co-regulatory approach to the direct marketing industry. This is because such a combined system will be representative of the stability and force of law, whilst still maintaining the flexibility of industry regulation and appreciating the fact that the direct marketing industry may offer considerable expertise in relation to how the market ought to be effectively regulated from an insider perspective. Thus, truant marketers will still have the wrath of the law to face and consumers and direct marketers will be able to partake in a market that is regulated in a mutually beneficial manner.

Chapter 7: Conclusion and recommendations

7.1.Overview

The inspiration behind the examination of the issue of direct marketing in this dissertation lay in the fact that it is almost trite that every reader will have been exposed to direct marketing in some form or another and will relate to the difficulties faced by the everyday consumer in this regard. Direct marketing is not only bothersome when it is unsolicited, but it simultaneously encroaches on our constitutionally enshrined right to have our personal information respected, protected and kept private.

Framing this problem lead to the consideration of the current regulatory framework, i.e. the common law, the Constitution, the CPA and ECTA. In respect of the common law, an individual has recourse in the form of the *actio inuriarum*, and although privacy does not exist as a distinct and separate right under the common law, it has been judicially interpreted to form part of the concept of *dignitas*, and has now been recognised as being an independent personality right.⁴⁰⁵ However, a fundamental flaw of the common law is that in order to have access to the *actio inuriarum* as a remedy, the actions of the direct marketer in misusing the personal information of a consumer, must have been intentional. Thus, negligent acts of a direct marketer will not be sufficient to satisfy the fault element, and the consumer would at this point have to rely on the Constitution and statutory remedies.

In my view, and in comparison to the UK and NZ for example, which do not codify or entrench the right to privacy as SA does, the Constitution comprehensively regulates the right to privacy and allows for a clearer placing of the right, i.e. that it is a constitutional imperative.⁴⁰⁶ In order to give effect to the Constitution, the legislature promulgated several statutes, for example, the CPA and ECTA, which regulates direct marketing in sections 11 and 45 of each piece of legislation respectively.⁴⁰⁷

In terms of the aforementioned sections, the consumer is currently afforded opt-out mechanisms through which they may indicate their preference not to be contacted for direct marketing purposes. However, as examined in paragraph 4.2.5, these opt-out mechanisms are

⁴⁰⁵See discussion in paragraph 2.2.

⁴⁰⁶See discussion in paragraph 2.3.

⁴⁰⁷See discussion in chapter 4.

riddled with difficulties and are a vital contributory factor as to why consumers face hardship in relation to direct marketing.

The subsequent promulgation of POPI, as previously mentioned, is indicative that the legislature is aware that SA was in severe need for comprehensive data protection legislation.⁴⁰⁸ POPI is seen to be a fundamental game-changer in the industry, by rendering the aforementioned opt-out mechanisms superfluous and by establishing the regime of opt-in consent, thereby attempting to reduce the scourge of unsolicited direct marketing in SA.⁴⁰⁹

In light of the aforementioned study of direct marketing, the purpose of this chapter is to draw a conclusion as to the effect that POPI will have on the regulatory status quo, and provide suggestions for the way forward in so far as improving the existing problem areas in the direct marketing industry.

7.2. Recommendations for South Africa

POPI is a significant improvement on the current opt-out system, as now direct marketers will not be able to inundate consumers with unsolicited communications until such consumers take the effort to opt-out, but instead would need to ascertain the consumers consent before sending through marketing communications. This change is indicative that the legislature wishes to tip the power-balance in favour of the consumer so that consumers are left feeling more empowered and more in control of their place in the market. This proposed change in favour of the consumer is also in line with global trends of consumer awareness and empowerment which indicates that SA is or is aiming to be on par with developed markets in so far as consumer protection is concerned⁴¹⁰.

There are however some concerns which relate to the fact that POPI only requires a consumers' consent to be obtained once. It is submitted in this regard, that if abused, the opt-in regime could essentially revert to an opt-out system as consumers, although having initially consented to communications, may after a while be inundated with unwanted communications and would thereafter have to opt-out once again.⁴¹¹ In order to prevent this situation from arising, direct marketers should only be permitted to contact consumers who

⁴⁰⁸See paragraph 4.4.

⁴⁰⁹Geissler (note 111 above) 386.

⁴¹⁰Woker (note 15 above).

⁴¹¹See discussion in paragraph 4.4.5.

have consented for similar communications, and if the consumer wishes to halt such communications, they should be given an effective mechanism to opt-out.

Moreover, both the current opt-out and future opt-in regimes, should be revised so as to follow the example of the UK's DPA, which specifically details how the mechanism should work. Such specificity lessens the scope for abuse and offers greater protection for the consumer.

POPI's opt-in regime can be said to conflict with the CPA's provision for the establishment of a national pre-emptive block registry, as the mere fact that a consumer will have to give their consent to communications, to an extent nullifies the purpose of the registry.⁴¹² It is submitted that the legislature provide clarity on how these two provisions will co-exist, if they are to that is, however it is suspected that there will not be a need for the registry to be established anymore. Moreover, considering that the establishment of the registry was delayed to date, it is unlikely that the CC will comply with this aspect of the CPA in light of the changing landscape that POPI imposes.

The discussions in chapters 4 and 6 have outlined that statutory regulation on its own, appears not to be as effective as it was perhaps intended to be. This is because legislation is often inflexible and rigid and not responsive to change, amongst other reasons. Industry regulation, as discussed in paragraph 6.3, on its own appears to lack the enforcement capacity that legislation offers. It is therefore submitted that a balance be struck between the statutory regulation of direct marketing under the CPA, ECTA and POPI and industry regulation, in the form of co-regulation so as to have the stability of legislation whilst simultaneously having the flexibility and expertise of industry regulation.⁴¹³ It is further submitted that such a system of co-regulation will be able to effectively deal with the current legislative inconsistencies experienced by South African consumers to date.

With regard to communications that are received from foreign jurisdictions, it is submitted that the legislature considers how the data protection framework in SA could extend extra-terrestrially, to protect consumers from unsolicited communications holistically and not just within SA. This could perhaps take the form of a multilateral agreement between the countries that typically engage in sending cross-border communications and which has

⁴¹²See discussion in paragraph 4.3.4.

⁴¹³See discussion in chapter 6.

similar data protection legislation so that such communications are captured regardless of the jurisdiction to which it is sent.⁴¹⁴

Lastly, it is submitted that in order to stay relevant and to ensure that legislation is always dealing with evolving technology, that the regulation of direct marketing in SA be regularly visited so that new advancements in technology do not create vacuums within which direct marketers may circumvent the law. In my view, it is the Information Regulator who will be primarily responsible for fulfilling this function as it is armed with extensive powers as outlined previously.⁴¹⁵

7.3. Recommendations for direct marketers

It is important for direct marketers to note that the dawn of POPI is not only inevitable, but that it is going to fundamentally alter the status quo as they know it. It is submitted that direct marketers engage in preparation for compliance with POPI as outlined in paragraph 4.4.8.

Furthermore, in the event that a particular marketing company has branches in foreign jurisdictions, it is recommended that such companies ensure that the foreign jurisdiction offers adequate protection to the personal information of consumers, which is either similar, or superior to the protection offered in POPI. This will enable such companies to continue business as usual, so long as compliance with POPI is at the forefront of their business plan.

It is also recommended that direct marketers actively involve themselves in issues concerning a self-regulatory approach to the industry so that in the event that the Information Regulator utilises its allocated powers to create binding industry codes, such marketers would have been engaged with such issues, and possibly would be able to contribute to the formation of such codes. This will ensure that the interests of all stakeholders involved are catered for as appropriate.

7.4. Recommendations for consumers

Perhaps one of the most important elements of consumer protection mechanisms is that of consumer education. Consumers need to be alert as to what their rights entail and what relief they have access to should their rights be violated. For example, consumers should be made aware of the dawning opt-in regime in POPI so that they know that marketers need to obtain

⁴¹⁴Swales (note 216 above) 83.

⁴¹⁵See discussion in paragraph 6.2.2.

their consent first before any communications may be sent to them. As a further example, consumers need to be aware of when they may be contacted for direct marketing purposes so that they may refuse contact from direct marketers within prohibited times.⁴¹⁶ These are some essential facts that consumers must be conscious of in order to effectively vindicate their rights to data privacy.

It is submitted in this regard that the Information Regulator ought to draw on the powers afforded to it in terms of section 40(1)(a) of POPI, so as to promote consumer education by undertaking educational programmes to make consumers aware of their rights in relation to POPI and data privacy.

Ultimately, it is however the consumer who must take responsibility for their data privacy concerns as the shift in the legislative dynamic awards more power to the consumer than before and accordingly, advantage should be taken of this. Consumers can empower themselves by: researching data protection and direct marketing trends; reporting truant direct marketers to the Information Regulator; contacting the Information Regulator for information if they are uncertain what action to take in particular circumstances or if they are unsure of their rights in a particular situation; and holding the Regulator accountable when they feel their data privacy concerns are not being met.⁴¹⁷

7.5. Conclusion

In light of all of the above recommendations, it can be seen that SA has laid a solid foundation for the protection of personal information and the promulgation of POPI is yet another way of aligning itself to international standards of data protection. It is further hoped that POPI does in fact meet its mandate in relation to protecting personal information as it is submitted that this will largely depend on the enforcement capacity of the Information Regulator. Thus, the success of POPI, in so far as effectively improving the regulation of direct marketing in SA is awaited with bated breath.

⁴¹⁶See discussion in paragraph 4.3.6.

⁴¹⁷See discussion in chapter 4.

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9. REPORTS AND DISCUSSION PAPERS

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27 May 2015

Ms Yasmeen Rasool (210500581)

School of Law

Howard College Campus

Dear Ms Rasool,

Protocol reference number: HSS/0541/015M

Project title: An examination of how the Protection of Personal Information Act 4 of 2013 (POPI), will impact on direct marketing and the current legislative framework in South Africa

Full Approval – No Risk / Exempt Application

In response to your application received on 19 May 2015 the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully



Dr Shenuka Singh (Chair)

/ms

Cc Supervisor: Mr Lee Swales

Cc Academic Leader Research: Dr Shannon Bosch

Cc School Administrator: Mr Pradeep Ramsewak

Humanities & Social Sciences Research Ethics Committee

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