



## REPORT OF THE ADJUDICATOR

**WASP:** Allied Pacific Investments

**Service Type:** Subscription services

**Complainant:** WASPA Monitor

**Complaint Number:** 25904

**Code Version:** 13.0

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### Complaint

The original complaint read as follows:

SMS commercial SMS\'s were sent to a tablet where no prior testing nor subscriptions had ever taken place. The messages are therefore regarded as SPAM, and explicit consent is requested from Allied Pacific.

We await logs from Allied Pacific to prove a prior relationship.

The Monitor provided the text of the messages and clarified that it was only the unsolicited nature thereof that is in issue in the complaint at hand.

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### WASP's response

The WASP stated that the tablet or number belonged to one Ms Xulu who clicked on a marketing banner on 1 January 2015 at 23h56.

### Sections of the Code considered

The following sections of the Code were identified in the complaint:

4.2. Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.

5.4. Members must have honest and fair dealings with their customers.

16.4. Any member authorising, directing or conducting any direct marketing must implement appropriate procedures to facilitate the receipt of a demand from a person who has been approached for the purposes of direct marketing to desist from initiating any further communication (an "opt-out request").

16.9. A member may engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing, to a person who has given his or her consent.

16.10. A member may engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing, to a person who:(a) has provided the party responsible for sending the direct marketing communication with his or her contact details in the context of the sale of a product or services, and the responsible party's own similar products or services are being marketed, and (b) has been given a reasonable opportunity to object, free of charge, and in a manner free of unnecessary formality, to such use of his or her details at the time when the information was collected and on the occasion of each subsequent direct marketing communication sent to that person.

16.11. A member may not engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing other than as provided for above.

16.12. Any communication for the purpose of direct marketing must contain the details of the identity of the sender or the person on whose behalf the communication has been sent and an address or other contact details to which the recipient may send a request that such communications cease.

5.15. Members must respect the constitutional right of consumers to personal privacy and privacy of communications.

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## Decision

The issue at hand in this matter is one of consent – did the recipient of the sms give consent to receive marketing material.

The clauses in issue are therefore 16.9, 16.10 and 16.11 above.

The WASP provided the details of the person that they believe is the owner of the number and submitted that she had “clicked on one of our marketing banners” and “We were provided with her name, address, gender and mobile number”.

The Monitor provided an MTN account showing that the number does not belong to the person named by the WASP. This is *ex facie* genuine and I therefore accept that this owner is the true holder of the number.

My concerns stem from 2 aspects of this:

- [ The incorrect details held by the WASP;
- [ The WASP's evasiveness about the consent.

To elaborate on the second point: The advertising material provided to me shows no place that a consumer would have provided details and, more importantly, consented to receive marketing material. There are no logs provided to back this up, despite WASPA being clear on the need to provide logs and me allowing a second opportunity to do same. I am, in this context, concerned about the ambiguity of the sentence, "We were provided with her name, address, gender and mobile number".

In the first place, it's rather awkward construction makes me believe that the consumer (whoever it was) did not supply the details, but some other source. The second is that the consumer's details are not what is important, what is important is their consent.

On the material before me there is no proof of consent. In addition, there is no proof that the consumer ever bought a similar product or service.

**I therefore find that, on the evidence before me, the WASP is in breach of clauses 16.9, 16.10 and 16.11.**

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## **Sanctions**

I consider this a serious breach going to the very core of ethical WASP behaviour, and I am unimpressed by the WASP's failure to address the issues head on.

**I fine the WASP R100 000 in respect of this breach.**