



## Report of the Appeals Panel

Complaint number	<b>#58518</b>
Cited WASPA members	<b>HYVEMobile (1518)</b>
Notifiable WASPA members	<b>N/a</b>
Appeal lodged by	<b>WASPA Compliance Department</b>
Type of appeal	<b>Written appeal</b>
Scope of appeal	<b>[X] Review of the adjudicator's decision [X] Review of the sanctions imposed by the adjudicator</b>
Applicable version of the Code	<b>Version 17.3</b>
Clauses considered by the panel	<b>4.9(c), 5.1, 5.2, 5.5, 8.7, 8.8, 12.1, 12.2, 23A5(a)</b>
Related complaints considered	<b>Complaints # 49150, 57571, 58659, 58666, 58744, 58745, 58746</b>
Amended sanctions	<b>(a) Clause 4.9(c) -- R25,000. (b) Clause 5.4 and 8.7 -- R25000 (c) Clause 5.5 -- R25,000 (d) Clause 8.8 -- R20,000</b>
Appeal fee	<b>Appeal fee not to be refunded</b>
Is this report notable?	<b>Not notable</b>
Summary of notability	<b>Not applicable</b>

## Initial complaint

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1. Whilst monitoring, testing services and conducting compliance checks of test results, the WASPA Compliance Department identified services which they believe did not comply with the requirements as set out in the WASPA Code of Conduct (Code). Below is an outline of the test result, together with the alleged breaches of the WASPA Code.

On the 3rd of January 2023, a tester was browsing an adult website with the following URL: <https://sexu.com/20287540> on the MTN network.

(a). The tester clicked on an explicit (X18) adult content banner advertisement; the tester again clicked on a blank image with some adult text.

(b) The tester was redirected to a non-adult website, the tester clicked on an ad banner which contained the green WhatsApp icon, an exclamation mark and the following text: "Upgrade to the latest WhatsApp content NOW!".

(c) There was a green 'CONTINUE' call to action button. After some line breaks, in a white font against the green background, in a much smaller font size, the following was displayed: "Daily service charge R15 T&Cs apply".

(d) The tester clicked on the call-to-action button and was redirected to what looked like a WhatsApp chat service (WhatsApp icon/logo, green call-to-action button, wording, etc.). The following text was displayed:

"WhatsApp Alert: Your WhatsApp has expired today! If you do not update it now, all your contacts, chats and photos will be lost! Your private photos and chats can get on the internet today!

You have 0.58 seconds to update your WhatsApp

Click the Update button below and verify your mobile number (100% free). We'll send you an update link via SMS!

UPDATE NOW"

(d) The tester clicked on the "UPDATE NOW" button and was redirected to a service landing page for Whats Trending from Hyve Mobile. The tester clicked on the Subscribe button and was redirected to the MTN hosted confirmation page.

(e) The tester elected to stop the test at this point, as there were multiple breaches of the Code during the subscription acquisition flow for the Whats Trending service.

2. On the 16th of January 2023 a tester was browsing on an adult website with the following URL: <https://m.sextvx.com/> on their test device on the MTN network.

(a) The tester clicked on multiple explicit adult videos with the expectation of watching the explicit adult content video. However, the tester was directed to a non-adult website with the following URL: <https://financeritual.com/these-billion-dollar-tech-ideas-were-actually-inspired-by-famous-movies/>

(c) The tester clicked on an ad banner which contained the green WhatsApp icon, an exclamation mark and the following text: "Upgrade to the latest WhatsApp content NOW!".

(d) There was a green 'CONTINUE' call to action button. After some line breaks, in a white font against the green background, in a much smaller font size, the following was displayed: "Daily service charge R15 T&Cs apply".

(d) The tester clicked on the Continue button and was redirected to a service landing page for Whats Trending from Hyve Mobile charged at R35/week.

(e) The subscription service landing page is designed in such a way as to appear to be linked with an upgrade for the Whatsapp chat platform (Whatsapp icon/logo, green call-to-action button, wording, etc....) The following text was displayed:

"NEW WHATSAPP UPGRADE AVAILABLE NOW"

(f) The pricing information was neither clear nor prominent and required closer examination to be noticed.

(g). The tester clicked on the "Subscribe" button and was directed to the MTN confirmation page.

(h) The tester elected to stop the test at this point, as there were multiple breaches of the Code during the subscription acquisition flow for the Whats Trending service from Hyve Mobile.

3. The tester responded to an ad banner which appeared to be from the WhatsApp messaging platform (WhatsApp icon/logo, green call-to-action button, wording, etc.), prompting the tester to upgrade to the latest WhatsApp content now. The ad banner led to what looked like the WhatsApp message service (WhatsApp icon/logo, green call-to-action button, wording, etc.), stating that his/her WhatsApp account had expired and needed an upgrade, failure of which may result in contacts, chats, and photos being lost. The upgrade alert also stated that failure to upgrade will lead to photos and chats being on the internet. The countdown timer (1:00) for the upgrade gave a sense of urgency to the tester, making them think that if they don't upgrade, they will lose their contacts, chats and photos. The alert stated that it was free to update "(100% free)". The "WhatsApp Alert" leads to a subscription service landing page that is designed in such a way as to all appear to be linked with a WhatsApp upgrade (WhatsApp icon/logo, green call-to-action button, wording, etc.). This is misleading advertising of the member service.

4. Pricing issues: The pricing information on the ad banner is displayed at R15/day while the service landing page displays the pricing information at R35/week. The reference on the landing page to it being a subscription service with a related cost is not clear, nor prominent, and requires closer examination. Although the pricing information is provided, it is displayed in such a way as to be missed/overlooked/not seen due to the placement and design (font colour, size, background, etc.). The name of the subscription service on the confirmation step – Whats Trending – appears to be entirely unrelated to the WhatsApp application requiring an update to avoid losing contacts, chats and photos. The tester was therefore misled and deceived into believing that their WhatsApp required an upgrade – to avoid it from losing information - when in fact it was a dishonestly designed marketing ploy to lure the tester into subscribing to an unrelated subscription service for Whats Trending at R35.00 per week.

5. The member responded to the complaint that there was a misdirection from the original sites for which they were not responsible in both instances where the tester was directed from pornographic websites to their landing page.

6. In regards to the pricing issue the member admitted the facts but argued that it was a *bona fide* mistake that was not done knowingly or with the intention to mislead customers. The mistake was picked up on 3 April 2023 and corrected on the same day.

7. The member further submitted as mitigating circumstances that “There have been no successful complaints made against Hyve in the past 3 years and that no customers were harmed or suffered any loss.

## Adjudicator’s findings

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8. The Adjudicator after considering the submissions referred to the following sections of the Code:

4.9(c) - Members must not provide any services or promotional material that induces an unacceptable sense of fear or anxiety.

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

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.

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, provided that the mobile network operator does not prescribe any specific advice of charge requirements. 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.

23A.5 - Subscription services must have a landing page prior to the confirmation step. An advert for a subscription service may not send a customer directly to a confirmation page but must link the customer to a landing page for the service. A landing page: (a) must clearly show the pricing information for the service.

9. The Adjudicator held that:

(a). The main argument of the Member as to why they should not be sanctioned in terms of this complaint is the fact that they were not responsible for the redirect from their valid advert to a site which they did not control. In respect of both Annexure A and Annexure B complaints, the Member states that the adult websites in question served misleading content and adverts to users and redirected such users to unrelated websites.

(b) Whilst the Adjudicator acknowledge that it might be possible for the Complainant not to have control of the adult websites prior to the non-adult website where their valid ad banner was served, in determining compliance with the Code of Conduct the ad banner itself, the website where the ad banner was placed, the service landing page, and the confirmation page to determine compliance with the Code of Conduct, was considered.

(c) The Member addressed the misdirection from the adult sites but did not respond to the breaches cited relating to the design of the Whats Trending ad banner (WhatsApp icon/logo, green call-to-action button, wording, etc.) in respect of the first instance.

(d) In regard to the second instance the Member reiterated its submissions regarding the misdirection from the adult website. In regard to the pricing issue, it admitted that the pricing was non-compliant, i.e. R35 per week vis-a- vis R15 per day.

(e) The Adjudicator agreed with the Member's submission that the pricing information is legible, horizontal and presented in a way that does not require close examination.

(f) However, the Member also failed to address the breaches cited relating to the design of the Whats Trending ad banner (WhatsApp icon/logo, green call-to-action button, wording, etc.),

(g) The Adjudicator agreed that the Member is not responsible for the redirect from the adult websites, but everything from their banner ad on a valid website should be

their responsibility. In addition, whilst there was no issue with the pricing as it is displayed, the duration that incorrect pricing was allowed to be live is unacceptable. Finally, the Member did not address the similarities in design of their service and the WhatsApp service which the Adjudicator found to be confusingly similar and deceptive.

8. The Adjudicator made the following findings:

- (a) Clause 4.9(c) (services or promotional material that induces an unacceptable sense of fear or anxiety) was breached.
- (b) Clause 5.1 (offer of services unable to provide) was not breached.
- (c) Clause 5.4 (honest and fair dealings) was breached.
- (d) Clause 5.5 (knowingly disseminating false information) was breached.
- (e) Clause 8.7 (misleading pricing information) was breached.
- (f) Clause 8.8 (misleading content) was breached.
- (g) Clause 12.1 (clear and prominent pricing) was not breached.
- (h) Clause 12.2 (display of pricing) was not breached.
- (i) Clause 23A.5 (double confirmation) was not breached

9. The Adjudicator imposed the following sanctions:

- (a) Clause 4.9(c) R15 000
- (b) Clause 5.4- R15 000
- (c) Clause 5.5 – R15 000
- (d) Clause 8.8 – R10 000

## **Appeal submissions**

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10. The Member made the following appeal submissions:

(a) Ad Clause 4.9(c): With reference to the 'Whatsapp Alert' illustrated in A5 of Annexure D, which prompts a customer to 'upgrade their Whatsapp within 0.58 seconds', failure of which may result in contacts, chats and photos being lost, they wish to reiterate that this banner does not belong to Hyve, was not inserted by them or by Google and nor is it part of their usual subscription flow. They do not agree with the use of the 'Whatsapp Alert' banner as a marketing tactic and would not condone such use in their subscription flow.

The Member denies that clicking on the Update Now button directed the Complainant directly to the WhatsTrending service in A6 and A7. The website is completely unrelated to their subscription flow for their services and does not belong to them. It is not certain where the 'Whatsapp Alert' comes from. They have actively engaged with Google to investigate and this discussion is ongoing. A video recorded on 30 June 2023 illustrating the normal flow was attached.

(b) Ad Clause 5.5 and 8.8: With reference to the WhatsTrending banners, one needs to look at the banners as a whole. One cannot only focus on the Whatsapp logo or word 'update'. The Whatsapp logo has been incorporated in the designs to show that the WhatsTrending service relates to Whatsapp. For example, when advertising a Fantasy Football service, one would incorporate images, logos and players and teams from the Premier League, however it does not mean that one is advertising the Premier League. A customer is able to update their Whatsapp status, profile, chats and background with the content and stickers from WhatsTrending. Therefore context and looking at the banner as a whole is key. Objectively, the banners do not advertise upgrading to the New Whatsapp as may have been interpreted by the Complainant. When a customer subscribes to WhatsTrending, the customer receives access to Whatsapp content (stickers, status updates and wallpapers) as advertised

On the subscription landing page the Google Ads banner illustrates the Whatsapp logo with an exclamation mark inside a triangle to draw the customer's attention to the banner and the Whatsapp logo, with the description, 'New Whatsapp Upgrade available now.' And below, a more detailed description, 'Click below now to access awesome content & so much more!' which accurately describes the WhatsTrending service as is being advertised. The context of the banner as a whole shows that the customer is able to upgrade their Whatsapp by accessing content for their Whatsapp.

(c) The member accepted the finding on the pricing Clause 5.4 and the sanction imposed because of the pricing error.

11. The Complainant made the following appeal submissions:

(a) They found the finding that there was no infringement of Clauses 5.1, 12.1, 12.2 and 23A.5(a) disappointing.

(b) The Adjudicator found a breach of Clause 8.7 but no sanction was imposed. The Appeals Panel is requested to impose a sanction for this breach.

(c) In regard to the flows and technical procedures, the Complainant reiterated their findings on the flow and remarks that how the Member decides to set up their flows and technical procedures is entirely up to them. The reality remains that the tester was misled into thinking that the WhatsApp advertisement banners, WhatsApp alert message, and the WhatsApp double opt-in subscription service were from the WhatsApp messaging platform.

The Member failed to provide evidence that their Google advertisement banner did not redirect the consumer to the WhatsApp alert page. The only information the Member provides is denial of the facts. It is clear from the acquisition flow that the consumer was redirected to the WhatsApp alert message page from the Member's Google advertisement banner.

(d) A distinction should be drawn on the one hand, between independent content that can be shared by and between users of the WhatsApp messaging platform, and on the other, content that is offered by or through the WhatsApp messaging platform itself. The Member states that when a customer subscribes to the “Whats Trending” subscription service, the customer receives access to Whatsapp content which includes stickers, status updates and wallpapers. The Complainant submitted that the said stickers and wallpapers were merely images which can be stored in the photo library of a device/phone and be used anywhere on the device/phone.

(e) It appears from the information provided by the Member in Annexure G of the Member’s appeal submission that subscribers would only be able to download content not offered by or directly related to the WhatsApp platform itself. The landing page of the Member subscription service is misleading insofar as the content being promoted is unrelated to the content that is made available to subscribers once they have subscribed. The Complainant therefore respectfully submitted that the “Whats Trending” subscription service did not technically use an API or something similar to “update” or “upgrade” the WhatsApp messaging platform. The Member failed to provide any “updates” or “upgrades” to the actual WhatsApp messaging platform from version xxx to version xxy. The Complainant requests the Panel to find a breach of Clause 5.1 and impose the necessary sanction.

(f) The Complainant agrees that the pages must be considered as a whole and not piecemeal. The WhatsApp logo on both ad banners informs the consumer that this advert is from the WhatsApp messaging platform. It is worth noting that the “Whats Trending” logo is not used to advertise the service. The exclamation mark inside a triangle on the WhatsApp logo on both ad banners: The Member states in their appeal submission that this element is used to draw the viewer’s attention to the advert. The Complainant submits that an exclamation mark in a triangle generally means a warning of some sort, this element informs the consumer that there is something wrong with the WhatsApp messaging platform.

The words “Upgrade to the latest WhatsApp content NOW!” on both ad banners – The wording informs the consumer to upgrade to the latest WhatsApp content NOW! (Please take note of the word “NOW!”). It is also worth noting that this content is not offered by or directly related to the WhatsApp platform itself, but it is content add-ons that may be used anywhere in the device (stickers, status updates and wallpapers)

A green “Continue >>>” button on both ad banners – Again the use of a green colour similar to the WhatsApp green colour. This is a marketing technique used by the member to mislead the consumer to think the advert banner is from WhatsApp messaging platform.



The service name “Whats Trending” has their own logos used in the service. It begs the question, why did the member not use their own logos to advertise the “Whats Trending” service?

(g) The Member provided no evidence that they blocked the source of the “WhatsApp Alert” page so that it does not form part of their flow. As such, the Member did not provide any evidence that they took reasonable steps, which could be considered as a mitigating factor in terms of Clause 4.9(c) and are liable for the breach of Clause 4.9(c) of the Code.

(h) The Member states that the pricing information discrepancy of R15 per day versus R35 per week was a bona fide error. The Member submits that the error was picked up by a team member on the AdOps Team on the 3rd of April and rectified on the same day. However, this means that the error was in play for at least 3 months as this was picked up on 3 January 2023.

(i) The Adjudicator correctly found the Member to be in breach of clause 8.7 of the Code, and that the member does not dispute the pricing information discrepancy. We believe that sanctions should be imposed by the panel to the Member for breaching clause 8.7.

(j) As disappointing as it was for the Adjudicator not to find a breach for clause 12.1, 12.2 and 23A.5(a), the Complainant believes the Panel might come to a different conclusion regarding the visibility of the pricing information on the member service landing page. The font used for the pricing information is substantially smaller than the font used for the other wording displayed on the page and the light grey font colour used against the white background (Annexure A) OR the light green font colour used against the green background (Annexure B) makes this information easy to overlook or it would require close examination by a consumer.

(k) A different Adjudicator who was handling a previous similar complaint (#57571), paragraph 45 and 46 of the 2022 report, agreed that “the Member had an opportunity to design the pricing information on its landing page in a clear, legible, and precise manner and intentionally omitted to do so”. Almost a year later and the Member still chooses to ignore the adjudicator’s ruling relating to the pricing information. The Complainant requests that the panel review the previous successful complaints of a similar nature (complaint #57571) and find the member to be in breach of clause 12.2, 12.2 and 23A.5(a) and impose the necessary sanctions for ignoring remedial actions from previous adjudications.

24. The Member did not respond to the appeal submissions made by the Complainant.

## Deliberations and findings

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25. We agree with the factual findings made by the Adjudicator in the adjudication.

26. On the breach of Clause 4.9 we agree with the findings made by the Adjudicator. Whereas the Member does not necessarily have control on what happens on third party sites not controlled by it, it is responsible for the flow under its control. However, if consideration is had to complaint #57571 in which the Complainant came across three different adult sites which directed to the Member's landing pages, the veracity of the excuse starts to ring hollow as their seems to be definite pattern which has been ongoing since July 2022. See also adjudications 58659, 58744, 58745 and 58746.

27. The Member acknowledges that the first landing page is their page but disavows knowledge of the next page with the threatening messages about the discontinuation of the WhatsApp service and the loss of information unless action is taken. The Member initially did not respond to this complaint prior to the adjudication. The Member offers no plausible explanation on how this intervening page could have been inserted or on the concrete steps taken to determine how this page could have been inserted in their flow. The submissions on investigations and ongoing conversations with Google is vague and unconvincing.

28. The appeal against this finding is accordingly dismissed.

29. On he breaches of Clauses 5.5 and 8.8 the Complainant submits that the page must be considered as a whole. We disagree with the submission that the Whatsapp logo has been incorporated in the designs only to show that the WhatsTrending service relates to Whatsapp. We agree with the submissions by the Complainant that the page is misleading and creates the impression of being a WhatsApp page whereas it is not. On consideration of the page as a whole the content is misleading. Nowhere is there a clear indication that this service is not WhatsApp content or an upgrade, but rather that of the Member. The Member's own logos are conspicuous in their absence. The page is clearly designed to mislead. The appeal against the findings on Clauses 5.5 and 8.8 is accordingly dismissed.

30. The Adjudicator found a breach of Clause 8.7 (misleading pricing) but no sanction was imposed. The Complainant requests the Appeals Panel to impose a sanction for this breach. The breach of Clause 8.7 is closely aligned to the finding on the breach of Clause 5.4 (honest and fair dealings). In the appeal submissions the Member mentions Clause 5.4 in regard to the pricing issue whereas it actually relates to the honest and fair dealing due to the misleading webpages and flow. The infringements will be treated as one for the purposes of the sanction.

31. The Complainant did not lodge a formal appeal against the findings of the Adjudicator on of Clauses 5.1, 12.1, 12.2 and 23A.5(a), but did request the Appeals Panel in their submission to reconsider these findings. The Member failed to respond to these requests to overturn the findings by the Adjudicator.

32. The WASPA Code of Conduct makes provision for appeal proceedings but does not address the current situation explicitly. We have considered how we should deal with this situation in a manner that is not unfair procedurally or detrimental to the rights of the Member. We decline to overturn the findings of the Adjudicator on Clauses 5.1, 12.1, 12.2 and 23A.5(a) on procedural grounds because there is no formal cross-appeal. However, prima facie there seems to be a strong case made out by the Complainant that ought to have been considered. We therefore recommend that WASPA should consider lodging a formal appeal in terms of the Code even though the appeal may be out of time due to the procedural uncertainty in this instance. The Adjudicator failed to take into account complaint #57571 which seems to be very similar to the complaint in this instance and where the Adjudicator came to a different conclusion.

33. To summarise, the whole of the appeal of the Member against the findings of the Adjudicator is dismissed.

### **Amendment of sanctions**

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36. The Member also appealed against sanctions imposed by the Adjudicator. In its submissions to the Adjudicator the Member stated that there had been no successful complaints against Hyve in the past three years. This was a blatant untruth as it had been found to have infringed Clauses 5.1, 5.4, 5.5, 8.8, 12.1 and 12.2 in Adjudication #57571 in quite similar circumstances.

37. We have taken adjudication #57571 in consideration in determining the appeal against the sanctions. The fact that the Member has infringed some of the same clauses in that adjudication is taken as an aggravating factor. Despite that adjudication the Member has persisted with its misleading conduct and infringements of the Code. We regard the infringements as very serious warranting appropriate sanctions. We have therefore decided to increase the fines imposed by the Adjudicator as follows:

- (a) Clause 4.9(c) R25,000.
- (b) Clause 5.4 and 8.7 R25000
- (c) Clause 5.5 R25,000
- (d) Clause 8.8 R20,000

### **Appeal fee**

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38. The appeal fee is forfeited in total.