



**Wireless Application Service Providers' Association**

## Adjudicator's Report

Complaint number	32834
Cited WASPA members	W2M GmbH (1127)
Notifiable WASPA members	Mira Networks (Pty) Ltd (0011)
Source of the complaint	Public
Complaint short description	Inconsistent pricing
Date complaint lodged	11 February 2017
Date of alleged breach	10 February 2017
Applicable version of the Code	14.6
Clauses of the Code cited	8.7
Related complaints considered	30995/30996/30999
Fines imposed	<i>None</i>

Is this report notable?	<b><i>Not notable</i></b>
Summary of notability	<i>na.</i>

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## Initial complaint

The complaint states:

I was browsing the internet and came across an ad for a content service. Pricing is shown as R4 per day. However, the confirmation page shows R6 per day. This is against section 8.7 of the code.

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## Member's response

The Member did not deny that the pricing inconsistency was a breach.

It explained that it used an affiliate marketer who linked the wrong banner to the wrong campaign. It also submitted that it uses monitoring software to oversee the actions of the affiliate marketers.

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## Clauses

8.7. Pricing information must not be misleading. The price must be the full retail price of the service, including VAT. There must not be any hidden costs over and above the price included in the pricing information.

## Decision

It is by now a well-established principle of WASPA that the member is responsible for the actions of the affiliate marketers, and that a breach at the hands of the affiliate marketer is essentially a breach at the hands of the Member.

There is interesting precedent on the issue, which is discussed in detail in matter 30995/30996/30999 which discusses the history of this situation:

*The Member in this matter does not deny that the clauses were breached, but submits that the breaches were the actions of a third party affiliate.*

*Given this, I am not charged with the question of whether the cited clauses relating to the content and process are breached – it is common cause that this is the case. It is also now a well-established principle in WASPA decisions that WASPA members are responsible for the actions of affiliate marketers.*

*In matter 26211, the Appeal Panel was charged with a situation where an affiliate marketer has committed an act that the WASP immediately acknowledges as wrong, but seeks to mitigate because of the fact that it was an affiliate marketer. In that matter, the Panel said:*

*At the core of this complaint is the very pertinent question of how much supervision and control a WASP is expected to exercise where it chooses to advertise and promote its websites and services using third parties and affiliate advertising networks in light of the overarching requirements of clauses 4.2, 5.4 and 5.5 of the Code.*

*In outsourcing advertising and promotion for its services to an affiliate who, it would appear, was either expressly or tacitly permitted by the member to use further third parties without needing to run either the identity of those parties by the member or the content of the material being used to promote the member's websites and services, the Appellant took a risk of the advertising for its services being misleading, deceptive and unfair. The Appellant itself states that, "Often, in these cases, the promotions are delivered on blind networks, and Advertisers are unaware of who the publishers are to maintain business interests". In other words, because the affiliate "delivers" the advertising, the WASP does not concern itself with the details of the actual advertising itself.*

*Clause 1.2 of the Code makes it clear that an objective of the Code is to ensure that members operate in accordance with ethical and reasonable business practices. This objective is codified into express obligations in clauses 4.2 and 5.4 of the Code which stipulate that:*

*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.*

*Misleading and deceptive advertising is not fair. It appears that in this matter it is not contested that the actions of Payripo.com were not acceptable, were grossly misleading and prejudicial to members of the public.*

*This Panel does not consider that it is professional to simply allow unchecked use of advertising by unidentified affiliates who the member appears to know often publishes advertising using “blind” networks consisting of other persons who do not comply with the Code and who do not need to seek the Principal’s approval on campaigns and strategies.*

*This Panel therefore upholds the finding that the Appellant has breached clauses 4.2 and 5.4 of the Code.*

*In matter 26420, the Appeal panel reached the same conclusion via a slightly different route:*

*The Panel notes that it is common cause that the material in question, alerting consumers to a virus, was unacceptably misleading.*

*On the question of liability, the Panel notes that one need look no further than the Code, which states:*

*3.6. Members must ensure that any customer who is not a member of WASPA, but is providing services covered by this Code of Conduct, provides 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 by a customer, if that customer is not also a member of WASPA. If the member can demonstrate that they have taken reasonable steps to ensure that that customer provides 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.*

*We can therefore accept that the Appellant is liable for the conduct of its affiliates, whether directly or indirectly employed.*

*The only remaining question is whether the Appellant took reasonable steps to ensure that the affiliates complied with the Code. The Appellant set out a number of processes that it has in place, all of which indicate a concern around this type of behaviour and a monitoring thereof.*

*However, it remains that the Appellant allows affiliates to run campaigns that are not signed off and are by unidentified publishers. In contracting to an affiliate who it would appear used further third parties without needing to run either the identity of the party by the Appellant or the content of the material by the Appellant, the Appellant took a risk. It would appear in these cases that because the Advertiser “delivers”, the WASP does not concern itself with the details of the transaction.*

*This Panel is of the opinion that this is not the reasonable level of care envisaged by Clause 3.7. More pertinently, this is not behaviour that is consistent with the following clause:*

*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.*

*The Panel notes for the guidance of the Appellant and other WASP’s that it considers the contractual resolution of these issues – which appear to be the current trend in both complaints and appeals – to be simple. If a WASP requires all campaigns to be signed off, and an Affiliate fails to do so, that affiliate is in breach of contract. In the current environment, it is simply not reasonable for a WASP to allow unapproved campaigns to run. It is simply unacceptable for WASPs to hide behind the unauthorised behaviour of unidentified affiliates.*

*The Panel also notes that, as the Adjudicator pointed out, if the Appellant has indeed put good contractual protections in place, the fine will be recoverable from the Affiliate who appears to be the party most directly responsible for the campaign.*

*As in matter 26211, Clauses 4.2 and 5.4 are currently before me.*

*The precedent above is clear that the Member cannot simply “blame” the affiliate marketer. In allowing an affiliate marketer to run unapproved campaigns, they took a risk and must be liable for the fallout of that risk.*

The matter at hand is somewhat different in that ONLY Clause 8.7 was cited. The principle of natural justice and express provisions of the WASPA Code require that I cannot find a party guilty of breach of a clause that is not cited.

However, Clause 3.7 acts as an interpretation tool, and as a guideline for sanction.

**I therefore find that Clause 8.7 was breached.**

However, the following must be considered:

- The breach is a moderate one. By the time the consumer subscribes, it appears *ex facie* that they are aware of the correct price;
- The error is one that makes sense as a *bona fide* error – this is not a situation where non-compliant banner has been created but rather one where a compliant banner has been linked to the incorrect campaign;
- The Member appears to take reasonable steps in oversight of affiliate marketers in that it monitors the campaigns. This goes to the requirements of Clause 3.7;
- The member has correctly submitted that they are not a serial offender.

**I therefore do not consider a sanction appropriate in this matter.**