



REPORT OF THE ADJUDICATOR

Complaint reference number:	12547
WASPA member(s):	Nashua Mobile
Membership number(s):	0013
Complainant:	Competitor
Type of complaint:	Spam
Date complaint was lodged:	4 April 2011
Date of the alleged offence:	1 April 2011
Relevant version of the Code:	10.0
Clauses considered:	3.9.1, 3.9.2, 3.9.3, 4.2.1, 4.2.2, 5.1.1, 5.1.4, 5.1.5, 5.2.1, 5.3.1
Relevant version of the Ad. Rules:	Not applicable
Clauses considered:	Not applicable
Related cases considered:	Not applicable

Complaint and Response

1. This complaint relates to the transmission of spam by an IP using the SP's SMS gateway. Several complaints have been made by different persons concerning SMSes apparently relating to the same campaign.
2. The adjudicator established that the IP is a company called "Bayport Cellular". It is not a member of WASPA as per the WASPA website.
3. The complainant works for or is otherwise associated with a competitor of the member.
4. The complaint was made to WASPA on the 7th of April 2011 in the following terms:

NASPName: Nashua Mobile (Pty) Ltd

OtherID: SMS Code: 32681 VAS Rate: R1.00 Name: Nashua Mobile (Pty) Ltd
Telephone:

0860 412 412 Website: http

Code_Breached: I have been sent unsolicited SMS and spammed as I did not give Nashua Mobile permission to send me any SMS. I have had a complaint against Nashua Mobile before for sending me unsolicited porn which was upheld and a fine was set.

This is also in contravention of the Consumer Protection Act.

Detailed_Description_Complaint: I have received an SMS which states the following:

SenderID: +2783679799912264

\“Are you permanently employed for 6 months? Get a Nokia+additional phone + airtime on contract. SMB JAT to 32681 to apply or STOP to opt out. Blacklisted welcome.\”

Point1: I did not give Nashua Mobile permission to contact me

Point2: 32681 is a VAS R1 code. Opt out should be done on a standard rated code and is in contravention of WASPA regulations and the CPA.

Point3: There is no indication of the cost of the SMS to apply or to opt out. This is in contravention of WASPA regulations and I believe the CPA as well.

Point4: The contact number for Nashua Mobile on the smscode.co.za website is invalid so there are no valid contact details for Nashua Mobile which is also in contravention of WASPA regulations and I believe CPA as well.

NOTE:

I have replied to the original SMS with STOP so I hope that I have been opted out of their service but I would like WASPA to take this up with Nashua Mobile and have them blacklist my number on their database, whether it is their database or their customer databases. I am unable to contact Nashua Mobile on the contact details provided on the smscode.co.za website

5. The complaint was forwarded to the member on 11 April 2011.
6. The complainant contacted the WASPA Secretariat again on 18 April and advised that a representative of the IP had contacted him and apologised for the SMS; this person advised him that his MSISDN was acquired from a database purchased from another company, and that they were aware that his details appeared in the DMA “do-not-contact” database (which apparently they do). They were not certain why the SMS was nonetheless sent to him.
7. The complainant also received a phone call from a representative of the company that “sold” the contact database to the IP (there is no need to name the company, which will be referred to as the “data supplier”). The data supplier was not aware that the complainant was listed on the DMA “do-not-contact” database. A representative of the data supplier also sent an e-mail to the complainant on 18 April 2011 setting out the following:
 - 7.1. The data supplier supplied the IP with a contact database during or about July 2010, and the complainant's details did appear in the database. However, the database did not contain the complainant's MSISDN, and the IP (according to the data supplier) updated the details through a “bureau”.

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- 7.2. The data supplier's representative advised that the data supplier was a member of the DMA, and complied with the DMA's rules relating to the database. She could however not find a mention of the complainant's details in the database on the date of the email.
 8. The complainant also noted at this juncture that only the first point of his complaint had been addressed thus far.
 9. The member sent its formal response to the complaint to the WASPA Secretariat on 18 April 2011 (though the adjudicator notes that the response is dated 13 April, but given the content of the response below, this must be a mistake). The member's response can be summarised as follows:
 - 9.1. The IP received the complainant's contact details from the data supplier (the data supplier is named by the member but the adjudicator withholds the name).
 - 9.2. The IP contacted the complainant on 14 April and resolved the matter amicably.
 - 9.3. The cost of the opt-out SMS was R1, which is the lowest available rate that can be charged (in terms of clause 5.1.4 of the WASPA code of conduct). The member offered to credit the complainant with this cost.
 - 9.4. The member advised that it had alerted the IP of the proper "opt-out" message requirements for SMSes and will ensure compliance in future.
 - 9.5. The member's contact details have been corrected and the member thanked the complainant for bringing this error to its attention in point 4 of his complaint.
 - 9.6. Finally, the member apologised to the complainant, noted that they had blocked the complainant's MSISDN on their gateway, and that he would receive no further SMSes from the IP through them.
 10. This response was immediately sent to the complainant, who replied on the same day in the following terms:
 - 10.1. The complainant's right to privacy and confidentiality had been breached because the IP bought his personal information from the data supplier without his explicit consent.
 - 10.2. The opt out facility in the SMS was irregular in that:

The word "stop" was included in the message but it was directed at the code "32681" which is a premium rated number of R1,00 which is NOT at the lowest available tariff rate. Also, I replied to the original SMS with the word "stop" but did not receive any confirmation of such.

Exact wording of the SMS is as follow: "SMS JAT to 32681 to apply or STOP to opt out."
 - 10.3. The complainant had no direct or indirect or recent commercial relationship with the IP or the data supplier and did not opt in to receipt of the SMSes.

- 10.4. The IP established that the complainant was on the DMA "do-not-contact" database, but sent him the SMS nonetheless.
11. The complainant followed up the following day (19 April) with the secretariat, which advised that the matter had been referred to adjudication.
12. The adjudicator requested the Secretariat to request further information from the member in the following terms:
- Can the member provide a copy of documentation whereby it bound the information provider to ensure compliance with the WASPA Code of Conduct as required by section 3.9.1 thereof?
- If the member has signed a template agreement with the IP as set out in section 3.9.3, can it provide a copy?
- Can the member set out the measures it takes to prevent its facilities from being used by information providers for the purpose of sending spam as contemplated in section 5.3.1?
13. The member's response to the first request was to send a copy of its standard terms and conditions to the Secretariat. This document appeared to the adjudicator to be its standard cellular services contract, and not to relate specifically to the provision of WASP services to IPs. The adjudicator directed the secretariat to confirm with the member that it had provided the correct document. The member assured the secretariat that it had, and that the services referred to in this document are "...the SMS Gateway product which is the bearer of the SMSs to the four Networks."
14. The terms and conditions make no reference to unsolicited communications, but clause 3.10 thereof binds the member's customer to the WASPA Code of Conduct, and the member's Acceptable Use Policy.
15. The member's AUP is available on the member's website, but does not mention spam SMS specifically, the most relevant sections being:
- Laws and Regulations**
2. Transmission, distribution or storage of any material on or through the infrastructure in violation of any applicable law or regulation is prohibited.
- Email use**
1. It is explicitly prohibited to send unsolicited bulk mail messages ("junk mail" or "spam") of any kind (commercial advertising, political tracts, announcements, etc). This is strongly objected to by most Internet users and the repercussions against the offending party and Nashua Mobile can often result in disruption of service to other users connected to Nashua Mobile.
- ...
8. In the event that the user engages in any one or more of the above practices, which shall be determined at Nashua Mobile's sole discretion and whose decision shall be final, then Nashua Mobile shall be entitled to:
- Terminate, without notice...
16. The WASPA Code of Conduct of course deals with unsolicited communications in some detail.

17. The member's response to the second request was to refer the adjudicator to its standard terms, which the adjudicator takes to mean that it did not sign a separate template agreement with the IP.
18. As to the third request, the member, after some prodding, advised that given the sheer number of SMSes that pass through its SMS gateway from hundreds of customers, it has no capacity to monitor traffic for possible spam, and relies on its customers to comply with its terms and conditions.

Sections of the Code considered

19. The conduct complained of took place during April 2011, and consequently version 10.0 of the code of conduct is relevant to this complaint.
20. The complainant works for a member of WASPA, and should consequently have been able to identify the relevant sections of the code of conduct relating to this complaint. Nonetheless, he has given sufficient information to determine that the following sections are relevant:

3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.

3.9.2. Where any information provider that is not a WASPA member conducts any activity governed by the provisions of this Code, and makes use of the facilities of a WASPA member to do so, that member must ensure that the information provider is made fully aware of all relevant provisions of the Code and the member shall remain responsible and liable for any breach of the Code resulting from the actions or omissions of any such information provider.

3.9.3. A WASPA member shall, by obtaining the information provider's signature on the WASPA template agreement, be deemed to have taken all reasonable steps to ensure that the information provider is fully aware of the terms of the WASPA Code of Conduct and this shall be considered as a mitigating factor for the WASPA member when determining the extent of any possible liability for the breach of the provisions of the WASPA Code of Conduct as a result of any act or omission by the information provider.

4.2.1. WASPA and its members must respect the constitutional right of consumers to personal privacy and privacy of communications.

4.2.2. 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 where required to do so by law.

5.1.1. All commercial messages must contain a valid originating number and/or the name or identifier of the message originator.

5.1.4. For SMS and MMS communications, a message recipient must be able to opt out at the lowest tariffed rate available (with the exception of reverse billed rates). If replying 'STOP' as set out in 5.1.3 will result in a charge greater than the lowest tariffed rate available, then instructions for the lowest tariffed rate opt-out must be included in every message sent to the customer.

5.1.5. Once a recipient has opted out from a service, a message confirming the opt-out should be sent to that recipient. This message must reference the specific service that the recipient has opted-out from, and may not be a premium rated message.

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 (within the last six months) 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.

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.

Decision

21. The complainant has raised several grounds in his complaint, which will be dealt with individually.

CPA

22. Section 3.1.2 of the Code of Conduct enjoins members to act in a lawful manner at all times. This technically should a member infringe a provision of the Consumer Protection Act (CPA), it would also have infringed the Code of Conduct. However, the problem arises that adjudicators are not part of the national justice system, and consequently are not competent to rule on whether certain conduct amounts to a CPA infringement or not. As a result, this adjudication cannot deal with possible breaches of the CPA.

Privacy and Confidentiality

23. Section 4.2 of the code does indeed oblige members to respect consumers' right to privacy and the confidentiality of consumers' personal information. The complainant however does not take into account (or did not realise at the time) that the member in this instance is merely providing a gateway for the IP to send SMSes, and thus cannot be found to have infringed the complainant's rights in this regard.
24. The IP for its part did not sell or distribute the complainant's personal information, but *bought* it. Moreover the evidence does not show that the IP knew or ought to have known that the data supplier had included the complainant's personal information in error; in fact the data supplier itself apparently was not aware of the error until this was pointed out to it. The adjudicator is mindful of the fact that the IP sent the SMS complained of despite the fact that it knew the complainant was on the DMA's "do-not-contact" list, but because the IP became aware of the complainant's DMA "no-not-contact" status *after* receipt of the personal information, the point relates to the sending of spam and not privacy.
25. The law currently gives limited protection to consumers in the position of the complainant. It is doubtful whether the action of the data suppliers in supplying the complainant's personal information to the IP was unlawful (using the formation to send spam is, again, another issue).
26. Once the registry contemplated in s 11(3) of the CPA is established, there will be a greater degree of enforcement in this regard. Until that happens, the

complainant is advised to approach the DMA to investigate the conduct of the data supplier.

27. The adjudicator shares the complainant's irritation that his personal information was peddled in the way that it was, but unfortunately there is little that WASPA can do in this regard at present.

Cost to Unsubscribe

28. The adjudicator accepts the member's contention that R1 is the lowest available tariff rate. The member has consequently not infringed section 5.1.4.
29. The Code does not require that the cost of an SMS to apply to or be unsubscribed from a service be included in a commercial SMS.

Unsubscribe confirmation message

30. The complainant alleged that he did not receive any response from the IP to his "opt-out" message. However he raised this issue *after* his complaint had been submitted and responded to by the member, which then did not have an opportunity to respond to this new allegation. It is very likely that the complainant was unsubscribed manually as a result of the complaint, in which case the required automatic confirmation would not have been generated. In the circumstances the adjudicator can make no ruling in this regard.

SP's Contact Number Invalid

31. The complainant alleges that the SP's contact number on its website is invalid and that this constitutes an infringement of the Code of Conduct. He does not specify which section of the code is infringed here however, and the adjudicator cannot see from the complaint and supporting documentation what section may have been infringed. Consequently no ruling can be made in this regard.

Spam Generally

32. There seems to be no doubt that the SMS complained of was unsolicited, and that it constituted a commercial message. Consequently the message constitutes spam as contemplated in section 5.2.1 of the Code.
33. Were the IP the subject of this complaint, there would be little doubt that it had infringed section 5.3.1 of the code of conduct, and it would be sanctioned accordingly. However, it is the member's conduct that is at issue here.
34. There are two separate issues to be decided. Firstly, is the member liable in any way for the IP's misconduct as determined by sections 3.9.1, 3.9.2 and 3.9.3 of the Code of Conduct? A second and unrelated question is whether the member took reasonable steps to ensure that its facilities were not used by the IP in sending spam.

Member's Liability for the IP's Infringement (section 3.9.2)

35. Section 3.9.1 of the Code of Conduct requires that members should bind IPs to ensure that they do not contravene the provisions of the Code of Conduct. In this case the member has made the IP agree to the terms of the WASPA

Code of Conduct in its standard terms and conditions. Failure to adhere to any of these policies constitutes a breach of contract. The relevant provisions are tucked away in the small print and it seems doubtful that the IP's attention was drawn to it, but the member has nonetheless complied with the provisions of section 3.9.1.

36. Section 3.9.2 applies specifically to the situation in this case, where the IP is not a member of WASPA, but uses the member's facilities to conduct an activity governed by the Code of Conduct. In such a case the member has a duty to ensure that the IP is made aware of the relevant sections of the Code of Conduct, and the member remains liable for any breach of the code as a result of the actions or omissions of the IP.
37. Section 3.9.3 in its turn qualifies section 3.9.2. If the member has obtained the IP's signature on the WASPA Template Agreement (a template agreement between SPs and IPs that is made available by WASPA), then the member will be deemed to have taken all reasonable steps to bring the provisions of the WASPA Code of Conduct to the IP's attention. This will then be counted as a mitigating factor in determining the member's liability in respect of the IP's breach.
38. Note that signature of such a document would be a mitigating factor, and will not necessarily exclude such liability.
39. In the event, the only document that the IP signed was the member's standard terms and conditions, not the template agreement. The adjudicator examined the standard terms to determine if it at least contained the material clauses of the template agreement, but sadly it does not. Such material clauses would include the requirement that the IP become a member of WASPA should the member require, and the member's right to retain funds due to the IP in the event of WASPA complaints. The member can hence not rely on the provision of section 3.9.3 to avoid liability for the IP's actions in this instance.
40. There is no indication that the member has made any effort to bring the provisions of the WASPA Code of Conduct to the attention of the IP beyond expecting it to read the standard terms and conditions, see the reference to the WASPA Code of Conduct and read that. Certainly the member would have been expected to advise the secretariat of any further steps taken after receiving the questions put to it at the request of the adjudicator.
41. There are no other mitigating factors set out in section 3.9.2 that can affect the adjudicator's decision.
42. Given the fact of the infringement of section 5.3.1 of the Code of Conduct by the IP, the member is accordingly held liable under section 3.9.2 for the IP's actions which infringed section 5.3.1 of the Code of Conduct.

Spam (section 5.3.1)

43. The message complained of has been determined to be spam. Did the member take reasonable steps to prevent its systems from being used to send spam?

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44. The member by its own admission does not monitor traffic through its SMS gateway or take any measures to actively prevent spam other than to make use of its facilities subject to the WASPA Code of Conduct and its AUP. The AUP does not address SMS spam directly, and appears to deal only with spam transmitted by email.
45. It is apparent that the spam SMS was sent as a result of a mistake by the IP. Consequently the adjudicator cannot see what steps the member could have taken in this instance to prevent its facilities from being used in this way. The member has not breached section 5.3.1 of the Code of Conduct.
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Sanctions

46. Notwithstanding the member's breach of section 3.9.2, the adjudicator is mindful of recent revisions made in version 11.0 of the WASPA Code of Conduct which insert a new section 3.9.3 in the following terms:

3.9.3. Notwithstanding clause 3.9.2, where an information provider makes use of a member's facilities for the sending of spam or fails to comply with the provisions of 5.1.10, the member shall not be liable for any such breach unless the member failed to take the reasonable measures contemplated and provided for in 5.3.1.

47. While section 11.0 does not apply to this adjudication and the adjudicator could impose a sanction in respect of the member's breach, it would be unjust to do so where the code has changed as described. Moreover, the member's record of code infringements is by no means a poor one. Consequently no sanction is imposed on the member.
48. The adjudicator does however make the following recommendations to the member:
- 48.1. Either have IP clients sign the WASPA Template agreement or incorporate its terms into a specific WASP agreement; and
- 48.2. Change the AUP to refer to spam in any form, not just email.

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