



**Wireless Application Service Providers' Association**

Report of the Adjudicator

Complaint number	<b>#35213</b>
Cited WASPA members	<b>CANGETTE INVESTMENTS (1597)</b>
Notifiable WASPA members	<b>SMSPortal (Pty) Ltd (0139) &amp; Plurisync (Pty) Ltd (1322)</b>
Source of the complaint	<b>Public</b>
Complaint short description	<b>Unsolicited Marketing Message</b>
Date complaint lodged	2017-07-27
Date of alleged breach	Unknown
Applicable version of the Code	V15.0
Clauses of the Code cited	5.15., 5.16., 16.5 (b), 16.9, 16.10 (a) (b), 16.11., 16.13.
Related complaints considered	#20187 #22254 #27172
Fines imposed	<b>None.</b>
Other sanctions	None.
Is this report notable?	Not Notable

Summary of notability	N/A
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### Initial complaint

*Therefore a Formal complaint sent to WASP and aggregator on 2017-08-28:*

The formal complaint of the Complainant is incorporated with her initial complaint which is as follows:

*I have taken my complaint up with Hollard directly. They provided misinformation and confirmed that they sent unsolicited marketing to me, but they provided the wrong -me for the SMS (I cannot receive an SMS before it was sent). I then proceeded to contact the ISPA, DMASA, NCC and the FSB. Not one of these bodies were able to address my full complaint. Although they all ensured that I am on the (same) DNC list that only addresses a very small part of my actual complaint.*

*The fact that Hollard marketed to me (even though I am registered on the National Opt-Out Database). The fact that you have to pay to opt-out of marketing that you never opted in to. The fact that they are not providing true and accurate information or providing information where they are obtaining my AND a friend of mine's information-on and contact details from.*

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### Member's response

*Respondent provided a response to the complaint on 2017-09-19.*

We ran a campaign using Lifestyle Mail Order's customer database. I've attached a screenshot from Lifestyle Mail Order's database as proof. Our intent was to market to [REDACTED] and not to the complainant [REDACTED]. We have suppressed the number in question. Addressing the fact that the complainant is registered on the DMA's Opt-Out database, the problem we found was that the file was previously edited in Excel on windows and re-saved in csv format, resulting in the records being appended with a carriage return & new line "/r/n".

Our database process works on a Linux platform which uses only a new line "/n", When the file was deduped against the DMA list in the database the carriage return "/r" was retained in the cell number field and therefore the exclusion failed due to the extra characters. Unfortunately it affected that batch of 5 699 records. We would be happy to refund the complainant her costs for opting out if she wishes to furnish us with the amount that it cost her and her friend. If at all possible we request the complainant to also to provide us a mobile number for her friend whom we assume has taken the same steps to Opt-Out.

We apologise for this error and assure you of our best interest at all times.

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## **Complainant's response**

*Responses sent to complainant for a response on 2017-09-20 and Complainant provided a response on 2017-09-21.*

No, I am unfortunately not satisfied with the resolution of my complaint, and I would like to request that this be referred to WASPA's Head of Complaints for review.

This is due to the fact that they want people to opt out at a cost - I was told this will be addressed, but it wasn't. Further, they provided misinformation to make the problem go away.

They are also marketing to my friends and relatives - when asked where they obtained their contact details from, Hollard said they could not provide further information.

Therefore, this complaint is far from resolved in my opinion.

Thank you for attending to my complaint, it is much appreciated.

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## **Member's further response**

*Complainant's response provided to the respondent on 2017-09-22.*

The Respondent provided that same information as that of the 19-09-2017 and also attached the screenshot of the date, time and detail of the message.

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## **Complainant's further response**

*Complainant's response provided to the respondent on 2017-09-22.*

With reference to their email, herewith my response:

In an email (see picture below) sent on 12 July 2017, I provided my friend's number. I asked them to provide the following:

1) Where they obtained her number from (they phoned her and said she will be removed from their database, but could not tell her where they obtained her number from)

2) To lodge a complaint due to the charge for opting out. I addressed this matter with them previously and was told that that they will rectify this, BUT they are still charging people to opt out of unsolicited marketing - nothing is being done about this. With point 2 I feel they had enough from me to address the issue. ████████ told me they had an issue to get a free opt out option, but they will address the issue.

I noticed that they are offering to pay for our opt out fees. The solution is quite simple: DO NOT send any unsolicited SMS's to ANYONE until they can opt out for free. This is a very easy and simple solution, but they actively choose to continue with non-compliance and still send these SMS's to everyone. Further, the charge to opt out at this point is not my concern. I have been trying to find a solution for this problem, since April. A mere SMS fee is not my concern here, it is all the time and effort, phone calls and correspondence I had to enter into with various people and organizations because they are not following due diligence or the correct procedures. Again, no one should have to pay to opt out of their unsolicited marketing.

At the end of the day, I know Hollard is buying our details from a database. This is ILLEGAL, but my concern is not with Hollard. My issue is with the organization selling our contact details. I know they provided information regarding my number, but they could not provide any details of my friend's (████████) number (████████). I know which organization we have in common, but I would like to hear from Hollard where they are buying databases from. Should they provide the correct and truthful information I can address this with the organization who sold our personal details. Should Hollard choose not to provide this information, I feel they should be brought to book for marketing to people and then charging them to opt out of this unsolicited marketing, even though they never opted in.

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### **Member's further response**

*Respondent provided a further response on 2017-09-27.*

We've attached below a copy of my previous response to the complainant addressing all points on the formal complaint on MSISDN ██████████ initially sent. The request concerning MSISDN ██████████ does not pertain to this complaint, will you kindly inform the complainant as such.

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### **Sections of the Code considered**

The following sections of the WASPA Code of Conduct, version 15.0, were considered:

5.15. Members must respect the constitutional right of consumers to personal privacy and privacy of communications.

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.

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:

- (a) a person who has submitted an opt-out request to that member,
- (b) a person who has registered a pre-emptive block with a registry established by the National Consumer Commission, or**
- (c) a person who has registered a pre-emptive block with a registry established by WASPA.

16.9. A member may engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing, to a person who has given his or her consent.

16.10. A member may engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing, to a person who:

(a) has provided the party responsible for sending the direct marketing communication with his or her contact details in the context of the sale of a product or services, and the responsible party's own similar products or services are being marketed, and

(b) has been given a reasonable opportunity to object, free of charge, and in a manner free of unnecessary formality, to such use of his or her details at the time when the information was collected and on the occasion of each subsequent direct marketing communication sent to that person.

16.11. A member may not engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing other than as provided for above.

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.

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## **Decision**

I am satisfied of the above as submitted to each aggregator and will therefore not address my decision at all to them. Clause 24.22A applicable. Further, I will not make a ruling on the provision of the MSISDN in the email provided by the complainant as it was not the subject matter of this complaint neither was the Respondent provided an opportunity to provide input on the said MSISDN of the Complainants friend. Further with specific regard to Hollard, WASPA has no jurisdiction to pronounce on the manner in which they attend to their marketing functions neither is WASPA enabled to provide a directive to Hollard to provide that information regarding personal information obtained from various sources to the complainant.

Determination of a matter such as this is complex and requires close analysis as well as the ability to weigh up the interests of either party. The situation regarding unsolicited marketing messages is one that arises frequently and the market is constantly ripe for abuse. The complainant in this matter is adamant regarding the so called purchase of a database, yet provides no proof,

accordingly she makes a statement of legality and the adjudicator under complaint #10854, was correct In stating *“To the extent that an allegation of illegality has been raised the information related to the origination of the SMS message is known to Vodacom and the complainant and either can choose to pursue this aspect of the matter. The Code is clear that determinations of legality do not fall within the jurisdiction of WASPA”*. The respondent confirms the acquisition of the database, advising that a campaign was run using the LifeStyle Mail Order list (the confirmation does not confirm purchase neither does it advise on legitimate use), along with an error and / or change in the Linux Program used. The complainant herself is confused regarding the actual company behind the “push” and further fails to understand that there are API companies specialising and /or ensuring bulk messaging services. Further, the issue regarding the “purchase” of databases is fraught with misconception in that the public are less aware of the fact that many databases are in fact obtained from public sources and / or platforms.

The complainant in this instance advised that she herself was on the DNC and the Respondent provided, in my view an adequate explanation as to why she was in fact sent one unsolicited message rather than the intended recipient. The DNC itself, run by the Direct Marketing Association of South Africa “DMASA” is specific in nature and the complainant, has not indicated and/ or provided proof of what means of communication she wanted to opt out from. According to the DMSA, *“We ask for the ID number of the registrant to verify their identity. Our members must pass their marketing lists for potential customers through the register, which then identifies anyone on the list who has opted out, and these people need to be removed from the marketing list”*. My submission is that even though the Respondent was not intentional in the transmission of the single sms, as it was a program error (and he complied with the running of the number through the DNC) , the adjudicator under adjudication #22254, held *“there remains a duty on WASPs who buy databases to ensure that the database is legally compiled and that the requirements of the WASPA Code are met”*.

Neither party provided either an example of nor a screenshot of the actual message that went out therefore the determination on legality of structure is halted, I merely have an indication from the complainant that there was an opt out function, such therefore indicative that the Respondent complied with the Code in that respect.

My submission is that the complaint is dismissed as there is no evidence to indicate that the Respondent was reckless and intentional and WASPA has no jurisdiction to make a ruling on the non-compliance with the Consumer Protection Act as well as the Electronic Communications and Transactions act. In making such determination, the below is highlighted;

With regards to clause 5.15, the Respondent cannot be found to have disregarded the constitutional right of the complainant in that there has not been any unlawful disclosure of private facts about the customer. “Unlawfulness” is judged by the “general sense of justice of the community”. Will the community in general regard the sale of an email database as unlawful? In our view, probably not<sup>1</sup> alternatively that of a list of cell phone numbers as in this instance.

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<sup>1</sup> <https://www.michalsons.com/blog/email-databases-for-sale-legal-concerns/2569>

There is no proof of sale of customer information , neither was there a disregard for the adherence of checking the DNC, the program failed and one cannot deduce a breach of clause 5.16.

Clause 16.5, 16.9, 16.10 and 16.11 would see application and find for breach in an instance were there was no adherence to the system check by the Respondent, the Complainant was not the intended recipient. Therefore allegations of breach based on these clauses fail.

Breach of 16.13 accordingly must fail as the Respondent identified the source of the contact details within the requisite time, he further provided proof that the Complainant was not that intended recipient (hence a singular text message was transmitted) – therefore there cannot be an instance wherein the Respondent is made to provide details of the complainant when she was not the intended recipient.

The complaint accordingly is dismissed.

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### **Sanctions**

None.

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### **Matters referred back to WASPA**

*NONE.*

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