

WASPA Member (SP)	The Nxt Thing Now (Pty) Ltd
Information Provider (IP)	N/A
Service Type	Unsolicited SMS & Unlawful conduct
Source of Complaint	George B. Firmin
Complaint Number	#4652
Code of Conduct Version	6.1
Date of Adjudication	12/09/2008

Complaint

The Complainant raised the following complaint: "Fm 35007 - I received and sms from ACSA relating to Information Services Via NXT

To 32691 -I have to pay R1 to have these \\\\"SPAM \\\\" messages \\\\"STOPPED \\\\"

I phoned Vodacom Customer Help and the staff DO NOT KNOW WHAT SPAM IS ! On a 3rd call, I got the infomation below.35007 is \\\\"ACSA\\\\" Airports Company South Africa 32691 is NXT. I was also given 2 cell numbers to call Namely 0827728099 and 0832465885 to call for help or complaint. Both these numbers are for Ex Staff members who have left the Co NXT +- 2 years already. I do not feel that this is right, and also that these SPAM messages are sent out to Contract Customers, and that I have to Pay to have them stopped."

SP Response

The Response provided by the SP is reproduced in full:

"1. On the 15th July we received notification of the WASPA unsubscribe request made by Mr Firmin.

2. On the 17th July we dispatched a polite email to Mr Firmin informing him that we had actioned his unsubscribe request and assured him that he would not receive any further ACSA marketing communications (attached).

3. Later on the 17th July we received a response from a now highly agitated MR Firmin who was of the opinion that the service in question was an

"outrageous marketing ploy" designed to extort money from the public, and who was threatening to contact key stakeholders

3. The service from which Mr Firmin received the SMS communication is a long running ACSA flight information service whereby customers could transmit their flight numbers via SMS in order to determine whether the flight was subject to any delays. Earlier this year, the service was taken down for maintenance and had been recently reinstated. The SMS communication Mr Firmin received was a once-off service message to inform previous patrons of the service that it had been reinstated. The contents of the message Mr Firmin received substantiates this: "The ACSA Flight Info Service is up & running! Remember to check your flight status. SMS your flight number to 35007. R3/sms. Optout: Send STOP to 32691(R1)"

Mr Firmin received the message because his number was on the database of previous customers who had made use of the service. The table below illustrates Mr Firmin's MSISDN's historical interactions with the service.

Mobile	Shortcode		Message		Date/Time
27828024788	35007	KL	0591	2006/11/05	20:44:37
27828024788	35007	AF	990	2004/03/29	06:25:36

Based on the pattern of usage, i.e. 2 years apart, and the fact that the service had been down for some time (thus preventing any opportunity for recent interactivity) it was assumed, reasonably we believe, that the customer in question (i.e. Firmin) would be interested to know that the service was once again available. This then, constituted the (sole) rationale behind including Mr Firmin's MSISDN in the communication.

It should be noted that the service in question is not a subscription service and therefore Mr Firmin would not have suffered any financial prejudice had he not unsubscribed. Further there was no immediate call to action, but rather an invitation to use the service the next time Mr Firmin was to travel.

4. Our argument that Mr Firmin has reached the incorrect conclusion regarding the intent of the SMS communication rests on the following facts:

4.1 Mr Firmin's MSISDN had interacted with the service on two previous occasions and therefore had a direct prior relationship with ACSA in this regard

4.2 The marketing message was therefore highly targeted and highly relevant

4.3 The opt out mechanism is a compulsory feature that we are compelled to include and not a means by which to generate revenue as Mr Firmin suggests

4.4 In terms of CRM practice, it is reasonable to conduct targeted marketing

communications that are based past consumer behavior, as this is best predictor of future behavior. In this case, there was a 2 year and 7 month gap between Mr Firmins first and second interactions. Based on this past behavior it was therefore reasonable to forecast that future interactions could take place within a similar window of time. Since this window had not yet elapsed Mr Firmin was still viewed as a potential customer of the service and therefore a candidate for the once-off service message.

In conclusion, we regret Mr Firmins interpretation of events and trust our explanation above adequately clarifies the matter.”

Sections of the Code considered

The following sections of version 6.1 of the Code of Conduct were considered:

2.8. A “commercial message” is a message sent by SMS or MMS or similar protocol that is designed to promote the sale or demand of goods or services whether or not it invites or solicits a response from a recipient.

2.16. A “message originator” is the entity sending a commercial message and can be any person with a commercial arrangement with a WASP to send commercial messages, or a WASP directly.

2.22. “Spam” means unsolicited commercial communications, including unsolicited commercial messages as referred to in section 5.2.1.

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;
- (b) the message recipient has a direct and recent (within the last six months) prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or
- (c) the organisation supplying the originator with the recipient’s contact information has the recipient’s explicit consent to do so.

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.

Decision

In adjudicating a matter, the Adjudicator has to rely on the information provided to him/her.

In adjudicating whether a commercial message is spam, one has to take caution when analyzing the following section of the Code of Conduct:

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;
- (b) the message recipient has a direct and recent (within the last six months) prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or
- (c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

It is clear that the Complainant in this matter has indeed not requested the message.

It also appears that the Complainant did not give his **explicit** consent.

The SP might argue that the Complainant had a direct and recent prior relationship with the SP / IP and would reasonably expect to receive marketing communications from the originator.

This is where the Adjudicator strongly disagrees. The Adjudicator is of the opinion that there was **no recent (within the last six months)** (in this case two years) relationship and that in this case there was **no reasonable expectation** by the Complainant to receive any marketing communications. The Adjudicator further refers to the WASPA Advertising Rules' section 5.3.8 with regard to distribution lists:

- If by requesting any Content or accessing a service, the consumer so doing is automatically placed on a distribution list that will continuously or periodically send that consumer further related or unrelated communications from that Content provider or any other Content provider or advertiser, then the T&C text must explicitly specify in the T&C that updates will be sent until cancelled.

In the absence of any Terms and Conditions or proof thereof, the Adjudicator in considering all of the above, is of the strong opinion that none of the exclusions as are stated in section 5.2.1 of the Code of Conduct were fulfilled.

The Complaint is upheld.

In determining an appropriate sanction, the following factors were considered:

- The prior record of the SP with regard to breaches of section 5.3.1 of the Code of Conduct and 5.3.8 of the WASPA Advertising Rules;
- The action taken by the SP.

The SP is formally reprimanded to ensure that its current practices are amended to comply with the above sections of the Code considered.
