



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Exactmobile
Information Provider (IP): (if applicable)	N/A
Service Type:	Spam
Complainant:	Consumer
Complaint Number:	4653
Code version:	Code v6.1 and Ad Rules v1.6
Date of Report:	12 September 2008

Complaint

1. On the 7th of August 2008 the Complainant lodged the following complaint via the WASPA website:

Affiliations: I am not employed by, or otherwise associated with one of WASPA's member companies

Affiliation_Information: I was employed by Cointel VAS (Pty) Ltd, but as of the 1 July 2008 I was transferred to another department within Vodacom (Pty) Ltd that has no association with WASPA.

Name_WASP: ExactMobile

OtherID: +27820070182

Code_Breached: With reference to an e-mail sent to Wasps around the 12 June 2008.

No premium-rated customer support lines (4.1.8)

Lowering of max opt-out cost from R1 to 50c (5.1.4)

Not to mention that I had not given any consent since September 2007 for ExactMobile to send me advertising SMSes.

Detailed_Description_Complaint: Hello WASPA

I would like to complain against ExactMobile.

I received a spam SMS on the 5 August 2008 at 19:23 from +27820070182 with the following message:

"Go to www.exactmobile.mobi for over 300,00 full tracks, cool video clips & lots more superb entertainment. No subscription. SMS stop to 32924 (R1) to stop msgs"

Firstly, I did not give permission to ExactMobile to sent advertisements.

Secondly, when I called ExactMobile on 011 467 1677 to have my number removed from their database I was told to call 082 230 2222, a premium rated number.

When I called the premium rated number, 082 230 2222 today, 7 August 2008 around 13:10 I spoke to a woman called Cindy. She said that ExactMobile received my mobile number when I had downloaded a ringtone in September 2007. I do not deny downloading the ringtone. What I do deny is for ExactMobile sending me advertising SMS and I have not given them consent.

What upsets me is the following:

According to the SMS received I could SMS stop to 32924 at my expense to stop messages that I did not give consent to receive.

I had to call a premium rated number to ask them to remove me from their database.

2. As the Complainant does not work in a division of Vodacom which is involved in the industry, the Adjudicator accepts that the complaint can be treated as a consumer complaint.
3. There are three complaints set out in the Complainant's submission, being:
 - 3.1. that the SP sent the Complainant unsolicited commercial messages, or spam;
 - 3.2. that the SP's helpline was a premium rated number
 - 3.3. that the cost for unsubscribing from the SMS distribution list in question cost R1 where it should have cost no more than 50 cents.

Response

4. The complaint was communicated to the SP on the 15th of August, and on the 19th of August the SP sent a response to the complaint which read as follows:

Response to Complaint Number : 4653

Complainant 1 : Code_Breached: With reference to an e-mail sent to Wasps around the 12 June 2008. No premium-rated customer support lines (4.1.8) Lowering of max opt-out cost from R1 to 50c

The latest Code of Conduct version 6.1 dated 1 July 2008 has reference.

Although it was proposed that the unsubscribe SMS be reduced from R1.00 to 50c this was not implemented due to not all the networks having a 50c rate band. Therefore the Code of Conduct was not changed. The current version in clause 5.1.3 states

5.1.3. Any mechanism for allowing a recipient to remove him or herself from a database must not cost more than one rand

Complaint 2

Not to mention that I had not given any consent since September 2007 for ExactMobile to send me advertising SMSes.

The latest Code of Conduct version 6.1 dated 1 July 2008 states

5.2.1 (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

The previous Code of Conduct 5.5 dated 13 Dec 2007 states

(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

When the latest version of the Code of Conduct was released, all WASPA were given 3 months in which to implement the changes. Exactmobile has already started this process and from the 1st September all marketing SMS will be only be sent to users that have a recent relationship of less than 6 months. It was not possible for Exactmobile to make the changes earlier as all the numbers for the campaigns had been extracted in June to cover July and August.

Portion of the Code Considered

5. The following sections of the WASPA Code of Conduct are relevant to this complaint:

2. Definitions

...

2.20. A "premium-rated service" is any service charged at a higher rate than the standard rate set by the network operator for that particular service.

4. Customer relations

4.1. Provision of information to customers

...

4.1.8. Customer support may not be provided via premium rated numbers, and may only be provided via standard-rate or VAS-rate numbers.

5. Commercial communications

5.1. Sending of commercial communications

...

5.1.3. Any mechanism for allowing a recipient to remove him or herself from a database must not cost more than one rand.

5.1.4. Notwithstanding 5.1.3, for SMS and MMS communications:

(a) A recipient should be able to stop receiving messages from any service by replying with the word 'STOP'. If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate. The reply 'STOP' procedure must be included at the start of any messaging service, for example: "reply STOP to opt out".

(b) Recipients of premium rate or non-replyable messages must have the option to opt out at the lowest tariffed rate available (with the exception of reverse billed rates). This opt-out instruction must be included in every commercial premium rate or non-replyable message, for example. "sms STOP to 32xxx to opt out".

...

5.2. Identification of spam

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.

5.2.2. WASPA, in conjunction with the network operators, will provide a mechanism for consumers to determine which message originator or wireless application service provider sent any unsolicited commercial message.

5.3. Prevention of spam

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

6. **Sending of spam.** It appears to be common cause between the parties that the only contact that the Complainant had with the SP was a ring tone downloaded in September 2007 -- almost a year before the SMS message in question was received. Section 5.2.1 of the Code of Conduct sets out the circumstances in which commercial messages may be sent to consumers, the one upon which the SP relies being set out in section 5.2.1 (b). This states that if the message recipient has had a commercial relationship with the SP within the last six months, the SP would be entitled to send commercial messages to that consumer.
7. Clearly the commercial relationship in question took place more than six months before the commercial message in question was sent to the Complainant.
8. The SP argues that WASPs had been given three months in from the date of implementation of version 6.1 of the Code of Conduct to bring their systems into compliance with it. The previous version of the code merely describes: "direct and recent prior commercial relationship", without setting a time limit. As the Code of Conduct was implemented on the 1st of July 2008, the SP's contention is that it has until the 1st of October 2008 to comply with the six-month time limit.
9. There are two flaws in this argument. The first is that while WASPs were certainly given time frames within which to comply with certain changes to the Code of Conduct, the change set out here was not one of them. Secondly, in Adjudicator reports dealing with this clause before it was amended to include the six-month period, such as that of the Appeals Panel in complaint number 330, it was found that the phrase "recent prior relationship" allowed a certain discretion on the part of Adjudicator in determining what a reasonable period was under the circumstances of a particular complaint. Certainly a period of 11 months since last communication from the Complainant in the view of this Adjudicator does not give rise to a recent prior relationship.
10. Accordingly, even if WASPs had been given the period of compliance as alleged by the SP, the SP would still be in violation of section 5.3.1 read with section 5.2.1(b) of the Code of Conduct.
11. The Adjudicator hence finds that the SP has infringed section 5.3.1, in that it has sent spam to the Complainant.
12. **The SP's helpline was a premium rated number.** The Code of Conduct at section 4.1.8 states that customer support may not be provided via premium rated numbers. However, with reference to the definition of premium-rated service given above, there is no indication that the SP charged more for providing the customer support than would have been charged for a regular cellular telephone call. The SP has thus not infringed section 4.1.8 of the Code of Conduct.
13. **The distribution list unsubscribe cost was one rand when it should have been no more than 50 cents.** The SP has quoted rather selectively from the Code of Conduct. While it is true that section 5.1.3 refers to a maximum cost of one rand, section 5.1.4 (b) refers to recipients of non-reply will messages having the option to opt out at "the lowest tariffed rate available".

14. It is impossible to determine the lowest possible tariff based on the information provided. Consequently the Adjudicator cannot make a finding as to whether the unsubscribe cost is excessive. However, it appears that the SP has misunderstood the provisions of the revised Code of Conduct and has consequently not adapted its systems appropriately. This aspect is dealt with below.

Sanction

15. The following sanction is imposed in respect of the SP's breach of section 5.3.1 of the Code of Conduct:
 - 15.1. the SP is fined an amount of R 2 500, payable to the WASPA Secretariat within 5 days of notification of this report's findings, and
 - 15.2. the SP is to ensure that its systems comply with section 5.2.1 (b) of the new Code of Conduct within 24 hours of notification of this report's findings. That is to say, no commercial message is to be sent to any person, whether by SMS or any other means, more than six months after the last commercial dealings with that person.
16. The SP has clearly misunderstood the amendments made to section 5.1 of the Code of Conduct, and has assumed that it can continue to charge one Rand for unsubscribe instructions without reference to applicable tariffs; the Adjudicator cannot find a breach without information on these tariffs. As the SP has clearly not applied its mind to this amendment, to the detriment of consumers, it is within 14 days of notification of this report's findings to reduce its rate in this regard to the lowest tariffed rate available and provide a report to the WASPA Secretariat setting out how it has calculated this rate.

-----o0000O0000-----