

Short notes on:

UNWANTED DIRECT MARKETING AND YOUR RIGHT TO REFUSE

Introduction

A situation that almost every consumer has experienced has been that of receiving an unwanted phone call from a telemarketer. The conversation is carried out with the intention of selling you a product or service and is essentially a sales pitch. As a consumer, do you know your rights to refuse your information being used for such direct marketing purposes? Also, do you know how to address enforcing such a right if it does indeed exist?

Your Right to Refuse

In short, the answer is yes; as a consumer, you do have rights that can be enforced to avoid being contacted as part of direct marketing campaigns. The point of departure would be the Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution"). Section 14(d) stipulates that *'everyone has the right to privacy, which includes the right not to have... the privacy of their communications infringed.'* Accordingly, when the Consumer Protection Act 68 of 2008 (hereinafter 'the CPA') was assented to, it included the right to restrict unwanted direct marketing under Section 11. Briefly explained, this provision provides for a consumer's right to refuse to accept or to request another person to discontinue or to pre-emptively block any communication if its primary purpose is direct marketing.¹ As per Section 11(3) of the CPA, authority is given to the National Consumer Commission to establish a registry that consumers can register to in order to pre-emptively block such direct marketing communications.

Further to this, a consumer's right to prevent unsolicited direct marketing is protected in the Protection of Personal Information Act 4 of 2013 (hereinafter 'POPIA'). The emphasis here would be placed on Section 69, which deals with unsolicited direct marketing. POPIA clearly states that *'the processing of personal information of a data subject (consumer) for the purpose of direct marketing by means of any form of electronic communication, including automatic calling machines, facsimile machines, SMSs or e-mail is prohibited unless the data subject has given his, her or its consent to the processing; or ... is... a customer of the responsible party.'*²

¹ Section 11(a), 11(b) and 11(c) of the CPA.

² Section 69(1) of POPIA.

Interestingly, POPIA also contains a provision which stipulates that any consumer whose information is included in a directory of subscribers, must be informed of such inclusion and the purpose thereof and be allowed to object to being included in such a directory.³

How to Enforce Your Right of Refusal

In the first instance, consumers may refuse to be included in any direct marketing databases or campaigns. If you are contacted and informed of such inclusion, you may request to be excluded from any future communications of that nature by the contacting party.

As stated above, the National Consumer Commission has the authority to establish a registry used to list the details of all consumers wanting to pre-empt the refusal of direct marketing communications. This registry has however not been established.

Instead, there exists a not-for-profit company named Direct Marketing Association of South Africa (hereinafter 'DMASA'). This company is dedicated to the *'protection and development of the Interactive and Direct Marketing (IDM) industry'*.⁴ DMASA has established a pre-emptive block list to which consumers can register in order not to receive direct marketing communication. This refusal is only effective against DMASA members and not all businesses operating within the country's borders. Their member directory, however, does contain a few big businesses likely to make use of direct marketing strategies such as major banks, various advertising agencies and even well-known and established retail groups.

To register, you could log on to DMASA's website and follow the prompts to the DMA National OPT OUT Database.

Conclusion

If you have followed the steps above already and are still being contacted by a persistent direct marketer, you do have the option of registering a complaint. The complaint would be against the business effecting such communication, and to formalise this, you would approach the Consumer Goods & Services Ombud. The Ombudsman in this context would be able to assist in resolving a dispute you might have against any supplier of goods or services within its jurisdiction. This

³ Section 70(1) and Section 70(2) of POPIA.

⁴ <https://www.dmasa.org/page/about-us> (accessed on 09 June 2019).

jurisdiction covers all suppliers of goods or services operating within the country's borders unless such supplier is regulated by a code prescribed by a Minister or if a complaint against such supplier falls within the jurisdiction of a different Ombud.

As a consumer, you are afforded protection against direct marketing and should never feel as if you have no choice in the matter of whom to be contacted by. If you are unsure about the next step to protect such a right, consult with an experienced legal professional.

Contact SchoemanLaw Inc today for expert advice on all your privacy needs.

