



REPORT OF THE ADJUDICATOR

Complaint reference number:	15208
WASPA member(s):	Clickatell (Pty) Ltd (SP); COMIT Technologies (Pty) Ltd (IP)
Membership number(s):	0004 (SP); 1213 (IP)
Complainant:	Public
Type of complaint:	Unsolicited Message
Date complaint was lodged:	13/12/2011
Date of the alleged offence:	October 2011
Relevant version of the Code:	11.0
Clauses considered:	3.1.1, 3.1.2, 4.1.1, 4.1.2, 4.1.3, 5.3.1; 14.4.1
Relevant version of the Ad. Rules:	Not Applicable
Clauses considered:	Not Applicable
Related cases considered:	None

Complaint and Response

1. This complaint relates to alleged unsolicited commercial messages sent to the complainant per SMS, as well as misrepresentation of the identity and / or nature of the IP.
2. During or about October 2011 the complainant, a member of the public, received an SMS in the following terms:

Thank you for your interest in Elite Mobile. We are looking forward to keeping you updated on our great specials. To opt-out @ any time reply STOP 0861103195
3. The complainant was displeased at receiving the message, and complained to the WASPA Secretariat in the following terms:

At no stage have I or any one else you has access to the mobile phone made any request to "Elite Mobile" for information or otherwise provided the number.

Accordingly the message is an unsolicited commercial message. I am not willing to assist the WASP concerned in "list washing" when they are so obviously involved in unashamed spamming (unsolicited commercial messages) and as such refuse to request the WASP to unsubscribe the number - instead I believe the WASP should explain its behaviour and suffer the consequences, not simply be given the opportunity of removing a complaining member of the public.

Should the WASP attempt to introduce evidence of an information request, I would appreciate an opportunity to view and refute any purported evidence.

Its behaviour is in direct violation of Section 5.3.1 of the WASPA Code of Conduct.

4. In his investigations of the originator of the SMS, the complainant also discovered the following:

* on the WASPA member list the WASP is identified as COMIT Technologies and a URL is provided www.elitemobile.co.za. At the website located at such URL (at the very bottom) is an indication "Elite Mobile is a division of the Ignition Group".

Further examining the website (at <http://www.elitemobile.co.za/deals/?/help/terms>) describes the WASP as a company "At Elite Mobile we are committed to informing our users of their privacy and the terms and conditions in which they make use of our website and deal with our company."

It then purports to identify the company as "Elite Mobile (Pty) Ltd" (see clause 1.1).

Needless to say for a company that is a sender of unsolicited commercial messages, the WASP is a member of the Direct Marketing Association of SA (see logo at bottom of page), a sure sign of responsible direct marketing and a spammer!

A review of the Companies and Intellectual Property Commission database indicates that no company names Elite Mobile (Pty) Ltd exists. A close corporation exists called Elite Mobile Telecommunications CC, however it cannot be part of a group (as indicated on its own website) or part of COMIT Technologies - as only a natural person can own the members' interest in a close corporation. Interestingly enough, the CIPC database shows an invalid email "NIVASHINI.GOVENDER@COMITTECHNO" which may indicate that the CC is in fact the WASP, however the WASP has provided false information both to WASPA and the public (via its terms).

There is also an Elite Mobile Technologies (Pty) Ltd in the database which appears to be in liquidation.

COMIT Technologies (Pty) Ltd exists and was converted from a CC to a private company, seemingly in 2011. Again, as a CC or a private company, it could not own an interest in another CC.

5. In the complainant's view, the above amounts to further breaches of the Code of Conduct for the following reasons.

3.1.1 - I allege the WASP is guilty of unprofessional conduct in deliberately misleading WASPA and the public regarding its identity. Alternatively of unprofessional conduct in complete ignorance of basic company law.

3.1.2 - I allege that the WASP is failing to act lawfully in hiding its identity in contravention of the Companies Act. In addition, the WASP is in contravention of the Electronic Communications and Transactions Act in that

the WASP sells products and services yet fails to provide various items of information as set out in Section 43(1)(a) - (g)

I also have no doubt that the WASP's attempt to hide its identity contravenes the Consumer Protection Act.

4.1.1 - I allege that the WASP's attempt to hide its true identity is neither honest nor fair.

4.1.2 - I allege that the WASP is knowingly disseminating information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

4.1.3 - the WASP does not provide the minimum information require by the Code of Conduct.

6. The WASPA Secretariat sent the notice of complaint to the SP on the 13th of October 2011, and received a reply (after granting an extension to the SP) on the 2nd of November.
7. Before examining the SP's response, it is important to establish the parties.
8. The SP is a full member of WASPA and it is clear from its submission that it acted as a message aggregator in this case.
9. The IP is an affiliate member of WASPA, and used the SP's systems to send the SMS that is the subject of this complaint.
10. This is confirmed by the SP when it states that it made submissions "...regarding an sms message sent to mobile number [removed] from one of Clickatell (Pty) Ltd's clients ("Sender") using the Clickatell sms engine."
11. Affiliate members of WASPA are subject to the provisions of the WASPA Code of Conduct in their own right.
12. The complaint was initially directed against the SP alone, and only the SP provided a response. It was not clear to me why the complaint was directed against the SP and not the IP, when the IP was a member of WASPA and was the only party cited by the complainant.
13. I accordingly requested the WASPA Secretariat to direct the complaint to the IP and give it an opportunity to respond to the complaint. This was done, and the IP's response was that it was satisfied with the response given by the SP.
14. As a result I will adjudicate this complaint as a complaint against both the SP and the IP in which the SP's response also constitutes the response of the IP.
15. The relevant sections of the SP's response are set out below.

Section 3.1.1: 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.

We struggle to understand why this section of the Code is applicable to the complaint in question. The Sender is a reputable service provider, a member of the Direct Marketing Association of South Africa and have sophisticated software that specifically cater for compliance with consumer protection laws and industry codes, including the Electronic Communications and Transactions Act of 2002, the Consumer Protection Act of 2008, the DMSA

Code of Conduct and the WASPA Code of Conduct. The Sender confirmed that it does from time to time acquire bulk sms contact lists from DMASA approved dealers. However, in this instance, the client's contact details were not obtained for purposes of marketing via sms through an acquired list.

The Complainant was phoned from the Sender's call centre in the normal course of business. Since the Complainant did not answer, a voice mail message (a transcript of which is available on request) was left by the call centre agent. The normal procedure upon a call centre agent leaving a voice message is for the agent to click on an on-screen "tick box" to indicate that a voice message was left. However, on the same screen, there is an "opt-in" tick box – this button is used when a consumer is reached via phone and agrees to receive sms and email marketing messages from the Sender. Instead of ticking the voicemail check box, the agent by mistake clicked on the opt-in tick box, which generated an automatic sms response to the Complainant. From the content of the offending sms message it is clear that this was not a marketing message but a notification confirming interest in the Sender's products. We submit that the sending of the offending sms was due to a small human error and in no way displayed unprofessional conduct. The Sender is addressing the problem by arranging additional training for its call centre agents and confirmed that the Complainant has been included in its "do not contact" list.

Section 3.1.2.: Members are committed to lawful conduct at all times.

Sending of unsolicited commercial sms messages is not unlawful per se. However, such messages have to comply with, inter alia, section 45 of the ECT Act. Direct marketing messages must also comply with section 11 of the CPA. Sender submits that the offending sms message was not a direct message and that it does not violate either of these acts or any other legislative provisions as it clearly communicated instructions on how to opt-out from receiving further sms communications from the Sender.

Section 4.1.1: Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

The Sender admits that there was an error on its website www.elitemobile.co.za. The terms and conditions available on the Sender's website stated that the service provider is Elite Mobile (Pty) Ltd whereas Elite Mobile is not a separate legal entity but a division of ComIT Technologies (Pty) Ltd. The Sender has already corrected the mistake on its website. To view the corrected page, please visit <http://www.elitemobile.co.za/deals/?/help/terms>.

However, the Sender denies that it was dishonest and submits that sms message clearly stated who the Sender was, i.e. Elite Mobile. The fact that the Complainant was able to find the Sender's website confirms that the Complainant was fully aware of who sent the sms message. The Sender's full contact details appears on its website and the Complainant was at all times welcome to contact it to confirm whether it sent the sms and/or to opt-out of further communications.

Section 4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

The Sender vehemently denies knowingly disseminating any false, deceptive or misleading information. The only incorrect information was the unintentional display of an incorrect company name on the website. The Sender was unaware of this drafting error until receipt of this complaint and immediately corrected the company name on the website.

Section 4.1.3. Each member must provide their full contact details on the member's web site, including the registered company name, telephone and fax numbers, email address and physical address.

As explained above, the Sender's website did contain an error regarding the registered company name. However, the Sender's contact details are clearly displayed on its website and there was no intent to hide its identity.

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.

The Sender vehemently denies involvement in any spamming activities. Although the definition of "spam" in the WASPA Code of Conduct is wide enough to include any type of unsolicited commercial message, it is clear from the wording of the definition read with the relevant sections of the ECT and CPA Acts that the intention of anti-spamming provisions are to prohibit unsolicited direct marketing. The offending sms message was not a direct marketing message but was a once-off confirmation message sent to the MSISDN of the Complainant by mistake. The Sender is taking appropriate steps, as outlined above, to prevent the re-occurrence of this unintentional error.

In addition, as explained above, should the offending sms message be seen as a unsolicited commercial communication, it was not unlawful as it was compliant with section 45(1) of the ECT Act (which requires unsolicited commercial communications to consumers to cancel their subscription to the sender's mailing list) as the message contained instructions on how to opt-out of receipt of further sms communications from the Sender.

The Sender wishes to apologise to the Complainant for any inconvenience caused as a result of the sms message sent to the Complainant by mistake. However, the Sender submits that the complaint is malicious and ungrounded and requests that WASPA dismiss it as such.

Sections of the Code considered

16. The SMS complained of was sent during October 2011, and thus version 11.0 of the WASPA Code of Conduct applies to this complaint. The following clauses are relevant:

3.1.1. 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.

3.1.2. Members are committed to lawful conduct at all times.

4.1.1. Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

4.1.3. Each member must provide their full contact details on the member's web site, including the registered company name, telephone and fax numbers, e-mail address and physical address.

5.2.1. Any direct marketing message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;

(b) the message recipient has a prior commercial relationship with the message originator and has been given a reasonable opportunity to object to direct marketing communications

(i) at the time when the information was collected; and

(ii) on the occasion of each communication with the recipient;
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.

14.4.1. An adjudicator finding prima facie evidence that any member may have breached clause 3.1.2 of the Code of Conduct must request that WASPA refer the breach to the relevant statutory or regulatory authority, unless that authority has already made a ruling on that particular case. If the relevant authority has already made a ruling on that particular case, then the adjudicator may find a breach of clause 3.1.2.

Decision

17. This complaint has two heads:

17.1. Firstly that the IP sent an unsolicited message (spam) to the complainant. The complaint against the SP is not clear, as it was not cited in the complaint, but as aggregator the appropriate allegation would be that it failed to take reasonable steps to ensure that its facilities were not used to send spam. Clauses 5.2.1 and 5.3.1 relate to this head.

17.2. Secondly, that the IP misled the public and WASPA by posting misleading and / or deficient information about itself on its website. Clauses 3.1.1, 3.1.2, 4.1.1, 4.1.2 and 4.1.3 relate to this head, as does section 43(1) of the Electronic Communications and Transactions Act 25 of 2002. I do not consider that there are any grounds of complaint against the SP on this head.

Transmission of Spam

18. On the SP's version, an employee of the IP telephoned the complainant, presumably to market a product to him. The complainant did not answer his phone and the employee left a voice message. The employee should then have checked a box in the IP's system to note that he/she had left a message, but instead mistakenly checked the "opt-in" box. As a result, an automated SMS was sent via the SP's system to the complainant's MSISDN to confirm that the complainant had displayed an interest in the IP.

19. The content of the SMS that bears the IP's version out. Such an SMS would not be effective as a marketing message "out of the blue", as it does not give any information as to what goods or services the IP has to offer. It only makes sense as confirmation of a relationship of some sort established between the parties. A cynic might hold that this is simply a ploy by the IP to get around

the WASPA rules on spam; however the message is not effective as a marketing message, and such a ploy would not work more than once (one would hope).

20. I am thus convinced by the SP's submission that the IP sent the message by mistake. I do not think that clause 5.3.1 can be stretched to include negligently sending a message, especially when the message is not sent in bulk.
21. The complaint in respect of clause 5.3.1 is dismissed against the IP.
22. It follows that the SP cannot have infringed clause 5.3.1.

Misrepresentation

23. The complainant alleged that the IP misrepresented its identity and nature in the following ways.
 - 23.1. The IP listed itself as a division of the Ignition Group, when this is not the case.
 - 23.2. The IP identified itself on its website as "Elite Mobile (Pty) Ltd" when there is in fact no such company and the appropriate description is "a division of COMIT Technologies (Pty) Ltd".
 - 23.3. The IP sells goods through its website, and accordingly required by the ECT Act to list certain information, which it did not do.
24. The complainant also suggested that the IP could not claim to be part of a group of companies because it was a close corporation. It was subsequently established that the IP is not a close corporation and so this will not be pursued.
25. The SP's response to the above was that the IP's proper description was "Elite Mobile a division of COMIT Technologies (Pty) Ltd". The fact that its website did not reflect this was explained as an error. The SP denied that the IP was dishonest in this regard. Neither party explained what the "Ignition Group" was but I do not think that this is material to the outcome of the complaint.
26. In considering the allegations in paragraphs 23.1 and 23.2, I cannot see what the IP would have gained by conducting an intentional misrepresentation as suggested. It is doubtful that this would have induced any party to enter into business with it that would otherwise not have done so, nor would it have been of much assistance to the IP if it wished to "cover its tracks". The ease with which the complainant found the IP stands testament to that.
27. If I could see any such benefit, I would have reason to doubt the IP's version that the incorrect information was the result of a simple error. As matters stand, I cannot hold that the IP had any intention to deceive, and consequently cannot find that it has infringed clauses 4.1.1 or 4.1.2.
28. The complainant lists the shortcomings of the IP's terms and conditions as found on its website, but does not comment on the rest of its website. While he alleges that the information required by clause 4.1.3 does not appear on

the IP's website, he only discusses the terms and conditions. I accessed the IP's website and the required information is present. Accordingly there is not sufficient information available to allow me to find that the IP has infringed clause 4.1.3.

29. It is embarrassing to make a mistake when describing oneself on one's own website. Is it also unprofessional as contemplated in clause 3.1.1 of the Code of Conduct? The term "unprofessional" is a nebulous one at best, but I do not think that it is broad enough to encompass the mistake made by the IP. The SP's submission on the point, incidentally, was not on point, dealing with spam as it did.
30. Finally, the complainant alleges a breach of clause 3.1.2, which obliges members to act in a lawful manner. Clause 14.4.1 of the Code prevents me from making a determination whether the IP's conduct was unlawful *per se*; I must request that WASPA refer *prima facie* unlawful conduct to the "relevant statutory or regulatory authority".
31. The complainant alleged that the IP was acting unlawfully in that it misrepresented its identity in contravention of the Companies Act, and that it failed to list certain information on its website as required by section 43(1) of the ECT Act.
32. I have examined the IP's terms and conditions as set out on its website, and they appear to comply with the provisions of section 43(1) of the ECT Act. I could also not find any sign of the alleged infringement of the Companies Act on the IP's website. The IP admitted in its submission that there were errors which it had corrected, so presumably the website has been amended since.
33. I have no reason to doubt the complainant's observations as set out in the complaint, and if matters were as described by the complainant, the IP's conduct would have constituted a *prima facie* infringement of the Companies Act 71 of 2008 (in particular section 32 thereof) and the Electronic Communications and Transactions Act 25 of 2002 (section 43(1)(a) thereof). The problem lies in proving that such infringements took place, given that the IP has amended its website.
34. There is *prima facie* evidence of unlawful conduct: the WASPA Secretariat is requested to ascertain whether it is feasible to report the matter to the relevant authorities.