



Wireless Application Service Providers' Association

Report of the Adjudicator

Complaint number	#31228
Cited WASPA members	<i>High Gable Limited (1486)</i>
Notifiable WASPA members	<i>Smartcall Technology Solutions (0090)</i>
Source of the complaint	<i>Public</i>
Complaint short description	Unsolicited marketing message Misleading advertising Information that is false or deceptive, or is likely to mislead by inaccuracy.
Date complaint lodged	<i>2016-08-05</i>
Date of alleged breach	<i>2016-08-11</i>
Applicable version of the Code	<i>14.5</i>
Clauses of the Code cited	<i>4.2, 4.3, 5.4, 12.3, 15.9, 15.10, 15.12, 15.19, 18.2, 18.4</i>
Related complaints considered	<i>#31407</i>
Fines imposed	R50 000 for breaching clauses <i>12.3, 15.9, 15.10</i> R5000 for breaching clause <i>5.4</i>
Other sanctions	The subscription service offered by the Member known as the 'R180 Data Bonus' hosted at www.epicbundle.co.za must be suspended pending compliance with clause 18.4 of the WASPA Code of Conduct

	<p>and clauses 12.3, 15.9 and 15.10 of the WASPA Code of Conduct. The Member is ordered to advise the WASPA media monitor of the proposed resumption of the service at least 3 calendar days before the service is live again in order for the Media Monitor to evaluate the service and, if necessary, initiate a further complaint against the Member</p> <p>The Member is warned to comply with clause 18.2 of the WASPA Code of Conduct</p>
Is this report notable?	Not notable

Summary of Complaint:

Formal Complaint (2016-02-22)

Initial Complaint

A member of the public registered a complaint relating to a subscription service run by High Gable Limited (the 'Member'). The complaint was registered by MTN on the 3rd June 2016 but the formal complaint process was initiated by WASPA on the 11th August 2016. In the complaint the complainant indicated that he wanted proof of his subscription to the service as well as a refund. Specifically, the complainant indicated that the SIM card was used in an alarm system since 2002 and so it was not possible for this SIM to subscribe to a subscription service.

In addition to proof of subscription and a refund the complainant requested that:

- The Member unsubscribe him
- The Member send an SMS confirming that he had been unsubscribed

1st Response by Member

The Member initially responded by stating that:

- the complainant had been unsubscribed,
- a confirmation SMS of unsubscribing had been sent
- the Member had contacted the complainant but had not offered a refund,
- Proof of subscription to the subscription service had been provided to WASPA

WASPA secretariat query

WASPA then contacted the Member and asked how the subscription service was entered into (SMS / call to action button on a web site), based on the following subscription logs:

SUBSCRIPTION LOG

```
<19 Apr 2016 07:27:39.354> <DEBUG> <WAPConfirmServlet> <MSISDN: [
[complainant's cell phone number] ]>
```

```
<19 Apr 2016 07:27:39.354> <DEBUG> <WAPConfirmServlet> <RESULT_CODE:
[CONFIRMED]>
```

```
<19 Apr 2016 07:27:39.354> <DEBUG> <WAPConfirmServlet> <WASP Endpoint:
```

[http://66.8.40.222:80/mesh/http.aspx]>

2nd Response by Member

A further query regarding the number was made by the WASPA secretariat which resulted in the Member indicating as follows on the 24th June 2016:

We apologize on our behalf as we determined the cause for subscribing the number [Complainant's cell phone number] was a result of typographical error. The number was entered by mistake from our side of technical support. In that matter we are prepared to offer a full refund. Please confirm if we can proceed with the refund.

Complainant's response

The complainant then reiterated his call for proof of subscription as well as whether the refund had been implemented.

3rd Response by Member

The Member then responded on the 26th August 2016 and provided a screen shot of the following subscription service landing page:

R180 Data Bonus

Subscribe and stand a chance
to **Get R180**

Enter Your Mobile

SUBSCRIBE

R7/day Subscription Service

Service is available to users from South Africa only. By entering this drawing, participants agree to waive any right to claim any ambiguity or error in these official rules, or the drawing itself, and agree to be bound by these official rules and by all decisions of the service, whose decisions are final. By subscribing to the service users are declaring to be 18+, accepting terms and conditions and to receive free promotional messages about this and related services operated by content provider.

To deactivate the service, send STOP to 43927. This promotional competition will start on 11/04//2016 00:00hr, and it will end on 30/06/2016 23:59hr. If you have any queries about our service please contact our Support Officer at info@epicbundle.co.za. This publishing is operated and controlled by BestPlace4you. By participating, you agree to receive marketing from us and our partners. Support line: 0112185615. Prices inc VAT.

www.waspa.org.za



The Member then alleged that the complainant had inserted his MSISDN (i.e. cell phone number) in the space above the 'subscribe' button on the 18th April 2016 at 13:33:56 and this triggered a subscription request SMS to the complainant. The complainant would have been requested by MTN to:

'Accept/Confirm' or 'Decline/Reject' the first opt-in request to join the subscription service at R7/day.'

The complainant allegedly then waited until 19th April 2016 at 07:27:26 to reply positively to the request to join the subscription service. As evidence of this Member provided MTN's logs of the transaction which ostensibly proves that the complainant responded positively to the request to join the subscription service, although the actual response by the complainant is not provided.

The Member then went on to confirm that a full refund of R257.00 was offered to the complainant although it does not appear that the refund has actually been paid to the complainant. The Member then went on to deal with each of the clauses that were alleged to have been breached by the Member (please refer to Annexure A).

This same response by the Member included an Annexure in which a representative of MTN stated as follows on the 26th August 2016:

The subscriber had a token(4621173631555319357) which was in a pending state on 2016-04-18 13:33:56 . An SMS was then sent by the subscriber to TBB on 19-04-2016 at 07:27:26 which changed the state of the token from pending to active which suggests that the subscriber activated the content subscription service. We can see that the SMS was sent but are not able to view the content of the SMS as this is illegal and will need to be verified by the Fraud team if need be.

As a result, there is an allegation that an SMS was sent by the complainant on the 19th April 2016 at 07:26:26 which activated the subscription service but the actual content of the SMS is unknown as MTN.

A second annexure from Smartcall Solutions is also attached. Essentially this annexure confirms that the customer validly entered into a subscription agreement and provides details of the token provided to the customer as well as the details of the welcome message to the customer which reads:

2016-04-19
07:27:41 AM
[complainant number] DELIVRD

Welcome to your R180 Data Bonus service. Visit www.epicbundle.co.za and enter Password: [complainant password], R7/day, to optout txt stop, Support: 0115074630.

Complainant's response

The complainant then responded by asking for the attachment that was sent to the Member as well as an extension of the deadline.

WASPA response

WASPA's secretariat responded by providing a copy of the response to the complainant. The matter was thereafter sent to formal adjudication.

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.

4.3. Members must conduct themselves lawfully at all times and must

co-operate with law enforcement authorities where there is a legal obligation to do so.

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

12.3. A member must confirm that any MSISDN entered into a web page by a customer is, in fact, an MSISDN belonging to that customer. This must be done in one of the following ways, or in a functionally equivalent manner:

(i) The customer's mobile carrier can provide the member with confirmation.

(ii) The member can send an SMS to the customer's MSISDN containing a unique password or PIN which, when entered on a web page, validates the handset number.

(iii) The member can send an SMS to the customer's MSISDN containing a unique link, which, when clicked, validates the handset number.

15.9. The confirmation step for any subscription service must require an explicit response from the customer of that service. The confirmation step may not be performed in an automated manner in such a way that the process is hidden from the customer.

15.10. For all subscription services initiated via a web page, there must be an additional specific confirmation step before the customer is billed. This confirmation step must be provided in one of three ways:

(i) The customer's mobile carrier may implement the confirmation step.

(ii) The member can provide the customer with a "confirmation page".

(iii) The member can send a "confirmation message" to the customer. The customer must not be charged for the confirmation message.

15.12. For all subscription services initiated by the sending of an SMS, there must be an additional specific confirmation step before the customer is billed. This confirmation step must be provided in one of two ways:

(i) The customer's mobile carrier may implement the confirmation step.

(ii) The member can send a "confirmation message" to the customer. The customer must not be charged for the confirmation message.

15.19. A reminder SMS message must be sent to a subscription or notification service customer within 30 days of the initiation of the service, and once per calendar month thereafter. This message is referred to as the "reminder message". The customer must not be charged for any reminder message.

18.2. The cost for a single entry into a promotional competition must not exceed R1.50.

18.4. An offer to participate in a promotional competition must clearly state:

(a) the competition to which the offer relates;

(b) the steps required by a person to participate in the competition;

(c) the full cost to enter the competition;

(d) the basis on which the results of the competition will be determined;

(e) the closing date for the competition;

- (f) how the results of the competition will be made known;
- (g) how a person can obtain a copy of the competition rules; and
- (h) how the successful participant can obtain the prize.

Decision

From the above correspondence it is clear that the subscription service works as follows:

- 1) The user navigates to the relevant web page on his cell phone (or possibly computer – it is unclear whether this page would have rendered on a computer or on a cell phone only);
- 2) The user then inserts his cell phone number into the allotted space and clicks on 'subscribe';
- 3) An SMS is generated by the Mobile Network Operator which provides the user with the opportunity to confirm the subscription to the subscription service or refuse it;
- 4) Once an SMS is sent by the user to the MNO confirming his participation in the subscription service a welcome message is sent to the user.

Based on the evidence provided the Member would have us believe that the complainant validly subscribed to the subscription service (by performing the acts mentioned above). However there are various discordant factors, namely:

- 1) We are unable to know the content of the SMS reply that allegedly came from the complainant's MSISDN. Instead we are assured by the Mobile Network Operator (MTN) that the system would have rejected the subscription had the SMS not contained the correct text.
- 2) Despite providing the 'proof' that the complainant did in fact subscribe both the Member and Smartcall Solutions (the Aggregator) offered a full refund to the complainant. Indeed the Member apologized for a 'typographical error' and stated: *'We apologize on our behalf as we determined the cause for subscribing the number [Complainant's cell phone number] was a result of typographical error. The number was entered by mistake from our side of technical support.'*

What is particularly concerning about the statement by the Member is that it was even possible for technical support to 'enter the number'. As MTN and the Member were at pains to emphasize it should not be possible for the complainant to be subscribed to the subscription service without MTN confirming the SMS by the complainant, and yet – somehow – the Member's technical support staff were capable of unilaterally activating a subscription service by inserting the incorrect digits.

Of course it would have been helpful had the complainant provided any evidence at all that the SIM card in question was in fact used in an alarm system (for example an email from the alarm company operating the alarm system confirming that it used that SIM card, alternatively any billing information or a picture of the SIM card within the alarm system). However even then it is

possible (if somewhat unlikely) that the complainant could remove the SIM card from the alarm system on a temporary basis and then replace it.

However, based on the balance of probabilities (which includes the Member's acknowledgement of fault) I find that the complainant did not choose to enter into the subscription service but was rather 'auto-subscribed' to the subscription service by the Member's staff. The failure to obtain the necessary approval from the complainant breaches clause 15.10 of the WASPA Code of Conduct.

A further allegation was that the service provided by the Member breached clause 18.2 and 18.4 of the WASPA code of conduct as the subscription service included 'promotional competitions'. This is a critical aspect of the Member's subscription service as the Member agrees that the subscriber would be entered into multiple competitions where the subscriber would have the opportunity to receive prizes from each of the competitions.

As a result it is necessary to consider the definition of 'promotional competitions' in order to establish whether the Member's subscription service would be classified as such. In terms of clause 18.1 of the WASPA Code of Conduct a 'promotional competition' is: '...any competition, game, scheme, arrangement, system, plan or device for distributing prizes as defined in section 36 of the Consumer Protection Act, 2008.'

Section 36 of the Consumer Protection Act defines the following terms:

- a) "**participant**" means a person who enters, competes in or is otherwise eligible to win a promotional competition;
- (b) "**prize**" includes a reward, gift, free good or service, price reduction or concession, enhancement of quantity or quality of goods or services, or other discounted or free thing;
- (c) "**promoter**" means a person who directly or indirectly promotes, sponsors, organises or conducts a promotional competition, or for whose benefit such a competition is promoted, sponsored, organized or conducted; and
- (d) "**promotional competition**" means any competition, game, scheme, arrangement, system, plan or device for distributing prizes by lot or chance if
 - (i) it is conducted in the ordinary course of business for the purpose of promoting a producer, distributor, supplier, or association of any such persons, or the sale of any goods or services; and
 - (ii) any prize offered exceeds the threshold prescribed in terms of subsection (11), irrespective of whether a participant is required to demonstrate any skill or ability before being awarded a prize.

The Member goes further and even states that this is a 'promotional competition' (see the screenshot of the terms and conditions above). Based on the very wide definition of promotional competition as well as the use of the term by the Member I find that that the description of the competitions provided by the Member fit within the definition of 'promotional competitions' and

as such the Member is obliged to comply with clauses 18.2 and 18.4 of the WASPA Code of Conduct.

Regarding clause 18.2 of the WASPA code of conduct it is common cause that the Member's subscription service charges R7.00 per day as a subscription charge. Clause 18.2 of the WASPA Code of Conduct makes it illegal for a subscriber to be charged more than R1.50 per entry into a competition. (It should be noted that there is a disparity between section 36(3)(a) of the Consumer Protection Act and clause 18.2 of the WASPA code of conduct, although for our purposes we are only governed by the WASPA code of conduct and so the provisions of section 36(3)(a) of the CPA do not apply). Thus if the participant were to get 5 separate entries into promotional competitions per day it would be theoretically possible for the total cost to the customer to be R7.50 per day (or less) and this in turn would satisfy clause 18.2 of the WASPA Code of Conduct. This in turn means that a customer would need to get at least 150 entries into promotional competitions per month for the subscription cost to be justified. The Member does allege that the customer would be entered into over 200 competitions but we are not provided with the terms of those competitions (as required by clause 18.4) and bearing in mind the Member denies that the competitions are in fact promotional competitions it is clear that the Member does not consider compliance with clause 18.4 to be necessary. Indeed, this is explicitly stated by the Member in clause 25 of the Member's reply. However, for the purposes of clause 18.2, we do not have sufficient evidence to make a conclusive finding that clause 18.2 has been breached.

Regarding clause 4.2 (professional conduct) the Member did not provide any indication of a lack of professionalism and so this allegation is dismissed.

Although there is an argument that the Member's conduct contravenes the Consumer Protection Act and as such contravenes clause 4.3 (lawful conduct), there has been no finding to this effect by a court or similar administrative body and by now it is trite that WASPA adjudicators may not make a finding of criminal conduct on the part of Members, but instead can refer the matter to the appropriate administrative body. In this case the appropriate body that would deal with this matter would be the National Consumer Commission.

The allegation regarding clause 5.4 (fair and honest dealings) is more difficult to reconcile. On the one hand the Member admitted to incorrectly subscribing the complainant and offered a refund and on the other the Member persisted with its claim that the complainant was correctly subscribed. These two versions of mutually contradictory and as a result I find that clause 5.4 was contravened by the member.

It is currently unclear that the method used by the Member to subscribe customers is functional or is functionally equivalent to the requirements of clause 12.3 of the WASPA code of conduct. However based on our earlier finding that the Member contravened clause 15.10 it follows that, on the balance of probabilities, the Member is found to have contravened clause 12.3 and for similar reasons clause 15.9.

The allegation relating to clause 15.19 is more difficult. Based on the offer for the refund to the customer of R257.00 it follows that, at R7.00 a day, the Member is of the opinion that the complainant was subscribed to the service for approximately 36 days from the 18th April 2016. Clause 15.9 of the WASPA Code of Conduct requires that a reminder message be sent to the subscriber within 30 days and thereafter every calendar month. Once we have established that a subscription service did come into operation the onus to prove that the reminder message was sent as required by clause 15.9 of the WASPA Code of Conduct falls on the Member. Despite being given the opportunity the Member provided no proof to indicate that a reminder message was in fact sent and as a result, by default, I am forced to assume that it was not as required by clause 15.9. As a result clause 15.9 has been breached by the Member.

Sanctions

This matter raises several important issues, of which the nature of the service by the Member (a promotional competition) and the automatic subscription to a subscription service are the most serious.

The Member clearly misunderstands the nature of the service provided and whether it is in fact a promotional competition as defined by the Consumer Protection Act as read with the WASPA Code of Conduct. It is clear that the Member believes the subscription service is not subject to the legislative requirements governing promotional competitions as found in the Consumer Protection Act and in the WASPA Code of Conduct and has made no effort to comply with the various requirements. In the circumstances I find that:

- The subscription service offered by the Member known as the 'R180 Data Bonus' hosted at www.epicbundle.co.za must be suspended pending compliance with clause 18.4 of the WASPA Code of Conduct and clauses 12.3, 15.9 and 15.10 of the WASPA Code of Conduct. The Member is ordered to advise the WASPA media monitor of the proposed resumption of the service at least 3 calendar days before the service is live again in order for the Media Monitor to evaluate the service and, if necessary, initiate a further complaint against the Member;
- The Member is warned to ensure that it also complies with clause 18.2 of the WASPA Code of Conduct;
- The Member is fined R50 000 for breaching clauses 12.3, 15.9 and 15.10 of the WASPA Code of Conduct;
- The Member is instructed to refund the complainant in the amount of R257.00;
- The Member is fined R5 000 for failing to have fair and honest dealings with the complainant and in so doing breaching clause 5.4 of the WASPA Code of Conduct.

Matters referred back to WASPA

None

Annexures: Summary of important communications and graphics

Member's response on the 26th August 2016

17. Clause 4.2. We respectfully submit that we are not in breach of this clause. We have supplied all the details to [complainant's name] when he requested the logs and we have also responded in a professional manner to the complainant and WASPA.

18. Clause 4.3. We respectfully submit that we are not in breach of this clause. The service supplied to the customer was lawfully. We did co-operate with law enforcement authorities and provided all information to the complainant as requested.

19. Clause 5.4. We respectfully submit that we are not in breach of this clause. The Complainant's mobile number was entered on the WAP site and initiated interaction with our services and provided confirmation with the mobile network operator to initiate the service. The logs provided further support our submissions.

20. Clause 12.3. The confirmation message was sent by the mobile operator and the confirmation received from the MSISDN in question was the confirmation.

21. Clause 15.9. We respectfully submit that we are not in breach of this clause. The confirmation step for the service was sent by the mobile network operator via SMS and a confirmation sms was received from the MSISDN. The logs provided further support our submission.

22. Clause 15.10. We respectfully submit that we are not in breach of this clause. The confirmation step for the service was sent by the mobile network operator via SMS and a confirmation sms was received from the MSISDN as per clause 15.10 (i) . The logs provided further support our submission.

23. Clause 15.19. We respectfully submit that we are not in breach of this clause. The user terminated the subscription with the network prior to the reminder messages were sent.

24. Clause 18.2. We respectfully submit that we are not in breach of this clause. The service is not a single entry promotional competition, but a subscription service whereby the user subscribe to the service and receive multiple entries into the service to stand a chance to win multiple prizes. The service is a subscription service whereby the subscriber will be entered into over 200 online promotions. The details of these promotions are readily available to the user and when the client signs up to the service the information, methodology and cost are clearly visible to the user. The service is not a single entry into a competition service and therefore the user is not billed for a single entry into a competition, therefore the R1.50 per single entry into a competition does not apply to this service.

25. Clause 18.4. We respectfully submit that we are not in breach on this clause. The service is not a single entry promotional competition, but a subscription service whereby the user subscribe to the service and receive multiple entries into the service to stand a chance to win multiple prizes. The service is a

subscription service whereby the subscriber will be entered into over 200 online promotions. The details of these promotions are readily available to the user and when the client signs up to the service the information, methodology and cost are clearly visible to the user. The service is not a single entry into a competition service and therefore the user is not billed for a single entry into a competition, therefore the requirements as per Clause 18.4 for promotional competitions do not apply to this service and as such this clause is not applicable to the current matter.