



REPORT OF THE ADJUDICATOR

WASPA Member (SP): iTouch (Pty) Ltd

Information Provider

(IP): AME Adult services
(if applicable)

Service Type: Spam

Source of Complaints: Member of the public

Complaint Number: 0103

Adjudicator: Kerron Edmunson

Complaint

A complaint was received from a member of the public by email on 21 December 2005 in which he stated under the heading "Unsolicited SMS of a sexual nature": "I keep getting these SMSs from this number. I have found that the number, 31519 belongs to a website called MobileGalaxy.co.za which was/is owned by Cointel (Pty) Ltd, I tried contacting them and they said that the number was no longer active. Is there any way one can find out who is using the number currently?"

The complainant also notes that the SP has not resolved his complaint to his satisfaction.

SP Response

2 responses were received from the SP on 2 February 2006, the first explaining a technical error and changes in staff as the reason for the failure to respond promptly to the complaint, and the second detailing who should be contacted in future. The salient points of each response are as follows:

- "I have researched the complainant's history on his mobile activities and found that he had used AME adult services before and tried to opt out as well. Unfortunately his attempts to opt out failed on our system, due to a technical problem on our side. The technical problem has subsequently been fixed. I have personally opted out the complainant's MSISDN... from our database and will ensure that his number does not appear on our database in future. We apologise for any inconvenience caused to the complainant."
- "On the few occasions that I have received a WASPA complaint, I have always responded immediately, indicated my intent to investigate the matter, and ultimately reverted with a comprehensive finding of my investigations. I shall do the same in this case...."



Consideration of the WASPA Code

1. The General provisions of the Code have application in all cases in relation to matters dealt with by WASPA, and provide a good platform on which to base most adjudications. Section 3.1.1 provides that: “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.” Sections 3.7.1(b) and 4.2 (privacy and confidentiality) are relevant in this case too, and provide that “Members will not provide any services or promotional material that:... results in any unreasonable invasion of privacy” (section 3.7.1(b)) and “WASPA and its members must respect the constitutional right of consumers to personal privacy and privacy of communications” and “members must respect the confidentiality of customers’ personal information and will not sell or distribute such information to any other party without the explicit consent of the customer, except when required to do so by law” (sections 4.2.1 and 4.2.2).
2. The definition of “spam” is “unsolicited commercial communications, including unsolicited commercial messages as referred to in section 5.2.1.”
3. Turning to the sections dealing with commercial communications, it is relevant to consider section 5.1 (sending of commercial communications) and particularly sections 5.1.1, 5.1.3, 5.1.5, 5.2.1, 5.2.2 and 5.3.
 - a. Section 5.1.1: “all commercial messages must contain a valid originating number and/or the name or identifier of the message originator.”
 - b. Section 5.1.3: “where feasible, customers should be able to unsubscribe from any subscription service using no more than two words, one of which must be ‘STOP’ ”.
 - c. Section 5.1.5: “upon request of the recipient, the message originator must, within a reasonable period of time, identify the source from which the recipient’s personal information was obtained.”
 - d. 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.”
 - e. Section 5.3.1: “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.”
 - f. Section 5.3.2: “members will provide a mechanism for dealing expeditiously with complaints about spam originating from their networks.”

Decision

The right to privacy is a constitutionally protected right and any invasion of it should be taken seriously, in every forum. Furthermore, the WASPA Code specifically prohibits spam and regards a breach of this seriously. The WASPA Code also requires transparency in dealing with consumers.

By its own admission the SP has:

- Failed to enable an opt-out by the complainant (section 5.1.3)
- Continued to send unsolicited SMSs to the complainant (section 5.2.1)

On the facts the SP has also breached the provisions of section 5 set out above, notwithstanding the technical issues referred to in the SP's response, which will be taken into account in applying the sanction.

Sanction

In terms of section 5 of the Code and by its own admission, I find the SP to be liable for the sending of unsolicited marketing messages to the complainant where no recent prior relationship existed and where the identity of the IP was not clearly described as required under section 5, and the SP is ordered to pay a fine of R2,000 within 5 days of the making of this order.

The effect of the unsolicited marketing messages is also to breach sections 3.7.1 and 4.2 of the Code and the SP is ordered to pay a further fine of R10,000 within 5 days of the making of this order.