

Cyberlaw@SA III

The law of the internet in South Africa

THIRD EDITION

Sylvia Papadopoulos

Sizwe Snail

(EDITORS)

Van Schaik
PUBLISHERS

Published by Van Schaik Publishers
1059 Francis Baard Street, Hatfield, Pretoria
All rights reserved
Copyright © 2012 Van Schaik Publishers

No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means – electronic, mechanical, photocopying, recording or otherwise – without the written permission from the publisher, except in accordance with the provisions of the Copyright Act, Act 98 of 1978.

Please contact DALRO for information regarding copyright clearance for this publication.

Any unauthorised copying could lead to civil liability and/or criminal sanctions.

Tel: 086 12 DALRO (from within South Africa) or +27 (0)11 712 8000

Fax: +27 (0)11 403 9094

Postal address: PO Box 31627, Braamfontein, 2017, South Africa

www.dalro.co.za

First edition 2000

Second edition 2004

Third edition 2012

ISBN 978 0 627 02807 6

Commissioning editor Chandré Blignaut

Production manager Werner von Gruenewaldt

Editorial coordinator Estian Behrens

Copy editors Linton and Beverlie Davies

Proofreader Chrisna Nel

Cover design by Gisela van Garderen

Typeset in 9.3 on 11 pt Century Old Style by Pamset, Johannesburg

Printed and bound by Ultra Litho, Johannesburg

Every effort has been made to obtain copyright permission for material used in this book. Please contact the publisher with any queries in this regard.

Please note that reference to one gender includes reference to the other.

This book has been reviewed by independent peer reviewers.

Online consumer protection

Sylvia Papadopoulos

5.1 INTRODUCTION

In South Africa, online consumer protection was initially regulated in terms of the common law, the now repealed Usury Act 73 of 1968, the Credit Agreements Act 75 of 1980, and the Consumer Affairs (Unfair Business Practices) Act 89 of 1998,¹ certain industry-specific self-regulatory guidelines and codes² and Chapter VII of the Electronic Communications and Transactions Act 25 of 2002 (hereafter referred to as the ECT Act).

Online consumer protection is currently affected by newer legislation such as the National Credit Act 34 of 2005 (the NCA), the Consumer Protection Act 68 of 2008 (the CPA), and possibly in the future the proposed Protection of Personal Information Bill, B9-2009 (the PPI).³

5.2 THE RISE OF M-COMMERCE

Mobile handset technology and the use of mobile devices by consumers have made the mobile

commerce market (also known as mobile e-commerce or M-commerce) more consumer oriented. The OECD Policy Guidance for Addressing Emerging Consumer Protection and Empowerment Issues in Mobile Commerce defines the concepts as follows (OECD M-Commerce Policy Guidance 2009: 2):

- a) *M-commerce* refers to the commercial transactions and communication activities conducted through wireless communication services and networks by means of short message services (SMS), multimedia messaging service (MMS), or the internet, using small, handheld mobile devices that typically are used for telephonic communications.
- b) *Mobile operator* refers to a company that provides services to mobile subscribers.
- c) *Mobile vendor* refers to a company that sells goods and services through mobile platforms, either directly or through intermediaries including website operators (such as Yahoo! and

¹ The Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980 were repealed by the National Credit Act 34 of 2005 and ceased to apply on 1 June 2007, and the Consumer Affairs (Unfair Business Practices) Act 89 of 1998 was repealed by Section 121(2)(f) of the Consumer Protection Act 68 of 2008 in accordance with incremental implementation set out in Schedule 2.

² Such as the Code of Banking Practice, available at http://www.banking.org.za/our_industry/code_of_banking_practice/language_version/code_of_banking_practice_english.htm; the Direct Marketing Association Codes for Interactive and Direct Marketing, available at http://www.dmasa.org/dmasa/dma_load.php?str=1/18/0; and the Wireless Application Service Providers Association (WASPA) setting codes of conduct, advertising rules and a dispute resolution mechanism for members and consumers of the mobile services industry. More information is available at <http://www.waspa.org.za/>.

³ As published in *Government Gazette* No. 32495 of 14 August 2009.

eBay) and mobile aggregators (i.e. entities that assist mobile vendors by, for example, processing and forwarding multiple third-party vendor charges to mobile operators for billing to mobile subscribers).

d) *Mobile subscriber* refers to the individual who pays for a mobile phone subscription.

According to the OECD M-Commerce Policy Guidance (2009: 2),

[w]ith the convergence of operating platforms, M-commerce is now expanding into Internet-based e-commerce. This is making it increasingly difficult to distinguish mobile commerce from other forms of e-commerce. While mobile commerce does not as such require Internet access, ever more m-commerce transactions occur by means of communications system protocols (such as Web (HTML, TCP/IP) and Wireless Application Protocol (WAP) – and phones connected to wireless communications networks (e.g. 3G). In addition, an increasing number of personal data devices or smart phones are now able to support wireless telephonic communications. Mobile commerce is currently growing at a rapid pace in many OECD countries. In these countries, more and more individuals have advanced mobile phones and other such devices that allow them to benefit from a broad range of mobile services that are different from what is currently possible from fixed computers.

Currently, cellphone subscribers can use their devices to

- purchase and download content, such as movies, music, ring tones or games
- play online games or gamble
- access information available on a mobile screen, such as weather forecasts or the news
- access mobile TV and programme information
- obtain information tailored to data about their location
- access online banking and financial services and do financial transactions
- make payments for mobile activities, either charged to credit cards or cellphone bills
- purchase goods or services using the phone as a payment device (*e-wallet*), or
- vote in interactive TV programmes (OECD M-Commerce Policy Guidance 2009:2-3).

The roll-out of third and fourth-generation (3G and 4G) mobile services vastly increased the data transfer rate and therefore the variety of services that can be provided on a mobile device. The development of these mobile services, which offer

high-speed internet access on cellphones, complete with audio and higher-quality graphics, has expanded consumers' interest in these devices and opened up the potential for new commercial applications. As a result consumers can now reap the benefits of their handsets at any time anywhere. This raises some interesting consumer protection issues, such as the limited information that can be made available on a screen due to size and other technical constraints, the security of payments made via mobile devices and the high penetration of such devices among minors which can lead to problems such as over-consumption and access to inappropriate content (OECD M-Commerce Report 2007:4). A key challenge for all stakeholders (OECD M-Commerce Report 2007: 2-3) is to ensure that children benefit from mobile device services, while effectively protecting them from aggressive, inappropriate and abusive mobile marketing practices and offers.

Without focusing too much on device and medium-specific issues, this chapter aims to discuss in broad terms the protection of e-consumers or consumers in an online electronic environment within the current South African legislative framework. Readers will firstly appreciate that general consumer protection law is well represented in a number of other reputable publications (Van Eeden 2009; Jacobs *et al.* 2010) and secondly that a comprehensive detailed discussion or analysis of each of the above-mentioned pieces of legislation is not possible within the confines of a single chapter.

5.3 APPLICABLE CONSUMER PROTECTION LEGISLATION

5.3.1 The Electronic Communications and Transactions Act

5.3.1.1 Introduction

Chapter VII of the ECT Act introduced a number of important protective measures for online consumers over and above those that were normally available for offline consumers (Buys & Cronjé 2004), such as the duty of a supplier to provide: the minimum information as listed (Section 43(1)), a transaction summary display for the consumer to review and correct or withdraw from the transaction (Section 43(2)), a secure payment system (Section 43(5)), and notice of a cooling-off period (Sections 42(1)(r) and (44)), and to execute the contract within 30 days of receiving an order (Section 46). These provisions were modelled on the European Distance

Selling Directive⁴ and they set the basic parameters for South African website owners or electronic traders who have to construct their webpages in accordance with these provisions (Van der Merwe *et al.* 2008: 180). Failure to do so gives the consumer the right to cancel the transaction within 14 days of receiving the goods or services under the offending transaction (Section 43 (3) and (4)).

The reasons most often given for this additional protection is that online consumers face unique issues such as the fact that they cannot feel, touch, inspect or test the goods in the same way as a consumer could in any other retail environment, and that to promote trust there must be a secure payment system (Buys & Cronjé 2004: 140; Van der Merwe *et al.* 2008: 181).

Unsolicited junk mail and the collection of personal information for direct marketing are, however, not unique to online consumers, but the sheer magnitude, invasiveness and variety of these practices as well as the risks or negative consequences associated with an electronic environment, have solicited worldwide consumer and data protection responses.⁵

5.3.1.2 Field of application

Chapter VII, Section 42(1) of the ECT Act states that the consumer protection provisions only apply to electronic transactions. Eiselen (in Van der Merwe *et al.* 2008: 181) correctly points out that in order to obtain a clear view of the scope of the consumer protection provisions of Chapter VII, Section 42 must be read together with the rest of the chapter, which will make it clear that the chapter only applies to electronic transactions where one party is a consumer. Thus the scope of application hinges on the definitions or interpretations of the terms *electronic transaction* and *consumer*.

5.3.1.2.1 Electronic transaction

Oddly enough an *electronic transaction* is not defined in the ECT Act, but a *transaction* is either of a commercial or non-commercial nature and it

includes the provision of information and e-government services (Section 1).

In keeping with the basic philosophy behind consumer protection legislation, which is to offer the greatest protection to the consumer who is in a weaker bargaining position, the application of this chapter has been cast in wide terms to include commercial and non-commercial transactions and the provision of information or e-government services.⁶

Several points of criticism have been raised against the clumsy drafting of these provisions. Buys & Cronjé (2004: 140–141), concurring with Eiselen (in Van der Merwe *et al.* 2008: 183), point out, that the protections afforded may not be available when part of the transaction is concluded electronically and part of it by non-electronic means. Requiring all parts of a transaction to be concluded electronically before the consumer protection principles apply to the transaction negates the essence of the consumer protection chapter, as the whole application of the chapter could depend on the method of payment employed in a particular transaction i.e. be it manual or electronic. This, they maintain, could be resolved by interpreting the provisions to be applicable in all instances where part of a transaction is concluded electronically.

In support of this interpretation, it is suggested that if one looks at the definitions of *electronic agent*, *electronic communication* or *electronic signature* with data as the common denominator, one could surmise that similarly an “electronic transaction” includes a transaction where the use of data, or electronic representations of information (Section 1 of the ECT Act: definitions), is intrinsic to or is at least an element of the transaction.

5.3.1.2.2 Consumer

The definition of a consumer is fundamental in determining who warrants protection under most consumer protection legislation. Thus Chapter VII of the ECT Act defines a consumer as “any natural person who enters or intends entering into an

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

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

6 Van Der Merwe *et al.* (2008: 182) and Buys & Cronjé (2004: 141), are in agreement and advocate the use of a wider rather than a narrower interpretation for the chapter.

electronic transaction with a supplier as the end-user of the goods or services offered by that supplier" (Section 1).

This definition excludes the operation of the consumer protection provisions in the following electronic transactions:

- All business-to-business (B2B) transactions where, for example, goods or services are supplied to juristic persons such as companies and close corporations.
- Certain business-to-consumer (B2C) transactions where the consumer is a natural person but not the end-user of the goods or services acquired, for example, where a sole proprietor or natural person buys the goods, with the intention of re-selling them to another consumer.

It is common cause that small businesses, corporations and trusts are often in the same practical position as a natural person consumer as an end-user, and therefore a strong case could be made to include at least some of these parties in the definition of a consumer worthy of protection (Buys & Cronjé 2004: 142; Eiselen in Van der Merwe *et al.* 2008: 181). This has to some degree been recognised in the Consumer Protection Act 68 of 2008, where the consumer includes both natural and small to medium sized juristic persons⁷ whose asset value or annual turnover at the time of the transaction is less than the monetary threshold of two million rand.⁸

The consumer is also a person who *intends* entering into an electronic transaction, in other words consumers who merely browse a website with the intention of possibly entering into a transaction are also entitled to the protection offered by Chapter VII of the ECT Act. This in turn is important to a supplier because it dictates, for example, how and where the information which has to be displayed is placed on a website (Buys & Cronjé 2004: 142).

5.3.1.3 Specific exclusions

In general, the ECT Act applies to all electronic transactions and data messages except those

excluded by the Act itself or its schedules (Section 4 and Schedule 1 and 2). Some provisions, such as Section 42(3), limit the scope of specific provisions (*in casu* Chapter VII) of the Act.

The point, purpose, reason and meaning of Section 42(3) is not at all clear. It excludes the application of Chapter VII to a regulatory authority established in terms of a law if that law prescribes consumer protection provisions for electronic transactions.

Eiselen (in Van der Merwe *et al.* 2008:183) suggests that what the section is trying to convey is that when another Act of Parliament subjects electronic consumer transactions to alternate (possibly stronger) consumer protection measures, then Chapter VII of the ECT Act will not apply.

With the CPA having taken full effect, will this mean that any electronic transaction that falls within the parameters of the protection offered by the CPA will not be subject to Chapter VII of the ECT Act? This may well be a moot point if Eiselen is correct in his opinion that Section 42(3) cannot be rescued by creative interpretation and that it remains "a dead letter in the Act" (Van der Merwe *et al.* 2008: 183), but it also impacts on the question of how to apply the provisions of the CPA where the CPA expressly provides for the application of provisions of Chapter VII of the ECT Act. For example, in the CPA it is stated that Section 16(1) does not apply to a transaction if Section 44 of the ECT Act applies to that same transaction.⁹

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

In the enforcement of the consumer protection provisions of Chapter VII of the ECT Act, Section

7 "Juristic person" has been given a wide meaning for the purposes of the CPA where it includes "(a) a body corporate; (b) a partnership or association; or (c) a trust as defined in the Trust Property Act 57 of 1988."

8 The Determination of Threshold in terms of the Consumer Protection Act 68 of 2008 was published in *Government Gazette* No. 34181, Government Notice No. 294 of 1 April 2011 (hereafter referred to as the Determination of Threshold Regulation).

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

Act itself or its schedules (Sections 1 and 2). Some provisions, such as the scope of specific provisions in VII of the Act.

purpose, reason and meaning of the Act is not at all clear. It excludes the Chapter VII to a regulatory authority of a law if that law prescribes provisions for electronic

der Merwe *et al.* 2008: 184)

the section is trying to convey the Act of Parliament subject to transactions to alternative consumer protection measures.

the ECT Act will not apply. Having taken full effect, will this electronic transaction that falls

of the protection offered by subject to Chapter VII of the Act will be a moot point if Eiselen

that Section 42(3) cannot be interpreted and that it in the Act" (Van der Merwe

also impacts on the question of the CPA where the provisions for the application of VII of the ECT Act. For

stated that Section 16(1) of the Act if Section 44 of the Act is a transaction.⁹

According to the ECT Act the provisions are applicable to commercial transactions that a supplier and a natural

also the end-user of the transaction. The protection should be completely through the electronic representations of there is an intention to

consumer protection the ECT Act, Section

“(a) a body corporate” published in *Govern-* the Determination of

ECT Act.

49 allows a consumer to lodge a complaint with the National Consumer Commission (established in terms of the CPA)¹⁰ for any non-compliance with the consumer protection principles of the ECT Act.

5.3.2 Inconsistency between the ECT Act and other legislation

In accordance with Section 3, the ECT Act must not be interpreted so as to exclude any statutory law or the common law from being applied to, recognising or accommodating electronic transactions, data messages or any other matter provided for in the Act.

5.3.2.1 General premise

The Consumer Protection Act 68 of 2008 (CPA) came into effect in stages with Chapters I and V becoming effective on 29 April 2010 and the rest of the Act taking effect on 31 March 2011 (Schedule 2).

The CPA's purpose and policy is clear – it wants to promote the social and economic welfare of consumers in South Africa inter alia by establishing a legal framework for a fair, accessible, efficient, sustainable and responsible consumer market that promotes fair business practices, encourages responsible consumer behaviour and provides an efficient system of redress for consumers (Section 3(a)–(h)). To achieve these aims it introduces a number of fundamental consumer rights (Chapter II, parts A–I, Section 8–67) that may be enforced either by referral to the Tribunal¹¹ or the applicable Ombud,¹² to a provincial consumer court (Section 69(c)(i)–(iii)) or a complaint may be lodged with the National Consumer Commission (established in terms of Section 85) and thereafter to the courts (Section 69(d)).

The redress offered to aggrieved consumers in terms of the CPA includes orders that any offending conduct be changed or stopped, damages may be awarded, and the offender may be liable to severe

fines or even a maximum of 10 years imprisonment (Sections 76, 111 and 112 of the CPA).

5.3.2.2 Field of application

In essence, the CPA regulates the marketing of goods and services to consumers with the specific focus on the relationships, transactions and agreements between the producers, suppliers, retailers, service providers, importers and other intermediaries and the consumer. It also regulates the relationship between franchisors and franchisees (Section 5(7)). The main commercial activities affected are “transactions” and “marketing” (Van Eeden 2009: 36).

According to Section 5(1), this Act applies to every transaction occurring in South Africa and includes the promotion, performance or supply of goods or services, the goods and services themselves as well as goods that are a part of an exempted transaction.¹³ This means that most entities supplying goods or services in South Africa and the transactions that they enter into with the consumers (natural persons and small to medium sized juristic persons who do not exceed the two million rand threshold) will fall within the ambit of the Act. However, to precisely delineate the scope of application for this Act, it is necessary to define some of the key concepts used in Section 5(1), which include the terms *transaction*, *goods*, *services*, *market*, as well as the key role players, namely the *consumer* and the *supplier*.

5.3.2.2.1 Transaction

The Act refers to a transaction in the ordinary course of business, which is an agreement between two or more persons for

- the supply or potential supply of goods or services
- the supply of any goods to or at the direction of a consumer, or

10 Schedule 1, Part B, par. 15 which amends Section 1 of the ECT Act.

11 Section 69(a) of the CPA when permitted. The National Consumer Tribunal established in terms of Section 26 of the NCA; see Section 1, definition of *Tribunal* in the CPA.

12 Section 69(b) of the CPA if the supplier is subject to the jurisdiction of an ombudsman.

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

- the performance of any services by or at the direction of the consumer in exchange for consideration.

Consideration would be anything of value, given and accepted, in exchange for the goods or services (Section 1 of the CPA).

For the online consumer this would typically include electronic credit, tokens and tickets, money, property, awards, undertakings, loyalty credit and rights to assert a claim.¹⁴

Under Section 5(6) there are certain arrangements that may also be considered as *transactions* between a *supplier* and a *consumer* in terms of the Act, i.e. deemed transactions. Deemed transactions include the supply of goods or services in the ordinary course of the supplier's business to any members of a club, trade union, association or society, and this is true even if the service or goods are provided free of charge.¹⁵

5.3.2.2.2 Consumers and suppliers

The *consumer* includes both natural person consumers and small to medium sized juristic person consumers whose asset value or annual

turnover at the time of the transaction is less than the monetary threshold of two million rand calculated in accordance with the schedule¹⁶ to whom goods or services are marketed, who have entered into transactions with suppliers in the ordinary course of business of the supplier. It may also include a user, recipient or beneficiary of the goods or services and a franchisee (Section 1 of the CPA; Van Eeden 2009: 41) (See Figure 5.1).

The supplier is in simple terms the person who markets (promotes or supplies) any goods or services, while a service provider is the person who promotes, supplies or offers to supply a service (Section 1).

5.3.2.2.3 Goods and services

Goods include (see Figure 5.2):

- Anything marketed for human consumption.
- Any tangible object including any medium on which anything is or may be written or encoded; any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product.

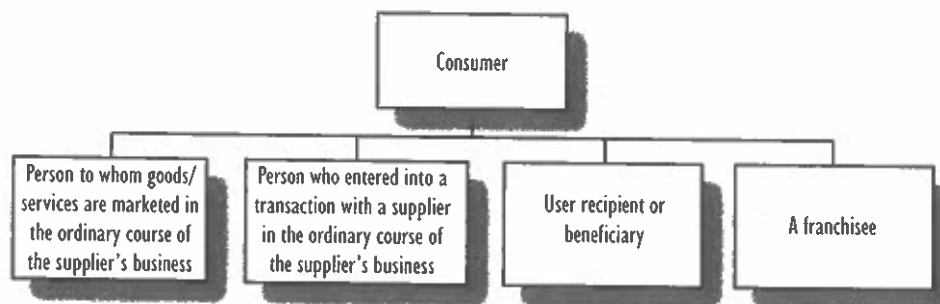


Figure 5.1 Definition of a consumer

- 14 Section 1 of the CPA, where consideration also includes cheques, negotiable instruments, credits or debits, electronic chips, labour, barter, coupons, undertakings, promises or agreements.
- 15 Section 5(6) also regulates transactions that relate to franchising agreements. It is assumed by the author that franchise agreements fall outside the typical scope of online consumer law or e-commerce law, and therefore the provisions directly applicable to franchising have not been included in this discussion.
- 16 The Determination of Threshold in terms of the Consumer Protection Act 68 of 2008 were published in the *Government Gazette* No. 34181, Government Notice No. 294 of 1 April 2011. The CPA does not apply to a transaction where the consumer is a juristic person whose annual turnover or asset value at the time of the transaction equalled or exceeded the monetary threshold of two million rand calculated in accordance with the Schedule to the Regulation.

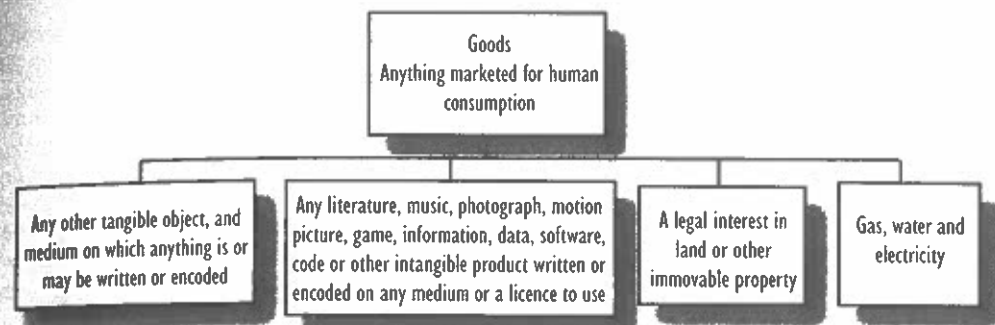


Figure 5.2 Definition of goods

- A legal interest in land or any other immovable property, other than an interest that falls within the definition of *service* in this section.
- Gas, water and electricity (Section 1).

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

(a) any work or undertaking performed by one person for the direct or indirect benefit of another; (b) the provision of any education, information, advice or consultation, except advice that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002); (c) any banking services, or related or similar financial services, or the undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any such service –

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

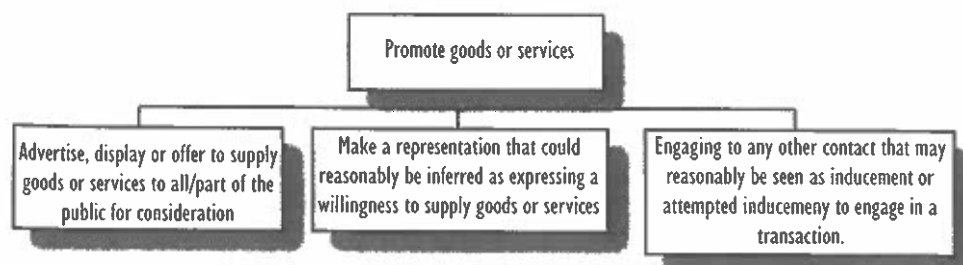


Figure 5.3 Definition of a market (promotion of goods or services)

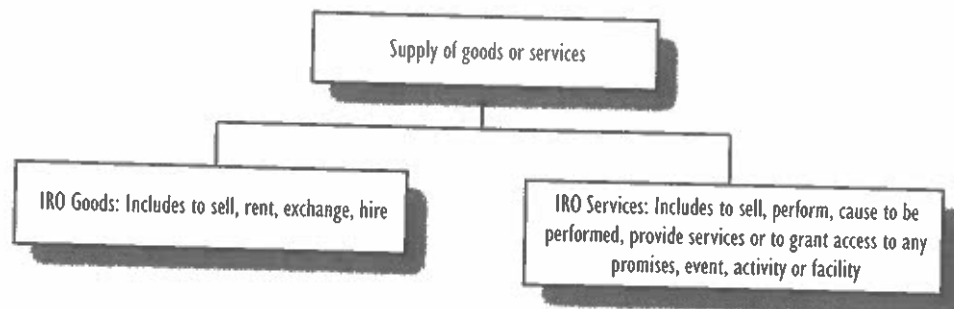


Figure 5.4 Definition of a market (supply of goods or services)

5.3.2.2.4 Market

The term *market* is defined as promoting or supplying goods or services in the ordinary course of business for consideration (see Figures 5.3 and 5.4).

5.3.2.3 Specific exclusions

Despite the very wide-ranging and broad definitions discussed above, the CPA does not apply to everyone or everything. The exemptions to the Act are listed in Sections 5(2)(a)–(g) and 5(3)–(4) and relate to goods and services promoted to the State where the consumer is an exempt juristic person; transactions exempted by the Minister; credit agreements under the NCA (the CPA does, however, still apply to the goods and services sold in terms of such a credit agreement); services under an employment contract; and the provisions of education, information, advice, consultations,

banking services or related financial services that are regulated under the Financial Advisory and Intermediary Services Act 37 of 2002, the Long-term Insurance Act 52 of 1998 and the Short-term Insurance Act 53 of 1998.¹⁷

In respect of the juristic person threshold, the regulations published by the Department of Trade and Industry indicate that the Act does not apply to any transaction where the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction equals or exceeds two million rand. The regulations also set out how the asset value and annual turnover should be calculated.¹⁸

Finally, the CPA does not in general apply to pre-existing transactions and agreements except to the limited extent set out in Item 3 of Schedule 2 of the Act.¹⁹

- 17 If any goods are supplied within the Republic of South Africa to any person in terms of a transaction that is exempt from the application of the CPA, those goods, the importer, producer, distributor and retailer of the goods are still subject to Sections 60 and 61. See Section 5(5) of the CPA.
- 18 The Determination of Threshold Regulation of 1 April 2011.
- 19 Item 3 of Schedule 2 to the Act states that "[e]xcept to the extent expressly set out in this item, this Act does not apply to – (a) the marketing of any goods or services before the general effective date; (b) any transaction concluded, or agreement entered into, before the general effective date; or (c) any goods supplied, or services provided, to a consumer before the general effective date. (2) The sections of this Act listed in the first column of the following table apply, to the extent indicated in the second column, to a pre-existing agreement between a supplier and a consumer, if that pre-existing agreement – (a) would have been subject to this Act if this Act had been in effect at the time the agreement was made; and (b) contemplates that the parties to it will be bound for a fixed term until a date that is on or after the second anniversary of the general effective date: (3) Section 35 applies to any pre-existing loyalty programme, but only with respect to any – (a) offer to participate in that programme, or document setting out such an offer, that is made or published on or after the general effective date; (b) tender by a consumer, on or after the general effective date, of any loyalty credit or award in that programme as consideration for any supply of goods or services; and (c) any supply of goods or services if, on or after the general effective date, the consumer tendered any loyalty credit or award in the programme as consideration for those goods or services. (4) Section 61 applies to any goods that were first supplied to a consumer on or after the early effective date. (5) Any provision of this Act not otherwise contemplated in subitems (2) to (4) applies to any pre-existing conduct, circumstance, transaction or agreement only to the extent required to ensure proper interpretation of, or compliance with and enforcement of, the provisions that are mentioned in subitems (2) to (4)".

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

5.3.2.4 Inconsistency between the CPA and other legislation

Should there be contradictions or inconsistencies between the CPA and any other legislation such as the ECT Act, then Section 2 of the CPA provides an

interpretational formula. It states that if there are inconsistencies between the CPA and any other Act then

- a) the provisions of both Acts apply concurrently to the extent that it is possible, as long as the provisions of either Act are not contravened, and
- b) if both cannot be applied concurrently, the courts must give effect to the provision that extends the greatest protection to the consumer.²⁰

In contrast, the ECT Act is somewhat vague in this regard, as Section 3 only requires that the ECT Act be interpreted so that it does not conflict with other legislation. It is assumed, however, this vagueness would easily facilitate the type of interpretation envisioned by the CPA.

5.3.3 Summary of fields of application: ECT Act versus CPA

Chapter VII of the ECT Act	The CPA
Does not protect natural persons who are not end-users.	Covers an agreement between a supplier, acting in the ordinary course of business, and a consumer for the supply or potential supply of goods or services in exchange for consideration; or the supply/performance to the consumer/at the direction of a consumer, for consideration.
Does not protect juristic persons as consumers.	Protects juristic persons whose asset value or annual turnover at the time of the transaction is less than two million rand.
Applicable to transactions that are partly/completely concluded through the exchange of data messages.	Applicable to marketing of goods and services to consumers and the related transactions.
Excluded: transactions that are not concluded via data messages at all.	Excluded: goods and services to the State; the consumer who is a juristic person whose asset value or annual turnover at the time of the transaction equals or exceeds the threshold value of two million rand; a credit agreement under the National Credit Act (but the goods or services that are the subject of the credit agreement are not excluded); providing services under an employment contract; giving effect to a collective bargaining/collective agreement (as per Sections 23 and 213 of the Labour Relations Act); any industry-wide exemptions granted by the Minister (Section 5(3)); the provision of any education, information, advice or consultation that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 or any banking services, or related or similar financial services; or the undertaking, underwriting or assumption of any risk by one person on behalf of another, to the extent that any such service constitutes advice or intermediary services that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act 37 of 2002; or is regulated in terms of the Long-term Insurance Act 52 of 1998, or the Short-term Insurance Act 53 of 1998; and finally pre-existing agreements as per item 3 of Schedule 2 of the CPA.

²⁰ Section 2(8)–(10) provides that “[i]f there is an inconsistency between any provision of Chapter V of this Act and a provision of the Public Finance Management Act 1 of 1999, or the Public Service Act, 1994 (Proclamation No. 103 of 1994), the provisions of the Public Finance Management Act, 1999, or of the Public Service Act, 1994, as the case may be, prevail [...] If there is an inconsistency between any provision of this Act and a provision of any Act not contemplated in subsection (8) – (a) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and (b) to the extent that paragraph (a) cannot apply, the provision that extends the greater protection to a consumer prevails over the alternative provision, provided that in the case of hazardous chemical products only the provisions of this Act relating to consumer redress will apply. (10) No provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law”.

5.3.3 Summary of fields of application: ECT Act versus CPA (continued)

Chapter VII of the ECT Act	The CPA
Provides the minimum information as listed, and an opportunity to review, correct, withdraw, secure payment systems and to execute contractual obligations within 30 days.	Complies with fundamental consumer rights and their related prohibitions or obligations as per Sections 8-67.

5.3.4 The application of the Protection of Personal Information (PPI) Bill B9-2009²¹

5.3.4.1 Field of application

The PPI applies to the processing of personal information entered into a record by or for a responsible party domiciled in the Republic of South Africa, or if not domiciled in the Republic of South Africa, using automated or non-automated means unless those means are used only for forwarding personal information, provided that it forms part of a filing system or is intended to form part thereof (Section 3). This Bill will apply to all public and private bodies.²²

Of particular importance for the field of application are the definitions for *personal information* and *processing*.

5.3.4.1.1 Personal Information

Section 1 of the PPI defines *personal information* as

information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person, including, but not limited to — (a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person; (b) information relating to the education or the

medical, financial, criminal or employment history of the person; (c) any identifying number, symbol, e-mail address, physical address, telephone number or other particular assignment to the person; (d) the blood type or any other biometric information of the person; (e) the personal opinions, views or preferences of the person; (f) correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence; (g) the views or opinions of another individual about the person; and (h) the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person.

5.3.4.1.2 Processing

Processing is defined as

any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including — (a) the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use; (b) dissemination by means of transmission, distribution or making available in any other form; or (c) merging, linking, as well as blocking, degradation, erasure or destruction of information.

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

²¹ This Bill is comprehensively discussed in Chapter 13. The discussion here is merely to set out the extent to which the PPI will affect a consumer's personal information when it is processed for the purposes of spam or direct marketing, i.e. the rights of data subjects regarding unsolicited electronic communications and automated decision making contained in Chapter VIII of the PPI.

²² Section 1 of the PPI defines a *private body* as "(a) a natural person who carries or has carried on any trade, business or profession, but only in such capacity; (b) a partnership which carries or has carried on any trade, business or profession; or (c) any former or existing juristic person, but excludes a public body" and a *public body* as "(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or (b) any other functionary or institution when — (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation".

5.4 CONSUMER PROTECTION UNDER THE ECT ACT

5.4.1 The duties of the supplier (web trader)

The consumer protection provisions of the ECT Act place four main duties on the supplier/website owner or electronic trader who offers goods or services for sale, hire or exchange by way of electronic transaction. These duties are to

- disclose the listed minimum information to online consumers (Section 43(1)(a)–(r))
- provide an opportunity for the consumer to review, correct and withdraw from the electronic transaction (Section 43(2))
- provide a secure payment system (Section 43(5)), and
- execute the order within 30 days of receiving the order unless otherwise agreed (Section 46(1)–(3)).

These provisions also provide rights to the consumer and remedies should the supplier fail to comply with the above duties, such as a right to cooling off and the right to cancel (Sections 44, 43(3) and 46)).

5.4.1.1 Minimum information

In an electronic transaction between a supplier of goods or services and a consumer as defined in the ECT Act, a certain minimum amount of information must be made available to the consumer on the website where such goods or services are offered.²³ Failure to make this information available to the consumer gives the consumer the right to cancel the transaction within 14 days of receiving the goods or services (Section 43(3)). If the transaction is terminated in this manner the only charge that may

5.3.4.2 Exclusions

However, this Bill does not apply to the processing of personal information (Section 4) that is done in the course of a purely personal or household activity – that has been de-identified to the extent that it cannot be re-identified again – and processing by or on behalf of the State for reasons of national security, defence or public safety; or where the purpose of the processing is for the prevention, investigation or proof of offences, the prosecution of offenders or the execution of sentences or security measures, to the extent that adequate safeguards have been established in specific legislation for the protection of such personal information. Processing is similarly allowed for exclusively journalistic purposes by responsible parties who are subject to, by virtue of office, employment or profession, a code of ethics that provides adequate safeguards for the protection of personal information; or by Cabinet and its committees, the executive council of a province or a municipal council of a municipality that relates to the judicial functions of a court referred to in Section 166 of the Constitution, or that has been exempted from the application of the information protection principles in terms of Section 34 of the Bill.

5.3.4.3 Inconsistency between the PPI and other legislation

According to Section 5(1), this Bill will not affect the operation of any other legislation that regulates the processing of personal information and is capable of operating concurrently with the act. However, if any other legislation provides for safeguards for the protection of personal information that is more extensive than those set out in the information protection principles of the Bill, then the more extensive safeguards should prevail.

²³ Section 43(1)(a)–(r). Jacobs (2004: 561) correctly points out that goods and services are not defined here and the question is whether this includes sale, exchange or hire or whether or not financial services or products are included. Compare the definitions for goods and services under the CPA.

be levied against the consumer is the direct charge of returning the goods (Section 43(4)). The consumer is obliged to return all goods received or cease using the services performed and the supplier must return all other amounts received²⁴ (Section 43).

The information required includes:

- a) *The full name and legal status of the supplier.* This would include its place of registration, its registration number, the names of important office bearers and the legal status, such as whether it is a sole proprietorship, company, close corporation or trust.
- b) *The physical address, telephone number and e-mail address of the supplier.* This includes the address to which the supplier will receive legal service of documents. These are the contact details of the supplier to be used by the consumer should they wish to exercise their rights or obtain further information. In terms of Section 23(c) it is also important because it is the physical address that determines the usual place of business for jurisdiction and the place of conclusion of a contract.
- c) *Details of subscriptions to or membership of industry regulatory bodies, accreditation bodies, codes of conduct, etc.* This includes the contact details of the specific body. These could, among others, include subscriptions to the Code of Banking

Practice (<http://www.banking.org.za>); the Direct Marketing Association Codes for Interactive and Direct Marketing (<http://www.dmasa.org>); the Wireless Application Service Providers Association (WASPA) codes of conduct and advertising rules (<http://www.waspa.org>); The Advertising Standards Authority (<http://www.asasa.org.za>) and the Internet Service Providers Association (<http://www.ispa.org.za>). A hyperlink would probably be sufficient disclosure.

- d) *A proper description of the goods or services offered so that the consumer is able to make an informed decision about the transaction they intend concluding.* The measure would be whether or not the description supplied is sufficient for a reasonable consumer to make an informed choice (Van der Merwe *et al.* 2008: 184). The OECD lists some practical examples of what would be considered best practice in fulfilling this requirement.²⁵
- e) *The full price of the goods or services, including transport costs, taxes and any other fees or costs.* These costs have to be revealed at a time that will enable the consumer to make an informed decision on whether or not to purchase the items. It is therefore suggested that while consumers are browsing a website, they should have access to this information via a hyperlink, pop-up window

Information about the goods or services (OECD 2002)

- An online appliance store provides a three-dimensional picture of all of its products. When a consumer clicks on the picture the product rotates so that all sides can be viewed. The picture also allows a consumer to narrow the view to be able to read product information about the item. Related warranty and safety information is provided via a link next to the picture as well as all information relating to the size, colour and energy requirements necessary to operate the product. *This site implements principle IIIB of the Guidelines (information about the goods or services) because it provides the consumer with accurate and easily accessible information describing the goods offered.*
- An online clothing store provides static pictures of all of its products, but includes fabric specifications, colour and full sizing charts. Because it provides the essential information about the goods in text form, *this site implements principle IIIB of the Guidelines (information about the goods or services) even though it may not take full advantage of the latest technology in terms of visual presentation.*
- An online toy store sells an electronic doll that can wave its hand and say "hello" in 15 languages. The site provides a clear photograph of the doll, specifies its actual size and notes that it is hypoallergenic. The site also mentions that it runs on batteries, but does not post the specific type. In fact, the doll requires a battery that can only be purchased in Japan and costs approximately 1 000 Japanese yen. *This site fails to implement principle IIIB of the Guidelines (information about the goods or services) because it does not provide the consumer with sufficient information to make an informed decision.*

- 24 Jacobs (2004: 560) suggests that suppliers should insist on the return of their goods/ceasing to use services prior to returning any money, i.e. they would need to reserve this right in the terms and conditions, otherwise little can be done to enforce return of goods.
- 25 OECD (2002) "Best practice examples under the OECD Guidelines on Consumer Protection in the Context of Electronic Commerce". (Hereafter the OECD Best Practice Examples.)

www.banking.org.za); the Direct Association Codes for Interactive and Banking (http://www.dmasa.org); the Application Service Providers (ASPA) codes of conduct and codes (http://www.waspa.org); The Standards Authority (http://www.saspa.org.za). A hyperlink to the Internet Service Providers (ISP) (http://www.ispa.org.za). A hyperlink to sufficient disclosure.

of the goods or services offered, the consumer is able to make an informed decision on the transaction they intend to enter into. A measure would be whether or not the information supplied is sufficient for a consumer to make an informed decision (Merwe *et al.* 2008: 184). The following are practical examples of what would constitute best practice in fulfilling the requirements.

the goods or services, including any and any other fees or costs. The information is revealed at a time that will enable the consumer to make an informed decision on whether or not to purchase the items. The information should be accessible to the consumer, they should have access to the information via a hyperlink, pop-up window

When a consumer clicks on the link, the consumer is able to narrow the view of the information provided via a link to the requirements necessary to make an informed decision about the goods or services offered.

The specifications, colour and form, this site implements the requirements and may not take full advantage

languages. The site provides information. The site also mentions the battery that can only be used in principle IIB of the consumer with sufficient

ing to use services prior to the purchase, otherwise little can be done in the Context of

or drop-down menu, and that at some stage in the transaction they have an opportunity to view a complete summary of the total cost of the transaction (OECD Best Practice Examples: 4).

d) *The methods of payment.* It is suggested that the consumer should be informed about the type of payment methods accepted, e.g. debit cards, credit cards, the use of e-wallets or third parties such as Paypal or EFTs, and also the stage at which the consumer will be charged, e.g. on dispatch and how refunds will be credited (OECD Best Practice Example: 5).

e) *The terms of the agreement, including any guarantees that will apply, how the terms may be accessed, stored, and reproduced electronically by consumers.* This is a requirement which offers the consumer the ability to obtain a record of the terms of the contract that they agreed to be bound by. It is sufficient for a website to provide a date-stamped, printable and/or downloadable version of the transaction terms and conditions via a hyperlink. The reference to the terms and conditions must meet the minimum requirements for incorporation by reference set in Section 11(2) and (3) of the ECT Act for electronic transactions (OECD Best Practice Examples 2002:4, Buys & Cronjé 2004:144; Van der Merwe *et al.* 2008: 185 and 167–168. Cf. Pistorius 2004:569).

f) *The time within which the goods will be dispatched and delivered or the duration of the period for which the services will be rendered.* Once again this requirement relates to consumers being able to make an informed choice. They need to be aware of when they can expect their goods to arrive. Most websites will give a dispatch time and an estimated delivery time because time of delivery may depend on circumstances beyond their control. It is also common to make use of parcel tracking services or couriers who offer a similar service.

g) *How and within what timeframes the consumer can generate, access or store a complete record of the transaction.* The generally accepted methods include a duty on the consumer to download and/or print the record; the record is sent via e-mail to the consumer or the record is stored by the website and the consumer can access it within a defined timeframe.

h) *The return, exchange and refund policy for the transaction.* This may be included as part of the general terms of the transaction or in the form of a separate policy document available on the website. In this respect the website owner has

to comply with Sections 17 and 20 of the CPA when it is applicable.

k) *Any alternative dispute resolution codes that the supplier subscribes to and how these codes may be accessed electronically by the consumer.* This would include whether or not a dispute relating to the transaction is subject to the arbitration process.

l) *The security procedures and privacy policy of the supplier in respect of payment, payment information and personal information.* The supplier is obliged to disclose the procedures, technical or otherwise, that are in place to ensure the privacy and security of the payment mechanism, the consumer's payment information and personal information (Buys & Cronjé 2004:146). Section 43(5) of the ECT Act must be taken into account here which requires the supplier to use a payment system that is sufficiently secure within the accepted technological standards available at the time of the transaction for the specific type of transaction concerned. Failure to provide a sufficiently secure payment system renders the supplier liable for any damages suffered by the consumer (see also par. 5.4.1.3).

m) *Where appropriate, the minimum duration of the agreement for agreements that pertain to the supply of services or products that are performed on an ongoing basis or that are recurrent.* Consumers must be provided with the opportunity to terminate the agreement at the end of such a period. This would be most relevant in transactions where the consumer subscribes to an online dating or news service.

n) *Notice of the consumer's rights of cooling-off in terms of Section 44 when it is applicable to the transaction.* The provisions of Section 44 allow the consumer to cancel, without reason and without penalty, any transaction and related credit agreement for the supply of goods within seven days of the receipt of the goods and for the supply of services within seven days after the date of conclusion of the agreement.

The information listed here must be available to consumers "on the website where such goods or services are offered" (Section 43(1) of the ECT Act).

The term *website* is defined in Section 1 of the ECT Act as "any location on the internet containing a homepage or webpage", and a *webpage* is defined as "a data message on the World Wide Web", while a *homepage* is defined as "the primary entry point webpage of a website".

According to Buys & Cronjé, as well as Jacobs,

from the abovementioned definitions it follows that suppliers conducting electronic transactions from locations other than a *website* do not have to comply with the Section 43 disclosure requirements. Examples of such transactions are those concluded via SMS or automated transactions where the supplier uses recorded voice (Buys & Cronjé 2004: 148; Jacobs 2004: 560).

The legislator's choice to limit the information duties to transactions on a *website* is regrettable especially in light of the escalation of M-commerce as discussed in par. 5.2.

Jacobs also points out that apart from stating that the information must be available on the *website* where the goods or services are offered, the ECT Act is silent on the way in which the information must be made available to consumers (Jacobs 2004: 558).

It is accepted that at a minimum, for suppliers to comply with their informational duties, they would have to conform to Sections 11(2) and 11(3) of the ECT Act. These sections recognise that information, which is merely referred to in a data message, can have legal effect and force, and that in order for it to be incorporated into an agreement the information must be referred to in a way in which a reasonable person would have noticed it, and that it must be accessible in a form in which it may be read, stored, or retrieved either electronically or as a computer printout (Jacobs 2004: 558–559). Therefore the reference to the terms and conditions or information as required by Section 43 would have to be sufficiently clear and in an obvious position so that the reasonable consumer will take note of it.

5.4.1.2 Opportunity to review, correct and withdraw

The supplier must provide a consumer with an opportunity to review a summary of the entire electronic transaction, correct any mistakes and withdraw from the transaction before finally assenting to it (Section 43(2) of the ECT Act).

With the confirmation process consumers should be given an opportunity to identify the goods they wish to purchase, to identify and to correct any errors and to express informed and deliberate consent to the transaction. While the shopping cart ordering/confirmation mechanism is often used,

there are many different ways for consumers to place or confirm their orders. The requirement is that consumers should be offered all the elements, i.e. the ability to identify what they have ordered, the ability to cancel or modify their order, the ability to see the total cost, the ability to express consent to the order and the ability to retain an accurate record (OECD Best Practice Examples 2002: 3).

The ECT Act does not state at what stage or how this confirmation process should be afforded, only that it should be completed before any order is finally placed. Buys & Cronjé (2004: 149) suggests that consumers should be given a complete summary of their purchases once they have indicated a readiness to effect payment. For example, the consumer may put various items in his or her shopping basket and then click on an *Order now* icon. The summary should detail the items purchased, their costs, applicable taxes, delivery cost, delivery address, personal details of the consumer, payment details and the total amount due. The consumer should then be prompted either to change the information or withdraw from the transaction or proceed with payment. If the consumer elects to change information, a new summary should be created incorporating the amended information. If the consumer decides to withdraw from the transaction, such withdrawal cannot carry any costs or penalties.

If the supplier fails to give the consumer the opportunity to confirm the transaction detailed above, the consumer may elect to cancel the transaction within 14 days from receipt of the goods or services. In case of cancellation the consumer must return the goods or cease using the services and the supplier must refund all payments made by the consumer minus the direct cost of returning the goods.

There is a similar requirement in the sections of the ECT Act dealing with automated transactions,²⁶ where there is no agreement formed when the party interacting with an electronic agent to form an agreement makes a material error and is not provided with an opportunity to prevent or correct the error. In order to cancel the agreement with retrospective effect under Section 20 of the ECT Act, the consumer/interacting party must notify the other contracting party as soon as possible after

26 An automated transaction is an electronic transaction conducted or performed, in whole or in part, by means of data messages in which the conduct or data messages of one or both parties are not reviewed by a natural person in the ordinary course of such a natural person's business or employment. (Section 1 of the ECT Act.)

different ways for consumers to their orders. The requirement is could be offered all the elements, identify what they have ordered, or modify their order, the ability to express consent to the ability to retain an accurate Practice Examples 2002:3).

does not state at what stage or on process should be afforded, completed before any order is & Cronjé (2004: 149) suggests could be given a complete purchases once they have ss to effect payment. For er may put various items in basket and then click on an summary should detail the, applicable taxes, address, personal details of details and the total amount d then be prompted either tion or withdraw from the ed with payment. If the nage information, a new eated incorporating the of the consumer decides to naction, such withdrawal r penalties.

to give the consumer the the transaction detailed may elect to cancel the from receipt of the goods cancellation the consumer cease using the services and all payments made by irect cost of returning the

ment in the sections of automated transactions,²⁶ ment formed when the ionic agent to form an rial error and is not y to prevent or correct et the agreement with Section 20 of the ECT g party must notify the soon as possible after

or in part, by means of ned by a natural person e ECT Act.)

learning of the error. They must take reasonable steps to return or, if so instructed, destroy any performance received and receive no material benefit from the goods (Section 20(e)(i)–(iv) of the ECT Act). The consumer does not have a duty to pay for the return of the goods if the transaction is cancelled under the provisions of Section 20 (Van der Merwe *et al.* 2008: 187).

5.4.1.3 Secure payment system

The supplier must provide, and the consumer has a right to, a payment system that is sufficiently secure with reference to accepted technological standards at the time of the transaction and the type of transaction concerned (Section 43(5) of the ECT Act).

The determination of a sufficiently secure payment system is a factual question that has to be answered by examining the general technological security standards used at the time of the transaction for the specific type of transaction, employed by the e-commerce payment industry (Jacobs 2004: 556).

The factors that could be considered in such an enquiry include, but are not limited to (Buys & Cronje 2004: 146–147, 150; Van der Merwe *et al.* 2008: 187):

- The use of digital certificates from acknowledged service providers to authenticate the website
- Encrypted communication of all payment information between parties
- Access to transactional pages through the use of usernames and secure passwords
- Time-out functions that log the user off when there is no activity on the webpage for a period of time
- Secure storage of payment information
- Use of the latest updated security software and encryption methods
- Regular reviews of the security procedures employed and comparable industry norms

In the event that the supplier's payment system is not secure, the supplier could be held liable for any damage suffered by a consumer (Section 43(6)). In order to succeed with the claim against the supplier, consumers would have to prove that (Buys & Cronjé 2004: 150)

- there was a breach of security during or after the payment process that relates to the consumer's payment or payment information
- the breach was due to a failure or refusal by the supplier to use or maintain a sufficiently secure payment system in accordance with the latest

available technology or systems, or that the supplier or its employees acted negligently with the consumer's payment or payment information, and

- they suffered damages as a result of the supplier's actions/inaction.

5.4.1.4 Executing the order

Unless agreed to between the parties to the contrary, the supplier must execute the order within 30 days of receiving the order (Section 46 of the ECT Act). Execution of the order implies that the supplier should have completed all its duties in terms of the electronic transaction concerned, such as receipt of the goods from a retailer, packing the goods for shipment, correctly addressing the goods, effecting the consumer's payment instructions and ensuring proper delivery. This does not mean that the consumer must receive the goods within the 30-day time period (Buys & Cronjé 2004: 156–157).

The 30-day period is calculated from the date the supplier receives the consumer's order (Section 46). If the order was sent in the form of a data message, as will most often be the case, the date of receipt will be the date *when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee*, unless the parties have reached an alternate arrangement (Sections 21 and 23(b)).

Where a supplier has failed to execute the order within 30 days or within the agreed period, the consumer may cancel the agreement by giving seven days' written notice (Section 46(2)).

If a supplier is unable to perform in terms of the agreement on the grounds that the goods or services ordered are unavailable, the supplier must immediately notify the consumer of this fact and refund any payments within 30 days after the date of such notification (Section 46(3)). This would appear to allow the supplier to terminate the agreement due to an inability to perform. However, it is argued that the supplier cannot simply rely on unavailability to escape its duties under the agreement concluded. Some evidence should be presented, on request of the consumer, that proves that the goods or services are objectively unavailable and that such unavailability is not directly related to negligence or wilful actions by the supplier or its agents or employees. It is suggested that the supplier should not be able to terminate the transaction in terms of Section 46(3) if it played any role that contributed directly to the unavailability. Furthermore, if it is found that the consumer

artificially created the unavailability, the consumer could have a claim for damages for breach of contract (Buys & Cronjé 2004: 157; Van der Merwe *et al.* 2008: 188).

5.4.2 Cooling off

The right to cooling off is a feature of most consumer protection legislation²⁷ and it generally allows a consumer to rescind or withdraw from an agreement without having to supply a reason and without incurring a penalty, provided the right is exercised within a relatively short space of time. Under the informational duties of the website owner, it is required that the right to cool off be brought to the attention of the consumer (Section 43(1)(r) of the ECT Act).

Under the terms of Section 44(1), a consumer is entitled to cancel any electronic transaction and any related credit agreement without reason within a seven-day period. The calculation of the seven-day period depends on whether the consumer purchased goods or services.

Where goods are concerned, the period is calculated as seven days from the date of receipt of the goods and where services are concerned, the period is calculated as seven days from the date of the conclusion of the agreement.²⁸

If the consumer elects to cancel the transaction, the only charge that may be levied on the consumer is the direct cost of returning the goods. If payment for the goods or services has been effected prior to a consumer exercising his or her cancellation right, the consumer is entitled to a full refund of such payment, which refund must be made within 30 days from the date of cancellation (Section 44(2) and (3)).

Although the manner of cancellation is not prescribed by the ECT Act, it would be best practice for the consumer to inform the supplier of the cancellation in writing (Buys & Cronjé 2004: 156–157).

5.4.2.1 Transactions not subject to the cooling-off period

The cooling-off right does not apply to the following types of electronic transaction (Section 42(2) of the ECT Act; Buys & Cronjé 2004: 153–156):

- a) *Financial services, including but not limited to, investment services, insurance and reinsurance operations, banking services and operations relating to dealings in securities, e.g. online banking transactions.*
- b) *Online auctions.* These are strictly regulated by the Consumer Protection Act.²⁹
- c) *The supply of foodstuffs, beverages or other goods intended for every-day consumption supplied to the home, residence or workplace of the consumer.* Buys & Cronjé suggests that the phrase “intended for everyday consumption” should be an objective enquiry into whether or not the reasonable consumer would have purchased the goods with the intention of using them every day (Buys & Cronjé 2004: 153).
- d) *Services which began with the consumer’s consent before the end of the seven-day period referred to in Section 44(1).* This exclusion only applies to services if such services commenced before the end of the seven-day period or commenced at the agreed time (Buys & Cronjé 2004: 154).
- e) *Where the price for the supply of goods or services is dependent on fluctuations in the financial markets and which the supplier cannot control.* This exclusion applies to both goods and services if it can be shown that the price of the goods or services is dependent on the exchange rate or other changes in financial markets. To determine whether the price is actually affected by financial market movements requires a factual investigation as to the source and origin of the goods or services and whether market changes would,

27 The cooling-off provisions in the ECT Act are based on the EU’s Distance Selling Directive, Directive (EC) 97/7 on the Protection of Consumers in respect of Distance Contracts [1997] OJ L144/19. In Section 121 of the National Credit Act 34 of 2005 the consumer or credit receiver is given the right to rescind an instalment agreement or lease, entered into at any location other than the registered business premises of the credit provider, within five business days after concluding the credit agreement. See also Section 16 of the Consumer Protection Act discussed in par. 5.5.2.

28 Section 44(1)(a)–(b). The days are calendar days and not business days: Section 4 of the Interpretation Act 33 of 1957.

29 See in this regard Section 45 of the CPA and the Consumer Protection Act regulations that appeared in the *Government Gazette* No. 34180, Government Notice No. 293 of 1 April 2011. See also the discussion of the strict rules applicable to electronic and general auctions in par. 5.5.4.

Transactions not subject to the cooling-off period

which does not apply to the following transactions (Section 42(2) of the Consumer Protection Act 2008: 153–156):

Transactions, including but not limited to, insurance and reinsurance, banking services and operations, and securities, e.g. online transactions.

These are strictly regulated by the Consumer Protection Act.²⁹

Transactions involving goods, such as foodstuffs, beverages or other goods for everyday consumption supplied to the consumer at his or her workplace or at his or her home. The phrase "everyday consumption" should be interpreted into whether or not the consumer would have purchased the goods if he or she was using them every day (Section 42(2)(b)).

Transactions with the consumer's consent to a seven-day period referred to in the Consumer Protection Act. This exclusion only applies to transactions commenced before the seven-day period or commenced at a later date (Section 42(2)(c)).

Transactions involving the supply of goods or services in the financial market where the supplier cannot control. This exclusion only applies to goods and services if the price of the goods or services is determined by the exchange rate or other factors in the financial market. To determine whether a transaction is financially affected by financial markets, a factual investigation into the origin of the goods or services and market changes would be required.

Directive, Directive (EC) 97/7, Section 121 of the National Consumer Credit Institute Act or credit provider, within five years of the Consumer Protection Act dis-

Interpretation Act 33 of 1957

that appeared in the Government of the strict rules

viewed objectively, affect the prices of the goods or services (Buys & Cronje 2004: 154).

f) *Where the goods are made to the consumer's specifications, or they are clearly personalised or by reason of their nature cannot be returned or they are likely to deteriorate or expire rapidly.* These exclusions apply only to goods and will only exclude the cooling-off cancellation right if such goods were made according to specifications provided by the consumer, are personalised or clearly cannot be returned either due to their nature or due to their rapid expiration or deterioration. To succeed as an exclusion, there must be some evidence produced in support of the claim.³⁰

g) *Where audio or video recordings or computer software were unsealed by the consumer.* This exclusion only applies to goods such as CDs, tapes, DVDs, disks and cassettes featuring audio, video and software in whatever format (Buys & Cronje 2004: 155).

h) *The sale of newspapers, periodicals, magazines and books.* This is regulated by the CPA.

i) *The provision of gaming and lottery services.* This exclusion only applies to services related to gaming and lottery. An electronic transaction to download software that enables the consumer to gamble at an online casino would not qualify for the exclusion as such software is classified as goods (Buys & Cronje 2004: 155).

j) *The provision of accommodation, transport, catering or leisure services and where the supplier undertakes, when the transaction is concluded, to provide these services on a specific date or within a specific period.* This is regulated by the CPA (see definition of services).

Many of these transactions will, however, to some degree be regulated in terms of the CPA or other legislation.

5.4.3 The retention of rights

There are two provisions of the ECT Act that are aimed at ensuring that consumers are not deprived of their consumer protection rights.

The first, according to the ECT Act, is that the

protection provided to consumers in Chapter VII applies irrespective of the legal system applicable to the agreement in question (Section 47). If the consumer is a South African resident or citizen or concludes the electronic transaction from within South Africa, Chapter VII applies to the consumer and therefore also to the supplier. This type of provision will only be enforceable when litigation ensues in a South African court (Buys & Cronje 2004: 159; Van der Merwe *et al.* 2008: 189).

The second is that any provision in an agreement, which excludes any rights provided for in Chapter VII, is null and void (Section 48). Although the parties cannot exclude any rights detailed in Chapter VII, they are free to agree on a number of other issues such as the time upon which the transaction is concluded, the period in which the supplier must execute the transactions, the manner and format in which cancellations should be communicated and when data messages should be regarded as having been sent or received by either party (Buys & Cronje 2004: 160).

5.5 OVERVIEW OF CONSUMER PROTECTION UNDER THE CONSUMER PROTECTION ACT

5.5.1 Introduction and general consumer protection

The Consumer Protection Act is designed to enhance the consumer's choice and rights and to provide effective redress for grievances. It therefore prohibits various unfair business practices and sets a range of obligations on suppliers and service providers with corresponding rights for a consumer, which include the rights to equality, privacy, choice, disclosure and information, fair and responsible marketing, fair and honest dealings, fair and reasonable terms and a right to fair value, good quality and safety.

A tabulation of the prohibitions (see Table 5.1) and obligations under the CPA is a useful starting point in getting to grips with the framework and workings of the Act (Melville 2009: 30–32) (see Table 5.2).

³⁰ Compare in this respect the provisions of the CPA, Section 17, and the definition of "special order goods".

Table 5.1 Prohibitions of the CPA

SUPPLIERS AND SERVICE PROVIDERS MAY NOT:	SECTION(S)
Under the right to equality, <i>unfairly discriminate</i> or give any person or group preferential treatment unless there are reasonable grounds for the differentiation, e.g. selling tobacco to minors.	8 & 9
Under the right to privacy, engage in any <i>unwanted direct marketing</i> , which is linked with a restriction on the times when consumers can be contacted at home (see also par. 1.8).	11 & 12
Make <i>false, misleading or deceptive representations</i> about a supplier, goods or services unless there is a reasonable belief that they are true.	4(5)(b)-(c)
Make <i>false, misleading or deceptive representations</i> about the nature, properties, advantages or uses of goods or services.	29
Give <i>misleading trade descriptions</i> .	24(2)
Express or imply a false, misleading or deceptive representation, use <i>exaggeration, innuendo or ambiguity</i> with regard to a material fact or fail to disclose a material fact.	41
Mislead or deceive consumers in respect of the availability or price of the goods or services, i.e. so-called bait-and-switch marketing.	30(1)
Enter into an agreement on terms/in ways that are <i>unfair, unreasonable or unjust</i> in respect of the price, marketing or negotiation.	48(1)-(2)
Enter into or make use of <i>prohibited transactions, terms or conditions</i> . These may be for the purpose of defeating the aims of the CPA, misleading or deceiving a consumer, requiring consumers to waive their rights or avoid a supplier's duty.	51(1)
Engage in, promote, join or participate in <i>fraudulent or pyramid schemes or offers</i> .	42(1) & 43(1)
In terms of the consumer's right to choose, arbitrarily <i>bundle goods or services</i> , i.e. make it obligatory for a consumer to purchase related goods or services without being able to show the economic benefits and sufficient convenience.	13(1)
Under the right to choice, exceed the regulated time period for <i>fixed-term agreements</i> or deprive a consumer of the <i>right to early termination</i> .	14(1)
Under the right to choice, <i>repair or perform maintenance</i> without obtaining <i>pre-authorisation</i> from the consumer, based on an estimate that satisfies the requirements set out.	15(1)
In terms of the consumer's right to choice, provide <i>unsolicited goods or services</i> . A consumer has no obligation to pay for unsolicited goods and may lawfully retain them.	21(1)
Engage in <i>negative option marketing</i> .	31(1)
Over-book or over-sell	47(1)
Make a <i>promotional offer</i> or offer a <i>loyalty programme</i> without an intention to fulfil it. In the case of prepaid vouchers they may not expire until the date on which the full value was redeemed or three years after the date they were issued.	34(3) & 35(2) & 63
Pretend a person has won a competition.	36(2)

Table 5.1 (continued)

	SECTION(S)
group preferential e.g. selling	8 & 9
which is linked with see also par. 1.8).	11 & 12
goods or services	4(5)(b)-(c)
properties,	29
	24(2)
generation, serial fact.	41
goods or	30(1)
injust in	48(1)-(2)
may be for consumer,	51(1)
fers.	42(1) & 43(1)
e.g. i.e. make binding able	13(1)
reements	14(1)
reements	15(1)
A in them.	21(1)
	31(1)
	47(1)
	34(3) & 35(2) & 63
	36(2)

SUPPLIERS AND SERVICE PROVIDERS MAY NOT:	SECTION(S)
Make a false misrepresentation in respect of the <i>availability, profitability or risk of work or business.</i>	37(1)
Promote, offer or supply goods or services on the condition that the consumer will <i>receive a benefit if the consumer refers other customers.</i>	38(1)
Contract with <i>mentally unfit persons and minors.</i>	39(1)
Under the right to fair and honest dealing, engage in unconscionable conduct such as <i>the use of physical force, undue influence or unfair tactics</i> in marketing, negotiating, supply of goods or services or the execution, enforcement of a contract or the collection of payment.	40(1)
Knowingly take <i>advantage</i> of physical disability, mental incapacity, illiteracy, ignorance or inability to understand language.	40(2)
Require consumers to <i>waive any rights</i> , assume obligations or waive supplier liability.	48(1)
Supply <i>unsafe, defective or hazardous</i> goods.	61(1)

Table 5.2 Obligations under the CPA

SUPPLIERS AND SERVICE PROVIDERS MUST:	SECTION(S)
In terms of the right to choice, allow consumers to <i>cancel an advance booking, reservation or order</i> except if it is a special/custom-made order. The supplier may charge a reasonable and fair cancellation fee except if the cancellation is due to hospitalisation or death.	17
Provide notices and documents in the format prescribed or in <i>plain understandable language</i> so that consumers can make informed choices.	22(1) & (2)
Provide a <i>written record</i> of the transaction/agreement.	26(2) & 50(1)
Disclose <i>reconditioned or grey market</i> goods.	25(1)
Provide the <i>prescribed information</i> during the sale of any property or services by an intermediary.	27(1)
Inform the consumer of the <i>right to cancel</i> after concluding a direct marketing agreement.	32(1)
Draw the consumer's attention to any <i>limitation of risk or liability</i> by the supplier/assumption of risk by the consumer.	49(1)
Allow a consumer to cancel a sale and return goods to the supplier within 10 business days and receive full refund if the consumer did not have the opportunity to examine the goods before delivery or if the consumer is not satisfied that the goods are of the type and quality agreed on. See also Section 17 in respect of special orders.	20, 55(3), 19(5) & 19(8)
Draw attention to the <i>potential risks</i> of an unusual character or to risks that the consumer could not reasonably be aware of or that could result in serious injury or death.	58(1)

Table 5.2 (continued)

SUPPLIERS AND SERVICE PROVIDERS MUST:		SECTION(S)
Wear or display identification devices when calling on a consumer.		28
Accept the return of designated products from the consumer, without charge for safe recovery and disposal.		59(1)
Deliver the goods/refund the consumer for lay-bys.		62(1) & (2)
Give written notice of intention to close a service facility.		64(3)
Take care of and account for consumer's property.		65
Repay the deposit for containers or pallets, etc.		66
Provide quality service.		54
Provide safe, good, quality goods that are suitable for their generally intended purpose.		55
Return parts or components.		67
Inform a consumer of their right to cooling off after direct marketing without reason or penalty within five business days of concluding the agreement or delivering the goods, whichever date is the later one.		16 & 32

Some of the more pertinent provisions relating to online consumers are examined in more detail below.

5.5.2 Summary of specific sections where the ECT Act applies and the CPA does not

The CPA contains five provisions where rights are not applicable to an electronic transaction because a similar right falls within the ambit of the ECT Act. These include:

- Section 16 of the CPA concerning the right to cool off within five business days after direct marketing. This section does not apply to a transaction if the general seven-day right to cool off in terms of Section 44 of the ECT Act is applicable.
- Section 19 of the CPA concerning the consumer's rights to delivery or supply. It does not apply if Section 46 of the ECT Act setting out similar rights is applicable to the transaction.
- Section 23 of the CPA, which relates to the disclosing of a price for goods or services. This does not apply when the informational duties for a website of Section 43 of the ECT Act does apply. For example, Section 43(i) of the ECT Act

requires a web trader to disclose the full price and transport costs.

- Section 26 of the CPA requiring a sales record to be kept of a transaction. It does not apply if Section 43 of the ECT Act applies. Section 43(m) of the ECT Act requires web traders to inform consumers about the manner and period within which consumers can access and maintain a full record of the transaction.
- Section 33 of the CPA relates to catalogue marketing and the minimum information that needs to be disclosed for telephone, fax or postal orders, but it also does not apply if Chapter VII of the ECT Act applies to the transaction.

5.5.3 Speculative software and 419 schemes

The CPA draft general regulations sought to regulate "speculative software"³¹ and so-called "419 schemes" (Draft Regulation 21). However, both of these draft regulations were excluded from the final regulations.³² Nevertheless, it is interesting to note what the legislator had in mind.

Speculative software was defined as software which claims to assist consumers to understand or to trade profitability with securities and exchanges

31 Draft Regulation 17. The Draft Regulations for the CPA (the General Regulations), *Government Gazette* No. 33818, General Notice No. 1099 of 29 November 2010 (hereafter referred to as the Draft Regulations).

32 The Consumer Protection Act Regulations, *Government Gazette* No. 34180, Government Notice No. 293 of 1 April 2011 (hereafter the CPA Regulations).

SECTION 3

28

59(1)

62(1) & (2)

64(3)

65

66

54

55

67

16 & 32

or which claims to predict the outcome of horse races. Draft Regulation 17 sought to prohibit a person from offering or selling this type of speculative software unless the following statements were included, without alteration in the agreement:

(a) I, (initials and surname of the consumer) understand that I am entitled to cancel this contract within five days of the date on which I signed this contract excluding the day of signature as well as Saturdays, Sundays and public holidays. This cancellation must be conveyed in writing by me and must be received by the supplier or any employee of the supplier, within the five-day period, at the physical address of the supplier. 'In writing' includes the use of any electronic means to transmit messages, provided a hard copy of the message can be reproduced without alteration by the supplier.

(b) I prefer to pay the purchase price in a once-off payment, whether by cash, cheque or a debit on my credit card.

I prefer to make monthly repayments on my debit card. I understand that should I select this option, the supplier will be credited with the full purchase price, and that I will have to make monthly repayments, including interest at the prevailing interest rates, to the bank. (Delete the option which is not applicable.)

(c) The terms, conditions and costs involved for both options were explained to me and a copy of the contract, which include the statements above as well as the signed statement by the supplier that I will be refunded the money paid by me should I cancel this contract within five days, was handed to me.

(Signature of the consumer).

(d) I have not made any verbal promises to the consumer which are not printed in any official literature of the firm. Upon termination of the contract by the consumer as set out above, I shall, within five days as defined above, refund all payments made by the consumer or reverse any credit transaction.

(Signature of the supplier or authorised agent).

Draft Regulation 21 wished to prohibit so-called 419 schemes (undefined) and therefore prohibited a person from obtaining by any false pretence and with an intention to defraud or to induce any person to obtain or deliver property or benefit or to transport monetary instruments into, out of or through South Africa.

5.5.4 Online auctions

5.5.4.1 Introduction

Auctions are extensively regulated under the CPA and its regulations (Section 45 of the CPA and

Regulations 18–33 of the CPA Regulation of 1 April 2011). Regulation 30 makes specific provision for auctions via the internet or other electronic medium, where it states that the rules applicable to general auctions apply to electronic auctions *mutatis mutandis*, irrespective of where the server, electronic medium or platform is situated.

5.5.4.2 Rules specific to online auctions

There are some rules under the CPA and its regulations that are exclusively applicable to auctions conducted over the internet or other electronic medium. These include:

- That the internet, website or electronic platform must
 - be available to anyone over the age of 18 at any time of day (Regulation 30(1)(b))
 - provide high standards of security for electronic transactions (Regulation 30(1)(c))
 - provide easy access to all the records prescribed by the CPA (Regulation 30(1)(d)), and
 - keep all information contemplated in Regulation 28(4) (Regulation 30(1)(e)).
- Prospective bidders must provide full names, identification or passport numbers, age, physical address, internet protocol address, login code or name and password (Regulation 30(2)).
- An auctioneer may not exclude liability if any goods purchased at the auction are not delivered to the purchaser thereof (Regulation 30(3)).

5.5.4.3 Rules applicable to all auctions

The regulations for auctions do not apply to goods auctioned where the proceeds of the auction go to a *bona fide* religious, educational, cultural, welfare, social or sports organisation which does not undertake commercial or business operations or transactions concluded under the auspices of a registered or licensed stock exchange. For all other auctions, irrespective of the nature of the goods offered, the value of the property or the reason for conducting an auction, these regulations do apply (Regulation 18(3) and (4)). What follows is a short summary/overview of the rules applicable to auctions in general (including online auctions). The reader is, however, advised to study Regulations 18–33 and Section 45 of the CPA for greater detail and to ensure proper compliance.

Except insofar as Section 45 of the CPA includes a sale in execution, it is interesting to note that an auction *per se* is not defined and is perhaps a

significant oversight by the legislator given that the rules only apply to this very specific type of transaction. The Regulations have, however, defined *auction house*, *auction without reserve*, *auctioneer* and *closed auction*.³³

The first set of rules for an auction relate to the fact that auctions must be advertised in a way that the general public has a reasonable opportunity to become aware of the auction and the goods on offer. The onus of proving that the auction was properly advertised lies with the auctioneer, and failing the proper advertising, no goods may be sold.³⁴

Unless notice is given in advance that a sale by auction is subject to a right to bid by or on behalf of the owner or auctioneer, neither of these parties may bid or employ any person to bid at the sale and the auctioneer may not accept a bid from either. The consumer may approach the court to declare the transaction fraudulent if these subsections have been violated (Section 45(4) and (5)).

The second set of rules apply to the actual auction itself and among others the rules of the auction must be in writing and available to the general public a minimum of 24 hours before the auction commences (Regulation 21(1)). These rules may not exclude liability for inaccurate information, not adhering to the Regulations or the CPA or contain any qualification, reservation or diminution of these (Regulation 21(3)). The auctioneer must certify and sign off the rules of the auction and is personally accountable and liable for the contents thereof (Regulation 21(5)–(7)).

Furthermore, the auctioneer has to account for the consumer's property and may not sell goods without first having entered into a written agreement with the owner or rightful holder of the goods (Regulation 22). For each auction the auctioneer must compile and retain a bidder's record where the identity of the bidders is recorded and verified, and this record must be available for public inspection (Regulation 26). These and all other records prescribed in the Regulations such as a vendor's roll must be kept for at least three years (Regulation 31).

Section 45 of the CPA confirms that when goods are put up for sale by auction in lots, each lot is regarded as a separate transaction except if there is evidence to the contrary.

The auctioneer may not

- be compensated or receive any fee until the goods are delivered to the purchaser
- accept a bid from a person, unless he or she is registered as a bidder
- knowingly misrepresent, or cause to be misrepresented, the value, composition, structure, character or quality of the goods
- make false entries in the auction record (Regulations 24 and 25), or
- hold or participate in a *mock auction*.³⁵

Many website/online auctioneers will have to significantly overhaul their websites in order to totally comply with these extensive notes.

33 Regulation 18(1): An "*auction house*" means a company or other juristic person which from time to time conducts auctions as part of its business. An "*auction without reserve*" means an auction at which (a) goods are sold to the highest bidder without reserve; (b) the auction does not require a minimum bid; (c) the auction does not allow competing bids of any type from the seller or an agent of the seller; and (d) the seller of the goods cannot withdraw the goods from the auction after the auction has opened and there is public solicitation or calling for bids. The "*auctioneer*" means the person conducting the auction, irrespective of whether or not he or she is doing so for his or her own account or as an employee of or agent for an auction house or other person. A "*closed auction*" means an auction where the auctioneer or the owner issues an invitation to take part in an auction to a finite list of consumers.

34 See Regulations 19(1)–(4) and 20(1)–(19). Under the advertising rules for auctions it is clear that the adverts must be accurate and contain sufficient detail for an informed consumer, therefore for example it must contain the date, time and place where the auction will take place, contain a URL where the CPA Regulations for auctions can be accessed, be clear on the rules applicable to the particular auction, and may not be advertised as a "sale in execution", "deceased estate auction", "insolvent estate auction", "divorce auction" unless at least 75 per cent of the goods on offer are to be sold pursuant to such a court order as the case may be. It may not be advertised as without reserve or absolute unless the goods are sold in terms of an unqualified acceptance of the highest bid, etc.

35 Regulation 29: A mock auction is where goods are sold for less than the highest bid, or part of the purchase price is credited to the purchaser, or where goods are given away as gifts, etc.

5.6 OVERVIEW OF PROTECTION OFFERED BY THE PPI BILL

Please see the discussion in Chapter 13 of this book on the PPI Bill.

5.7 UNSOLICITED COMMUNICATIONS AND DIRECT MARKETING

5.7.1 Introduction

Some believe advertising is "the most prevalent and toxic of all mental pollutants" (Lasn 1999:59). Unsolicited electronic communications (or spam) are the bane of most internet users' lives and account for a disproportionate amount of our internet traffic.³⁶ Accurate figures do not seem to be available, but depending on the source they range from 45 per cent to 92 per cent of all internet traffic.

Spam ranges from mildly annoying to outright harmful, objectionable and offensive, it is an abuse of recipient resources and it can be a threat to e-mail and internet security (Buys & Cronjé 2004: 160; Van der Merwe *et al.* 2008: 190). Although spam is predominately received via e-mail, it is increasingly being sent to cellphones via short message services (SMS) or multi media message services (mms).

5.7.2 What is spam?

Although most internet or cellphone users would be able to identify spam, agree that it is unwanted and should in some manner be regulated, jurists the world over have varied significantly over a discernable, sufficiently encompassing legal definition for spam.³⁷ This variance in definitions

may to some extent have impacted on the effective control of spam.

In the US the CAN-SPAM Act was enacted to prohibit the sending of "any electronic mail message, the primary purpose of which is the commercial advertisement or promotion of a commercial product or service, including e-mail that promotes content on commercial websites".³⁸

In Australia, Section 16 of the Spam Act 129 of 2003 states that "a person may not send, or cause to be sent a commercial electronic message".³⁹

Back in South Africa, Buys and Cronjé (2004: 160) defined it as unsolicited bulk and/or commercial electronic communications, and Tladi (2006: 179) as unsolicited e-mail or electronic junk mail.

Regarding South African legislative intervention in the control or prohibition of spam, it will become evident from the paragraphs that follow, that there are some serious oversights which will require urgent attention in the near future.

The ECT Act was originally the only legislation directly regulating spam in South Africa, and in Section 45 it refers to spam as "unsolicited commercial electronic communications sent to consumers". As of 1 April 2011 the CPA became applicable in South African law and has very specific provisions that relate to "direct marketing". The CPA has not repealed Section 45 of the ECT Act and therefore the two Acts concurrently regulate aspects of spam or unsolicited electronic communications.

Furthermore, it is also possible that in the future Parliament will finally adopt and enact the Draft Bill on the Protection of Personal Information B9-2009 (the PPI). In its current form it is envisaged that the PPI will repeal Section 45 of the ECT Act,⁴⁰ and replace it with Chapter VIII, Sections 66–68, detailing the rights of data subjects regarding unsolicited electronic communications and automated decision making, and therefore it seems

36 See <http://www.yale.edu/its/metrics/email/index.html>, <http://www.spamlaws.com/spam-stats.html> and www.maaawg.org/sites/maaawg/files/news/MAAWG_2009-Q3Q4_Metrics_Report_12.pdf.

37 The word "spam" was first used in 1926, when Hormel Foods introduced a brand of tinned lunchmeat known as spam. For an overview of the history of SPAM, see Mossoff (2004).

38 Section 3(2) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (commonly known as the CAN-SPAM Act), available at <http://www.spamlaws.com/federal/108s877.shtml>.

39 Available at <http://www.comlaw.gov.au/Details/C2011C00080>. A similar definition can be found in the New Zealand Unsolicited Electronic Messages Act 7 of 2007, available at <http://www.legislation.govt.nz/act/public/2007/0007/latest/DLM405134.html>.

40 Schedule to the PPI – "Laws repealed or amended by Section 101".

as if spam will (in the future) be concurrently regulated by both the CPA and the PPI.

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

5.7.3 Section 45 of the ECT Act

As mentioned, the ECT Act regulates (does not prohibit) the sending of unsolicited commercial electronic communications to consumers. In terms of Section 45, senders are first required to give the consumer the option to opt out of the mailing list and second, if so requested by the consumer, to reveal the source where the e-mail address or cellphone number was obtained. A failure to comply with these requirements is an offence in terms of Section 89(1) with penalties that include fines and imprisonment of up to 12 months. Finally, it confirms that no agreement is concluded where a consumer fails to respond to the unsolicited communication (Section 45(2)).

Unsolicited implies that there is no prior relationship between the sender and the recipient and that the recipient has not consented to receive the communication or that the recipient has not previously attempted to terminate such a relationship by instructing the sender to remove the recipient's contact details from the mailing list or database (Buys & Cronjé 2004: 160).

Commercial is not defined in the ECT Act, but if we look to foreign legislation such as the CAN-SPAM Act, it seems to relate to messages whose primary purpose is to advertise or promote goods or services.⁴¹ Therefore non-commercial communications such as newsletters, opinion surveys, religious messages, political content, virus warnings and virus hoaxes, urban legends, news, chain letters and hate mail are not regulated as spam under the ECT Act (Buys & Cronjé 2004: 160).

The ECT Act did not include the bulk requirement as can be found in some foreign jurisdictions and therefore a single unsolicited commercial communication may be classified as spam (Buys & Cronjé 2004: 161).

Electronic – the spamming provisions of the ECT Act fall under the general application of Section

42(1). This dictates that Chapter VII of the ECT Act, including Section 45, only applies to electronic transactions. Therefore it would follow that spam, in terms of the ECT Act, excludes unsolicited telephone calls and post but includes e-mail, SMS, etc. (Buys & Cronjé 2004: 160).

Sent to consumers – Section 45(1) indicates that it only applies when the spam is in fact sent to a consumer. As discussed above, 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*. It would therefore follow that Section 45 only regulates spam if it is sent to a natural person who enters or intends entering into an electronic transaction and furthermore only if such natural person is the end-user of the goods or services offered by the spammer (Buys & Cronjé 2004: 160).

These provisions of the ECT Act have been criticised by a number of South African jurists (Buys & Cronjé 2004: 165; Tladi 2006: 178). They point out that for the opt-out or unsubscribe mechanism to be effective, two things are necessary: firstly that the spammer respects the call to stop sending and secondly that the consumers have faith in using the opt-out mechanism (Tladi 2006: 186). Neither of these is realistic in the world of spam.

Some further criticisms of Section 45 include the following (Tladi 2006: 186–187):

- It does not stipulate how the opt-out mechanism should be made available. This means that most spam does not have any sort of opt-out link or if it does, it is often dysfunctional.
- Most spammers disguise or falsify their headers (headers being that part of an e-mail that tells us who sent the e-mail, the sender's e-mail address, time, date and subject) and recipients cannot opt out because they are unable to trace or identify the real spammer. This is problematic because this practice is not prohibited or penalised.
- If a person uses the opt-out mechanism or requests information on where the spammer obtained the address, all that happens is that the recipient confirms that the address is alive and functional, with the result that even more spam will be sent, often from a number of new sources.
- The onus is always on the consumer to request spammers to stop or to obtain information to lay

41 The Federal Communications Commission Consumer Facts: CAN-SPAM Unwanted text messages and e-mail on wireless phones and other mobile devices. Available at <http://www.fcc.gov/cgb/consumerfacts/canspam.html>.

res that Chapter VII of the ECT Act, only applies to electronic messages before it would follow that spam in the ECT Act, excludes unsolicited e-mail but includes e-mail, SMS, etc. (2004: 160).

Section 45(1) indicates that if the spam is in fact sent to a natural person who enters or intends to enter into a transaction with a supplier of goods or services offered by that person, then Section 45 will apply. Therefore follow that Section 45 only if it is sent to a natural person. Furthermore only if such natural person is a user of the goods or services. (Buys & Cronjé 2004: 160). The provisions of the ECT Act have been criticised by South African jurists (2004: 165; Tladi 2006: 178). They argue that the opt-out or unsubscribe mechanism, two things are necessary: first, the consumer must respect the call to stop; second, the consumers have faith in the mechanism (Tladi 2006: 186). The provisions of Section 45 include the following (186-187):

how the opt-out mechanism is implemented. This means that most of the sort of opt-out link or if it is dysfunctional. The consumer may or falsify their headers as part of an e-mail that tells us the sender's e-mail address, and recipients cannot opt out. This is problematic because the opt-out mechanism or the spammer where the spammer that happens is that the address is alive and spam that even more spam a number of new sources. The consumer to request to obtain information to lay

a complaint which in turn means that if consumers do not exercise their rights, spammers can continue to send spam and remain unsanctioned.

- Finally, most spam originates outside of South African jurisdiction, which makes enforcement of these regulations very difficult, and the result is that few (including under-resourced law enforcement offices) will spend the time, effort or money on locating an offender and litigating for a maximum penalty of 12 months in jail. Instead it is probably much easier and cheaper

for a consumer to purchase spam filter software, delete the messages from inboxes or to set the various junk mail settings.

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

5.7.4 Direct marketing under the CPA

In the marketing of goods or services, the CPA has placed a great deal of emphasis on honest, fair and

Table 5.3 Provisions of the CPA

SUPPLIERS AND SERVICE PROVIDERS MUST:	SECTION(S)
Not make false, misleading or deceptive representations about a supplier or any goods or services unless the person has reasonable grounds for believing the representation to be true.	4(5)(b) & (c)
Not directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact, use exaggeration, innuendo or ambiguity as to a material fact or fail to disclose/correct an apparent misunderstanding regarding a material fact.	41
Make no false, misleading or deceptive representations about the nature, properties, advantages or uses of the goods or services	29
Not apply discriminatory marketing.	8
Make no misleading trade descriptions.	24(2)
Apply no unfair, unreasonable or unjust price, marketing or negotiation. This includes terms that are excessively one-sided or that are so adverse to the consumer that they are inequitable.	48(1) & (2)
Not set up fraudulent or pyramid schemes and offers.	42(1), 43(1)
Not over-sell or over-book.	47(1)
Not mislead or deceive regarding the actual availability or price of the goods or services, such as bait-and-switch marketing.	30(1)
Not use physical force, undue influence, unfair tactics, etc. in marketing, negotiating, supplying goods or services or the collection of payment – unconscionable conduct.	40(1)
Not take advantage of physical or mental disability, illiteracy, ignorance or inability to understand the language.	40(2)
Not apply negative-option marketing.	31 (1)
Not pretend someone has won a competition – promotional competitions.	36(2)
Not make a promotional offer without the intention of fulfilling it – trade coupons, etc.	34(3)
Not offer participation in a customer loyalty programme without the intention of providing it.	35(2)
Not make false representations regarding the profitability, availability or risk of work or a business (alternative work schemes).	37(1)

Table 5.3 (continued)

SUPPLIERS AND SERVICE PROVIDERS MUST:		SECTION(S)
Not do referral selling.		38(1)
Not do direct marketing.		11, 12, 16, 28 & 32
Not sell unsolicited goods.		21

responsible conduct. Once again a tabulation of the provisions relating to the advertising and marketing of goods and services under the CPA is a useful starting point (Melville 2009: 49–50) (See Table 5.3). Section 11 of the CPA specifically sets out the consumer's right to restrict unwanted direct marketing. The CPA Regulations appear in *Government Gazette* No. 34180, as Government Notice No. 293 of 1 April 2011. Under this, Regulation 4 finally establishes the nuts and bolts for controlling direct marketing communications.

Direct marketing is defined in the CPA as an approach to a person, either in person or by mail or electronic communication, for the direct or indirect purpose of promoting, offering to supply, in the ordinary course of business, any goods or services or to request a donation of any kind (Section 1 of the CPA).

An *electronic communication* is a communication by means of electronic transmission, including telephone, fax, SMS, wireless computer access, e-mail or similar technology or device.⁴²

In essence the section relating to the consumer's right to restrict unwanted direct marketing is a welcome relief and long overdue. It lays down that a consumer has the right to refuse to accept, require another person to discontinue or pre-emptively block any approach or communication if the approach or communication is primarily for the purpose of direct marketing (Section 11(1)(a)–(c)). The consumer may also place a sign on a post box, gate, etc. to indicate that he/she does not wish to receive

any material related to direct marketing.

In order to facilitate this, the Commission will establish a registry where a person may register a pre-emptive block against direct marketing communications and any person authorising, directing or conducting any direct marketing must implement appropriate procedures to facilitate demands to stop further communications (Section 11(2)–(4)). Furthermore, Section 12 read with the regulations determines the times that the supplier may contact a consumer for direct marketing purposes. The Notice "Prohibited Time for Contacting Consumers" sets the prohibited time for contacting consumers as Sundays and Public Holidays, Saturdays before 9:00 and after 13:00 and all other days between the hours of 20:00 and 08:00 the following day (CPA Regulations of 1 April 2011). Regulation 3(c)(iv) affords the consumer an opportunity to register a pre-emptive block for any time of the day or any day of the year if the operator of the registry so allows.

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

- His or her name, identification number, passport number, telephone number, facsimile number, e-mail address, postal address, physical address, a website uniform resource locator (URL).
- A global address for any website or web application or site on the world wide web.
- Any combination of the media or addresses contemplated in paragraphs (i) and (ii) above.

⁴² It is perhaps pertinent to note that this definition of electronic communication in the CPA differs from that of the ECT Act where it is defined as communication by means of data messages which is data that is generated, sent, received or stored by electronic means and includes voice where it is used in an automated transaction and a stored record. The reason for this differentiation may be that under the CPA, the legislator would clearly like to include direct marketing via the telephone and postal services within its protective provisions. Although it is under the ECT Act, communication via telephone is, according to Van der Merwe *et al.* 2008: 148–150, not strictly included as an electronic communication because it is a direct method of communication to which the information theory is applied for the determination of the time and place for the conclusion of a contract, whereas the ECT Act deals exclusively with indirect forms of communication such as telexes, faxes, SMSs, e-mails and interaction with websites to which the reception theory is applied. See Sections 22 and 23 of the ECT Act.

	SECTION(S)
	38(1)
	11, 12, 16, 28 & 32
	21

- d) A pre-emptive block for any time of the day or any day of the year.
- e) A comprehensive prohibition for any medium of communication, address or time whatsoever in his or her sole discretion, as the factor which triggers the pre-emptive block contemplated in Section 11(3) of the CPA.

Most importantly, a direct marketer must, without exception, assume that a comprehensive pre-emptive block has been registered by a consumer unless the administrator of the registry has in writing confirmed that the pre-emptive block has not been registered (Regulation 4(3)(g)).

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

Thus for the online consumer, the receipt of any communication sent via electronic transmissions that has the direct or indirect purpose of promoting or offering to supply goods or services can be restricted or pre-emptively blocked under the CPA. However, as with the ECT Act, if the communication does not promote or offer to supply goods or services, it cannot be restricted or pre-emptively blocked and the consumer will therefore have to continue to rely on software and junkmail settings.

5.7.5 Chapter VIII of the PPI: Rights of Data Subjects Regarding Unsolicited Electronic Communications and Automated Decision Making

5.7.5.1 Unsolicited Electronic Communications

As previously mentioned, it is possible that in the future Parliament will finally adopt and enact the Draft Bill on the Protection of Personal Information B9-2009 (the PPI) which is an all-encompassing data protection Act.⁴³ In its current form it is envisaged that the PPI will repeal, among others, Section 45 of the ECT Act (Schedule to PPI), and replace it with Chapter VIII, Sections 66–68, detailing the rights of data subjects regarding unsolicited electronic communications and automated decision making.

Again, I would just like to caution the reader that it is probable that the final wording of this Act, which will only be adopted after it has completed its legislative journey, may differ slightly in certain respects from the provisions discussed below. For an explanation of the PPI's field of application, envisaged exclusions, definitions and interpretational clauses see the discussion in Chapter 13 on privacy and data protection and 5.3.6.

Despite the fact that the heading of Chapter 8 is *Rights of Data Subjects Regarding Unsolicited*

⁴³ Discussed in more detail in Chapter 13 on Privacy and Data Protection.

Electronic Communications and Automated Decision Making, it is clear from Section 66 of the PPI that in essence the provisions actually prohibit the processing of personal information of a data subject for the purpose of direct marketing (not defined in the PPI) by means of automatic calling machines,⁴⁴ facsimile machines, SMSs (not defined in the PPI) or electronic mail. *Electronic mail* includes any text, voice, sound or image message sent over a public communications network⁴⁵ which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient (Section 1).

It is not clear why the legislature decided to use different definitions for key concepts, once again, but I submit that should this Bill become enforceable as an Act, these variances in definitions between the ECT Act for electronic communication⁴⁶ and information system,⁴⁷ the CPA for electronic communication⁴⁸ and SMS⁴⁹ and the PPI for electronic mail and public communications network will be the source of interesting litigation and interpretation. The lofty aim of trying to effectively control spam will be subjected to this fragmented approach.

Be that as it may, the PPI is an improvement over Section 45 of the ECT Act, insofar as it prohibits the processing of personal information for direct marketing purposes unless the data subject has given consent to the processing, or is, subject to Subsection (2), a customer of the responsible party.

A responsible party may only process the personal information of a data subject who is a customer of the responsible party if the responsible party (a) has obtained the contact details of the data subject in the context of the sale of a product or service; (b) has obtained the contact details of the data subject for the purpose of direct marketing of the responsible party's own similar products or services; and (c) if the data subject has been given a

reasonable opportunity to object, free of charge and in a manner free of unnecessary formality, to such use of electronic details either (i) at the time when the information was collected; or (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 (Section 66(2) of the PPI).

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

5.7.5.2 Printed or electronic directories

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

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

The data subject must furthermore be given a reasonable opportunity to object to the use of the personal information or to request verification, confirmation or withdrawal of such information if the data subject has not initially refused such use.⁵⁰

5.7.5.3 Automated decision making

Subject to Section 68(2), no one may be subject to a decision where there are legal consequences attached, or which affects them to a substantial degree, that has been taken solely on the basis of the automated processing of personal information,

44 Section 1 of the PPI defines an "automatic calling machine" as "a machine that is able to do automated calls without human intervention".

45 "Public communications network" means an electronic communications network used wholly or mainly for the provision of publicly available electronic communications services - Section 1, PPI.

46 According to Section 1 of the ECT Act, "electronic communication" means a communication by means of data messages.

47 "Information system" means a system for generating, sending, receiving, storing, displaying or otherwise processing data messages and includes the internet (ECT Act).

48 "Electronic communication" means communication by means of electronic transmission, including by telephone, fax, SMS, wireless computer access, e-mail or any similar technology or device (ECT Act).

49 "SMS" means a short message service provided through a telecommunication system (ECT Act).

tunity to object, free of charge and of unnecessary formality, to such details either (i) at the time when as collected; or (ii) on the occasion of the data subject for the conclusion or execution of a contract, and

intended to provide a profile of certain aspects of his or her personality or personal habits.

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

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

The appropriate measures referred to above must

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

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

the openness and decentralised nature of the Internet, which are the main reasons for its success, have also

created the conditions leading to a number of vulnerabilities that are increasingly exploited by spammers and other online offenders. The lack of centralised control enables users to hide their identity. In addition, the low cost of accessing Internet and e-mail services allows spammers to send out millions of spam messages every day at an extremely low marginal cost so that only a small response rate is required to attain high profits. However, in combating spam and other online threats it is viewed as important to maintain the openness, flexibility and innovation underlying the Internet (OECD 2006).

5.8 CONCLUSION

There is no doubt that consumer protection in South Africa is undergoing fundamental changes and that the effect of these changes will be felt throughout the country by all. As we move into a more pro-consumer era, there will be opportunities for refining the legislation we have enacted and ironing out the inconsistencies that may exist so that in the end we have a competitive, efficient, innovative market where the standards of consumer protection are high, consumers are empowered and confident about making choices and where businesses comply with consumer and competition laws but are not overburdened by regulation.

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

BIBLIOGRAPHY

Books and reports

- Buys, R. & Cronjé, F. (Eds). 2004. *Cyberlaw@SA II: the law of the internet in South Africa*. 2nd ed. Pretoria: Van Schaik.
- Kirby, N. 2011. The Consumer Protection Act – a brief overview of the Draft General Regulation. Report by Werksmans Attorneys, Johannesburg.
- Lasn, K. 1999. *Culture jam: the uncooling of America*. New York: William Morrow & Company.
- Melville, N.J. 2009. *The Consumer Protection Act made easy*. Pretoria: Book of Life Publications.
- Organisation for Economic Co-operation and Development (OECD). 2002. Best practice examples under the OECD Guidelines on Consumer Protection in the Context of Electronic Commerce. Digital Economy Paper No. 61, Paris, France: OECD Publishing.
- Organisation for Economic Co-operation and Development (OECD). 2006. Report of the OECD Task Force on Spam: Anti-Spam Toolkit of Recommended Policies and Measures. Paris, France: OECD Publishing.

- Organisation for Economic Co-operation and Development (OECD). 2007. Report on Mobile Commerce. Paris, France: OECD Publishing.
- Organisation for Economic Co-operation and Development (OECD). 2008. Policy Guidance for Protecting and Empowering Consumers in Communication Services. Paris, France: OECD Publishing.
- Organisation for Economic Co-operation and Development (OECD). 2009. OECD Policy Guidance for Addressing Emerging Consumer Protection and Empowerment Issues in Mobile Commerce. Paris, France: OECD Publishing.
- Van der Merwe, D., Roos, A., Pistorius, T. & Eiselen, S. 2008. *Information and communications technology law*. Durban: LexisNexis.
- Van Eeden, E. 2009. *A guide to the Consumer Protection Act*. Durban: LexisNexis.

Journal articles

- De Cock Buning, M., Hondius, E., Prins, C. & De Vries, M. 2001. Consumer@Protection.EU. An analysis of European consumer legislation in the information society. *Journal of Consumer Policy*, 24: 287–338.
- Gouws, M. 2010. A consumer's right to disclosure and information: comments on the plain language provisions of the Consumer Protection Act. *SA Mercantile Law Journal*, 22: 79–94.
- Jacobs, W. 2004. The Electronic Communications and Transactions Act: consumer protection and internet contracts. *SA Mercantile Law Journal*, 16: 556–567.
- Jacobs, W., Stoop, P. & Van Niekerk, R. 2010. Fundamental consumer rights under the Consumer Protection Act 68 of 2008: a critical overview and analysis. *PER/PELJ Potchefstroom Electronic Law Journal*, 13(3): 302–508.
- Mossoff, A. 2004. Spam – Oy, what a nuisance! *Berkeley Technology Law Journal*, 19(625): 631–632.
- Naudé, T. 2009a. Enforcement procedures in respect of a consumer's right to fair, reasonable and just contract terms under the Consumer Protection Act in comparative perspective. *SA Law Journal*, 127(3): 515–547.
- Naudé, T. 2009b. The consumer's 'right to fair, reasonable and just terms' under the New Consumer Protection Act in comparative perspective. *SA Law Journal*, 126(3): 505–536.
- Pistorius, T. 2004. Click-wrap and Web-wrap agreements. *SA Mercantile Law Journal*, 16: 568–666.
- Tladi, D. 2006. The regulation of unsolicited commercial communications (SPAM): is the opt-out mechanism effective? *SA Mercantile Law Journal*, 18: 178–192.
- Woker, T. 2010. 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. *Obiter*, 31(2): 217–231.

South African Legislation

- Consumer Affairs (Unfair Business Practices) Act 89 of 1998
- Consumer Protection Act 68 of 2008
- Credit Agreements Act 75 of 1980
- National Credit Act 34 of 2005
- Protection of Personal Information Bill, B9-2009
- Usury Act 73 of 1968

International Legislation

- Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (commonly known as the CAN-SPAM Act).
- Data Protection Directive 95/46/EC of the European Parliament of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data
- European Distance Selling Directive (EC) 97/7 [1997] OJ L144/19

Regulations

- Consumer Protection Act Regulations. *Government Gazette* No. 34180, Government Notice No. 293 of 1 April 2011.
- Determination of Threshold in terms of the Consumer Protection Act of 2008 (Act No. 68 of 2008) *Government Gazette* No. 34181, Government Notice No. 294 of 1 April 2011.
- Draft Regulations for the CPA, (the General Regulations) *Government Gazette* No. 33818, General Notice No. 1099 of 29 November 2010.

Web resources

- Advertising Standards Authority of South Africa (ASASA). [s.a.]. Available at <http://www.asasa.org.za>
- Australian Government. 2011. Spam Act 2003 (Act No. 129 of 2003 as amended). Available at <http://www.comlaw.gov.au/Details/C2011C00080>
- Direct Marketing Association of South Africa (DMASA). [s.a.]. Get recognized with a professional designation from the DMA SA. Available at http://www.dmasa.org/dmasa/dma_pd.php?str=1/18/0
- Federal Communications Commission (US). [s.a.]. Spam: Unwanted Text Messages and Email. Available at <http://www.fcc.gov/guides/spam-unwanted-text-messages-and-email>
- Internet Service Providers' Association (ISPA). [s.a.]. Available at <http://ispa.org.za>
- Messaging Anti-Abuse Working Group (MAAWG). 2010. Email Metrics Program: The Network Operators' Perspective. Available at http://www.mawg.org/sites/maawg/files/news/MAAWG_2009-Q3Q4_Metrics_Report_12.pdf
- New Zealand Government. 2011. Unsolicited Electronic Messages Act 2007. Available at <http://www.legislation.govt.nz/act/public/2007/0007/latest/DLM405134.html>
- Organisation for Economic Co-operation and Development (OECD). 2008. OECD Policy Guidance for Addressing Emerging Consumer Protection and Empowerment Issues in Mobile Commerce. Available at <http://www.oecd.org/dataoecd/50/15/40879177.pdf>
- Spam Laws. 2012. CAN-SPAM Act of 2003. Available at <http://www.spamlaws.com/federal/108s877.shtml>
- Spam Laws. 2012. Spam Statistics and Facts. Available at <http://www.spamlaws.com/spam-stats.html>
- Wireless Application Service Providers' Association (WASPA). 2012. Available at <http://www.waspa.org.za>
- Yale University. 2011. Email and spam statistics – Fiscal Year 2011. Available at <http://www.yale.edu/its/metrics/email/index.html>