



## REPORT OF THE ADJUDICATOR

**WASPA Member (SP):** Clickatell (Pty) Ltd

**Information Provider**

**(IP):** Roy Cawood, individual  
(if applicable)

**Service Type:** Alleged fraudulent activities over SMS

**Complainant:** IMOC Charity Toy Run

**Complaint Number:** 0081

**Adjudicator:** Kerron Edmunson

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### Complaint

On 24 November 2005 WASPA received a complaint by email from a charity (the complainant) concerning an unsolicited SMS received by one of its members on Sunday 20 November 2005 at 11h30am, which said ““TOY RUN” DONATE R10,00 to the TOY RUN CHARITY by SMSing the WORD “TOY” to 38003. SMS this message on to fellow bikers and help the less privileged children.”

The key elements of the complaint are twofold, (i) that the complainant owns the registered trade mark “TOY RUN”, has not licensed anyone to use this mark, and does not know of any other member of the National Toy Run Forum which may have licensed anyone, and (ii) the SMS is possibly fraudulent since it is an unauthorised attempt to use a recognised charity name to solicit funds not for the use of the charity.

In summary, the complainant avers that the service is “allowing customers to solicit funds under the name of a charity from the public via the SMS service without properly identifying that they are authorised to do so” and requests WASPA to investigate the matter and the SP to suspend the service pending determination of the legitimacy of the service.

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### SP Response

The SP responded with the IP’s details, an individual apparently wishing to set up a KEYWORD “TOY” to raise funds for the Toy Run Charity. A trial run SMS was sent to key Toy Run event organisers in order to initiate a fund-raising campaign to raise funds for the Toy Run Charity. This campaign was to be “set up in good faith and not of a fraudulent nature in any way with all proceeds to be paid over to “Toy Run Charity”. As I had not received permission to go ahead with the campaign from the Toy Run Charity I did not proceed to run the campaign any further. If this has caused any inconvenience to the Toy Run Charity I wish to apologise and offer my services

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to them. I also wish to sponsor the KEYWORD "TOY" for future Toy Run Charity events. I will also be in touch with the chairman of the Toy Run Charity to clear this matter up."

The SP itself responded to say that they could not reach their client initially and suspended the account to "prevent further damage should the complaint have been valid." However, their reports indicated that only 3 MO messages have been received on shortcode 38003 which included the keyword "toy" over the last 60 days. These were all on 23 November.

The SP also stated:

"I do not believe the IMOC Charity Toy Run Trust has sufficient grounds to brand this service as fraudulent, especially as our client did not proceed with the campaign. With regard to the complaint, ... we disagree totally based on our clients description of his service. The IMOC Charity Toy Run seems to have made a rather dangerous assumption based seemingly on very little information."

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### Consideration of the WASPA Code

I like to begin with considering section 3.1.1 of the Code (professional and lawful conduct) which states:

"Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA".

In addition in this complaint, section 3.4 (intellectual property) is relevant, and it states:

"Members will respect the intellectual property rights of their clients and other parties and will not knowingly infringe such rights."

Whilst the complainant does not specifically list other sections, given the subject matter of the complaint it is relevant to consider sections 5 (commercial communications) and 12 (charitable promotions) of the Code:

**Section 5.1.1:** all commercial messages must contain a valid originating number and/or the name or identifier of the message originator.

**Section 5.2.1:** any commercial message is considered unsolicited (and hence spam) unless: (a) the recipient has requested the message; (b) the message recipient has a direct and recent prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or (c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

**Section 5.3:** members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.

**Section 12.1.1:** any promotional material for charitable and/ or fundraising promotions must make it clear that network operator fees and administration fees will be deducted from amounts paid.

**Section 12.1.2:** promotional material must specify the identity of the beneficiary.

**Section 12.1.3:** promotional material must make clear any restrictions or conditions attached to the contribution to be made to the beneficiary.

**Decision**

In my view, despite the SP's vehement denial of wrongdoing by the IP, it appears to be clear that the IP simply didn't do its homework in terms of contacting the right people about the charity. The IP, by his own admission, had not been in touch with the chairman of the charity and does not make clear who he contacted and in fact states that "as he did not receive permission to go ahead with the campaign" he terminated it. A sensible IP would have sought the proper permissions before even launching a test service. This is contrary to the intention of the Code as laid out in section 3.1 and 3.4.

Leaving aside for the moment the fact that the messages to IMOC members effectively amount to spam, related to the absence of permission is the way in which the service was described. If the service was indeed a "trial", why did it not say so? The 3 respondents referred to by the SP are quite possibly of the belief that they have contributed R10 to the Toy Run Charity. This is in contravention of both sections 5.1 and 12.

Lastly, contacting the public in an unsolicited way without a request for contact, or a recent prior commercial relationship is spam. This is specifically prohibited under clause 5.3.

I regard all of these breaches as material and I do not agree with the SP that "the IMOC Charity Toy Run seems to have made a rather dangerous assumption based on seemingly very little information". Based on the information which they did have, I believe IMOC are fully entitled to take whatever action they deem necessary to protect valuable intellectual property, their reputation, and their members. The harm done potentially to their organisation (the purpose of which is to do good deeds) and their members had the IP been using the number for fraudulent purposes does not bear contemplating.

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**Sanction**

In the circumstances I find the following:

- For the breach of sections 1.3 and 1.4, I direct the SP to pay a fine of R10,000, R5,000 of which is suspended for 6 months from the date of this adjudication provided no other complaints are received against the SP and that the SP is not found guilty of any further breaches of these sections of the Code; the balance of R5,000 to be paid to WASPA within 5 days of the date of this adjudication being published;
- For the breach of sections 5.1 and 12, I direct the SP to pay a fine of R2,000 to WASPA within 5 days of the date of publication of this adjudication;
- For breach of section 5.3 I direct the SP to pay a fine of R3,000 to WASPA within 5 days of the date of publication of this adjudication.