



REPORT OF THE ADJUDICATOR

Complaint reference number:	18757
WASPA member(s):	Cellfind (Pty) Ltd (SP) (0019)
Membership number(s):	Above
Complainant:	Public
Type of complaint:	Spam
Date complaint was lodged:	2012-10-23
Date of the alleged offence:	2012-09-12
Relevant version of the Code:	12.1
Clauses considered:	Clause 3.9, 5.1.11; 5.2 and 5.3.
Relevant version of the Ad. Rules:	Not applicable

Related cases considered:

Complaint

- Complaint 18757 is escalation of unsubscribe request 3504699 regarding unsolicited sms's.
 - The formal complaint was sent to the WASP on 2012-10-29 and they responded on 2012-11-08.
 - Secretariat email concerning continued sms's received by complainant from WASP Cellfind.
 - WASP requested hand over to non-member 2012-11-08.
 - Secretariat advises the WASPA member of hand over too non-member 2012-11-09.
 - Additional info is requested by secretariat from WASP 2012-11-15.
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Service provider's (SP's) response

The Service Provider referred the case to the IP who is 3Way. However 3Way is not a WASPA member and cannot be bound by the Code of Conduct.

Sections of the Code considered

3.9. Information providers

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 or the Advertising Rules.

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. 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 5.1.11, 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.

3.9.4. 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.

5.1.11. Upon request of the recipient of a direct marketing message, the message originator must, within a reasonable period of time, identify the source from which the recipient's personal information was obtained, and provide proof that the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

5.1.12. Direct marketing messages may not be sent on Sundays, public holidays, on Saturdays before 09:00 or after 13:00, or on all other days between 20:00 and 08:00, unless expressly agreed to in writing by the recipient.

5.2. Identification of spam

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.

5.2.2. Any commercial message is considered unsolicited after a valid opt-out request.

5.2.3. WASPA, in conjunction with the network operators, will provide a mechanism for consumers to determine which message originator or wireless application service provider sent any unsolicited commercial message.

5.3. Prevention of spam

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.

5.3.2. Members will provide a mechanism for dealing expeditiously with complaints about spam originating from their networks.

Decision

Service Providers allowing Information Providers who are not WASPA members to utilise their networks are liable for such Information Provider's breaches of the WASPA Code if they have not followed the steps required by 3.9 and 5.3.1 of the Code. The Service Provider did not demonstrate that they had taken the reasonable steps as required by 5.3.1 and elaborated on in 3.9.4.

Sanctions

I am going to fine the SP R5000 and request that they get the IP to sign the WASPA template agreement pending 3Way actually becoming a WASPA member.