



## Report of the Adjudicator

Complaint number	#60328
Cited WASPA members	YellowDot Mobile (Membership no. 1950)
Notifiable WASPA members	n/a
Source of the complaint	WASPA Compliance Department
Complaint short description	Non-compliant promotion of subscription service
Date complaint lodged	2024-07-09
Date of alleged breach	2024-06-24
Applicable version of the Code	v17.7
Clauses of the Code cited	5.5, 8.8, and 21.11
Related complaints considered	60142
Fines imposed	Member fined following amounts:  a) R20 000 for breach of clause 5.5; b) R10 000 for breach of clause 8.8; and c) R20 000 for breach of clause 21.11.

Other sanctions	Formal warning issued that Member's membership of WASPA will be suspended if further breach of same or similar nature.
Is this report notable?	n/a
Summary of notability	n/a

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## Initial complaint

1. Whilst monitoring, testing services and conducting compliance checks of test results, the WASPA Compliance Department ("Complainant") identified services which they allege do not comply with the requirements as set out in the WASPA Code of Conduct ("Code").
  2. The Complainant's tester conducted a manual test on 24 June 2024 on the Telkom network and provided an outline of the test results, together with screenshots of the relevant web pages used, as evidence of various alleged breaches of the Code.
  3. The Complainant stated that their tester, while browsing on an adult content website, clicked on an explicit (X18) adult content video with the intention to watch the selected video. The tester was instead directed to the landing page for the Member's non-adult subscription service called 'Big Cash', which is charged at R5.00 per day.
  4. The Complainant alleges that the Member has breached the provisions of clauses 5.5, 8.8, and 21.11 of the Code.
  5. The Complainant also referred to a previous formal complaint lodged against the Member for the same or similar breaches of the Code (refer to Formal Complaint #60142).
  6. The Complainant submitted that the Member had, in their response to that complaint, stated that a third-party marketing supplier was responsible for the non-compliant promotional campaign and that corrective action had been taken, but the non-compliant marketing behaviour was still present as could be seen from the latest test conducted by the Complainant.
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## Member's response

7. The Member confirmed that this marketing was done by a third-party advertising agency, who were under strict instruction to only use approved marketing flows and advertising creatives and materials in full compliance with the Code.
  8. The Member stated that, following the continued breaches of the Code by their marketing partners, they would be implementing an anti-fraud detection and blocking system for all their services in South Africa as a long-term remedy to misleading advertising.
  9. The Member stated further that they had signed an agreement with one of the world's leading anti-fraud service providers and technical integration was ongoing at the date of writing their response, but was expected to be completed on or before the end of August 2024.
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## Complainant's further submissions

10. The Complainant referred to clauses 3.1, 3.2, 3.5, 3.6 and 3.7 of the Code and submitted that there was a positive obligation on the Member to ensure that third-party marketing agencies promoted and marketed the Member's services in accordance with requirements of the Code.
  11. The Complainant stated that the Member had to ensure that their marketing material used to promote their service aligns with the content that is actually provided as part of the subscription service.
  12. The Complainant submitted further that the use of explicit (X18) material is not only prohibited by the Code, but is also prohibited by the Films and Publications Board and this type of practice should be ceased immediately.
  13. The Complainant noted that the Member did not, in their response to the complaint, deny the non-compliant promotion and marketing of their service and only referred to remedial and corrective steps taken to address the continued breaches by their marketing partners.
  14. The Complainant submitted that, at the time the tests were conducted, the Member's service was in breach of the Code and that the Member remains liable for the breaches occasioned or facilitated by their third-party marketing suppliers.
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## Sections of the Code considered

15. Clauses 5.5, 8.8, and 21.11 of the Code were cited in the formal complaint and considered.
  16. Clauses 3.1, 3.2, 3.5, 3.6 and 3.7 of the Code were also considered.
  17. No other relevant clauses were assigned by WASPA.
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## Decision

18. The Member has acknowledged that the promotional campaign that is the subject of this complaint was not compliant with the requirements of the Code.
19. The Member's submission that the promotional campaign was conducted by a third-party advertising agency was not disputed by the Complainant. However, the Complainant correctly stated that the Member has a positive obligation, in terms of clauses 3.6 of the Code, to ensure that such third-party agencies, who are not members of WASPA, promote and market the Member's services in a manner consistent with the requirements of the Code.
20. In terms of clause 3.7 of the Code, the Member remains liable for any breaches of the Code resulting from services marketed by such third-party agencies.
21. With regard to the specific clauses of the Code that the Complainant alleges have been breached and after carefully reviewing the complaint and supporting evidence, I have made the following findings:
  - 21.1 The fact that adult content has been used to promote a non-adult subscription service is inherently deceptive and likely to mislead consumers by ambiguity. The manner in which this advertising has been conducted was also intentional. I am satisfied that there has been a breach of clause 5.5 of the Code for which the Member is responsible, and the complaint is accordingly upheld in this regard.
  - 21.2 The adult video content that is promoted in the relevant advertising is clearly not the same content that is provided to customers as part of the Member's subscription service. The advertising misleads consumers into believing that it is for an entirely different service or for different content. I am satisfied that there has been a breach of clause 8.8 of the Code for which the Member is responsible, and the complaint is accordingly upheld in this regard.

- 21.3 The relevant advertisement used depicted adult content that would be classified as "X18" by the Film and Publication Board. There has been a breach of clause 21.11 of the Code for which the Member is responsible, and the complaint is accordingly upheld in this regard.
22. The complaint against the Member for each breach cited is accordingly upheld.
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## Sanctions

23. When determining the appropriate sanctions to be imposed for the various breaches of the Code, the following factors must be taken into consideration:
- 23.1 whether any previous successful complaints have been made against the Member in the past three years;
  - 23.2 whether any previous successful complaints of a similar nature have been made against the Member;
  - 23.3 the nature and severity of the breach; and
  - 23.4 whether any efforts were made by the Member to resolve the matter.
24. It is duly noted that a previous complaint relating to the same or similar breach of the Code was made and upheld against the Member (see formal complaint #60142).
25. In their response to this previous complaint, the Member alleged that they were proactive in taking steps to prevent the non-compliant marketing of their services. This is clearly not the case.
26. The Member has failed to demonstrate that they have taken reasonable steps to ensure that the advertising agencies appointed to market their services do so in a manner consistent with the requirements of the Code.
27. The Member has now stated, in response to this latest complaint, that they have or are in the process of implementing an anti-fraud detection and blocking system for all their services in South Africa as a long-term remedy to the misleading advertising of their services. It remains to be seen whether this will be an effective measure.
28. I am of the view that if the Member was able to identify which third-party agencies were responsible for the non-compliant marketing of their services, it would reasonably be expected that the Member would stop using those agencies, taking into account the

repeated transgressions of the Code and the nature and severity of these transgressions. The Member has shown no intention of doing so.

29. Taking into account the precedent set by WASPA adjudicators and appeal panels in previous complaints, it has been widely accepted that the use of adult content to promote non-adult services, as well as the use of promotional material that depicts adult content that would be classified as "X18" by the Film and Publication Board, must be viewed in a very serious light, based on the potential risk of harm to consumers, especially children.
  30. Based on the above, all of which must be viewed as aggravating factors, the following fines are imposed on the Member:
    - 30.1 R20 000 for breach of clause 5.5;
    - 30.2 R10 000 for breach of clause 8.8; and
    - 30.3 R20 000 for breach of clause 21.11.
  31. The Member is also hereby formally warned that if there are any further instances of the same or similar breaches of the Code involving the use of adult content to promote or market its non-adult subscription services, their membership of WASPA will be suspended.
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