



Wireless Application Service Providers' Association

Report of the Appeals Panel

Complaint number	29916
Cited WASPA members	SMS Portal (Pty) Ltd (0139)
Notifiable WASPA members	N/A
Appeal lodged by	SMS Portal (Pty) Ltd (0139)
Type of appeal	"Written appeal"
Scope of appeal	[X] Review of the adjudicator's decision [X] Review of the sanctions imposed by the adjudicator
Applicable version of the Code	14.3
Clauses considered by the panel	3.5, 3.6, 3.7, 5.16 and 24.31.
Related complaints considered	N/A
Amended sanctions	The sanctions are amended to a combined fine of R25 000.00.
Appeal fee	Half of the appeal fee is to be refunded.
Is this report notable?	Not Notable
Summary of notability	

Initial complaint

The complainant received the following SMS:

“Hi, Would you like to reduce your DEBT/ACCOUNT repayments up to 50% and have EXTRA CASH leG over each month?SMS YES to see if you qualify :-) WE CAN HELP YOU”

The complainant initially identified the following issues:

- There is no opt-out procedure in the message (16.4)
- I am registered on the DMA national opt out registry (section 16.5 (b))
- I never consented to receive messages of this nature. Provide me with proof of consent. (16.9, 16.10)
- The message does not identify the sender. (16.12, 5.14*)
- I also requested that the IP responsible for supplying my details be identified.

The complaint details correspondence with SMS Portal and with their client in this matter, Debt International. It also referenced a previous WASPA decision against SMS Portal in matter 26148, and stated that Debt International appears to be the successor to the client in that matter. He further referenced matters 27172, 24456 and 27424.

The complainant requested that he be refunded for the time spent on this issue

Adjudicator’s findings

The adjudicator first considered clauses 3.1 to 3.17 as they relate to the liability of the WASP member for the actions of its customers and / or non-members.

The adjudicator felt that the WASP failed to demonstrate that they had taken any steps to ensure that their non-member customers complied with the provisions of the Code of Conduct. They accordingly found that there was no evidence to show that the WASP has taken any steps to ensure compliance with clauses 3.1, 3.2, 3.5, 3.6 and 3.7 of the Code and as a result this should be taken as an aggravating factor in any sanctions.

The adjudicator then turned their attention to the following:

Clause 5.14 “Members must have a procedure allowing consumers to lodge complaints regarding the services provided. Members must acknowledge receipt of complaints expeditiously, and must respond to any complaints within a reasonable period of time.”

The adjudicator found that clause 5.14 relates to the actual procedure and was in agreement with the WASP that it facilitated the complaint once actually receive and found no breach of Clause 5.14.

Clause 5.16 “Members must respect the confidentiality of customers’ personal information and will not sell or distribute such information to any other party without the explicit consent of the customer, except where required to do so by law.”

The adjudicator found a breach of 5.16 based on the fact that although the WASP itself did not appear to have contravened this clause itself, due to the fact that they failed to show any evidence of steps taken to ensure that their non-member customers were aware of the provisions of the Code, they are in breach of this clause.

Clause 16.4 “Any member authorising, directing or conducting any direct marketing must implement appropriate procedures to facilitate the receipt of a demand from a person who has been approached for the purposes of direct marketing to desist from initiating any further communication (an “opt-out request”).”

The WASP submitted that it was not in breach of this clause and confirms that it does have the required procedure to facilitate the receipt of an opt-out request. The adjudicator also noted that the obligation to have such a procedure is distinct from the obligation to provide instructions on how to utilise it in a direct marketing message and the failure to include the instructions in the message do not fall within the ambit of clause 16.4, and therefore found no breach of Clause 16.4.

Clause 16.5 (b) “16.5. Any member authorising, directing or conducting any direct marketing must not direct or permit any person associated with that activity to direct or deliver any communication for the purpose of direct marketing to:

. . .

(b) a person who has registered a pre-emptive block with a registry established by the National Consumer Commission . . .”.

Due to the fact that the Code does not specify the DMA but rather “a registry established by the National Consumer Commission...” the adjudicator found no breach of clause 16.5(b).

Clause 16.9 and 16.10 relate to permission to receive marketing messages. The adjudicator noted that the WASP accepted that its customer was in breach of this clause and found a breach of this clause by the WASP itself due to the fact that the WASP failed to show what reasonable steps it had taken to ensure the customer complied with the Code.

Clause 16.13 “Upon request of the recipient of a direct marketing message, the member must, within a reasonable period of time, identify the source from which the recipient’s contact details were obtained. The member must also provide proof that the recipient has given consent to receive that message, or alternatively provide proof that the recipient has provided his or her contact details in the context of the sale of a product or service the same as that being marketed.”

The adjudicator found that although they agree that the WASP cannot be expected to audit consent for each message passing through their system, and although they placed their customer and the complainant in contact, once again due to the failure in the eyes of the adjudicator to take steps to ensure compliance with the Code, the adjudicator found the WASP to have breached the Code but stated that they would take the procedural difficulties into account in their sanction.

To sanctions, the adjudicator ruled as follows:

“The complainant requested a refund of his time. I note that it is not within the ambit of my powers to award “damages” to a complainant (except in the form of a refund, which does not apply here.)

I am, however, empowered to fine the WASP, which fines are payable to WASPA, and I do so as follows:

In respect of Clause 5.16, the breach is a serious one. I do, however, note that it was the actions of the customer and not the WASP – the WASP’s failure – as with all of the breaches – is that of reasonable oversight. I fine the WASP R10 000.

· On similar reasoning, I fine an amount of R10 000 in respect of Clause 16.9 and 16.10 cumulatively.

· I consider the breach of Clause 16.12 to have been particularly within the control of the WASP, relating as it does to message format, and fine R20 000 in respect of this breach.

· In relation to Clause 16.13, I refer to my comments above and fine the WASP R5000. The total fine payable is therefore R 45 000.

I urge the WASP to put in place better controls of its many customers to avoid heavier fines

in the future.”

Appeal submissions

The Respondent appealed the decision and sanction of the Adjudicator. Only the sections relevant to the clauses which the Adjudicator found the Respondent to have breached have been included and not those in respect of which the Adjudicator found the Respondent not to have contravened:

1. The findings made in respect of the operation of certain provisions of Chapter 3 of the Code and the application thereof to the facts of the matter;
2. The finding that the Respondent breached clause 5.16 of the Code;
3. The various sanctions imposed.

The Respondent acknowledged several key facts raised by the complainant and subsequently ruled on by the adjudicator. The Respondent's main argument goes to what they view is the incorrect interpretation by the adjudicator of clauses 3.5 – 3.7 of the Code, namely that these impose a strict liability on the Respondent but should be considered as a factor in mitigation of sanction and not aggravation thereof.

The Respondent then went on to indicate that they would be approaching the relevant structures within WASPA for a review of the strict liability established under clause 3.7 due to the fact that the implications of the current formulation of clause 3.7 raise several challenges for WASPA members who are required to take responsibility for an apparently unlimited set of conduct on the part of their customers.

The Respondent then went on at length about the findings of the adjudicator being incorrect as to the Respondent's failure to show any evidence of steps taken to ensure that their non-member customers were aware of the provisions of the Code, thus erroneously finding the Respondent to have breached 5.16. The Respondent set out that their track record of compliance with the Code based on the number of SMS's sent through their system as well as the fact that all customers are required to accept their terms and conditions which clearly set out the requirements for complying with the Code should have inferred an acceptable level of compliance. Accordingly, the Respondent denies being in breach of clauses 3.5 and 3.6 of the Code.

Further, should the adjudicator have felt insufficient evidence was produced to back up the Respondent's position, the adjudicator should have utilized the powers granted to them in terms of clause 24.31 of the Code to request further documentation. The Respondent asserts that this failure in terms of clause 24.31 unnecessarily prejudiced

the Respondent and forced them into this appeals process (and accordingly the fee should be refunded).

The Respondent's appeal in respect of a breach of clause 5.16 as a result of 3.7 is one of impossibility of compliance with 5.16 in a strict liability scenario where the Respondent lacks control over their customer's behaviour.

The Respondent then argued about the sanctions and set out that clause 24.34 of the Code sets out the requirements imposed on an adjudicator in respect of a sanction imposed under the Code, namely:

"24.34. If the adjudicator determines that there has been a breach of the Code, then the adjudicator must determine appropriate sanctions. In determining any appropriate sanctions, the adjudicator must take into consideration:

- (a) any previous successful complaints made against the respondent in the past three years;
- (b) any previous successful complaints of a similar nature;
- (c) the nature and severity of the breach;
- (d) the loss suffered by the complainant;
- (e) any efforts made by the respondent to resolve the matter; and
- (f) any other factors that the adjudicator considers material."

The Respondent states that the adjudicator must have failed to follow these mandatory steps in sanctioning the Respondent due to the fact that the adjudicator did not set out in the adjudication the specific deliberatory steps. Accordingly, the sanctions were procedurally flawed and further that this procedural failure prevents the Respondent from being able to provide a detailed appeal.

The adjudicator wrongly considered non-compliance with sections 3.1, 3.2, 3.5, 3.6 and 3.7 as an aggravating factor in determining a sanction whereas clause 3.7 of the Code notes only that a finding that such steps have been taken constitutes grounds in mitigation of sentence.

Further, that the sanction in respect of the breach of clause 16.12 has been inflated as a result of the logic applied by the adjudicator, who regarded this breach "to have been particularly within the control of the WASP, relating as it does to message format". No WASP acting as an SMS aggregator controls message format.

The Respondent asserted that the sanction imposed in respect of the finding of breach of clause 5.16 of a fine of R10 000, due to the fact that it was a serious one relating to the application of clause 3-5-3.7 and the concept of strict liability, was out of proportion due to the incorrect interpretation by the adjudicator of clause 3.7 which asserts that the

steps taken by the Respondent in ensuring the non-member customer complies with the Code will be considered in mitigation of sentence and NOT aggravation thereof.

The Respondent stated that regarding the remoteness of the conduct constituting the breach and the impossibility of it exercising any form of control or “reasonable oversight” over aspect of the business of its customers which do not relate to it, should be considered as a factor in mitigation of sanction. Further, that the Respondent’s record with WASPA should also be a mitigating factor in sanctions.

Finally, the Respondent asserted that the adjudicator failed to consider that there was no loss to the complainant and that the Respondent co-operated at all times with WASPA in the resolution of this matter.

Deliberations and findings

After considering all the evidence before it the panel has come to the following conclusions.

This matter is not a simple one in that it involves issues of procedural irregularity, supposition and inference as well as disputes on the interpretation of the Code.

The adjudicator erred in certain respects due to a core misinterpretation of the Code which had knock-on impacts on the ruling.

The Respondent appealed certain breaches and requested mitigation in the sanctions imposed.

The Respondent’s appeal in respect of the findings relating to Chapter 3 of the Code and a related breach of clause 5.16 (as a result of clause 3.7 of the Code) is one of impossibility of compliance with 5.16 in a strict liability scenario where the Respondent lacks control over their customer’s behaviour. In this regard the panel finds that the adjudicator misinterpreted Chapter 3 of the Code in that they inferred that steps taken to ensure compliance being mitigating factors in sanctions meant that no steps taken would be aggravating factors. This is incorrect.

However, this in our view relates to sanctions and not to the breach of 5.16. The argument raised by the Respondent relating to the breach of 5.16 is that it is impossible to exercise any form of control or “reasonable oversight” over an aspect of the business

of its customers which do not relate to it and accordingly it cannot be held responsible for a breach of 5.16 as a result of 3.7. Unfortunately, the Code states that they will be strictly liable and as such the panel upholds the finding of breach and refers the Respondent to WASPA to take this matter up in the appropriate forum.

This interpretation and conclusion has been consistently applied to these types of contraventions. The underlying reason for the strict liability in this situation has always been that contraventions of the Code by customers who are not WASPA members should be visited upon the WASPA member otherwise the application of the Code would be seriously undermined. It is within the scope of responsibility of the WASPA member to ensure by its contractual relationship with the customer that there is an awareness of the Code and an obligation to comply with the Code and finally that any sanction against the WASPA member due to a breach of the Code will be passed on to the customer. In this way the WASPA member can effectively shield itself against the egregious conduct of its customers.

In its request for mitigation of the sanctions, the Respondent raised several issues:

1. That the adjudicator must have failed to follow the mandatory steps set out in clause 24.34 of the Code in sanctioning the Respondent due to the fact that the adjudicator did not set out in the adjudication the specific deliberatory steps taken;
2. The sanctions were therefore procedurally flawed and further that this procedural failure prevented the Respondent from being able to provide a detailed appeal;
3. The remoteness of the conduct constituting the breach and the impossibility of it exercising any form of control or “reasonable oversight” over aspects of the business of its customers which do not relate to it, should be considered as a factor in mitigation of sanction; and
4. (Relating to item 1 above) the adjudicator failed to consider that there was no loss to the complainant and that the Respondent co-operated at all times with WASPA in the resolution of this matter.

In respect of item 1 listed above the panel finds no merit in this argument. The failure to set out the thought process in sanctioning the Respondent cannot be inferred as a failure to consider these matters.

In respect of item 2, it is clear from the appeal submitted that the Respondent was able to provide a detailed appeal and as such the panel finds no merit in this argument.

In respect of item 3 in the list above, once again, this is not the appropriate forum to determine unreasonableness of the Code and the panel refers the Respondent back to WASPA to take up this issue further. Accordingly, there is no merit in the argument that this should be considered in mitigation of sentence. In the same vein that the Respondent argues that you cannot infer an aggravation of sentence due to the steps not taken in terms of 3.7, similarly the panel finds that the Respondent cannot infer that impossibility in complying with the Code should be taken as a mitigation of sanction.

Finally, in respect of item 4 in the list above, once again, the failure to set out the thought process in sanctioning the Respondent cannot be inferred as a failure to consider these matters. It can also not be accepted that the fact that there was no pecuniary loss to the complainant, should be a mitigating factor. In cases of spam there often is no direct pecuniary loss as in the case of subscription services, but the object of the protection provided by the Code in this case is not the prevention of pecuniary loss, but the infringement of the privacy of consumers. The infringement therefore is one of a personality right and a constitutional right usually entitling a person an award of non-pecuniary damages in civil law. These kinds of personal wrongs are viewed in a serious light as recent legislation such as the Protection of Personal Information Act illustrates.

The panel deliberated on the issue of the strict compliance created by 3.7 and the issues related to control that were raised by the Respondent. However, the panel finds that this perceived unfairness created by 3.7 must be balanced by the reality that where non-members utilize the service of members, the only mechanism that WASPA has of protecting the public and controlling such non-member services is via the member itself. As has been done by many members, they require their end customers to be members of WASPA to avoid any issues of impossibility of enforcement or perceived unfairness at being held liable for the acts of non-members.

Amendment of sanctions

The sanctions are amended to a combined fine of R25 000.

Appeal fee

Due to the partial success of the Respondent, half of the appeal fee is refunded.
