Wireless Application Service Providers' Association

Report of the Appeals Panel

Complaint number	26725
Cited WASPA members	*Clickatell (Pty) Ltd (0004)*
Notifiable WASPA members	*None*
Appeal lodged by	*Clickatell (Pty) Ltd*
Type of appeal	***Written appeal***
Scope of appeal	Review of the adjudicator's decision Review of the sanctions imposed by the adjudicator
Applicable version of the Code	*13.9*
Clauses considered by the panel	*3.5, 3.6, 3.7 and 16.7*
Related complaints considered	*None*
Amended sanctions	*Set aside*
Appeal fee	***Appeal fee to be refunded in full***
Is this report notable?	*Not notable*
Summary of notability	*n/a*

Initial complaint

The initial complaint in this matter arose from a spam sms sent to the complainant, for which the opt-out sms was a premium rated number.

Adjudicator's findings

The adjudicator found, in essence, a breach of Clause 16.7 (relating to a charge for opt out messages) as read with Clause 3.7 (relating to liability for customer's behaviour).

The reasons for the Adjudicator's findings will be canvassed more fully below,

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Appeal submissions

The Appellant WASP submitted that the customer sending the message was not using its services at the time, and that it was therefore not liable under Clause 3.7.

It submitted that the correct short code, that was subsequently used, belongs to iTouch Messaging Services (Pty) Ltd.

It submitted further argument that it, in any event, has reasonable controls in place surrounding compliance by customers.

Deliberations and findings

We start by noting that while the complainant originally raised the issue that he did not give permission to receive marketing material, he only raised Clause 16.7, which relates to the charge for the opt-out message. The Adjudicator therefore rightfully did not consider this issue, as he/she was only empowered to consider the clauses cited to the WASP.

This matter is, in essence, one that is based on a misunderstanding of written submissions.

The Appellant, in its response dated 8 July 2015, stated that it was not responsible for the sms. Later that day, it withdrew that response, stating, “I was referencing the wrong number” but then subsequently resubmitted the response saying, “I hereby confirm this [the first response] is indeed true”. It is not clear from the Adjudication, but it appears that the Adjudicator may have taken this as an admission that the *complaint*, and not the initial response, was true.

The Appellant then lodged a subsequent response where it stated “I can confirm these steps have been taken by our clients to resolve the matter. . .”. An attachment confirmed that a Clickatell short code had been incorrectly used.
The Adjudicator, in our opinion not unreasonably, took this to be an admission that the “clients” were acting in that capacity in this matter. The ruling is based on this assumption.

However, based on the submissions in the Appeal, and on a careful reading of the original responses, it appears that what happened was as follows:

- The Appellant denied liability as it was not responsible for the sms;
- The Appellant nonetheless brought the matter to the responsible party’s attention, because that party is indeed a client of the Appellant although was NOT in this matter;
- The Appellant provided this feedback to WASPA, thinking it was clear from previous submissions that it was not responsible for the sms;
- There was some confusion as to process and the Appellant apologises for this.

This is supported by the correspondence from “the client”, NXT Thing Now (Pty) Ltd, who state, in a mail dated 30 June 2015, “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 own short codes 31690.”

In short, while NXT is a client of the Appellant, it was not a client for the purposes of this messaging service. It is tempting to end the enquiry there. However, that is too simplistic. While it is true that the Appellant did not send out the offending sms on its network (and therefore did not have an opportunity to vet the message or short code in any manner) it did provide NXT with a premium rated short code, and therefore must have some responsibility for the use of same.

In this respect, this Panel is satisfied that the steps that the Appellant has taken contractually to ensure that the client was bound by the Code and was aware of the Code constitute reasonable steps in the context of Clause 3.7. In addition, by following the matter up with the client despite not being the message carrier, the Appellant has taken reasonable steps to remediate the offending use of its code.

Given this, the Panel is satisfied that the Appellant is not in breach of Clause 16.7 as read with Clause 3.7. The decision is set aside, together with the sanction. The Appeal fee is refunded in full.

While the error appears to have been entirely that of NXT, the WASP that did in fact carry the campaign may have had a responsibility to ensure that the correct codes were used in the messages that it disseminated. This is not a question for this Appeal Panel.

The matter is therefore referred back to WASPA to investigate and potentially lodge a complaint against the correct WASP in respect of this matter. We note that the new complaint should relate to both the initial submissions – that the complainant had not given permission for receipt of marketing material, and that the short code was a premium rated one.
