



**Wireless Application Service Providers' Association**

## Report of the Adjudicator

Complaint number	#27424
Cited WASPA members	SMSPortal (Pty) Ltd (SP) (0139)
Notifiable WASPA members	n/a
Source of the complaint	Public
Complaint short description	Unsolicited marketing message
Date complaint lodged	1 September 2015
Date of alleged breach	27 August 2015
Applicable version of the Code	Version 14.0
Clauses of the Code cited	3.5, 3.6, 3.7, 4.2, 5.4, 5.5, 5.10, 5.15, 14.1, 16.4, 16.9, 16.10, 16.11
Related complaints	12662, 16486, 20916, 25510, 26148

Fines imposed	R15 000 for contravention of clause 16.11
Other sanctions	n/a
Is this report notable?	No
Summary of notability	n/a

---

### Initial complaint

1. The complainant received the following promotional SMS:

*"Open a TRUWORTHS account: just reply with ur initials,surname &ID. If u don't wish 2 consent 2 receive future communication, SMS STOP=Optout.T&Cs@truworths.co.za"*

2. The complainant stated that he had never bought any products from Truworths, nor had he ever provided them with his cell phone number. He therefore alleges that the SMS was an unsolicited commercial message.
  3. The member unsubscribed the complainant from the relevant mailing list. However the complainant was not satisfied with this and wanted the complaint referred to the formal adjudication process.
  4. The complainant alleges that the member has contravened sections 3.5, 3.6, 3.7, 4.2, 5.4, 5.5, 5.10, 5.15, 14.1, 16.4, 16.9, and 16.10 of the WASPA Code.
-

## Member's response

5. The member's legal representatives responded to the complaint as follows:

- 5.1 *SMSPortal is a bulk SMS aggregator which provides services to information providers in terms of which such information providers utilise SMSPortal's systems and relationships with the mobile network operators to send marketing / A2P (Application to Person) messages to mobile network subscribers.*
- 5.2 *Information providers originate A2P messages. This means that it is the information provider who holds and maintains a database of persons to whom it wishes to market and it is the information provider who obtains or who is in a position to obtain the consent or other authorisation from recipients of such marketing.*
- 5.3 *It is not possible for SMSPortal – or any other aggregator – to verify itself that the person to whom a particular MSISDN has been assigned has provided their consent to the information provider or whether another grounds exists which would make the sending of an A2P SMS to that MSISDN compliant with the requirements of the WASPA Code.*
- 5.4 *SMSPortal's client/information provider in this matter was Truworths Limited ("the Information Provider"), with which it has an agreement regulating the provision of bulk SMS transmission services for the Information Provider. This agreement makes it clear that the Information Provider supplies the MSISDNs to be used in a campaign. This is effected through an online interface without any human intervention on the part of SMSPortal.*
- 5.5 *SMSPortal has made numerous attempts – written and telephonic – to obtain a detailed response to the complaint from the Information Provider. On the morning of the 29th October the following was received:*

*"The number was obtained from Blue Label that we use to refresh some of our contact data. All our SMS regardless of whether it says reply STOP or not will*

*automatically opt a person out of a marketing comms for the brand. I have opted this number out from receiving any marketing comms in future. ”*

- 5.6 *SMSPortal understands that this may not be a particularly helpful response to the Complainant’s query regarding the source from which his MSISDN was obtain.*
- 5.7 *As a result SMSPortal has instructed the writer to engage with the Information Provider in a further attempt to acquire better information to which the Complainant is entitled under clause 16.3 of the Code and to ensure that the circumstances giving rise to this complaint are not repeated.*
- 5.8 *The WASPA Member does not dispute that the message received by the Complainant is unsolicited in the sense that it is not justified under any of the grounds set out in clauses 16.9 and 16.10 of the WASPA Code.*
- 5.9 *In the absence of any substantive response from the Information Provider there is no basis to dispute the Complainant’s statement that it is unsolicited.*
- 5.10 *The WASPA Member acknowledges that the Information Provider is not a member of WASPA and that clauses 3.5, 3.6 and 3.7 of the WASPA Code are accordingly of application.*
- 5.11 *It understands that under clause 3.7 it is liable for any breaches of the WASPA Code resulting from services offered by a customer.*
- 5.12 *Our further instructions are that the WASPA Member denies:*
- 5.12.1 *Being in breach of clause 4.2 of the WASPA Code or that it has not at any time relevant to the complaint failed to conduct itself in a professional manner in its dealings with the public, customers, other service providers and WASPA. We submit that neither the complaint nor the facts of the matter as set out above support such a conclusion.*

- 5.12.2 *We further submit that the WASPA Member has responded to the complaint in a professional manner.*
- 5.12.3 *Being in breach of clause 5.4 of the WASPA Code in that it has failed to be honest and fair in its dealings with the Complainant or other customers. We submit that neither the complaint nor the facts of the matter as set out above support such a conclusion.*
- 5.12.4 *We further submit that the WASPA Member has responded to the complaint honestly and as fairly as it can in the circumstances.*
- 5.12.5 *Being in breach of clause 5.5 of the WASPA Code in that it has knowingly disseminated information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission. We submit that neither the complaint nor the facts of the matter as set out above support such a conclusion.*
- 5.12.6 *Being in breach of clause 5.10 of the WASPA Code in that the SMS complained about sought to assume that the recipient consented by default.*
- 5.12.7 *Our submission is that this clause is difficult to apply to A2P SMS, which is already regulated through the requirements relating to consent or other justification and the inclusion of an operational opt-out mechanism.*
- 5.12.8 *In the current matter there is no consent or other justification and the SMS is unsolicited: the fault here is not assuming that the recipient consented by default but rather that the consent of the Complainant was not obtained in the first place.*
- 5.12.9 *If the same SMS had been sent to a recipient who had consented to receiving A2P marketing from the Information Provider then the question of consent by default would not arise.*

5.13 *As regards clauses 16.9, 16.10 and 16.11 of the WASPA Code, the WASPA member:*

5.13.1 *Denies that it itself has engaged in direct marketing - it clearly has not – and further denies that it permits its facilities to be used for the sending of direct marketing to persons who have not consented thereto or where other justification exists, whether by the Information Provider or at all.*

5.13.2 *In support of this statement the WASPA member refers to the submissions regarding its disciplinary record vis-à-vis the WASPA Code set out below.*

5.13.3 *This does not deny that the Information Provider has sent an unsolicited SMS using the WASPA Member's systems, only that this was not permitted by the WASPA Member.*

5.13.4 *As regards clause 16.13 of the WASPA Code the WASPA Member acknowledges that it is unable – beyond the statement received from the Information Provider - at this time to provide the source from which the Complainant's contact details were obtained or alternatively provide proof that the recipient has provided his or her contact details in the context of the sale of a product or service the same as that being marketed.*

5.13.5 *As regards clause 14.1 of the Code it is our submission that this clause is of no application to this complaint as it deals with "ad hoc transactions". While this term is not defined in the WASPA Code it is clear from its use in the Code that a "transaction" for the purposes of the WASPA Code involves a purchase or subscription with monetary value. In this complaint we are dealing with an unsolicited offer sent by SMS, not a transaction.*

5.13.6 *Clause 8.1, for example, reads:*

For an ad hoc transaction, the "**pricing information**" consists of the cost to the customer for that transaction. Examples of pricing information: "**R5 once off**", "**R10**".

5.13.7 In the event that the adjudicator finds that this clause is of application, the WASPA Member submits that it has a record of a transaction in the wide sense of a record of the sending of the SMS to the Complainant – in which case the source of the transaction was the Information Provider - but it does not and never has had a record of the consent provided or other justification for the sending of the SMS as this information is held only by the Information Provider.

5.13.8 Denies being in breach of clause 16.4 of the Code in that it allowed direct marketing to be sent without implementing 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").

5.13.9 There is clearly an opt-out mechanism available in the text of the SMS received by the Complainant. The response received from the Information Provider further attests to there being an automatic opt out in place.

5.14 In mitigation of any sanction to be applied in respect of such breaches of the WASPA Code as are confirmed by the Adjudicator, our instructions are to bring the following to the attention of the Adjudicator:

5.14.1 SMSPortal's record in respect of complaints referred by WASPA to the formal adjudication process.

5.14.2 SMSPortal joined WASPA on 3 June 2008 and has been a member continuously since then.

5.14.3 During this time SMSPortal has been the subject of five complaints relating to unsolicited SMS messages.

---

## Sections of the Code considered

6. The following sections of the WASPA Code of Conduct were considered:
- 6.1 *Section 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.
  - 6.2 *Section 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.
  - 6.3 *Section 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.
  - 6.4 *Section 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.
  - 6.5 *Section 5.4:* Members must have honest and fair dealings with their customers.
  - 6.6 *Section 5.5:* Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.



- 6.7 *Section 5.10:* Whenever a customer is asked to consent to the terms and conditions of a service, it must not be assumed that the customer consents by default; a customer must take a specific action to confirm consent. (Example: A consent tick-box must be empty when presented to the customer, and the customer must click on the tick-box to indicate consent.)
- 6.8 *Section 5.15:* Members must respect the constitutional right of consumers to personal privacy and privacy of communications.
- 6.9 *Section 14.1:* For all ad hoc transactions the member must keep a record of the source of the transaction request, and provide that information to the customer, on request. Records must be kept for a period of at least three years after the date of the transaction.
- 6.10 *Section 15.10:* For all subscription services initiated via a web page, there must be an additional specific confirmation step before the customer is billed. This confirmation step must be provided in one of three ways:
- (i) The customer's mobile carrier may implement the confirmation step.
  - (ii) The member can provide the customer with a "confirmation page".
  - (iii) The member can send a "confirmation message" to the customer. The customer must not be charged for the confirmation message.
- 6.11 *Section 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").
- 6.12 *Section 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.

- 6.13 *Section 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.
- 6.14 *Section 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.
- 6.15 *Section 16.13:* Upon request of the recipient of a direct marketing message, the member must, within a reasonable period of time, identify the source from which the recipient's contact details were obtained. The member must also provide proof that the recipient has given consent to receive that message, or alternatively provide proof that the recipient has provided his or her contact details in the context of the sale of a product or service the same as that being marketed.
- 

## **Decision**

1. It is common cause that the promotional SMS sent to the complainant was unsolicited in the sense that it is not justified under any of the grounds set out in clauses 16.9 and 16.10 of the WASPA Code.

2. While it is accepted that the member cannot monitor all messages sent using its platform, and that it does not act positively or intentionally in the sense that it “permits” its facilities to be used in contravention of the WASPA Code, it does bear ultimate responsibility to consumers for the use of its facilities by information providers who are not members of WASPA.
3. The member has acknowledged that Truworths, the information provider who is responsible for the inclusion of the complainant’s number on its database, is not a member of WASPA and that clauses 3.5, 3.6 and 3.7 of the WASPA Code are applicable.
4. The member has also acknowledged that, under clause 3.7 of the WASPA Code, it is liable for any breaches of the WASPA Code resulting from services offered by the information provider.
5. The complaint in respect of a contravention of clause 16.11 (read together with clause 16.9 and 16.10) is accordingly upheld.
6. I am satisfied that the member has not contravened clause 4.2 of the WASPA Code. There is no evidence before me that the member has, at any time relevant to the complaint, failed to conduct itself in a professional manner in its dealings with the public, customers, other service providers and WASPA. The complaint is accordingly dismissed in this regard.
7. I am satisfied that the member has not contravened clause 5.4 of the WASPA Code. There is no evidence before me that the member has failed to be honest and fair in its dealings with the complainant or other customers. The complaint is accordingly dismissed in this regard.
8. I am satisfied that the member has not contravened clause 5.5 of the WASPA Code. There is no evidence before me that the member has knowingly disseminated information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission. The complaint is accordingly dismissed in this regard.

9. I am of the view that clause 5.10 of the WASPA Code is not applicable to the present complaint, and the complaint is accordingly dismissed in this regard.
  10. Regarding clause 16.13 of the WASPA Code, I am satisfied that the member has taken steps to provide the complainant with the source from which the complainant's contact details were obtained.
  11. In the absence of any further response from the information provider, the complainant can assume, for the purposes of any further legal action he wishes to take, that the source identified is the information provider itself, i.e. Truworths.
  12. I am satisfied that clause 14.1 of the Code is not applicable to this complaint. The complaint is accordingly dismissed in this regard.
  13. I am satisfied that the member has not contravened clause 16.4 of the Code. The message sent to the complainant clearly contains an opt-out mechanism in the text. The complaint is accordingly dismissed in this regard.
- 

## **Sanctions**

14. I have taken into account the submissions made on behalf of the member in mitigation.
  15. I have also taken into account the other complaints of a similar nature which have been upheld against the member in the past.
  16. Based on the foregoing, the member is fined the sum of R15 000.00.
-