

<b>WASPA Member (SP)</b>	Nashua Mobile
<b>Information Provider (IP)</b>	N/A
<b>Service Type</b>	Unsolicited SMS
<b>Source of Complaint</b>	Public
<b>Complaint Number</b>	#2403
<b>Code of Conduct Version</b>	5.3
<b>Date of Adjudication</b>	12/12/2007

---

### **Complaint**

The Complainant raised a breach of the prohibition on the sending of unsolicited commercial SMSs as set out in the WASPA Code. The detailed description of the Complaint read as follows:

“Have received over 10 sms\'s advertising their products ( form dstv time ) have replied to each sms requesting removal from sms list”.

A later message from the Complainant after an early attempt to remedy the breach by the SP, read as follows:

“I have been promised that this has been sorted out and will not happen again. But I am still receiving these unsolicited sms messages !”

No further details were provided.

---

### **SP Response**

The Response provided by the SP is reproduced in full:

“Whereas a complaint has been lodged against Nashua Mobile (Pty) Ltd (“Nashua Mobile”) on the 12<sup>th</sup> of October 2007 by Mr. Shawn Smith (the “Complainant”) for allegedly contravening the sections of the WASPA Code of Conduct in that it send/ facilitated unsolicited SMS’ through its gateway to the Complainant. WASPA has referred the complaint in terms of the Informal Complaint procedure in terms of Section 13.2 of the WASPA Code of Conduct

("the Code") and has subsequently referred the complaint to the Formal complaints procedure in terms of Section 13.3 of the Code on the 23<sup>rd</sup> of October 2007 for resolution.

In terms of the complaint, Nashua Mobile is accused of contravening Section 5.3.1 of the Code, which states that:

*"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."*

And Whereas Nashua Mobile denies contravening the Code and wishes to respond to the complaint as follows: -

On the 16<sup>th</sup> of October 2007, a representative from Nashua Mobile contacted the Complainant and undertook to block the SMS' he had received from number #278367580592328. The representative acted in *good faith* in attempting to resolve the complaint as soon as possible for the Complainant. It appears however, that the representative advised the complainant in error, as the SMS's were never aggregated through the Nashua Mobile gateway.

Upon thorough investigation Nashua Mobile has no record of sending any SMS's to the Complainant through its gateway between the periods 1<sup>st</sup> of August 2007 up to the 24<sup>th</sup> of October 2007. Nashua Mobile has never, and does not currently aggregate any of DSTV's SMS's through its gateway.

It is therefore submitted that Nashua Mobile is not in contravention of Clause 5.3.1 of the Code as it at no stage sent or promote the sending of Spam message to the Complainant.

In fact, it appears as if the SMS's originated from a Nashua Mobile customer that makes use of an 'SMS only package' and the customer sent SMS's directly to the Complainant from its handset. Nashua Mobile are not able to advise where the customer got hold of the Complainant's contact details. Nashua Mobile cannot disclose the particulars of the customer.

It is submitted that Nashua Mobile has at all times acted reasonably in an attempt to resolve the Complaint and as a gesture of goodwill and in order to assist the Complainant as much as possible, we have contacted the customer from whence the SMS's originated who has undertaken to remove the Complainant's details from its database and to ensure that no further SMS's are sent to the Complainant.

Nashua Mobile is of the view that it has taken all reasonable measures as per the Code and that it cannot prohibit an individual from sending SMS's from its personal handset. We do however; prohibit a customer in terms of our Cellular

Service contract from utilising our services for any improper, immoral, or unlawful purpose and in terms of all relevant legislation and regulations.

Having considered the above, we submit that we are not in contravention of the Code.”

---

## **Sections of the Code considered**

The following sections of version 5.3 of the Code of Conduct were considered:

2.9. 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.

2.14. An “information provider” is any person on whose behalf a wireless application service provider may provide a service, and includes message originators.

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.

4.1.8. Members undertake to inform their wireless application service customers that they are bound by this Code of Conduct. Members also undertake to make these customers aware of the WASPA complaints procedure and the mechanism for making a complaint, should any customer wish to do so.

4.1.9. Members' web sites must include a link to the WASPA web site and/or this 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 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.

---

### **Further Information requested by Adjudicator**

In terms of Section 13.3.8 the Adjudicator requested further information from the SP:

1. If Nashua can respond to why they have not furnished a link to WASPA or its Code of Conduct on its website; and
2. Whether Nashua can provide us with more details regarding their "SMS Only Package" as referred to in its response, describing inter alia:
  - a) Why such customer should not be regarded as an Information Provider;
  - b) The contract that is in place with such a customer; and
  - c) Why a receiver of messages originating from such a customer, cannot reply to the number (#278367580592328).

---

### **Subsequent Response by SP**

The SP responded in full and provided detailed answers to the questions posed:

1. Nashua Mobile does provide the WASPA code of conduct as a link on its website. The exact location is on:  
[http://www.nashuamobile.com/nm\\_portal.asp?link=landing\\_messaging\\_services&siteid=ver5&sid=personal](http://www.nashuamobile.com/nm_portal.asp?link=landing_messaging_services&siteid=ver5&sid=personal) where the link is on the left hand side - Integrated office solutions which directs the customer to the link. We have however, for the sake of more convenience, arranged for the WASPA code of conduct link be placed on Nashua Mobile's main page.
2. With regards to the clarification required on the "SMS Package only": - The SMS package is a type of package offered to our customers, which allow the customer to send and receive text SMS's as well as Voice if the SIM is utilised in a cellular handset or modem. Typically these packages are used for telemetry applications, but a subscriber could use the package to generate SMS's for bulk messaging purposes.
  - a. The customer is not considered as an information provider because he is not a Service Provider of the services but only a subscriber of Nashua Mobile's services;

- b. This customer would sign our normal terms and conditions;
- c. In the event of the SIM being utilised in a cellular handset with a 'user interface' for example a screen to receive SMS 's on, the response from the receiver could be read. However, in the event of a subscriber utilising / installing the SIM in telemetry devise, a handset is not necessary utilised and therefore the response from the receiver ("STOP") may not be readable. We do, however feel that it is necessary to raise that Nashua Mobile offer the SIM to customers as part of our services. Unfortunately, we cannot control the equipment the customer utilise the SIM in, or whether the equipment is able to read 'response' "STOP" sms's.

---

## Decision

In reviewing the Complaint lodged by the Complainant the Adjudicator has no doubt that by applying the sections of the Code considered, that this matter is in fact an issue dealing with the sending of unsolicited commercial messages (spam). This analogy is drawn from the details provided in the Complaint read with sections 2.9, 2.22 and 5.2.1 of the WASPA Code of Conduct. However, whether there was a direct breach of section 5.3.1 needs further scrutiny.

Section 5.3.1 places three different obligations on a Member:

Members will not:

- send spam; or
- promote the sending of spam; and

Members will take:

- reasonable measures to ensure that their facilities are not used by others for this purpose.

It seems to be clear from this particular case, that the customer of the SP is not an Information Provider as is defined by section 2.14 of the Code. This spreads from the fact that none of the unsolicited messages have in fact been aggregated through the SP's gateway, but was instead; send directly from the customer's handset to the Complainant. The customer also doesn't fall under the definition of a message originator. If the customer was indeed an Information Provider, then the SP would have been responsible for the sending of spam. It was not found to be the case here. This would therefore indicate that the SP itself has not send spam, therefore fulfilling the first obligation as indicated above.

After having reviewed the detailed response of the SP and having reviewed its standard agreement with its customers, it is the opinion of the Adjudicator that the SP is not in any manner or way whatsoever involved in the promotion of sending spam, therefore also fulfilling the second obligation.

It is however when the Adjudicator comes to the last obligation that he finds it difficult to make a definitive conclusion.

Did the SP take reasonable measures to ensure that its facilities are not used by others (this would include its customers) for the sending of spam?

The question is; are these measures only related to **informational measures**, or is it also related to **technical measures, or both**?

For this reason the Adjudicator has requested further information from the SP to ascertain whether it has taken all reasonable measures, inter alia;

#### Informational measures

- with regards to the SP's link to WASPA and/or its Code of Conduct; as well as
- the type of agreement with the customer; and

#### Technical measures

- information relating to why a receiver (Complainant in this matter) of messages originating from such a customer (SMS Package), cannot reply or respond to the number of the SP's customer.

The SP has responded by stating that it does provide a link to the WASPA website. Even after having been supplied with the link, it has been difficult for the Adjudicator finding its way to the said link, suggesting that it would be unreasonable for a customer not having been provided with the link, to know that the SP is even associated with WASPA. This would therefore preclude such a customer from becoming aware of the WASPA Code of Conduct and hence the sections relating to spam. Having said that, no breach of section 4.1.9 though was found to exist since no specification of where the link must be is being provided by the Code.

The SP has however responded by stating that they would make such a link for future purposes available on the main page. This initiative is welcomed.

No direct mention in the contract between the SP and its customers is made that is relevant to unsolicited commercial messages. Customers are however precluded from utilising the SP's services for any improper, immoral, or unlawful purpose in terms of all relevant legislation and regulations. This would therefore

include the prohibition on the sending of spam as is provided for in the Electronic Communications and Transactions Act 2002.

When the Adjudicator applies its mind to technical measures, it has to be weary of not stifling the advances that has been made in the communications industry by expecting SPs to take technical measures that might hamper the utility of such systems by its customers.

In carefully reviewing the SP's response with regard to the inability of a receiver to reply to a message that was generated by the SP's customer and subsequently send to the Complainant, the Adjudicator is satisfied with the answer that was given by the SP. It can't reasonably be expected from the SP to control the equipment its customers are utilising.

The Adjudicator therefore is satisfied that the SP has complied with section 5.3.1 of the WASPA Code of Conduct. It is however suggested that the SP take greater measures in ensuring that customers of its "SMS only package" is made better aware of their obligations and should the SP become aware of such similar situations where customers of these services are abusing the SP's system to send spam, that the services of such customers be suspended.

The Complaint is dismissed.

---