

**WASPA appeals panel
Complaint 11006**

REPORT OF THE APPEALS PANEL

Date:

Appellant: Peach Mobile

Complaint Numbers: 11006

Applicable versions: 10.0

1 BACKGROUND TO THE APPEAL

1.1 This is an appeal against the finding and sanction imposed on the Appellant by the adjudicator in complaint 11006.

1.2 The Appellant is an affiliate member of WASPA, and sent the SMS that forms the basis of this dispute using the systems of an aggregator. While the initial complaint was made against the aggregator, it was “re-directed” against the Appellant, and no finding was made against the aggregator.

1.3 The complaint was made by an anonymous complainant, and turned on his receipt of an SMS from the Appellant in the following terms:

Received SPAM sms from +27820072152072 with: Top tip! Review your cars value...SMS YES for cheaper quote! Stop to opt out. eeZy.co.za

1.4 The complaint listed three alleged infringements of the Code of Conduct:

Unsolicited SMS

No pricepoint for reply in sms

No pricepoint, etc in terms and conditions on website

1.5 The complainant also requested the Appellant to advise on what basis it had sent the SMS in question: “...there is no mention of where they got my details or why they have the right to market to me repeatedly...” The Appellant was accordingly asked to advise where it had obtained the complainant’s contact details.

1.6 Its response to the complaint, the Appellant advised that it had remedied the “pricepoint” concerns raised by the complainant. The Appellant further advised that it had obtained the complainant’s MSISDN from a third party data supplier, and that it would enquire of this data supplier where IT had obtained the MSISDN and advise the complainant directly.

2 THE APPLICATION OF THE CODE AND RULES

The Code, v10.0

- 2.1 The adjudicator correctly applied version 10.0 of the WASPA Code of Conduct to this complaint, the relevant sections of which are reproduced here for convenience:

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.

3 THE DECISION OF THE ADJUDICATOR

- 3.1 The adjudicator felt that as the Appellant had remedied the "pricepoint" issues immediately after receiving the complaint, it was not necessary for him to make a ruling on them.

- 3.2 Turning to the allegation that the Appellant had sent spam to the complainant, the adjudicator expounded the circumstances under which a commercial message would not constitute spam under the WASPA Code, which is set out in clause 5.2.1 above. He found that the Appellant had not established that any of these grounds existed vis-à-vis the complainant, and that consequently the Appellant had infringed clause 5.3.1 of the Code.

- 3.3 The adjudicator imposed the following sanction:

The IP is fined R 10 000-00 for its breach of section 5.3.1, payable to the WASPA Secretariat within five (5) working days after receiving notice hereof.

The IP is further instructed to provide the WASPA Secretariat a detailed report in how it managed to obtain the personal information of the Complainant in this matter within five (5) working days after receiving notice hereof.

4 GROUNDS OF APPEAL

- 4.1 In its appeal, the Appellant does not dispute either the adjudicator's grasp of the facts of the complaint, or the adjudicator's finding and sanction.

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- 4.2 On the substance of the complaint, the Appellant made the following comments in its appeal:

With respect to the Complaint itself, Peach is unable to provide conclusive proof that each of the individuals listed in the database it obtained from [the data supplier] opted in to receiving the messages Peach distributed. This information was not made available to Peach by [the data supplier]. We do wish to reiterate that Peach does not engage in the practice of indiscriminate direct marketing and takes reasonable steps to respect and give effect to recipients' right to privacy, including the right to opt out of receiving commercial messages.

- 4.3 The main thrust of the appeal however does not deal with the particulars of the Code of Conduct, but rather with the broader regulatory framework, the nature of the WASP business model, and where the Appellant and WASPA fit (and ought to fit) in this framework. To summarise the Appellant's submission:

4.3.1 The Appellant admits that it obtains marketing databases from intermediaries, which contain personal information and uses these databases to send marketing SMSes.

4.3.2 The Appellant is also a member of the Direct Marketing Association ("DMA"), and follows the best practices determined by that organisation, as well as subscribing to the DMA's "opt-out" database.

4.3.3 The Appellant updates its marketing databases regularly, and anyone appearing in the DMA's database will be removed from the Appellant's marketing databases once the Appellant becomes aware that they wish to opt out from receiving direct marketing.

4.3.4 By following the above practices, the Appellant believes that it is compliant with the provisions of the Consumer Protection Act 68 of 2008 ("CPA").

4.3.5 Clause 5.2.1 of the Code of Conduct is more restrictive than the CPA in that it imposes an opt-in regime where direct marketers can only send commercial messages to consumers who have by word or deed opted-in to receipt of these messages.

4.3.6 These stricter WASPA requirements are unrealistic and make direct marketers who are members of WASPA uncompetitive when set against direct marketers who are either not members of WASPA, or are located in other jurisdictions. Such unregulated direct marketers are difficult to monitor and control.

4.3.7 If WASPA maintains the unrealistically strict provisions of section 5 of the Code of Conduct, then direct marketers such as the Appellant will be driven out of business, and consumers will be left at the mercy of unregulated operators.

5 FINDINGS OF APPEALS PANEL

- 5.1 Before delving into the panel's reasoning, it is important to stress that the Appellant in this matter was not an aggregator of services, but was itself the

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originator of the messages complained of. An aggregator can argue that it took “reasonable measures” to prevent its facilities being used for the transmission of spam. As the Appellant is the originator of the message, however, this argument is not open to it and it must show that it satisfies one of the exceptions set out in clause 5.2.1.

- 5.2 There is no indication in the original adjudication files or in the appeal, that the Appellant satisfied any of these exceptions. Indeed, the Appellant’s submission quoted in paragraph 4.2 is confirmation of this conclusion. Consequently the panel finds that the message was an unsolicited message (spam) as defined in clause 5.2.1 of the Code of Conduct, and that the Appellant infringed clause 5.3.1 by sending spam. The adjudicator’s finding is upheld in this regard.
- 5.3 The CPA is relevant to and enforceable against the Appellant, but it does not operate to the exclusion of other obligations that the Appellant may be subject to. As a member of WASPA, the Appellant is bound to abide by the provisions of the WASPA Code of Conduct, and if these are more onerous than the provisions of the CPA, then the Appellant is obliged to meet the higher, not the lower, standard.
- 5.4 Equally, while it is not illegal *per se* to purchase marketing databases from intermediaries, this has nothing to do with the application of the WASPA Code of Conduct.
- 5.5 The WASPA Code of Conduct takes a stricter line on spam than legislation for a reason: SMS spam is a particularly intrusive form of unsolicited message, and the WASP industry can easily suffer severe reputational damage if the practice is not combatted. The “opt-in” approach taken by WASPA should be seen in that light.
- 5.6 This panel must interpret the Code as written. If a member argues that a particular provision is unrealistic or may have a detrimental effect on the business of WASPs or a class of WASPs, this argument is generally not relevant in interpreting that provision. The only exception to this rule is where the provision in question is ambiguous and the panel seeks to determine the intention of the provision. In the case of clause 5.2.1 read with clause 5.3.1, however, there is no ambiguity, and so the Appellant’s argument set out in paragraph 4.3 will not be taken into consideration by the panel.
- 5.7 The Appellant is further advised that the appeals process is not the correct forum in which to debate questions of policy, and that these concerns should be raised at the next meeting of the WASPA Code Committee.
- 5.8 The appeal is dismissed.
- 5.9 The Appellant’s appeal fee is forfeited.