



## REPORT OF THE ADJUDICATOR

<b>Complaint reference number:</b>	20887
<b>WASPA member(s):</b>	Cellfind (Pty) Limited
<b>Membership number(s):</b>	0019
<b>Complainant:</b>	Public
<b>Type of complaint:</b>	Unsolicited commercial message
<b>Date complaint was lodged:</b>	2013-06-20
<b>Date of the alleged offence:</b>	2013-06-05
<b>Relevant version of the Code:</b>	12.1
<b>Clauses considered:</b>	5.1, 5.2 and 5.3
<b>Relevant version of the Ad. Rules:</b>	Not applicable
<b>Clauses considered:</b>	Not applicable
<b>Related cases considered:</b>	0409; 15620

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### Complaint

There seems to be some discrepancy around the nature of the request initially made via the WASPA website. The complainant's request was logged as an unsubscribe request when the complainant was actually complaining about unsolicited messages received.

The complainant stated that she received the first unwanted communication on 22 April 2013. She responded with STOP on the same day. Another message was received on 25 April 2013 at 11.33. She responded with STOP again at 11.34. A third unsolicited message was received on 2 May at 13.39. She replied STOP again, with a warning that a complaint would be lodged.

The message received was as follows:

*"In market for a new vehicle, don't make rush decisions, McCarthy Edenvale Grand Opening 24 May 2013 - 011 879 8420"*

The complainant states that the last time she requested information from McCarthy was more than a year ago, and then on specific vehicles. She states that she never opted in to receive commercial SMS's such as the message she received.

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### **Service provider's response**

In response to an unsubscribe request, the SP responded that the complainant's number could not be found on the SP's database and therefore, according to the SP, the complainant could not be unsubscribed.

The SP responded further that the messages were sent by McCarthy, who are a client of Hi-Pixel Communications, who in turn are a customer of the SP.

The SP confirmed that the complainant has been added to all the opt-out lists for the SP and Hi-Pixel, and that any further messages from McCarthy will be blocked.

The SP also stated that if the complainant had replied with the message "Stop", she would have been added regardless of the message sent to her originally. Our system cannot edit messages going out via our systems as these are seen as private and confidential between the SP's customers and their customers. The SP does, however, support opt-outs on all messages sent in reply to any message.

The SP argues that under the WASPA code of conduct, WASPS are under no obligation to remove numbers listed on the DMASA.

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### **Sections of the Code considered**

#### *5. Commercial and bulk messages*

##### *5.1. Sending of commercial messages*

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 direct marketing database, so as not to receive any further direct marketing messages from that message originator.

5.1.3. For commercial messages, 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 should be

made clear to the recipient at the start of any messaging service, for example by including "reply STOP to opt out" in the first message sent. If it is not technically feasible for the recipient to reply to a specific message then clear instructions for unsubscribing must be included in the body of that message.

5.1.4. For commercial messages, 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. The reply "STOP" or alternative opt-out procedure must be included in all direct marketing communications. A "STOP" reply in this instance will refer to all direct marketing communications from the message originator.

5.1.6. Non-commercial bulk SMS services (such as newsletters) must have a functional opt-out procedure consistent with that described in clause 5.1.3.

5.1.7. Notwithstanding clauses 5.1.3 and 5.1.6, members are not obliged to honour an opt out request for communications that are necessary for the conclusion or performance of a contract to which the recipient is a party.

5.1.8. Notwithstanding clauses 5.1.3 and 5.1.6, members are not obliged to honour an opt out request for communications required by law.

5.1.9. 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.

5.1.10. Where the words 'END', 'CANCEL', 'UNSUBSCRIBE' or 'QUIT' are used in place of 'STOP' in an opt-out request, the service provider must honour the opt-out request as if the word 'STOP' had been used.

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
  - (iii) 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.

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## **Decision**

The complainant's initial request logged on the WASPA website was not to be unsubscribed from a subscription service but rather to exercise her rights in terms of clause 5 of the Code of Conduct, i.e. to stop the sending of commercial messages to her number from McCarthy, and to have the source, from where her details were obtained, disclosed to her.

The SP would therefore not have found the complainant's number on any of its subscription service databases, and its response in this regard does not take the matter any further.

The first issue to be determined is whether the messages received by the complainant were unsolicited, and hence spam.

The complainant stated in her complaint that she had previously made enquiries with McCarthy a year before the complaint regarding specific vehicles, but that she never opted-in to receive further promotional messages from them.

It is possible that the complainant was added to McCarthy's database, which in turn may have then been provided to McCarthy's SMS service provider, Hi-Pixel Communications. However, it appears from the complainant's version that she never agreed to this.

Even if it could be argued that the complainant did have a prior commercial relationship with McCarthy, the message originator, she was not given a reasonable opportunity to object to such direct marketing communications.

In any event, after the complainant replied "STOP" to the first message received, every message sent after that would be considered unsolicited.

I am therefore satisfied that the messages sent to the complainant were unsolicited and, hence spam.

I am not satisfied that a facility was provided to allow the complainant to remove herself from the database. The complainant should have been able to stop receiving the messages when she replied with the word 'STOP'.

Insofar as the SP is not directly responsible for the sending of the unsolicited messages to the complainant, the provisions of clause 5.3.1 of the Code of Conduct are clear in this regard.

I therefore find that the SP has contravened clause 5.3.1.

Finally, the complainant's request for confirmation of where her details were obtained remains unanswered. She is entitled to this information.

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## **Sanction**

I have taken into account previous complaints which have been upheld against the SP involving the sending of unsolicited communications in considering the sanctions to be given in this complaint. (See complaints 0409, 15620, 17872, 18757, 18971, and 19043).

In light of the foregoing, the following sanctions are given:

1. The SP is fined the sum of R30 000.00;
2. The SP must provide the complainant with the details of where the complainant's name and/or cell number were obtained by the message originator, i.e. McCarthy.