

## REPORT OF THE APPEALS PANEL

**Date:** 26 September 2011  
**Appellant:** PayProfit (Pty) Ltd (SP and member)  
**Complaint Number:** 9845  
**Code version:** Code v9.0, Advertising Rules v2.3

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### 1 INTRODUCTION

1.1 The complaint and adjudication raise important issues concerning the relationship between SPs and their IPs and their respective liability under the Code, particularly where the IP may not be a member of WASPA. In this matter the entity to which the short code has been allocated is not sanctioned although it is a WASPA member (BulkSMS). The SP (PayProfit) is also a member of WASPA and obtained the short code for use by its own clients. The client concerned and user of the short code (SMSCITY also named MADSMS) is itself using the system of another WASPA member to send SMSes (unknown).

1.2 We have dealt with the matter in detail because of the level of detail included in the appeal, in the hopes of clearing up related matters at the same time as dealing with the main complaint.

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### 2. HISTORY OF THE COMPLAINT

2.1 The complaint concerned an unsolicited text message from a short code (41659) which read, "Over indebted? Struggling to get by each month? Pay what you can afford.... Reply less to 41469, opt out sms "No"."

2.2 The complainant stated that he had not agreed to receive that message, and it originated from a short code which "is illegal as per Vodacom and there is no company information. I did not reply in fear of being subscribed to a stealth billing program".

2.3 The complainant was not satisfied with the responses received by WASPA from various parties and the matter was escalated.

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### 3. THE CODE

3.1 The adjudicator referred to the following sections:

3.1.1 section 4.2 (privacy and confidentiality) and specifically section 4.2.2;

3.1.2 section 5.2 (identification of spam) and specifically section 5.2.1; and

3.1.3 section 5.3 (prevention of spam).

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- 3.2 We agree that these are the appropriate sections to apply in this case although note that sections 5.1 (sending of commercial communications) and section 5.1.3 (specifically the instructions for and costs of opting out by replying STOP) are also relevant, read with the applicable definitions in section 2 of the Code. The message received by the complainant was indeed spam.
- 3.3 As will be seen from our findings, we also believe that other sections should be considered, because of the definition of “**wireless application service provider**” which reads “A “wireless application service provider” is any person engaged in the provision of a mobile service, including premium-rated services, who signs a WASP contract with a network operator for bearer services enabling the provision of such services”. In addition:
- 3.3.1 2.13. An “information provider” is any person on whose behalf a wireless application service provider may provide a service, and includes message originators.
- 3.3.2 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.
- 3.3.3 2.19. The “originating number” is the number allocated to the WASP by the network operator from which a commercial message is sent.
- 3.3.4 3.5.2. If a member becomes aware of illegal content under that member’s control, the member must immediately suspend access to that content.
- 3.3.5 3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.
- 3.3.6 3.9.2. Where any information provider that is not a WASPA member conducts any activity governed by the provisions of this Code, and makes use of the facilities of a WASPA member to do so, that member must ensure that the information provider is made fully aware of all relevant provisions of the Code and the member shall remain responsible and liable for any breach of the Code resulting from the actions or omissions of any such information provider.
- 3.3.7 3.9.3. A WASPA member shall, by obtaining the information provider's signature on the WASPA template agreement, be deemed to have taken all reasonable steps to ensure that the information provider is fully aware of the terms of the WASPA Code of Conduct and this shall be considered as a mitigating factor for the WASPA member when determining the extent of any possible liability for the breach of the provisions of the WASPA Code of Conduct as a result of any act or omission by the information provider.
- 3.3.8 3.11.1. WASPA members shall provide WASPA, on request, with a list of all short codes, long codes and alphanumeric identifiers assigned for use with that member’s services or the services of any of the member’s information providers.

- 3.3.9 5.1.7. Upon request of the recipient, the message originator must, within a reasonable period of time, identify the source from which the recipient's personal information was obtained.
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#### 4. **DECISION OF THE ADJUDICATOR**

##### 4.1 Findings on information presented

4.1.1 The adjudicator noted that "in adjudicating a matter the adjudicator has to rely on the information submitted and hence presented to him/her".

4.1.2 The adjudicator found that both the SP and its "client" (the IP) were associated with the short code, but that the SP, PayProfit should be accountable for the "use" of the short code.

4.1.3 The adjudicator also found that section 5.2.1 had not been complied with and that there was a breach of section 5.3.1. Without additional information the adjudicator was not prepared to make a finding on a breach of section 4.2.2. The complaint was accordingly upheld.

##### 4.2 Sanctions

The following sanctions were applied against PayProfit:

4.2.1 The SP was required to provide the WASPA Secretariat with the source of the complainant's personal contact information and the complainant was to be advised accordingly; and

4.2.3 A fine of R50,000 was imposed for the breach of section 5.3.1 payable within 5 working days of the date of notice of the adjudication.

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#### 5. **GROUNDS OF APPEAL**

5.1 PayProfit submitted a 20-page appeal covering a variety of issues including a detailed examination of its "compliance engine". It spelt out in considerable detail the relationship that it had with its client, SMSCITY, the entity which it claimed had sent the SMS to the complainant and which had breached the Code. The appeal does not request review of the amount of the fine imposed by the adjudicator or the grounds on which the SP seeks to appeal, although we have inferred that the SP wishes to appeal against both findings and fine. The salient points are set out below.

##### 5.1.1 The history of the short code

5.1.1.1 SMSCITY registered a dedicated PRSMS (premium-rated SMS number), 41659, on the standard SMS rate with the SP in March 2010. SMSCITY

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then used an international gateway in India to send SMSs to its customers in South Africa using the PRSMS number as its sender identification (sender ID) to facilitate management of unsubscribe requests, and requests for more information.

- 5.1.1.2 On receipt of the complaint, the SP instructed its client to cease the use of the PRSMS as sender ID for this purpose, and also confirm how it had obtained the complainant's and other customer information. Apparently the client agreed to cease the use of the short code for that service immediately and claimed that it had not intended to send spam.
- 5.1.1.3 The SP's client, and IP, SMSCITY, then claimed that it in turn had permitted the use of the short code by one of its own clients, but further information concerning the source of the personal information about the complainant was not forthcoming and the SP terminated the SMSCITY service in September 2010 (6 months after receipt of the complaint).
- 5.1.2 The SP's relationship with clients
  - 5.1.2.1 The SP has "created a compliance engine" to ensure that its clients run their services correctly and in line with the Code. However, the SP notes that the success of this system depends ("relies heavily") on its clients submitting their advertising to the SP for approval prior to launch of a campaign and it is difficult for the SP to monitor compliance if they don't, particularly where they use the systems of other operators and not the system of the SP, to distribute their messages. This sort of arrangement is not new to WASPA or aggregators.
  - 5.1.2.2 The SP confirms that it contacted its client regarding the complaint and that the client was "not aware" that his use of the short code for sender ID was not permitted under the Code, disabled the use of it as sender ID, and obtained long codes from another supplier. The SP suggests that this was therefore an error and not an attempt to make money. In addition the SP notes again that the messages were not sent from its systems and that although it had attempted to obtain further information from its client concerning the source of contact information on its databases, no response was received.
  - 5.1.2.3 In the middle of the lengthy set of messages which the SP copies out in its appeal is a message dated 18 August 2010 from the SP to its client, which states "My service provider BulkSMS is complaining about excessive unsubscribes and angry responses from clients that you are sending SMSs to. Also your CapeAds website is not according to WASPA rules because you should state the cost of the SMS. Please correct that.... Also, I need written assurance from you that you are sending SMSs containing the 41659 reference only to clients from a permission-based database".
  - 5.1.2.4 The response from SMSCITY indicates that its client in turn, is a debt collector, but that the short code is not used for spam or in fact for premium-rated services. Incidentally, SMSCITY is recorded as a Cape Town-based entity.

5.1.3 Analysis of adjudicator's report by SP

The SP indicates that it should have submitted more information in response to the complaint and therefore has included more detail in its appeal. It also takes full responsibility for clients using its PRSMS facilities but cannot take control of all of them – a somewhat contradictory position. Finally it also claims not to have been aware of the Code requirements in relation to the use of short codes.

5.1.4 Additional information from the SP

5.1.4.1 The SP includes a lot of detail about its “compliance engine” including screen shots to support its explanations of the workings of this system, but again it notes that the success of this system depends on whether or not its clients submit their material to it for approval.

5.1.4.2 Clients are, however, required to tick a box on the application form for PRSMS, indicating that they have read and accept the SP's terms and conditions before their information is “accepted by the system”. An extract of these terms and conditions is included in the appeal, which does refer to the Code and Advertising Rules. We note too that the terms and conditions (i) prohibit the use of third party systems for the sending of messages using the SP's short code so that the SP can “audit” their advertising, (ii) require the use of opt-in databases for the sending of messages using the short code. It would appear that the “audit” is not a precondition to the advertising, but rather an enabling factor.

5.1.4.3 An agreement is also sent to the SP's clients for signature and return before the PRSMS facility is activated.

5.1.4.4 Additional paragraphs describe other fail-safe procedures and mechanisms to check the content of messages and determine whether or not they might be spam, track volume, and monitor advertising. Software detects the use of certain key phrases and words within messages for this purpose.

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6. **FINDINGS OF APPEAL PANEL**

6.1 At the outset we note that there has not been reference to the other short code included in the message sent by the “client” of the SP. Our findings are confined to the complaint regarding the origination of the message from 41659. It is likely that the same finding would apply in relation to the other short code, 41469 (or that this is a typo).

6.2 The SP has put in place admirable mechanisms to ensure compliance by its own clients with the requirements of the Code and its terms and conditions. The problem appears to be with the way in which it enforces those provisions against its clients. We note that the SP claims that it does not investigate the cash position of clients applying for its PRSMS

service but that they probably can't or won't pay fines that are levied against the SP. This is unfortunate because this is the crux of the matter, the SP should have direct control over its clients through its contractual relationships with them. The argument by the SP that its clients fail to send it advertising material seems to be at odds with the operational capabilities of the compliance engine described by the SP. This is not an adequate defence in our view.

- 6.3 We note that when dealing in the use of short codes, responsibility for their use can be tracked right through the chain from the originating party (BulkSMS in this case) to the final user (the "client" of SMSCITY, who in turn is a "client" of PayPROFIT, who itself is the "client" of BulkSMS). The Code is clear on the relationship between and liability of service providers and information providers. We have set out the relevant provisions in this regard in part 3 above. We note this not to include BulkSMS but to clarify that the chain of responsibility does in fact start with them. We are also somewhat skeptical about the statements by the SP that it was not aware of certain provisions of the Code.
- 6.4. We agree with the findings of the adjudicator except insofar as we will take into account the steps taken by the SP to comply and reduce the fine to R30,000. At the same time we caution the SP to note the provisions of section 3.5.2 – a delay of 6 months is not appropriate when the Code requires immediate termination of a service. In the circumstances, the appeal fee is not refundable.