



## Report of the Adjudicator

Complaint number	<b>#43336</b>
Cited WASPA members	<b>eZMobile Solutions t/a PC2SMS (1932)</b>
Notifiable WASPA members	<b>Connet IT Systems Pty Ltd (1036)</b>
Source of the complaint	<b>Public</b>
Complaint short description	<b>Unsolicited marketing message</b>
Date complaint lodged	<b>05-05-2020</b>
Date of alleged breach	<b>05-05-2020</b>
Applicable version of the Code	<b>16.9</b>
Clauses of the Code cited	<b>4.2, 4.6, 4.7, 4.9. (b,c,k), 5.4, 5.5, 7.6, 16.4, 16.9, 16.10, 16.11, &amp; 17.1.</b>
Related complaints considered	<b>N/A</b>
Fines imposed	<b>N/A</b>
Other sanctions	<b>N/A</b>
Is this report notable?	<b>Not notable</b>
Summary of notability	<b>N/A</b>

### Initial complaint

The Complainant indicated that he received an unsolicited message that originated from the Member's platform and / or system.

## Member's response

In its response, the Member considered all the alleged breaches and provided a detailed response of which most parts are replicated here:

"PC2SMS does not condone or promote the use of unsolicited SMS and we do our best to block such traffic and continuously communicate and enforce with our clients via email, that they need to adhere to the WASPA code of conduct and always include OptOut clauses in all marketing related messages etc. Also on registration we request the client to adhere to the WASPA code and that we do not tolerate any SPAM being sent from our system I would herewith like to provide feedback on the clauses that PC2SMS supposedly has breached:

4.2. Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.

**Not sure how this applies to the message sent from our system, but PC2SMS is always professional towards the public, it's customers, other service providers and WASPA. We also ensure our service is not abused or used for spam or fraudulent traffic.**

4.6. Members must not knowingly host, transmit, publish or link to illegal content.

**PC2SMS was not aware of this content as it was not flagged by our spam filters nor by our WASPA gateway provider.**

4.7. If a member becomes aware of illegal content under that member's control, the member must, immediately suspend access to that content. Where required to do so by law, the member must report the illegal content to the relevant enforcement authority.

**PC2SMS blocked the user account and their mobile number, issued a suspension email and attached the details of the client.**

4.9. Members must not provide any services or promotional material that:  
(b) results in any unreasonable invasion of privacy;

**PC2SMS was unaware that the "client" was sending such sms as they were not flagged by the spam filter, and based on the message content it did not seem as having been an unreasonable invasion of privacy, if the message was in fact true and delivered to the correct recipient. PC2SMS is unable to contact the client and can not confirm where the recipients details came from.**

(c) induces an unacceptable sense of fear or anxiety;

**We apologise on behalf of the "client" but we were unaware that the "client" was sending such emails as they were not flagged by the spam filter and the client did not provide feedback as to how or where the number was obtained.**

(k) facilitates or encourages unlawful behaviour

**PC2SMS did not knowingly facilitate or encourage unlawful behaviour, and immediately took action and blocked the user account once made aware of the "fraudulent" sms.**

5.4. Members must have honest and fair dealings with their customers.

**PC2SMS has honest and fair dealings and due to the system being automated it can occur that some get through the nets**

5.5. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

**PC2SMS was unaware and had no actual dealings with this client.**

7.6. Members must notify WASPA if they become aware of any illegal conduct using its services, or any illegal content on its services and the steps that have been taken in response within a reasonable period of time.

**PC2SMS was not a WASPA affiliate yet and our WASPA gateway provider had already received the complaint and informed them of the issue.**

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”).

**PC2SMS sends out regular reminder emails and has push notifications to the client portal, which advises our clients that they need to adhere to WASPA code of conduct and all lists must be opt-in and recipient have requested info from the client. Should a recipient reply STOP or OptOut or 9, our system will automatically remove and blacklist the number from the clients group list. PC2SMS also request the client acknowledge the below when signing up.**

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.

**1. Since we did not have our own connection to the Mobile networks and use a 3rd party gateway who is a WASPA member (Connect Mobile), we believed we could not become a WASPA member, and only recently found out about the AFFILIATE membership, to which we have now signed up and become a member of. After receiving the complaint did we realise it was possible to become a member, and since we are all for above board messaging, we have joined.**

**2. We have tried to contact the account holder who sent the sms to find out where they had acquired the SMS database, but at this stage there was no response and the client is not responding to emails, calls or sms.**

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

**PC2SMS - has tried to contact the client to request proof of Opt-in of their group list, but since the suspension the client does not respond to emails or calls.**

(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.

**PC2SMS - agrees that their client did not offer such an option within the SMS, however they may have done so in other communication with their contact group. Regretfully PC2SMS is unable to verify with the client if this had been done or not. PC2SMS however does offer a opt-out link to it's clients to ensure the recipient of an sms can opt out without incurring an SMS fee.**

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.

**PC2SMS advises it's client to adhere to the above code of conduct and since we have not had a complaint in 9 years, it is apparent that our clients have been adhering to the polices and apply the required protocols when engaging with their clients.**

17.1. With the exceptions noted below, all subscription services, notification services, contact and/or dating services and other bulk SMS services (such as free newsletters) must have a functional opt-out procedure, including the option to reply 'STOP' to SMS messages.

**PC2SMS enforces and reminds it's clients to always include an OptOut clause in the sms, and our platform is setup to automatically remove and blacklist a recipient who replies STOP, OptOut, or 9 to any of our sms regardless if the clause was in the sms. PC2SMS agrees that the client who sent this particular sms and who was notified on multiple occasions to adhere to WASPA code of conduct, did not have the STOP clause present in his/her sms, however a recipient who would have responded with STOP would automatically be removed from ever receiving a message from that client again. The sms sent out by the client however, does not indicate it is a marketing or bulk sales related sms, but rather a personal contact message. PC2SMS uses the automated spam filter and occasionally monitor the traffic sent out by our clients, and in the last 9 years of operation we believe to have done extremely well to ensure our clients are adhering to the WASPA code of conduct.**

PC2SMS would like to stress that we are doing everything in our power to prevent such spam SMS and regretfully sometimes they do get through our security protocols, and we would like to apologise for the inconvenience and distress caused to the recipient of the sms, and we would like to assure them, that we have since enhanced our spam filter and have put steps in place to be more vigilant and not have this happen again.”

## **Complainant's response**

The Complainant offered no further response

## Member's further response

N/A

## Sections of the Code considered

4.2. Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.

4.6. Members must not knowingly host, transmit, publish or link to illegal content.

4.7. If a member becomes aware of illegal content under that member's control, the member must, immediately suspend access to that content. Where required to do so by law, the member must report the illegal content to the relevant enforcement authority.

4.9. Members must not provide any services or promotional material that:

- (b) results in any unreasonable invasion of privacy;
- (c) induces an unacceptable sense of fear or anxiety;
- (k) facilitates or encourages unlawful behaviour

5.4. Members must have honest and fair dealings with their customers.

5.5. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

7.6. Members must notify WASPA if they become aware of any illegal conduct using its services, or any illegal content on its services and the steps that have been taken in response within a reasonable period of time.

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").

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.

17.1. With the exceptions noted below, all subscription services, notification services, contact and/or dating services and other bulk SMS services (such as free newsletters) must have a functional opt-out procedure, including the option to reply 'STOP' to SMS messages.

## Decision

In reaching a decision the Adjudicator relies on all the information provided by both the Complainant and Member in this matter. Apart from the initial complaint, the Complainant opted not to further respond.

Unsolicited communication and / or direct marketing or so-called "spam" is an unwanted consequence of the digital age we all live in and a menace to society. Not only does it cause irritation, but it also leads to a sense of anxiety and fear for those on its receiving end. It is an invasion of one's privacy, outlawed in section 69 of the Protection of Personal Information Act and rightly so, also in WASPA's Code of Conduct.

Organisations have made massive progress in stemming the tide with various filters but this has not fully resolved the problem. Apart from utilising technology, organisations have an obligation to ensure that their systems and platforms do not get abused by others and organisations / Members, therefore also need to take organisational measures to root out the problem.

One way of achieving this is by ensuring that individuals or entities utilising a system / platform, are compelled to adhere to terms and conditions that underscore the importance of the problem. It is also important to ensure that the contracting party is properly identified so that any breach of the said terms would have consequences for the breaching entity.

The Adjudicator is of the view that the message received by the Complainant in this matter, although unsolicited in nature, does not necessarily translate as unsolicited **direct marketing**.

Clause 16.2. of the Code states that "**Direct marketing**" means to approach a person, either in person or by mail or electronic communication, for the direct or indirect purpose of:

- promoting or offering to supply, in the ordinary course of business, any goods or services to the person; or
- requesting the person to make a donation of any kind for any reason.

The Adjudicator is of the opinion that neither of these scenarios presented itself in the message received, therefore rendering the application of clauses 16.4, 16.9, 16.10 and 16.11 to this matter as incorrect.

The Adjudicator does however regard the message as unsolicited, false and deceptive, invasive and therefore contradictory to the spirit of the Code.

In light of the above the Adjudicator shall assess whether the Member in this matter breached any of the other relevant clauses.

The Adjudicator is not of the opinion that the Member breached clause 4.2 of the Code. On the face of the information received, the Member's behaviour and correspondence in this matter is deemed professional.

The Member did not knowingly distribute the content and can therefore not be held in breach of clause 4.6 and once it became aware of the activities, complied with clause 4.7 of the Code.

Should the Member have been pro-active in providing any services or promotional material **itself** that resulted in any unreasonable invasion of privacy, induced an unacceptable sense of fear or anxiety, or facilitated or encouraged unlawful behaviour, one might have held the view or argued that the Member was in direct breach of clause 4.9 paragraphs (b), (c) and (k). The Adjudicator does however not hold this view. Did the message result in an unreasonable invasion of privacy? Yes. Was it due to any direct action on behalf of the Member? No.

The Adjudicator is of the opinion that the Member did not conduct itself in a dishonest and unfair manner when dealing with its customers and therefore find no breach clause 5.4.

The Member in this matter did not **knowingly** disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission. Its client did. Therefore no breach of clause 5.5.

Clause 7.6. states that Members must notify WASPA if they become aware of any illegal conduct using its services, or any illegal content on its services and the steps that have been taken in response within a reasonable period of time.

The Member was not a WASPA affiliate at the time but its WASPA gateway provider had already received the complaint and informed WASPA of the issue.

The Adjudicator therefore finds no breach of clause 7.6 by the Member.

Irrespective of whether the Member's client displayed the option to opt-out or not, the bulk SMS services did have a functional opt-out procedure, but it did not include **the option** to reply 'STOP' to SMS messages. The client of the Member was however notified on several occasions to have the option made available. The Adjudicator therefore cannot find the Member in breach of clause 17.1.

The difficulty of this case is that although several breaches of the Code's clauses were committed, none of it can be attributed to the Member's own actions. Can it be attributed to inactions on its behalf? The Adjudicator is of the opinion that this might be the case and would like to refer the reader back to the opening paragraph:

“One way of achieving this is by ensuring that individuals or entities utilising a system / platform, is compelled to adhere to terms and conditions that underscore the importance of the problem. It is also important to ensure that the contracting party is properly identified so that any breach of the said terms would have consequences for the breaching entity.”

To curb the spread and posting of unsolicited communications and / or direct marketing, members will have to ensure that it is possible to correctly identify their own clients before providing them access to their services, and ensure that they have the ability to enforce their own terms and WASPA’s Code against their clients.

The Adjudicator, although dismissing the complaint in full, strongly advises the Member to take better organisational measures to prevent future breaches, as a repeat of this by its clients might lead to penalties against the Member in this matter.

The case is dismissed, but under caution of the above.

## **Sanctions**

N/A

## **Matters referred back to WASPA**

N/A