



The Changing Face of Spam Regulation in South Africa

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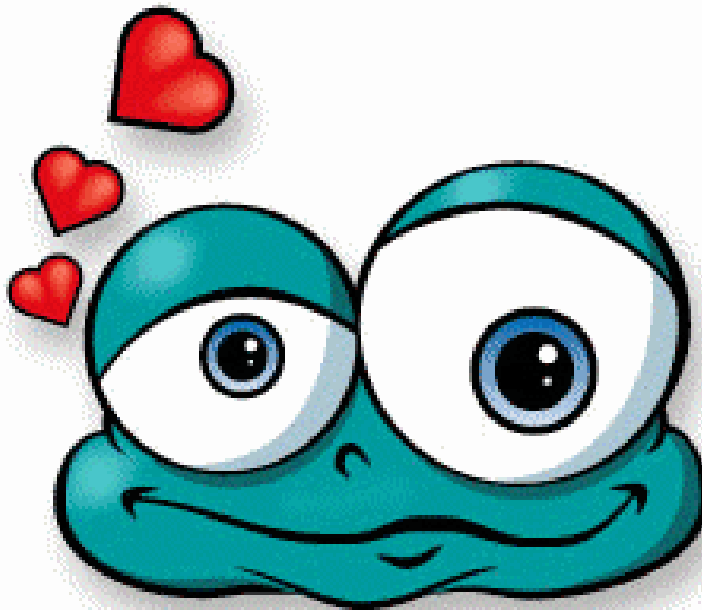
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SPAM / Unsolicited electronic junk mail



Good luck to you!!!
You have been Tagged by the Blue Man!!!
Which means you are a great friend!! You will Have Good Luck
For Two Years if you send this to 8 people or more and if this is
sent back to you then you know that you are a true friend.....
You must send it in 5 minutes or your good luck will be broken!!!
If this is sent to you it means you are a good friend!!!!



WHAT IS SPAM ?

- Tladi = unsolicited email / electronic junk mail
- Buys = unsolicited bulk and/or commercial electronic communications
- In the USA –CAN-SPAM Act 2003 = “any electronic mail message, the primary purpose of which, is the commercial advertisement or promotion of a commercial product or service,” including email that promotes content on commercial websites.– similar used in Australian Spam Act 129 of 2003
- In New Zealand = unsolicited electronic messages



WHAT IS SPAM ?



- ECT Act 25/2002 = unsolicited commercial electronic communications sent to consumers (S45)
- Consumer Protection Act 68/ 2008 = direct marketing - to approach a person, either in person or by mail or electronic communication for the direct or indirect purpose of promoting or offering to supply in the ordinary course of business, any goods or services ... or requesting the person to make a donation of any kind for any reason (S1 Def)
- Protection of Personal Information Bill 9- 2009 = Direct Marketing by means of unsolicited electronic communications (S69)



S45 ECTA

- Senders are required to:
 - give consumer option to opt out
 - Reveal source where the email address was obtained
- Fail to comply = offence to S89(1)
- S45(2)- failure to reply does not result in a contract
- Criticism (Buys, Eiselen, Tladi)
 - Only regulates does not prohibit – must opt out
 - Only applies to commercial communications sent to consumers (end users/ natural persons) – excludes non-commercial communications and spam sent to juristic persons
 - Does not state how opt out mechanism should be provided
 - Onus is on consumer
 - Don't have effective enforcement
 - Forging a header/disguising not penalised
 - Most spam originates outside SA –so jurisdiction an issue



Consumer Protection Act

- direct marketing - to approach a person, either in person or by mail or electronic communication for the direct or indirect purpose of promoting or offering to supply in the ordinary course of business, any goods or services ... or requesting the person to make a donation of any kind for any reason (S1 Def)
- Electronic communication--communication by means of electronic transmission, including by telephone, fax, sms, wireless computer access, email or any similar technology or device
- Right to cooling-off after DM -S16
- Does not apply if S44 ECTA applies
- Consumer may rescind transaction without reason or penalty:
 - by notice to the supplier in writing, or another recorded manner and
 - within five business days after the later of the date on which—
 - the transaction or agreement was concluded; or
 - the goods that were the subject of the transaction were delivered to the consumer.
- supplier must—
 - return any payment within 15 business days after—
 - (i) receiving notice / (ii) receiving goods supplied and not attempt to collect any payment in terms



PPI Bill 9-2009: Section 69-71

- S69: DM by unsolicited electronic communications
- S69(1) processing personal info for direct marketing by any form of electronic communication including automated calling machines, sms & email is **prohibited unless**:
 - (a) Given consent (Opt in)
 - (b) Is a customer through sale of product/service + given opportunity to opt out + seller include identifying info – s69(3)
- S70: Directories- not defined
- assume info kept in database e.g. email address:
 - Informed of purpose of directory + further uses
 - Opportunity to remove details
 - Does not apply to directories produced prior to commencement of PPI
- S71: Automated Decision Making
- no one subject to a decision where there are legal consequences taken solely on the basis of automated processing of personal info intended to profile aspects of personality/personal habits



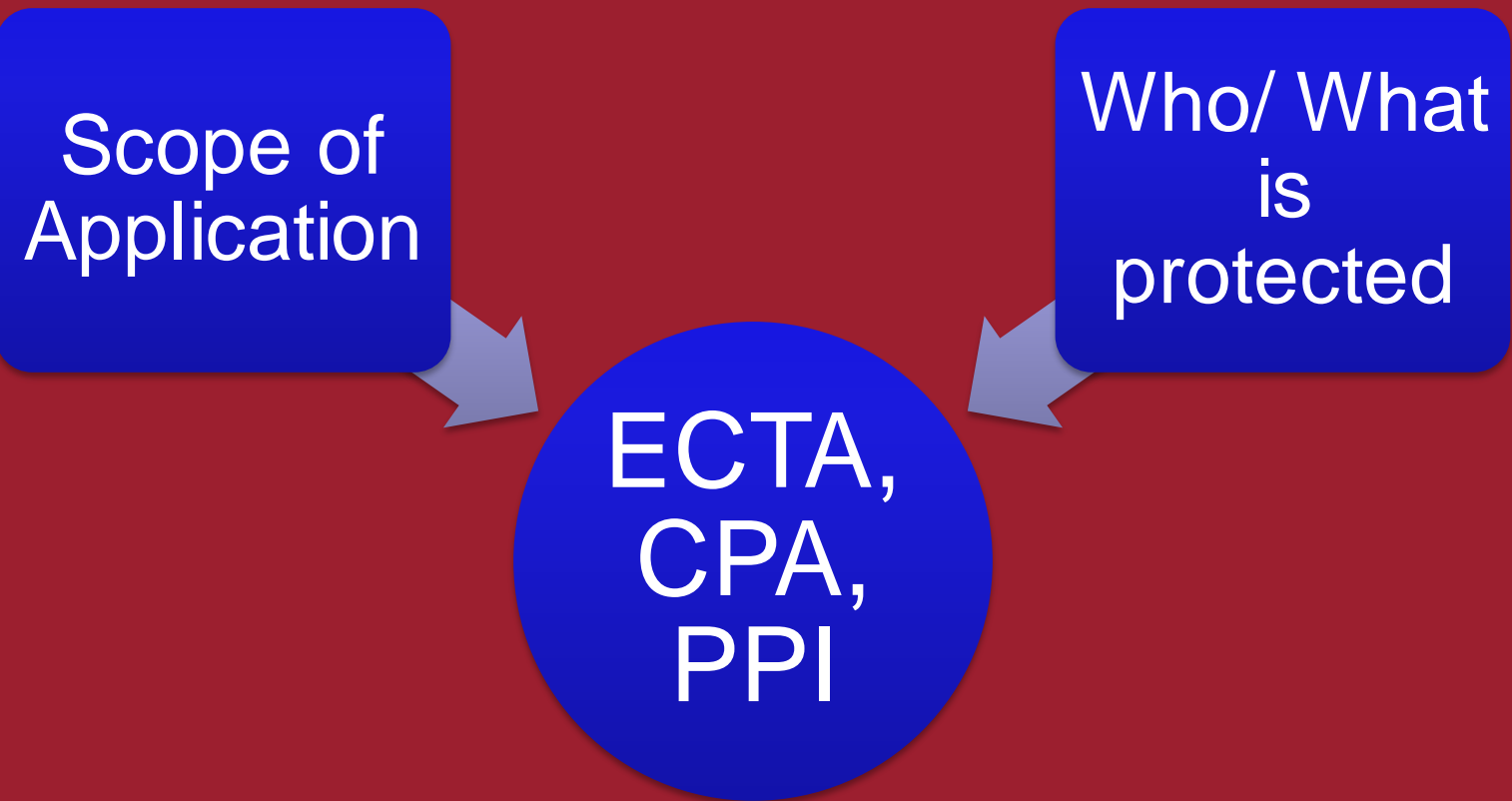
Is the repeal of S45 a significant improvement?

- ✓ **Opt in**
- ✓ **S69**
- ✓ **S71**

- **Ltd to direct marketing**
- **Definitions not consistent**
- **Falsified headers**
- **Jurisdiction**
- **Assistance to spam filters and ISP – requiring Advert/ adv to appear in subject line**
- **S70 not act on existing directories**



Can we marry the concurrent legislation?



Scope of Application

- ECTA – S42: only applies to electronic transactions where one party is a consumer –
- CPA – S5(1): Every transaction occurring in RSA, the promotion or supply of goods or services –
- PPI – S3: processing of personal information entered into a record by a person domiciled in RSA/ if not domiciled – using means in RSA + forms part of filing system -- exemption S4 –e.g. purely household activity, de-identified info etc



Who / What is protected

- ECTA & CPA = consumer
 - ECTA – S1 any natural person who enters or intends entering into electronic transactions with a supplier as the end user of goods or services
 - Electronic transaction= not defined
 - CPA – S1 person to whom goods or services are marketed / entered into a transaction/ user of goods or services
- PPI = Personal information



Conclusions

- Number of short comings that could have easily been addressed:
- The PPI has taken so long to pass through the legislative process that it is already in need of amendment to keep abreast of international developments e.g. requirement that the letters ADV / ADVERT appear to assist filters
- The definitional inconsistencies are a matter for concern due to lack of legal certainty
- As are the discrepancies between electronic consumers and all other consumers.

