

SMS

SMS marketing is 'technically illegal'

By Bonnie Tubbs, ITWeb

UNTIL FREE OPT-OUT becomes possible, it is technically illegal to send both unsolicited and solicited direct marketing via SMS.

This is according to Dr Pieter Streicher, MD of BulkSMS.com, who notes in a recent report that the Consumer Protection Act (CPA) allows sending of direct marketing under certain conditions, not all of which are possible to comply with when it comes to SMS communications.

In terms of the CPA, says Streicher, before sending out direct marketing messages to a database of contacts, a company would have to adhere to three conditions, one of them being that it must provide the mechanism to afford each recipient the opportunity to opt-out at no cost. "This is not possible, except on the Vodacom network, where a reverse billing channel is provided. Normally, sending an SMS using the reply path to the SMS received would cost the consumer between 50c and 80c, depending on the network.

"If the sender allows opt-out by calling a toll-free number, the call will not be toll-free if dialled from a mobile. If the sender allows opt-out via e-mail, four out of five mobile users will be unable to use this, as not everyone has an active e-mail address or access to

communicate through e-mail."

Nicholas Hall, of Michalsons Attorneys, says it is important to note that the CPA does not prescribe how opt-out messages must be handled. "To my mind this means that one could say that to opt-out of future messages, consumers must call a toll-free number from a landline number (for example)."

He says, while Streicher raises the technical issues with this, for example calling a toll-free number from a cellphone, "a supplier could raise a defense that it made all reasonable efforts to provide the consumer with a method of opting out that is in fact free, and that it was the consumer's actions that resulted in a charge being levied." He says if these arguments fail, the inference that using SMS for direct marketing is in fact legal, would stand.

He says that ultimately, if technicalities do in fact preclude direct marketing via SMS, the industry itself must take responsibility. "[It has been] nearly a year since the CPA came into effect. The Act in its final form was available to the public from as early as 2008 and [the industry] has had some time to put systems in place so that their businesses would be legal under the new law."

The National Consumer Commission had not commented by the time of publication.