

REPORT OF THE ADJUDICATOR

WASPA Member (SP): eXactmobile (Pty) Ltd

Information Provider

(IP):

(if applicable)

Service Type: No facility to unsubscribe

Complainant: iTouch (Pty) Ltd

Complaint Number: 408

Adjudicator: Kerron Edmunson

Code version: v4.3 and 4.6

Complaint

WASPA received a complaint via the website, on 17 August 2006. The complainant alleged that the SP was in breach of the Code and specifically sections 5.1.2 and 5.1.3 in that (in summary), the SP “did not have a facility to allow the recipient to remove his or herself from the message originator’s database, so as not to receive any further messages from that message originator”, and “persons receiving commercial messages should be able to remove themselves from the database of a message originator using no more than two words, one of which must be ‘STOP’”.

The essence of the complaint is therefore that there is no ‘opt out option’. The complainant stated further that although this was a “mirror [sic] transgression, it is a transgression nonetheless”.

The text of the message received on two different dates (30 June and 5 August 2006) followed:

“Date received: Saturday, 5th August 2006

Time received: 19:29

Received via SMS

MSISDN: XX

Sender number: +2782003902054173

MESSAGE TEXT:

New on eXactmobile NOW! M-Blog, Message NOW!, Fab Alarm Tones, High Octane Games (win an ipod!) & lots more. Go to www.exactmobile.co.za/now on your phone now!

Date received: Sunday, 30 June 2006

Time received: 19:32:48

Received via SMS

MSISDN: XX

#0408

Sender number: +2782003902054854

MESSAGE TEXT:"
[As above]

SP Response

The SP has responded with detailed references to the Code so I have replicated the entire response here, save for copies of the web pages which the SP makes reference to which can presumably be viewed on their website:

"The WASPA code of conduct states:

5.1.2. Any message originator must have a facility to allow the recipient to remove his or herself from the message originator's database, so as not to receive any further messages from that message originator.

This code states that the message originator must have the facility to allow the recipient to remove him self from a message originator's database. In this case the message originator is Exactmobile.

Exactmobile does provide this facility. This is provided via the 24hr call centre, via E-Mail, via the Exactmobile Web site and via SMS. Within a SMS Message, due to the limited space, it is not possible to explain the full SMS unsubscribe option. If this was a requirement, then no SMS marketing would be possible. This SMS clearly states the message is from Exactmobile. Exactmobile continuously states its web site address, and 24hr Call centre number to assist consumers.

5.1.3. Where feasible, persons receiving commercial messages should be able to remove themselves from the database of a message originator using no more than two words, one of which must be ?STOP?.

With SMS advertising, it is not feasible to explain the unsubscribe option using SMS. The facility to use SMS is however available and is promoted to users within the terms and conditions on the Exactmobile Web site. The wording is copied here for reference :

Exactmobile may send marketing information to users via SMS, MMS or email to inform users of new products and services. Messages are based on previous purchases of Exactmobile products. Users wishing not to receive these messages should send the words "stop SMS" to 3 222 7 (R1.00). Users may also log in to www.exactmobile.co.za to manage all messages and other services.

On the Exactmobile web site the following pages are available to manage subscriptions...."

I note that the website terms in relation to the NOW! Service state:

"eExactmobile NOW! Club:

You are presently subscribed to the eExactmobile NOW! Club. Click here to unsubscribe." [A button called "Unsubscribe" appears next to this paragraph]

Consideration of the WASPA Code

The two messages complained of have been sent on different dates – at times when in fact two different versions of the Code applied. On 30 June, v4.3 applied, and on 5 August, v4.6 has been drafted, however the sections referred to in the complaint have not changed so I refer merely to the Code in this adjudication.

The complainant has not alleged that the communications were unsolicited, therefore I have assumed the complainant and the SP had a commercial relationship, or otherwise that the complainant is not concerned with the provisions of section 5.2.

Quoted in full, the relevant sections within section 5.1 (Sending of commercial communications) are as follows:

Section 5.1.2: “any message originator must have a facility to allow the recipient to remove his or herself from the message originator’s database, so as not to receive any further messages from that message originator.”

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’.”

Seen on their own like this, separate from the rest of section 5.1, means that one doesn’t then take into account the balance of the requirements of this section – namely to charge no more than R1 (v4.6) or not to charge premium rates (v4.3). The charge relates to the use of “the mechanism for allowing a recipient to remove him or herself from a database” under section 5.1.4. This section clearly relates to the requirements of section 5.1.2.

It is also relevant to consider the introduction to the Code which sets it in context.

- Section 1.2 states that “the primary objective of the WASPA Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services. The Code aims to equip customers and consumers with a mechanism for addressing any concerns or complaints relating to services provided by WASPA members, and a framework for impartial, fair and consistent evaluation and response to any complaints made.”
- Section 1.4 states that “unless otherwise specified, this Code of Conduct applies to all wireless application services accessed by a customer in South Africa, transmitted by a wireless application service provider and carried by a South African network operator. Where the Code addresses services provided by members, it applies only to wireless application services provided by a WASP, and not to other types of services that the member may provide.”

Decision

I will address the SP’s response here in order to explain my decision.

SP response: In relation to section 5.1.2, the SP states that it has a “facility” provided via the 24-hour call centre, email, the eXactmobile website and SMS. It also states that because of limited space in an SMS it cannot explain the full SMS unsubscribe option and if that was a requirement then “no SMS marketing would be possible”.

#0408

Decision: having stated relevant parts of section 1 and section 5 of the Code, it is clear that it is in fact a requirement of the Code that it be possible for a message recipient to unsubscribe using SMS – WASP services are by their very nature, services provided over mobile networks (not websites or other facilities). The SP states that SMS is one of the unsubscribe options. However, a recipient will not be able to unsubscribe from a service without visiting the eXactmobile website first. In addition, the website does not refer to an SMS option – the recipient is only given an option to hit the “unsubscribe” button on the section of the website included with the SP’s response.

It is therefore not clear to me how eXactmobile can be said to have complied with the requirements to establish a facility allowing a message recipient to unsubscribe from a wireless application service, by sending an SMS message (at a regulated cost), and I find accordingly that the SP has not complied with section 5.1.2.

Response: in relation to section 5.1.3, the SP states that “it is not feasible to explain the unsubscribe option using SMS. The facility to use SMS is however available...on the eXactmobile website...”

Decision: to my knowledge and within my experience, no other message originators or SPs have raised this argument in relation to unsubscribing, and WASPA has not been called upon to revise the requirements of section 5.1. Again I refer to section 1 and the provisions of section 5.1.4 – clearly the Code is intended to and does require SPs to comply with certain conditions when advertising wireless application services.

I have seen several services advertised over SMS which contain instructions either specifically referring the recipient to a website in relation to unsubscribing, which although not adequate in my view, would at least be more closely approximating compliance, or giving instructions to unsubscribe on the SMS itself, for example “to unsubscribe, for R1 SMS “STOP” to xxxxx.” This does not seem to be an overly lengthy or complicated sentence. I therefore find that the SP has not complied with section 5.1.3.

Sanction

Although the complainant has stated that they do not regard the transgression of the SP to be anything other than ‘minor’, I do not agree. The sending of commercial communications will soon be regulated by legislation, unless WASPA members can demonstrate that their Code is appropriate and adequate for the protection of consumers. The ‘transgression’ of a law will result in criminal sanction and fines far greater than that levied by WASPA. WASPA’s Code plays a critical role in the self-regulation of an industry which is becoming daily more prolific in its output. The protection of consumers should be uppermost in the minds of industry participants – that is, after all, the source of their income.

I have found that the SP has breached both sections 5.1.2 and 5.1.3 – the sections complained of. I consider each breach to be serious, and the SP’s response to be at best, weak, and at worst, fatuous. Therefore:

1. The SP is directed to pay a fine to WASPA in relation to the breach of section 5.1.2, of R3,000, and in relation to the breach of section 5.1.3, R7,000, both within 10 days of the date of publication of this adjudication.

2. The SP is further directed to amend all advertisements or marketing in relation to commercial communications by SMS, to refer specifically to the facility for and manner in which unsubscribing may take place by SMS in terms of section 5 of the Code, and to confirm this in writing to WASPA within 30 days of the date of publication of this adjudication.