

## Adjudicator's Report



**Wireless Application Service Providers' Association**

<b>Complaint number</b>	26725
<b>Cited WASPA members</b>	Clickatell (Pty) Ltd (0004)
<b>Notifiable WASPA members</b>	None
<b>Source of the complaint</b>	Public
<b>Complaint short description</b>	Charging premium rates for opt-out messages
<b>Date complaint lodged</b>	2015-07-08
<b>Date of alleged breach</b>	2015-06-24
<b>Applicable version of the Code</b>	13.9
<b>Clauses of the Code cited</b>	3.5, 3.6, 3.7 and 16.7
<b>Related complaints considered</b>	No other cases cited
<b>Fines imposed</b>	R10 000 payable on demand by the Secretariat

<b>Is this report notable?</b>	Yes
<b>Summary of notability</b>	This report may be relevant to further complaints arising from the same complaint given that the member and its customer have acknowledged a breach of the Code.

## ***Initial complaint***

This complaint is relatively straightforward. The complainant, a member of the public, lodged the following complaint against the member:

*At 14:45 on 24 June, I received SPAM from +2784000131799999: "A R30000 dream bathroom could be yours. Enter online @ tileafrica.co.za and tell us what YOUR style is. SMS STOP to 40573 to opt out"*

*At 18:07 on 24 June, I received more SPAM from +2784000131799999 "Get 20% off selected Porcelain Tiles & 20kg Tile Africa Porcelain fix @ R79.99. Only at Tile Africa. Valid until SUnDay 28 June. SMS STOP to 40573 to opt out"*

*According to smscodes.co.za, that premium rated number belongs to Clickatell.*

*I wish to lay a complaint on the basis that: 1) I never gave them permission to spam me 2) The opt-out number is a R1.00 premium rated number*

## ***Member's response***

The member initially responded to WASPA asserting that the short code was not one of the short codes it made use of and indicated its willingness to defend the matter at an appeal stage. The member subsequently reverted to the Secretariat on 08 July 2015 with the following:

*Hi, I hereby confirm that this is indeed true – apologies for the run-around:*

The member followed up later that day with the following explanation:

*Our sincere apology for not responding timeously to the complaint, we acknowledge that this was indeed an oversight on our side and we are addressing this in our internal process.*

*I can confirm these steps have been followed by our clients to resolve the matter:*

- 1) Our client has been in contact with Julie van der Walt (complainant)*
- 2) Confirmation with Julie van der Walt was made their mobile number had been removed from the Tile Africa database.*
- 3) An SMS confirmation was also sent to Julie's mobile number 0734217262 confirm they've been removed from their system*
- 4) Corrected their system in terms of the opt out number 40573 was used in error and rectified to short code 31690*

*I've included the feedback from our client.*

*We sincerely apologise for the inconvenience caused*

The member also provided an email that its customer sent to its helpdesk for the Secretariat's information:

*Thank you for bringing this to my attention.*

*The message was sent by my client to a db that they acquired in-store. I can confirm MSISDN 073 421 7262 has been removed from their db.*

*In terms of the opt-out number (Clickatell Short code 40573) - this number was used in error and has been rectified to one of our short codes 31690.*

*Note, I have also been in contact with the subscriber (Julie van der Walt) and have confirmed with her that her mobile number has been removed from the Tile Africa database. The same has also been communicated to her in writing (via SMS).*

*Should you require anything further, please feel free to contact me on 082 992 3534.*

There is no evidence before me that gives me any reason not to accept the member's explanations as forthcoming.

## ***Complainant's response***

The complainant does not appear to have replied to the member's submissions.

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

The complainant cited section 16.7 of the Code which states the following:

*16.7. A member may not charge a consumer a fee for processing an opt-out request or for registering a pre-emptive block.*

The member and its customer have acknowledged that the use of the 40573 short code was in breach of the Code. For the reasons below, I also considered sections 3.5, 3.6 and 3.7 of the Code. These clauses address the question of member liability. These state the following:

### ***Customers who are not WASPA members***

*3.5. Members must ensure that any customer who is not a member of WASPA, but is providing services covered by this Code of Conduct, is aware of the requirements of this Code of Conduct.*

*3.6. Members must ensure that any customer who is not a member of WASPA, but is providing services covered by this Code of Conduct, provides those services in a manner consistent with the requirements of this Code of Conduct.*

*3.7. A member is liable for any breaches of this Code of Conduct resulting from services offered by a customer, if that customer is not also a member of WASPA. If the member can demonstrate that they have taken reasonable steps to ensure that that customer provides services in a manner consistent with the requirements of this Code of Conduct, this must be considered as a mitigating factor when determining the extent of the member's liability for any breaches.*

## ***Decision***

The member's customer, NXT Thing Now (Pty) Ltd, does not appear to be a WASPA member. Sections 3.5, 3.6 and 3.7 attribute responsibility for educating customers that are not members

about and ensuring compliance with the Code. The Code states that members “must ensure” that their members are compliant with the Code. The *extent* of a member's liability is determined by the extent to which it took “reasonable steps to ensure that that customer provides services in a manner consistent with the requirements of” the Code.

The error which gave rise to this complaint, namely using a premium short code for an opt-out message, could have resulted in numerous consumers being charged premium rates when they opted out of the member's customer's campaign. This is problematic and the member gave no explanation as to how a premium short code was confused with the alternative.

A reasonable member would maintain an awareness of which short codes are premium and which are not and advise its customers accordingly. A member's failure to do so would be negligent. That negligence is a factor to take into account when determining the *extent* of the member's liability, not whether it is liable for the actions of its customers.

In this case I find the member responsible for its customer's breach of the Code. Despite the member's initial assertion that it was not responsible for the short code, it's later submissions were fairly forthright. That said, I am concerned that this error occurred in the first place and about the absence of a meaningful explanation for this.

### ***Sanctions***

In light of my finding that the member is responsible for the breach of section 16.7 of the Code, I impose a fine of R10 000 which is payable on demand by the Secretariat.

### ***Matters referred back to WASPA***

Given that this issue may have affected other consumers, I recommend that the Secretariat make enquiries as to whether other consumers have made use of the premium short code to opt-out of the member's customer's campaign and whether the member or its customer took steps to reimburse those consumers?