CONSUMER LAW REVIEW NEWSLETTER

December 2013

Dear *Consumer Law Review* reader

Headline news this month is that the Protection of Personal Information Bill has been signed into law. But don't be fooled, it is not in effect yet. The President must still publish the commencement date. POPI will come into effect one year after that date. We have provided some handy links to more information on data privacy in the first article.

By all accounts it looks like 2014 is going to be a busy year for the credit industry. Parliament will be moving on the National Credit Amendment Bill and the Credit Amnesty Bill remains on the cards. In addition we are waiting for a decision by the Constitutional Court on the all-important s 129 of the NCA in two cases.

On the CPA front, the NCC is looking at a national opt-out list. The combination of this and POPI will cause direct marketers headaches in 2014. The time-share industry is also under investigation.

This is our last *Consumer Law Review* for the year. I will see you again in 2014.

Happy holidays!

Elizabeth de Stadler

Elizabeth de Stadler is the editor of the Consumer Law Review and a senior associate at Esselaar Attorneys in Long Street in Cape Town (http://www.esselaar.co.za). The firm specialises in consumer law. She is also a founding director of Novation Consulting (www.novcon.co.za or @NovConSA), a company which specialises in providing regulatory compliance solutions and designing innovative and effective ways to communicate 'legal' documents to consumers. Her book, Consumer Law Unlocked (Siber Ink) was published recently. She is the co-author of a consumer law textbook and a guide to plain language legal drafting, both of which are to be published by Juta Law. She is the co-author of chapters on the Consumer Protection Act in The Law of Contract in South Africa and The Law of Commerce in South Africa (Oxford University Press).

Please forward any comments and suggestions regarding the *Consumer Law Review* to lawmarketing@juta.co.za

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We welcome your feedback

Kind regards

Juta General Law

Ground Floor, Sunclare Building, 21 Dreyer Street, Claremont, Cape Town, South Africa
PO Box 14373, Lansdowne 7779; Docex Number: DX 326, Cape Town
Tel: +27 21 659 2300, Fax: +27 21 659 2360

Website: www.juta.co.za; e-mail:cserv@juta.co.za

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POPI is signed into law – what should business know right now?

POPI has become law. The Protection of Personal Information Act 4 of 2013 was signed by the President on 19 November 2013. You can download the Act here.

There are however a couple of things that have to happen before the Act will become a reality for business:

- The President still has to publish a commencement date in the Government Gazette.
- Once the commence date is published businesses will have at least a year to comply. This grace period may be longer, but at most it will be three years. See s 114.
- Before the Act can become fully operational an Information Regulator will have to be appointed and its office established. This will involve the publication of regulations.

However, a year is not a long time to ensure that a business is POPI compliant. For many businesses processing of personal information is a core business function which will make matters worse. For those who are wondering what POPI compliance will look like, the website of the UK Information Commissioner's Office is a good place to start. It features several checklists and codes of conduct. Also remember our 'Intro to POPI' articles which have appeared in the last year. Here they are:

- September 2012: When does PoPI apply? The definitions of 'personal information' and 'processing'.
- October 2012: When is the processing of information lawful? The factual scenarios which justify the processing of personal information.
- November/December 2012: The obligation to inform the consumer of the (explicitly defined) purpose for which the data is being collected.
- January 2013: The role of consent
- July/August 2013: Information security
- August/September 2013: Referral selling – is it ok to ask consumers for the personal information of others
- October/November 2013: Transborder information flow

(Back issues of the *CLR* can be accessed by clicking on newsletters on the www.jutalaw.co.za website.)

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South Africa is not the only country grappling with data privacy issues. See this interesting article about the drive to adopt stricter rules on data protection in the EU. More information on the existing data protection laws and the current reforms are available on the European Commission's website. This is a useful source of information given that POPI is based on EU law. We don't have to reinvent the wheel.

The African Union will also vote on the Convention on Cyber Security in January 2014. There are concerns that the Convention will lead to the abuse of the right to privacy. Read more about it here.

POPI is probably the scariest for direct marketers. POPI has been described as 'a silver bullet to kill spam'. Not only will they have to contend with the new rules regarding consent and the change from an opt-out to a qualified opt-in system; it also seems that we can expect a new national opt-out registry in 2014.

Consumer Law in parliament

Meat labelling regulations: The new meat labelling regulations were Gazetted on 25 October 2013. In a nutshell: If you are selling water buffalo, horse or donkey, it must say so on the label in plain language.

Legal Metrology Bill: The Legal Metrology Bill (B34B-2013) was debated in Parliament in the first week of November. What is metrology and why is it a consumer issue? In short, it regulates the way goods are measured (eg in weight or volume) and how these measurements are indicated on labelling. For more read the full Legalbrief Policy Watch report.

National Credit Act Amendment Bill and credit amnesty: Public hearings have been scheduled for January 2014. Amongst other things this Bill will tighten regulations relating to debt counsellors, provide for the automatic removal of adverse consumer information and will empower the NCT to suspend reckless credit agreements. Proposals for a credit amnesty was published on 30 September 2013 and a public hearing was held on 26 November 2013. The credit amnesty has attracted a chorus of criticism.

Full Legalbrief Policy Watch report

Reform of debt collection – garnishee orders: The Minister of Trade and Industry has been given permission to embark on an 'initiative' which will 'clean up the much-abused system of garnishee orders, the regulation of credit life insurance, a review of the pricing cap on loans, the introduction of affordability assessments by credit providers, and tougher enforcement against contraventions of the National Credit Act' according to this article in Business Day. What form this initiative will take and how it will impact on the existing reform of the NCA and the credit amnesty has not been announced.

Banks' liability under the CPA for defective cars – the court gets it wrong

The interaction between the CPA and the NCA caused headaches from the start. Section 5(2)(d) provides that the CPA will not apply to 'transactions' which are 'credit agreements'. The section contains the important proviso that 'the goods and services that are the subject of the credit agreement are not excluded'.

The confusion created by the qualified exclusion of credit agreements was evident in ***MFC (a division of Nedbank Ltd) v Botha***. The bank purchases a vehicle from a car dealership in order to sell it to Botha in terms of an instalment sale agreement which is a credit agreement for purposes of the National Credit Act. The credit agreement provided that the bank does not make any warranties in relation to the condition of the goods. Botha returned the vehicle to the bank, because the vehicle was defective. The question before the court was whether the bank could sell the vehicle in terms of s 127 of the National

Credit Act in order to credit the amount owed by Botha *or* whether Botha was entitled to return the vehicle in terms of s 56(2) which would entitle him to a full refund.

So, the question before the court was whether the credit provider was a supplier for purposes of the CPA. The judgment criticises the lack of clarity created by s 5(2)(d) by pointing out that '[i]t is not plainly evident how a consumer in the position of the respondent [Botha] would be able to avail of the protection offered to consumers in terms of s 56(2) of the CPA.' In short '[h]e could not return the vehicle to the supplier [the dealership] against a refund of the purchase price because ownership of the car vested in the credit provider; and it was the credit provider, and not he, that had paid the purchase price.' This, as well as the solution proffered by the judgment in paragraph 9 is not correct. Botha would be able to return the vehicle directly to the dealership as s 56(2) can be enforced against the producer, importer, distributor or retailer regardless of whether a contract exists between the consumer and one of those parties.

It was also held that the six months' window of opportunity for appropriate action to be taken had passed. This is a reference to the six month period mentioned in s 56(2). However, the effect of the six month period deserves further discussion. Section 55(2)*(c)* provides that consumers are entitled to goods which 'will be useable and durable for a reasonable period of time'. In the case of a car, that period will almost certainly longer than six months and it is possible to argue that the s 56(2) remedies will still be available to consumers.

Ultimately, it was held that the consumer could not rely on s 56(2) against the bank, because of the exclusion of the credit agreement in s 5(2)(d) and because the applicant was not a 'supplier' in terms of the CPA. In the end it was held that the proceedings should be adjourned to enable the bank to take the appropriate steps in terms of s 129(1); in other words, the court held that the appropriate steps would be to treat the consumer as if he is in default. This conclusion is as unfair to the consumer as it is incorrect as discussed above.

In summary, the consumer should have been able to return the vehicle as it is a supplier in terms of the CPA as well as the common law. It would then be for the bank to pursue a claim against the dealer. The exclusion of liability will also not avail the bank .The court failed to note that in terms of the NCA it is unlawful for a bank to insert a provision in a credit agreement which 'purports to exempt a credit provider from liability, or limit such liability for… (ii) any guarantee or warranty that would, in the absence of such a provision be implied in a credit agreement'. Given that the law of sale as well as the CPA applies, which both protects the consumer against defective goods, the bank cannot exclude liability.

(This article is based on an extract from **[insert]** which will be published in 2014.)

Plain language tip

Are you an "Andorian" or an "Anti-Andorian"?

In 1932 the American Bar Association Journal* had an editorial with the title "And/or" in which the use of "and/or" in legal drafting was questioned. In this editorial "and/or" is described as an "accuracy-destroying symbol" and "a device for the encouragement of mental laziness". This editorial sparked a debate on the use of "and/or" which is still going on today with the two sides sometimes aptly named the "Andorians" and the "anti-Andorians."

As far as Plain Language is concerned today, the general guideline is to avoid the use of "and/or" as far as possible. It might save a few words, but the feeling is that it is inherently ambiguous. In most cases it simply means either "and" or "or". For clarity use the appropriate one.

As it stands "and/or" means "the one or the other or both". In cases where that distinction is necessary, it is good practice to choose the unambiguous "the one or the other or both". If you therefore find on the website of a hotel the information that "every room has a bath or a shower or both" instead of "every room has a bath and/or a shower", you as customer will clearly know what to expect.
*"Editorial" *American Bar Association Journal* (1932)

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