

REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Altech Autopage Cellular
Information Provider (IP): (if applicable)	Blue World Agencies CC t/a SMSPortal
Service Type:	Bulk Messaging
Complainant:	Consumer
Complaint Number:	1986
Code version:	Code v5.3 and Ad Rules v1.6

Complaint

1. On the 22nd of August 2007, the Complainant lodged a complaint via the WASPA website in the following terms:

Affiliations: I am not employed by, or otherwise associated with one of WASPA's Member companies

Affiliation_Information:

Name_WASP: Unknown

OtherID: +27832272447

Code_Breached: Received an SMS advertising Woolworths insurance, no way of opting out. And it is unwanted, I would like to know where they got my details, as per the ECT act.

Detailed_Description_Complaint: Received SMS from +27832272447, as follows:
\"Woolworths Car & Home Insurance includes FREE Tracker installation. Call 0860 10 55 63 today or reply YES for a free quote & you could win an Apple Ipad!\"

Tick_as_appropriate: I am unable to determine who the service provider is

2. On the 27th of September 2007 the WASPA Secretariat advised the Member of the complaint, having in the meantime established from MTN that the originating number was assigned to the Member. The Member was requested to contact the Complainant and attempt to settle the matter on an informal basis in terms of clause 13.2 of the Code of Conduct.
3. On the 4th of October 2007 the WASPA Secretariat sent an e-mail to the Member requesting a response to its previous e-mail and advising that failing such a response the complaint would be escalated to a formal proceeding.

4. The Member advised on the same day that the matter was with their legal department for resolution.
5. On the 5th of October 2007 the Complainant, who had heard nothing from the Member regarding the complaint, requested the WASPA Secretariat to escalate the complaint to the formal procedure as set out in clause 13.3 of the Code of Conduct.

Response

6. On the 19th of October 2007 the Member forwarded responses by the IP to several related complaints, including this one. The response by the IP to this complaint was identical in all material respects to the response given to complaint 1743:
 - 6.1. This response set out the technical measures put in place by the IP to allow for users to unsubscribe from their services. The upshot of these measures is that incoming replies containing the words "stop", "delete", "remove", and "unsubscribe" are noted, and the corresponding user's mobile number is removed from the relevant mailing list. The IP also has a global "blacklist" of numbers that SMSs are not to be sent to under any circumstances.
 - 6.2. The IP advised that the Complainant had "...a 'relationship' (store card, cellphone account or opted into a mailing list)..." with their client. No proof of that relationship was forthcoming however, despite the Complainant's request for such information as set out in the complaint.
 - 6.3. The IP assured further that the Complainant would receive no further SMSs from it.
 - 6.4. It appears from a schedule of mobile numbers to which messages had been sent and received, which was provided by the IP in its response that no SMS was received from the Complainant's number.
7. The above submission was accompanied by a request for guidance by the Member's Commercial Legal Manager, who asked whether it will be feasible to forward the IP's response to the Complainant in the hope that the undertaking that no further SMSs would be received from the IP would satisfy the Member.
8. On the 25th October the WASPA Secretariat responded to the Member, advising them that as the complaint had been escalated to a formal complaint, WASPA would be obliged to hand the matter to independent adjudicator for review should it not receive confirmation that the complaint had been satisfactorily resolved.
9. The Member responded on the same day advising that an attempt would be made to contact the Complainant and resolve the matter.
10. On the 12th of November 2007 the WASPA Secretariat sent an e-mail to the Member advising it that as WASPA had received no response from the Member regarding the complaint, it was obliged to pass the matter on to an independent adjudicator for review without the benefit of the Member's response.

11. On the 20th of November 2007 the Member advised the WASPA Secretariat that the IP had given it a guarantee that the Complainant's number would receive no further unsolicited SMSs.

Portion of the Code Considered

12. While no clauses of the WASPA Code of Conduct are cited in the complaint, it is trite that Members of the public cannot be expected to quote chapter and verse of the Code of Conduct. The adjudicator is thus competent to decide what aspects of the code are likely to have been infringed in any particular complaint.
13. This matter revolves around the sending of unsolicited commercial emails as set out in clause 5 of the WASPA Code of Conduct:

5. Commercial communications

5.1. Sending of commercial communications

- 5.1.1. All commercial messages must contain a valid originating number and/or the name or identifier of the message originator.
- 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.
- 5.1.3. Any mechanism for allowing a recipient to remove him or herself from a database must not cost more than one rand.
- 5.1.4. Notwithstanding 5.1.3, for SMS and MMS communications:
 - (a) A recipient should be able to stop receiving messages from any service by replying with the word 'STOP'. If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate. The reply 'STOP' procedure must be included at the start of any messaging service, for example: "reply STOP to opt out".
 - (b) Recipients of premium rate or non-replyable messages must have the option to opt out at a cost of R1 or less. This opt-out instruction must be included in every commercial premium rate or non-replyable message, for example. "sms STOP to 32xxx to opt out".
- 5.1.5. Upon request of the recipient, the message originator must, within a reasonable period of time, identify the source from which the recipient's personal information was obtained.
- 5.1.6. Commercial communications may not be timed to be delivered between 20:00 and 06:00, unless explicitly agreed to by the recipient, or unless delivery during this period forms part of the upfront description of the service.

5.2. Identification of spam

- 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 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.

5.2.2. 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.

14. On examination of the facts, the clauses of particular concern in this matter appear to be:

14.1. **5.1.4 (a)** in that there was allegedly no unsubscribe instruction in the SMS message concerned,

14.2. **5.1.5** in that the source where the IP obtained the Complainant's personal information from may not have been adequately identified, and

14.3. **5.3.1** in that the commercial messages in question may have amounted to spam.

Finding

- 15. **Clause 5.1.4(a):** it is clear from the complaint that unsubscribe instructions were not included in the SMS in question, and I accordingly find that an infringement of clause 5.1.4 (a) has taken place. This conclusion is strengthened by the fact that complaints 1743 and 2090, adjudicated simultaneously with this complaint, also involve breaches of this clause – the breach thus seems to be systemic.
- 16. **Clause 5.1.5:** despite a request contained in the complaint for the IP to identify where the IP's client obtained the Complainant's personal information, no indication was given beyond the very generic answer contained in the IP's response of the 25th of October 2007. I accordingly find that this clause has been breached.
- 17. **Clause 5.3.1:** as set out above, clause 5.2.1 defines spam as any commercial communication where the recipient has not requested such a communication, does not have a "direct and recent prior commercial relationship" with the message originator or where the recipient's contact information has not been supplied to the message originator with the recipient's consent.

18. It does not appear from the facts that any of these three grounds have been established. The message in question hence constitutes spam.
19. The next question the is to determine whether the SP took adequate measures to prevent the sending of spam as required by the Code of Conduct. This is always a difficult enquiry to undertake, but given that spam was also sent by the same IP around the same time in complaints 1743 and 2090, *res ipse loquitur* - the clause has clearly been infringed in this case, a conclusion that is strengthened by reference to paragraph 20 of this report.

Sanctions

20. I note the decision of the adjudicator in complaint number 936, involving the same Member and IP, and also involving the sending of unsolicited commercial messages. The adjudicator found breaches of clauses 5.1.2 and 5.3.1, issued the Member with a formal reprimand and ordered it to suspend its service to the IP until such time as it was in compliance with the provisions of the Code of Conduct, especially clause 5. This matter also deals with the unsubscribe facility (clause 5.1.4 (a) here rather than clause 5.1.2 in complaint 936) and with 5.3.1 of the Code of Conduct.
21. The fact that the present complaint stems from similar facts to those of complaint 936, arising from a relationship between the same Member and IP, is a substantial aggregating factor. Spam is moreover the bane of the industry and should be dealt with firmly. Consequently, the following sanctions are imposed:
 - 21.1. If it were shown that clause 5.1.2 had been breached, a heavy fine would have been levied. As it is, a fine of R 2 500 is imposed upon the Member for the breach of clause 5.1.4 (a) of the WASPA Code of Conduct.
 - 21.2. A fine of R 2 500 is imposed upon the Member for the breach of clause 5.1.5 of the WASPA Code of Conduct.
 - 21.3. A fine of R 5 000 is imposed upon the Member for its breach of clause 5.3.1 of the WASPA Code of Conduct.
 - 21.4. The Member is ordered to suspend its services to the IP for a period of at least 14 days or until such time as it has satisfied itself that the IP is in compliance with the provisions of clauses 5.1.4(a) and 5.3.1, whichever is the longer period. Once the IP has complied the Member will immediately confirm its opinion that the IP is in compliance with the WASPA Secretariat in writing. This suspension is to run simultaneously with those imposed in complaints 1743 and 2090, unless the decisions in those other complaints are appealed.
 - 21.5. The WASPA Secretariat is ordered to notify all WASPA Members of the suspension set out above and to advise that if any of them offer services to the IP during the period of such suspension it will constitute a breach of the WASPA Code of Conduct.