



Wireless Application Service Providers' Association

Report of the Adjudicator

Complaint number	#31773
Cited WASPA members	High Gable Limited (1486)
Notifiable WASPA members	Not applicable
Source of the complaint	WASPA Media Monitor
Complaint short description	Marketing material that is untrue and induces an unacceptable sense of fear or anxiety Misleading marketing
Date complaint lodged	2016-10-06.
Date of alleged breach	On or about 2016-10-06
Applicable version of the Code	Version 14.5
Clauses of the Code cited	4.2., 4.9.(c), 5.1., 5.2., 5.4., 5.5., 15.4
Related complaints considered	Not applicable
Fines imposed	A fine of R150,000.
Other sanctions	Not applicable.
Is this report notable?	Not notable

Summary of notability	Not applicable.
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Initial complaint

The initial complaint resulted from a test run by the WASPA Media Monitor on 6 October 2016 on a campaign called "Update your WA campaign", running on both the Vodacom and MTN networks. The Media Monitor found that the campaign was misleading in that from the outset it is designed to mislead a consumer into thinking that they need to update their WhatsApp and that they would be downloading the latest version of the app.

The banner advertising reads "Your version is expiring." The network hosted message then read "Update your WA" and the landing page states "Enjoy your latest WA version". The page further indicated that the update would be free. The welcome message then read: Update your WA". Once registration was complete, however, there was no WhatsApp update located within the service. The pages simply provided content for the subscription service BuzzyLife.

The WhatsApp messages received looked as follows:



After receiving this message the page auto-directed the user to a double opt-in page for Update Your WhatsApp and then proceeded to click on the "Subscribe" call to action button. The banner (as shown below) directs the consumer to Click Below to Update. In fine print, much smaller than the banner there is an indication that this is a subscription service at R7.00 per day. The call to action button is styled "Subscribe".

/Day . Please accept or decline the request by selecting the appropriate option below.

Update your WhatsApp	
Subscribe	>
Decline	>

The Media Monitor, after having been subscribed, was able to unsubscribe the next day.

The Media Monitor requested that the adjudicator consider a refund of customers of this service.

Member's response

The member responded to the complaint stating that Buzzylife is a mainstream service providing useful tips for books or gardening and also offering updates and features for Whats App. Subscription cost is daily R7 as it stands in our terms. Every customer can join the service by passing 2 steps for subscription and accepting our terms of use.

When investigating the complaint the Member found that the Media Monitor's number was never subscribed to the service because it was blocked. The number was unblocked for future monitoring.

The very aggressive pre-page was done by their affiliate as they do not approve of this kind of advertising. due to negative experiences in the past. The Member acknowledges that this pre-page is in breach of clauses of the WASPA code and that they have put in an effort to stopping this practice and instructing their partners about the requirements of the WASPA code. Such pre-pages will not be used again in future and relations with the affiliate has been broken off.

The Member states that it was alarmed that there were no Whats App updates available on the website and that it was probably caused by a faulty update. There was no intention to deceive customers. The Member also offered to refund all users who were affected by this malfunction.

The member further stated that their dealing with the public, customers, other service providers and WASPA is always in professional manner. We strive to provide quality service to our customers in compliance with WASPA's regulations. In that matter we co-operate and make changes to segments which are in breach.

In regard to the breach of clause 4.9 (messages inducing a sense of fear and anxiety) the Member states that:

We were not in a breach of this clause as pre-page (stated above) was not uploaded to the campaign by us. Our company was not aware about Affiliate's practice and our partnership with them was suspended with immediate effect.

Adjudicator's request for further information

I referred a request to the Member for further information, namely:

1. What is the relationship between High Gable Ltd and Buzzylife?
2. Who is the Affiliate referred to in the response.
3. What is the relationship between High Gable and the Affiliate?

4. Does High Gable approve any marketing campaigns by the Affiliate prior to such marketing campaign?
5. Does the agreement between High Gable and the affiliate provide for an obligation by the Affiliate to comply with the WASPA Code of Conduct and recourse in the event of a breach of the Agreement as required by the WASPA Code?
6. A copy of the agreement
7. Copies of all communications subsequent to the complaint between High Gable and the Affiliate.
8. What is the nature of the WhatsApp services and updates provided by Buzzylife alluded to in the response. Are updates to WA not provided by WA itself?

The Member replied as follows:

1. High Gable is a service provider and Buzzylife is a service provided by High Gable.
2. The Affiliate used in this campaign was Beintoo with whom we discontinued cooperation.
3. Referring to our answer above, we discontinued cooperation with the Affiliate.
4. We had good relationship with the Affiliate until such violation of regulations occurred.
5. We discuss with all our Affiliates WASPA's Code of Conduct. It is hard to monitor behavior of Affiliates as they are working outside the jurisdiction of the Code and therefore only measure appropriate is to discontinue cooperation with such Affiliates which was taken in this case.
6. Please note that we discontinued this agreement.
7. We did not communicate with the Affiliate regarding this complaint as we only notified them about termination of cooperation in the future business.
8. Buzzylife allows customers all updates and novelties related to WhatsApp. Furthermore, it offers mainstream features, news and tips on one place.

Sections of the Code considered

The following sections were considered:

Extent to which the Code applies to third party services

3.6. Members must ensure that any customer, supplier, affiliate or sub-contractor who is not a member of WASPA, but is providing or marketing services covered by this Code of Conduct, provides and markets those services in a manner consistent with the requirements of this Code of Conduct.

3.7. A member is liable for any breaches of this Code of Conduct resulting from services offered or marketed by a customer, supplier, affiliate or sub-contractor if that party is not also a member of WASPA. If the member can demonstrate that they have taken reasonable steps to ensure that that party provides and markets services in a manner consistent with the requirements of this Code of Conduct, this must be considered as a mitigating factor when determining the extent of the member's liability for any breaches.

Professional conduct

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.

Decency

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

...

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

5. Customer relations

Service levels

5.1. Members must not offer or promise services that they are unable to provide.

5.2. Services must not be unreasonably prolonged or delayed.

...

Provision of information to customers

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.

General requirements

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".)

Decision

The provisions of section 4.2 stipulate very broad obligations that are hard to define in the absence of evidence as to what constitutes 'professional conduct'. It is also possible that conduct which can be regarded as infringing section 4.2, may also constitute conduct of other sections under the Code. In this case there is clear evidence of contraventions of other sections, obviating the need to rely on this very broad and general provision.

There is insufficient evidence before me of a contravention of sections 5.1 or 5.2. Although the services were not available at the time of the Media Monitor's monitoring, the explanation by the Member is plausible and must be accepted.

There is no evidence of any contravention of section 15.4 as neither the promotional material nor the Member's pages required a customer to join the subscription service to claim an existing reward, to redeem loyalty points or similar benefit. The benefit of receiving a free Whats App update seems rather inconsequential and reliance on that for a contravention is insufficient.

The Member acknowledges that the promotional material used by its affiliate is in contravention of the Code. The Member terms the promotional material used as 'very aggressive' and that it is in breach of the Code without referring to any specific section of the Code.

I agree that the promotional material is in breach of the Code in that it is untrue or deceitful by indicating to the customer that his or her Whats App services will be terminated unless updated in reaction to the call. The message is sent as a Whats App message creating the impression that it is a message sanctioned by Whats App. Such official looking messages are designed to instil a sense of fear or unease in recipients and are blatantly untrue. The getup of the landing page is also not clearly an invitation to joining a subscription service. There is no indication of what this service is, other than having your Whats App updated and extended. There is no mention of Buzzylife or the services it offers. It is clearly designed to deceive.

It is to be commended that the Member has broken off its relationship with the affiliate, but I do not understand the reluctance of the Member to share its communications with this recalcitrant affiliate upon my request. My request for a copy of the agreement with the affiliate was also avoided rather with vague assertions.

This type of deceptive marketing is rife in the marketplace and the Member acknowledges that it has had bad experiences with this type of marketing in the past. The Member has however not shared any detail of how it monitored the activities of its affiliates despite being aware of this type of behaviour by independent third parties who are not WASPA members. It is all too easy for members to hide behind mostly anonymous affiliates who contravene the clear provisions of the Code in promoting members' interests.

This is the reason why members are held accountable for contraventions perpetrated by such third parties in terms of section 3.7. Members are, or should be aware, that the conduct of their affiliates or third parties acting on their behalf will be visited upon them. Members are in a position to ensure compliance by third parties in making them contractually liable for any contraventions, especially if they are aware of this kind of conduct by third parties. Whether the Member has done so in this instance, is not clear, despite its acknowledgement of bad experiences in this regard in the past.

It is held that the Member has contravened section 4.9 of the code as the promotional material in question are designed to induce an unacceptable sense of fear or anxiety that the customer's Whats App account will be suspended.

It is also held that this is simultaneously a contravention of sections 5.4 and 5.5 as this promotional campaign is based on untrue and deceitful conduct as acknowledged by the Member. There was never any danger of a customer's Whats App account being terminated, nor was the primary aim of the campaign to update their Whats App apps. The primary aim of the campaign was to get customers to subscribe to a subscription service of which no detail is provided, other than the WhatsApp update which was in any event not possible.

Sanctions

In deciding on sanctions for the various breaches it is appropriate to consider the nature and seriousness of the contraventions, mitigating factors and previous contraventions by the

Member. For purposes of the sanction the contravention of sections 4.9, 5.4 and 5. will be taken as one since it resulted from the conduct of the affiliate as part of a single marketing campaign.

Deceptive marketing is a serious matter, especially where it preys on the legitimate fears of consumers and customers. Social media apps form important aspects of consumers' lives in the world we live in today. Being cut off from friends or family, even for a short time due to the termination of such apps, is serious.

The Member is fully aware of this kind of activity in the marketing place according to its own admission and has also been sanctioned by WASPA in the past for similar contraventions:

- (a) 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.
- (b) 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.
- (c) 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.
- (d) In complaint 30981 the Member was once again sanctioned for contravention of, inter alia, sections 5.4 and 5.5 when it ran a deceptive promotional campaign. A fine of R50,000 was imposed.

The Member has repeatedly contravened sections 5.4 and 5.5 dealing with deceptive and dishonest marketing. It should be more than aware of this type of marketing and should have taken extra precautions, given its own record that its affiliate would not contravene the Code.

It is a mitigating factor in terms of section 3.7 where a member is liable for the conduct of a third party, if the member can demonstrate that they had taken reasonable steps to ensure that that party markets services in a manner consistent with the Code. Despite being invited to do so, the Member has failed to demonstrate that it had taken reasonable steps to ensure compliance by its affiliate. Instead, the Member simply relied on some general non-specific statements paying lip-service to this requirement.

A fine of R150,000 is imposed.

Although the Media Monitor requested that the member be ordered to refund all consumers who subscribed as a result of this campaign, it is regarded as impractical to make such an order as it would be nigh impossible for WASPA to monitor compliance with such an order.