



Wireless Application Service Providers' Association

Report of the Adjudicator

Complaint number	30981
Cited WASPA members	High Gable Limited (1486)
Notifiable WASPA members	None
Source of the complaint	WASPA Media Monitor
Complaint short description	Misleading marketing – subscription services
Date complaint lodged	8 July 2016
Date of alleged breach	7 July 2016
Applicable version of the Code	14.5
Clauses of the Code cited	4.2., 5.4., 5.5., 12.1., 15.4., 15.5.
Related complaints considered	26723, 27644, 30842
Fines imposed	R50 000
Other sanctions	
Is this report notable?	no
Summary of notability	

1. Initial complaint and responses

- 1.1. On the 8th of July 2016 the WASPA Media Monitor lodged a complaint against the member in the following terms:

HighGable are running a subscription service to win a Phone.

The media monitoring team have tried to guide and educate HighGable on many occasions on how to market their subscription services. We have made it very clear that marketing such services via the "winning of a phone" is strictly not permitted. We have advised that when selling a subscription service, the CONTENT of the service must primarily be sold, and a secondary objective would be to market the winning of a phone.

The marketing is misleading consumers into the chance to win a phone. Consumers are not presented with content upfront, which is what they receive post joining the service.

Furthermore, the pricing display on the LP is not prominent. Prominent would suggest that pricing should be easily noticed and stand out. The pricing on this LP is the same size as the T&C's and could very easily overlooked by an average consumer.

We have further advised that the copy that reads: "The promotion draw is ancillary to the subscription service", does not protect this member if NO content is displayed.

It appears that our continuous guidance is being ignored.

With this in mind, we would like to file a formal complaint and request that this service is deactivated with immediate effect.

We also request that that database that is generated from this service, is not marketed to in future.

We request that consumers are refunded.

- 1.2. The complainant also provided a test result, which is attached as Annexure A.
- 1.3. The complaint was sent to the respondent on the 11th of July. The aggregator was also notified but plays no role in this matter.
- 1.4. The Respondent requested, and was granted, several extensions to the deadline to respond on the basis that its legal representatives were looking into the matter.
- 1.5. The Respondent entered its formal response on the 18th of August. The response amounted in large part to a bare denial, but the relevant portions will be dealt with in the decision below.

2. Sections of the Code considered

- 2.1. As the conduct complained of took place on the 7th of July 2016, version 14.5 of the WASPA Code of Conduct applies to this complaint.

- 2.2. The member is alleged to have infringed clauses 4.2, 5.4, 5.5, 12.1, 15.4, and 15.5, which read as follows:

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.

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.

12.1. For any web page, pricing information does not need to be displayed for services which are free, or which are billed at standard rates. For all other services, where there is a call-to-action, pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action.

15.4. A member must not require that a customer join a subscription or notification service in order to claim an existing reward, to be able to redeem existing loyalty points or to claim a similar benefit. (Example of incorrect marketing: "to claim your prize, join this service".)

15.5. A member may offer an incentive for joining a subscription or notification service, provided that it is clear that the benefit only applies once the customer has joined the service. (Example: "if you join this subscription service, you will be entered into a monthly draw for a prize".)

3. Decision

- 3.1. I have followed the record of subscription submitted by the complainant. The "dominant impression" of the landing page is of the "chance to win an iPhone". While the words "Subscription R7/day" do appear, they are in a very small typeface, as are the further terms below it.
- 3.2. Just below that on the landing page appears "The promotional draw is ancillary to the subscription service." Below THAT, in the main terms text appears "The subscription service offered is ancillary to any of the products or brands displayed in the marketing communications." It is really not clear what the member means by this.
- 3.3. In following the process captured by the complainant, I did not see clear reference anywhere to the actual subscription service, until the subscription welcome message mentions "Win World" or "www.bundleup.co.za". Presumably the "BundleUp" service is the portal for competition entries, but even if it really is a bona fide service, it was not mentioned in the advertising or opt-in messages.
- 3.4. Even the double opt-in messages refer to the complainant's chance to win an iPhone – no mention is made of a subscription service. To the member's credit it did at least state "R7.00 Daily" in both double opt-in messages. In the context however anyone reading the message would assume that the payment was in respect of the prize draw, NOT the subscription service.

3.5. It is not clear whether the member's intention is to lure consumers into a subscription service by means of a promotional competition, or whether the promotional draw is an example of the types of competitions the consumer can enter as part of a subscription service.

3.6. In making this complaint the complainant perhaps overlooked the fact that in the terms at the bottom of its "landing page" the member states that the "product" being promoted is a promotional competition. The relevant section of the Code dealing with promotional competitions was not cited in the complaint, so I have no intention of dealing with an allegation that the member has infringed that section, but I must nonetheless entertain the possibility that this was in fact a promotional competition and that the complainant has misdirected itself. In reviewing the member's material however I cannot reach this view: the sign-up process clearly subscribes the consumer to a subscription service, and whether the incentive used to do so is a competition entry or anything else, the fact remains that the consumer ends up subscribed to a subscription service.

3.7. To deal with the relevant clauses in order:

Clause 4.2

3.8. I don't see anything unprofessional in the record in the member's interactions with the public or WASPA. Professionalism in this context is about form of behaviour as opposed to substance of behaviour, and I cannot find that the form of the member's conduct was unprofessional. In the circumstances there is no breach of clause 4.2

Clause 5.4

3.9. In substance however the member's conduct is one of deception. As I have pointed out, not only was the member's advertising material designed to draw consumers into a subscription service when they thought they were entering a competition, but the subscription service was not even properly described. This was unfair and dishonest of the member, which has consequently infringed clause 5.4.

Clause 5.5

3.10. The material as presented to me was undoubtedly deceptive, but from the face of it I am unclear whether the member actually intended it to be so. It is however the evidence of the complainant that it has warned the member that such marketing practices are prohibited, but the member proceeded anyway. Further, if the member really intended to market a *bona fide* subscription service it would surely have gone to the trouble of describing what the service WAS somewhere in the sign-up process? The member has infringed clause 5.5 of the Code.

Clause 12.1

3.11. "Clearly and prominently" are the key words in clause 12.1. Pricing must be displayed both clearly AND prominently. While dictionary.com is not the finest dictionary available, it will do for our purposes, and the definition of "prominent" according to that source is as follows: "standing out so as to be seen easily; conspicuous; particularly noticeable".

- 3.12. Now if we compare the typeface of the “call to action” on the “landing page” with the typeface of the words “Subscription R7/day” we find that while the latter is indeed displayed immediately adjacent to the former as required by clause 12.1, it fails rather spectacularly to meet that dictionary definition of “prominent” on account of its small typeface and colouring. I note the member’s statement that the text is in white against a blue background, and doubtless if that background were a dark blue rather than the slightly darker of two lightish blues with white spots I would have squinted less in trying to read it.
- 3.13. I also note that pricing information did indeed appear in the double opt-in messages, but clause 12.1 relates to display of pricing in web advertising, and so the member’s contentions in this regard are not relevant; nor is the display of “subscription” for the purposes of this clause.
- 3.14. The member has infringed clause 12.1.

Clause 15.4

- 3.15. I can see no reference to an existing reward, loyalty points, “message waiting in your mailbox” or any of the usual suspects in infringements of this kind. There is no infringement of clause 15.4.

Clause 15.5

- 3.16. I have described the issues with the member’s advertising and subscription process above. There are two reasons why the member cannot escape a finding of infringement of this clause.
- 3.17. Firstly the fact that the incentive is dominant as the call to action, and the subscription element is relegated to a small and indistinct note on the landing page, and that no mention is even made of the subscription service in the opt-in process, means that it is certainly not clear to the consumer that the benefit only applies after sign-up to the service. The clause requires that this message be “clear”. It is not sufficient to state, in rather obscure text, that a certain element is “ancillary” to another. In this case the member makes two statements in this regard, which are contradictory anyway.
- 3.18. Secondly there was no meaningful description of a subscription service in the advertising material at all, or at least none that appears from the material on the record. The consumer would in fact be unlikely to know what the subscription service WAS in this case, even if it were clear that a subscription service was involved.
- 3.19. The member has infringed clause 15.5.

4. Sanctions

- 4.1. In determining a sanction it is not appropriate in this case to determine a separate sanction in respect of each discrete code infringement, because they are really all part of the same conduct designed to deceive consumers. Consequently the sanction applied is in respect of all sections breached.
- 4.2. In determining the sanction I take account of the member’s prior record.

- 4.3. In complaint 26723 the member was found to have infringed clauses 5.1, 5.5, 8.8, 12.1, 15.4, 15.18, 15.22, 15.26 and 15.31, and was fined R50 000 for these infringements. This complaint involved a misleading SMS marketing campaign where consumers were not given proper notice that the advertised service was a subscription service.
 - 4.4. The adjudicator in that matter went to great lengths to explain prominence of the subscription offering, especially where it is “bundled” with other offerings, and how this issue has been interpreted by successive WASPA adjudicators and appeals panels.
 - 4.5. In complaint 27644 the member was found to have infringed clauses 4.2, 5.4, 5.11, 5.14, 7.4, 7.5, 14.1, 15.3, 16.4, 16.13, 16.14 and 17.1. While the member was fined an amount of R50 000 in that matter, the adjudicator’s report contains insufficient detail for me to determine if the facts are similar.
 - 4.6. In complaint number 30842 the member was found to have infringed clauses 5.4, 5.5, 15.4 and 15.5, and was fined R50 000. While the complaint in question related to a misleading SMS campaign, that complaint has “misleading” as a common characteristic. This complaint was lodged on 23 June 2016, and the adjudicator’s report was published on the 16th of August 2016 and so the member may not have had the benefit of studying it.
 - 4.7. While the member had not read the report in complaint 30842 at the time that THIS complaint was made, it mislead consumers using another method, and consequently should be sanctioned separately. In other words I do not consider that this matter amounts to double jeopardy.
 - 4.8. Consequently I impose a fine of R50 000 against the member in respect of its infringements of clauses 5.4, 5.5, 12.1, and 15.5 of the WASPA Code of Conduct.
 - 4.9. The member also agreed to the following which are recorded here:
 - 4.9.1. The member is to refund all consumers who were subscribed to its services via this campaign, in full.
 - 4.9.2. The member is not to market to any of the MSISDNs captured via this campaign.
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5. Matters referred back to WASPA

None

Annexure A

Name: BundleUp

7 July 2016

SP: Smartcall Technology Solutions (Pty) Ltd.
IP: High Gable
WASPA Member: Yes (Affiliate)
SMS Code: 31245

URL:

http://down1000.me/rteywa98il/rteywa98il.php?kw=WINIPHONE6S09&s=31245&site_id=2524&prepagetime=0&kwa=WINIPHONE6S&tx=1f7db75f-0df7-5114-a7d3-19fe0ed6633b&token=76f99d19-4a08-4dd1-b29c-a732c62aa444

Please Note: All images have been resized to meet document requirements. Original screenshots available on request.

MTN

MSISDN: [REDACTED]
Handset: Z1 Compact



The user was then directed to a page now offering the "Change to WIN an iPhone 6s in just 2 steps" for R7/day. The user then proceeded to enter his MTN mobile number and clicked on the "Continue" call to action button.





