

The Consumer Protection Act: Direct Marketing

By Chantelle Gladwin and Adam Civin

Modern day advances in technology allow consumers to be contacted anytime day or night via e-mail, SMS and telephone calls. The Consumer Protection Act 68 of 2008 (CPA) seeks to regulate such communication by advertisers by empowering the consumer to restrict unwanted direct marketing.

The right to restrict unwanted direct marketing

In terms of s 11 of the CPA every person shall have the right to refuse, terminate or pre-emptively block any communication that is primarily for the purposes of direct marketing.

Direct marketing is defined in the CPA as:

‘[a] means to approach a person, either in person or by mail or electronic communication, for the direct or indirect purpose of –
(a) promoting or offering to supply, in the ordinary course of business, any goods or services to the person; or
(b) requesting the person to make a donation of any kind for any reason.’

Once a consumer has been contacted for the purposes of direct marketing such a consumer may demand, during or within a reasonable time after the communication, that the person who initiated the communication, desist from any further communication.

In order to facilitate this right of the consumer any person authorising, directing or conducting any direct marketing must implement appropriate procedures to facilitate the receipt of demands of consumers to desist from such communication.

Furthermore, once this demand has been received the communicator must not direct or permit any person associated with such communication activity to direct or deliver any communication for the purpose of direct marketing to a person who has either refused, pre-emptively blocked or opted out from receiving such communication.

It is important to note that the CPA provides that no person may charge a consumer a fee for making a demand to desist communication or registering a pre-emptive block. Potentially this means that the cost of sending an SMS to opt out of direct marketing communications, could be recovered from the person making those unsolicited communications.

Prohibited time for contacting consumers

The CPA further sets out specific times that consumers may not be contacted for the purposes for direct marketing. A marketer may not engage at all in any direct marketing directed to a consumer at home on Sundays or public holidays, Saturdays before 9 am and after 1 pm and all other days between the hours of 8 pm and 8 am the following day, except to the extent that the consumer has expressly or implicitly requested or agreed otherwise. Additionally direct marketing may not be timed to be delivered to the consumer during the prohibited times unless expressly, in writing, agreed to by the consumer.

A direct marketer is not in breach of the CPA if he or she has sent out the direct marketing within the period provided for, even if the consumer received the direct marketing outside of this. The onus to prove that the direct marketing was dispatched during the allowed period rests fully on the direct marketer and not the consumer.

Reporting breaches

If you are of the belief that a company has breached the provisions of the CPA, an anonymous complaint may be lodged with the National Consumer Commission for investigation.

How to exercise your rights pre-emptively

The CPA states that the Consumer Commission may establish or recognise as authoritative, a registry in which a person may register a pre-emptive block either generally or for specific purposes, against any communication that is primarily for the purpose of direct marketing. To date the commission has failed to set-up such registry. However, the Direct Marketing Association of South Africa (DMASA) has jumped at the opportunity to rise to the occasion.

The DMASA website (www.nationalopt-out.co.za), hosts a national opt out register, whereby users can indicate their intention to not receive direct marketing messages. These details are then provided to paid up DMASA members on a monthly basis, who are (in theory) then prevented from contacting consumers who have indicated their reluctance to be contacted by direct marketers.

Consequences of failing to adhere to consumers wishes

The question that remains is – after you have taken the time to inform DMASA that you do not want to receive direct marketing messages from its members, and a member or a company, which is not a member of DMASA persists in its direct marketing contact with you – what recourse does one have?

Conclusion

The authors are of the view that, apart from the costly and time-consuming exercise of applying to court for an interdict preventing further communication with you, or alternatively pressing criminal charges for harassment and following up with the South African Police Services to ensure that the charges 'stick' (which is in itself a massively time consuming and frustrating exercise), only a direct challenge to the National Consumer Commission will result in an answer.

- How to opt out of direct marketing: The DMASA website is at the following link:
www.nationalopt-out.co.za

Chantelle Gladwin *BA LLB (Rhodes) LLM (Unisa) (Notary) (Conveyancer)* is an attorney and Adam Civin *BA LLB (UP)* is a candidate attorney at Schindlers Attorneys in Johannesburg.