



**Wireless Application Service Providers' Association**

## Adjudicator's Report

Complaint number	33053
Cited WASPA members	Hulk Mobile Limited (1689)
Notifiable WASPA members	Basebone Pty Ltd (1344)
Source of the complaint	Media monitor
Complaint short description	Non compliant banner advertising
Date complaint lodged	28 February 2017
Date of alleged breach	
Applicable version of the Code	14.6
Clauses of the Code cited	3.5, 3.6, 4.2m 5.4, 5.5, 12.1, 12.4, 12.5 (a,b), 22.4
Related complaints considered	32834

Fines imposed	<i>R10 000 for cumulative breaches, payable immediately. R50 000 suspended.</i>
Is this report notable?	<i>Notable</i>
Summary of notability	<i>Guidance on approach to unidentifiable Affiliates.</i>

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## **Initial complaint**

The complaint is against two campaigns.

### *Campaign 1*

The issues for this complaint are that there is an explicit adult banner on Facebook whereas Facebook is a platform where adult marketing is not permitted. The banner does not display pricing, call centre number or a link to T&Cs.

### *Campaign 2*

This banner has no pricing, call centre number or T&Cs.

The Monitor submits that because the banners do not have pricing, and the price is first presented at the second phase of opt in, this is not a double opt-in process.

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## **Member's response**

On campaign 1, the Member pointed out that the post was a Facebook post posted by a Facebook user. It appears that the post has been removed and the Member was unable to trace who was responsible.

The Member said, "The only reason that this post is linked to a South African campaign is because the VPN software utilised, spoofs the Affiliate Redirects into forwarding the crawler to a South African advert (due to the IP displayed by the crawler)."

I requested that the Member set out the steps that they take to ensure compliance by affiliate marketers, and they submitted:

“As already indicated in the documentation provided to the Adjudicator, the MM did not provide us with the whole details regarding the URLs involved in these cases, therefore we had no chance to properly identify the Affiliate and proceed with the blacklisting actions and withdrawing of payments we have normally in place.

Moreover, in this case, the illegal/misleading advertising was posted on FB, a platform where we, as well as the MM and/or WASPA, have little to no direct influence on.

If provided with the complete URLs sequence, we could have ran our internal investigation, identified the Affiliate and proceeded with the blocking of the same and the withholding of the relevant payments.

Unfortunately, this was not the case and the only action possible on our side was to check closely FB and make sure the reported Advert was not displayed anymore.

We have tried several times to contact FB in order to address this matter but with no results nor feedbacks whatsoever. We have also informed our Aggregator of the same and they informed the MM and WASPA of the issue we were facing.

Since the very beginning of this issue (the general FB issue on the ZA market) we have fully collaborated with the MM taking all the required actions in due course and trying all the measures in our hands to avoid this from happening.

We have drastically reduced the advertising across the board and tried to avoid any dubious traffic source accepting the consequent loss of profits, however with no significant results.

Through our Aggregator, we have also asked the MM and WASPA to intercede in our favour with FB and try to have their help on this, but apparently neither us nor WASPA can do anything to prevent this situation.”

In relation to the second issue, the Member submitted:

When providing an Affiliate Networks with campaigns to be used, we also provide them with the relevant and compliant banner advertising.

Unfortunately, in this case it seems that an unapproved/modified banner was used. Due to the fact that the URL linking banner to the Network Confirmation page was supplied, the possibility to identify the Affiliate Network promoting the advertising, impossible. We have

however sent out a reminder to all partners that they must use the approved banner ads in all occasions.

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## Clauses

3.5. 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, is aware of the requirements of this Code of Conduct.

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.

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. Web advertising

#### Display of pricing information

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 adjacent to the call-to-action.

#### Display of minimum terms and conditions

12.4. For any web page advertising a service for which there is not a subsequent confirmation step containing a link to the terms and conditions, the minimum terms and conditions for the use of the service must be clearly displayed.

12.5. The minimum terms and conditions displayed on any web page must include at least the following information:

- (a) a customer support number, and
- (b) a link to a web page where the full terms and conditions for the service are available.

22.4. Promotions for adult services must be in context with the publication or other media in which they appear. Services should be in context with the advertising material promoting them. The content of a service should not be contrary to the reasonable expectation of those responding to the promotion.

## Decision

I have struggled with this decision, and I will set out why, in an explanation of the decision and the dilemma that faces both WASPs and WASPA.

It would appear that it is not contested that the material is in breach of the Code. The simple question before me is whether the member is liable. What complicates the question is that the Member claims to be unable to identify the Affiliates in question.

My starting point is that it is now a well-established principle that WASPs are responsible and liable for non-compliant advertising by Affiliate Marketers. I will not revisit this here, but refer the Member to matter 32834, or one of any number of matters similar to that one, for a complete discussion of the issue.

The dilemma that the Members face is that their Affiliate marketers go to extremes to get “the clicks” – to direct traffic to the site in question in order to get the commission payment. Because of the business paradigm, Affiliate marketers are more motivated to direct traffic than to comply with rules or to account to the Members for their behaviour.

The Member has indicated that their normal *modus operandi* would be to trace the Affiliate marketer and then take necessary action and withhold payment. This is well and good, but in this case they claim not to be able to trace the two deviant marketers as necessary. I am not convinced of this, but I also have no basis to find that it is definitely not true. So for the purpose of this decision, I accept that the Member cannot trace these advertisers.

This is what I struggled with. Do I hold a Member liable for the behaviour of errant Affiliate marketers that have “gone rogue” and that the Member is unable to control and to discipline. While there is a part of me that feels to do so is “unfair”, I return to some simple basic starting points:

- Members are liable for the actions of Affiliate Marketers;
- Members benefit from the actions of their Affiliate Marketers;
- When Members use Affiliate Marketers, and provide the wherewithal for these marketers to link to their campaigns and get paid for traffic, they take a risk;
- They take this risk knowingly, and because it ultimately benefits them.

This leads me to the following conclusion. If Members take the risk of using various and apparently untraceable Affiliate Marketers, then they must face the liability as well as the benefits. If they are unable to control the situation, then they need to revisit their relationships and business paradigms in order to limit their own liability and the extremely misleading and deceptive practices that the rogue marketers indulge in.

If we allow Members to hide behind the fact that they can't find the responsible marketer, we will face two problems:

- More Members will find themselves unable to find marketers;
- More and more deviant advertising will appear.

For this reason, I find that the Member is liable for the campaigns in question.

These campaigns are in breach of the named clauses.

I note that the Member appears to be a first offender.

I sanction the Member as follows:

- A fine of R 10 000 payable immediately, in respect of the cumulative breaches;
- A suspended fine of R50 000, to become payable if the Member is found liable for another incident relating to the marketing of untraceable Affiliate marketers. This sanction will only be triggered if the adjudicator in the subsequent matter is not satisfied with the steps taken in that particular situation.

It is my hope that this sanction serves as a motivation to engage in more careful and controlled use of Affiliate marketers.