



## REPORT OF THE ADJUDICATOR

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

**Information Provider (IP):**  
(if applicable)

**Service Type:** No facility to unsubscribe

**Complainant:** Members of the WASP fraternity

**Complaint Numbers:** 440 and 452

**Adjudicator:** Kerron Edmunson

**Code version:** v4.6

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### Complaint

I have addressed the two complaints in this adjudication as the advertisements and sections of the Code relied on are similar. I note that the SP, in its response to each, has stated that the complaints received in relation to 408, 440 and 452 are identical. This is not the case, as the complaint in 408 relied on sections 5.1.2 and 5.1.3 whereas 440 relies on sections 5.1.2 and 5.1.4 and 452 relies on 5.1.2 only. I have, however, been able to make a similar finding to that in 408 as the SP has chosen to respond in an identical fashion to each complaint.

#### *In relation to 440:*

WASPA received a complaint via the website, on 7 September 2006. The complainant alleged that the SP was in breach of the Code and specifically sections 5.1.2 and 5.1.4. The complainant stated that the following SMS was received by a "number of people" on different dates including 19 August 2006 and 1 September 2006:

"Reply YES to this SMS for a new Alarm Tone (e.g. Traffic Cop, Kom Nou Frikkie &...) or Weird Sound (Groen Koppie, Ticking Bomb &...) from eXactmobile. R5/item".

The complainant alleges further that "it would appear from the different dates on which the message was received that ExactMobile [sic] is sending this message out to much of their database, which must number in the millions. A check with the networks could confirm this. There is no mechanism displayed to opt out of this commercial communication as required by section 5.1.2. The only option open to a user is to reply STOP to the message which appears to be a R2 premium rate number, but could even be R5, in violation of 5.1.4."

#### *In relation to 452:*

A complaint was filed on the WASPA website on 20 September 2006. The complainant alleges that the SP has breached clause 5.1.2 in that "an SMS advert

was sent to the users phone. There was no mechanism offered for the user to remove themselves as required by the Code of Conduct for Commercial Communications.” The message was sent on 11 September 2006 and said “Open up a new world by going to [www.exactmobile.co.za/now](http://www.exactmobile.co.za/now) on yr phone. Get instant access to the latest content, Full Track Downloads, Chat NOW! & so much more!”

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## 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](http://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:

“eXactmobile NOW! Club:

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

## Consideration of the WASPA Code

The complainants have not alleged that the communications were unsolicited, therefore I have assumed each of the complainants and the SP had a commercial relationship, or otherwise that the complainants are not concerned with the provisions of section 5.2. The complainant in 440 has referred to version 4.3 of the Code as set out below, however the date of the complaint suggests that version 4.6 is in fact relevant. The difference in the two versions for purposes of this adjudication is only relevant in relation to section 5.1.4, as set out below. The version 4.3 wording has been deleted using strike-through to indicate the change in version 4.6.

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’.

**Section 5.1.4:** “any mechanism for allowing a recipient to remove him or herself from a database must not be premium-rated cost more than one rand.”

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.”

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## 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”.

*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 in relation to both complaints.

*SP Response:* although neither complainant has referred to section 5.1.3, the SP has referred to this section in its response. 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.

*Further decision:* as can be seen in section 1 and the provisions of section 5.1.4, 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 on its own version in relation to both complaints.

The SP has not responded to the allegation of a breach of section 5.1.4. However, since the SP has not, on its own version, included wording in the SMS advertisement or even on its website which would enable a recipient to unsubscribe by SMS, nor has it referred to the price which would attach to such an SMS, the SP is in breach of section 5.1.4 in relation to complaint 440.

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## **Sanction**

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.

The SP has breached sections 5.1.2 and 5.1.4 – the sections complained of. Having considered the relationship between the subsections of section 5.1, the SP’s response, and the terms of section 1, the SP has also breached section 5.1.3. 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 per complaint, and in relation to the breach of

section 5.1.3, R7,000, all within 10 days of the date of publication of this adjudication.

2. The SP is directed to pay a fine to WASPA in relation to the breach of section 5.1.4, of R2,000, within 10 days of the date of publication of this adjudication.
3. 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 5.1 of the Code, including charge, and to confirm this in writing to WASPA within 30 days of the date of publication of this adjudication.