



**Wireless Application Service Providers' Association**

## Report of the Adjudicator

Complaint number	<b>#38553</b>
Cited WASPA members	<b>Tech Garden Media Limited (1484)</b> <b>Basebone Pty Ltd (1344)</b>
Notifiable WASPA members	<b>All</b>
Source of the complaint	<b>WASPA Media Monitor</b>
Complaint short description	<b>Misleading Subscription Services and Dubious Advertising</b>
Date complaint lodged	23 March 2018
Date of alleged breach	19 March 2018
Applicable version of the Code	15.5
Clauses of the Code cited	5.4., 5.5., 5.6a.,8.1, 8.2, 8.7., 8.8., 12.1., 12.2, 15.18(a); (b) and (d) 15.22
Related complaints considered	38551 38552 38554 33364 30643 30621

Fines imposed	<p><b>Tech Garden Media Limited (1484)</b></p> <p>R 100 000, 00, R 40 000, 00 suspended for 6 months from date of adjudication report.</p> <ul style="list-style-type: none"> <li>- 8.2 read with 12.1</li> <li>- 5.5 read with 8.7</li> <li>- 5.4 read with 5.5</li> <li>- 5.5 read with 8.8</li> <li>- 12.1 read with 12.2 inconsideration of 5.4</li> </ul>
Other sanctions	None
Is this report notable?	Notable
Summary of notability	<p>Members must not be in the habit of designing a campaign to appear to be linked to another (separate, unrelated) campaign as well as designing a campaign to appear to be part of a subscription acquisition flow and accessing the content of that service, when in fact it is something completely different (the acquisition flow for another service as the design of a campaign which is structured in a way to deliberately mislead, deceive, lure or bait a consumer is a campaign which is in breach of the essence of this code.</p>

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## Initial complaint

### Manual Test Synopsis

The tester conducted a full manual test. The below demonstrates the journey the tester experienced. Browser cache and cookies were cleared, all active subscriptions were cancelled and a starting airtime balance was established.

The tester browsed the web and clicked on a banner advert which directed the tester to a landing page for the Chatpose (Westbound Direct) subscription service. The tester clicked on the call to action button and was directed to the Network Hosted Confirmation Page (NHCP). The tester confirmed the subscription on the NHCP.

A welcome message was received, and the MSISDN was billed. From the NHCP, the tester was automatically directed to a new landing page (for a different subscription service) and clicked on the Continue call to action button, which directed to a NHCP for the service Mediafolderz (Hammer Mobile). The tester confirmed subscription and was directed to a new landing page (for a different subscription service) and clicked on the Continue button, which directed to a NHCP for the service Pinpress (Tech Garden Media). The tester confirmed the subscription and was directed to a new landing page (for a different subscription service) and clicked on the pop-up banner which directed to a new landing page. The tester exited the browser session at this point, after being directed to various different subscription service landing pages and NHCPs.

The tester inspected his message inbox, and identified welcome messages for 3 different services, and confirmed that billing had occurred on the MSISDN for all 3 services.

The tester inspected the T&Cs on all 3 services to identify the company that was providing the respective subscription services (affiliates members responsible for the services). The tester unsubscribed from the services using the short codes provided in the respective welcome messages, and received the unsubscribe confirmation messages. The tester established a closing balance. Test was concluded.

This complaint is being lodged against the Full Member, as we do not believe that the Full Member has taken reasonable steps to ensure that their clients (Affiliate Members) comply with the provisions of the WASPA Code of Conduct. The misleading way in which these campaigns are marketed and provided result in the Full Members and its clients benefiting from this *modus operandi*.

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### **Member's response**

See attached comprehensive response from member, such is marked **Annexure A**.

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### **Complainant's response**

See attached comprehensive response from Media Monitor team, such is marked **Annexure B**.

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## Member's further response

See attached comprehensive response from member, such is marked **Annexure C**

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## Sections of the Code considered

- 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.
- 5.6A. Members must ensure that customers have ready access to information on how to access and use services.
- 8.2. For a subscription service, the "pricing information" consists of the word "subscription" and the cost to the customer and frequency of the billing for the service. The cost and frequency portion of the pricing information must follow the following format, with no abbreviations allowed: "RX/day", "RX/week", or "RX/month" (or RX.XX if the price includes cents). For services billed at an interval other than daily, weekly or monthly, the required format is "RX every [time period]", with no abbreviations permitted when specifying the time period. Examples of pricing information: "Subscription R5/week", "R1.50/day subscription", "RX every three days", "RX every two weeks". In a case where the total amount is billed in smaller increments over the subscription period, the pricing must still reflect the full price and not the incremental amounts ("R30/month" and not "6 x R5 per month").
- 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.
- 8.8. Content that is promoted in advertising must be the same content that is provided to the customer as part of the advertised service. Advertising must not mislead consumers into believing that it is for an entirely different service or for different content.
- 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.

- 12.2. There must not be any intervening text or images between the call-to-action and the pricing information. Pricing information must be legible, horizontal and presented in a way that does not require close examination. Pricing information must not be obscured by any other information. Pricing information must not be animated. It must not be a requirement that the viewer of an advert has additional software installed in order to see pricing information in the advert.
- 15.22. Any instructions for terminating a subscription or notification service must be clear and easy to understand and should be readily available to customers.
- 15.18. The welcome message must be a single message and may not contain any line breaks or carriage returns. The welcome message must begin with the word “welcome” and then contain only the following additional information:
- (a) the name of the service...
  - (b) the pricing information...
  - (d) instructions for terminating the service...
- (read with Clause 5.5, 8.1, 8.2 and 15.22)
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## Decision

My submission regarding the complaint before me is based on the comprehensive responses from both the media monitoring team as well as the member, it must be noted that there are no short summaries provided with regards to the complaint in this report and the annexures must be read as specifically incorporated herein due to the fact that the parties provide detailed analysis and screenshots to advance their reasoning. My reasoning behind the specific incorporation is that a provision of a summary may water down the responses from the parties and as such may not be beneficial to the membership at large.

While I am impressed with the articulation by both parties, I must caution the use of innuendos and spite that is evident in the responses. The industry as a whole stands to benefit between the members and this body (WASPA) which regulates conduct for the greater good. Members must therefore respect the manner in which such regulation occurs and disagree with respect. Therefore as the Adjudicator, my ruling is based on the evidence presented and such reasoned ruling is that there has been a partial breach of the code; I provide the narrative for my ruling and the basis of my sanction below.

The issues for determination before me are as follows;

***1. The pricing information on the initial banner advertisement does not follow the prescribed format. The pricing is also not clearly and prominently displayed.***

There is no dispute between the parties that, while there are various potential subscription acquisition flows in the industry, the member elected to make use of the “Banner > Landing Page > Network Hosted Confirmation Page (NHCP)”.

The member has therefore made use of the following format, “r15 (r7VC)/day” and such format is improper as it fails to align itself with the requirements of Clause 8.2 of the code in that the pricing utilized by the member is ambiguous and confusing to the consumer. It is nonsensical and for that reason it stands that the member has in fact breached clause 8.2 read with Clause 12.1 of the code.

***2. The pricing information provided on the banner, landing page and NHCP is not consistent.***

The argument put forward by the Media Monitoring team is that “ information that is provided to consumers in general, which would include pricing information, should not be false or deceptive, or presented in a way that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission. In the event that there are different price points per network, this information must be clearly communicated to consumers, so that they are provided with sufficient details to make an informed decision”. In my view this understanding stems from Clause 5.5 read with 8.7 and while I view the statement as true, it must not, in this case be taken out of context in that “The WASPA Media Monitoring Team must bear in mind that the information disclosed on the NHCP cannot be modified by the WASP, hence the discrepancy in the Vodacom case only. That being said, analysing this matter from a contractual/legal perspective, the consumer is: a) accepting a service cost of R15/day on the Landing Page; b) confirming a service cost of R7/day on the Vodacom Confirmation Page; and c) is billed at R7/day across the whole duration of the subscription. This means that actually the consumer is obtaining a service worth R15 for a lower price, that being R7”. While I partially align myself with the evidence placed forward by the member, I do concur with the Media Monitoring team on the issue of inaccuracy and ambiguity, I therefore find that a sanction is appropriate for the member as I find no evidence that the member has advised consumers of the variation in price points albeit such pricing is beneficial to the consumer. The code guard’s against any and all inaccuracy and ambiguity.

***3. After each NHCP the tester is looped into subscribing to a new service. This is done by misleading the tester to think that they are accessing the content for which they just subscribed to, but are in fact baited/ lured/ mislead/ deceived into subscribing to a totally different service.***

The member placed the following before me “What is happening in this case is a pretty common marketing practice, defined as Up-sell or Cross-sell, and it is very common in the VAS industry... The important aspect, in this case, is that the consumer is actually redirected to

further Double Opt-in processes/flows where they are provided with all the information needed in order to provide a conscious consensus to the purchase of such new services. There is not luring or deceiving not misleading action here. The consumer has to complete a full Double Opt-in process before getting subscribed to the cross-sold offer". This practice in itself is one that may be seen as dubious in that, knowledge of the acceptance of each individual offer by the consumer is necessary before it can be said that the subscription was validly concluded, the consumer would need to be made aware of the acceptance so that it could commence to perform his/her part of the bargain. My reasoning is that, the practice of cross sell/upsell where a consumer is looped into a new page every time he/she lands on a new one without the benefit of a change in the offer is suspicious. The member has failed to understand that a large majority of the consumers dealing with such offers are not tech savvy, along with the fact that the consumer has been baited into believing that their Whatsapp is in need of extra services. With the evidence before me, I align myself with the Media Monitoring team in that this situation of "cross-selling and upselling was designed in such a way as to bait/lure/mislead/deceive the consumer, and to deliberately and intentionally facilitate multiple subscriptions without providing clear, honest and fair information to the consumer".

The member may be correct in the that "As far as we know, there is no indication whatsoever under the Code of Practice that limits the rights of a WASPA member to cross-sell/up-sell their traffic to other WASPA members independently if those are competitors or not. As a company we have the right to decide how to conduct our business and what strategies implement while operating in conjunction with our competitors". However, I make no determination on the business practice of the member, rather, I caution the member for the use of the Whatsapp logo as well as the continuous loop of services which in my view indicates to the consumer that they are accessing the content for which they just subscribed to rather than a new service each time and as such it stand that there has been a breach of Clause 5.4 read with 5.5.

#### ***4. Colour of call to action buttons; similar advertising lay-out; lay-out and imaging etc.***

While I may align myself with the argument of the member that "the WASPA Code of Practice does not provide any colours restriction regarding the call to action buttons nor regarding the lay-out of the Landing Pages", I am of the view that there has been a breach of Clause 5.5 read with Clause 8.8 (advertising must not mislead consumers into believing that it is for an entirely different service)as the member here knowingly disseminated information that was deceptive and likely to mislead by ambiguity and exaggeration. The member has fully made use of the exact same colours of Whatsapp, further it has incorporated add on items that are not completely explained to the consumer when the consumer lands on the page of the member. In my submission, the member is ensuring that the colour scheme, logo and font used by Whatsapp are the same ones used by them. This in itself is extremely deceptive and misleads the consumer. Whatsapp and the campaign advertised by the member are separate campaigns and again I caution the member on the issue of possible intellectual property breaches (I make no finding on the issue of the use of unauthorized intellectual property and merely caution the member herein).

**5. The services being offered on the landing pages do not correspond with the information presented on the NHCP.**

I note the submission by the member that “NHCP layout is not in our hands nor the information provided into the same”, however I submit that the member is responsible for ensuring that their information complies with the Code of Conduct. They cannot abdicate responsibility and I find that there has been a breach of the code as highlighted by the Media Monitoring team, “The member provides the logo for this page, and can change that at any time. The member provides the name of the service to Vodacom, which is then displayed on the NHCP. The member is in full control of the landing page, and is therefore responsible to ensure that the information provided on the landing page, links and correlates with the information provided to Vodacom to display on the NHCP. The member is ultimately responsible to ensure that the consumer receives accurate information, which the member fails to do as there are numerous inaccuracies and conflicts throughout the subscription acquisition flow”. Breach of the code under Clause 12.1 read with 12.2 and 5.4 is evident here.

**6. The services being confirmed on the NHCP do not correspond to the services in the welcome messages read with Point 9, The services in half of the unsubscribe confirmation messages do not correspond with the service names in the welcome messages.**

In terms of Clause 15.8, I find no breach by the member in that the service name has been confirmed in the welcome messages received by the tester, there are instructions regarding the offeror of the service as well as the details of the WASP. I therefore align myself with the submission by the member that “the Landing Page is clearly stating that the “Service Name” is ChatPose and such Service Name is confirmed on the Welcome Message, as required by the Code of Conduct (Clause 15.18 (a)). On the other hand, the specific “Feature Name” (Directory for Whatsapp) is consistently maintained on the Landing Page and on the NHCP in order to make sure that the consumer is actually aware that they are purchasing the actual Feature they were looking for. Please bear in mind that in case the consumer contact with the MNO to request assistance with the actual service, the MNO will recognize the “Feature Name” and provide the consumer with the actual “Service Name” (Chatpose) and the contact details of the relevant WASP (Westbound Ltd)”.

It stands to reason that allegation of breach of Clause 15.8 is dismissed the flow utilized by the member fully complies with the Code

**7. The pricing format in the welcome messages does not follow the prescribed format.**



The ruling under paragraph 1 above applies hereto with the inclusion of the following, the code is a fluid document and WASPs are obligated to follow it and ensure full compliance without dismissing it. Albeit rectified by the member, at the time the complaint was lodged, there was a breach and as such the member stands to be sanctioned for such.

**8. The opt-out instructions in the welcome messages are ambiguous.**

I find no breach of Clause 15.22, the member here has complied with the format and correctly submits that “The disclosure “Stop sms stop to [Short-Code] Help? [Customer Service Number]” has been in place since the beginning of the operations in the South African market place and it is actually widely implemented across the whole VAS Industry by a number of WASPs.”

It stands to reason that allegation of breach of Clause 15.22 is dismissed.

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## **Sanctions**

I have taken the liberty of ensuring that I inspect other complaints against the member and what the nature of those complaints were , it is concerning to note that many a complain against this member is due to noncompliance with the code as well as IP infringement for services akin to the one in this complaint.

For that reason and the fact that I have the member to have partially breached the code, it stands to be fined R 100 000, 00 (one hundred thousand rand), R 40 000, 00 (forty five thousand rand) of which is suspended for six months from date of adjudication report.

The fine (in totality) imposed on the member is for breach of the following clauses;

- 8.2 read with 12.1
- 5.5 read with 8.7
- 5.4 read with 5.5
- 5.5 read with 8.8
- 12.1 read with 12.2 inconsideration of 5.4.

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## **Matters referred back to WASPA**

None.

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