



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Clickatell Cell C
Telephone Network(s)	MTN Vodacom
Information Provider (IP) (if applicable)	Promo D.o.o trading as Mob1
Service Type	SMS Competition
Source of Complaints	Public
Complaint Number	#0050

Complaint

A complaint was received from a member of the public regarding an unsolicited SMS message offering the conversion of “Mob1 bucks”. The complainant did not provide a copy of the SMS message received, however indicated that the message was received on 8 October 2005 and gave the number on which the SMS message was received.

In addition, the complainant raised the breach of his privacy rights in terms of the Constitution of the Republic of South Africa, 1996. He further indicated that he had raised this issue with the SP and complained about the manner in which his complaint was dealt with.

The Secretariat conducted an investigation into the service offered by the SP, on behalf of the IP.

The following breaches of the WASPA Code of Conduct were raised:

3.1.2. Members are committed to lawful conduct at all times.

3.7.1. Members will not provide any services or promotional material that:

.....

(b) results in any unreasonable invasion of privacy;

4.1. Provision of information to customers

4.1.1. Members are committed to honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

4.1.5. Members must have a complaints procedure allowing their customers to lodge complaints regarding the services provided. Members must acknowledge receipt of complaints expeditiously, and must respond to any complaints within a reasonable period of time.

4.1.6. Members undertake to inform their wireless application service customers that they are bound by this Code of Conduct. Members also undertake to make these customers aware of the WASPA complaints procedure and the mechanism for making a complaint, should any customer wish to do so.

5.1.2. Any message originator must have a facility to allow the recipient to remove his or herself from the message originator's database, so as not to receive any further messages from that message originator.

5.2. Identification of spam

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;
- (b) the message recipient has a direct and recent prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or
- (c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

5.3. Prevention of spam

5.3.1. Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.

6.2.2. All advertisements for services must include the full retail price of that service.

6.2.3. Pricing must not contain any hidden costs.

6.2.4. Pricing contained in an advertisement must not be misleading. If multiple communications are required to obtain content, then the advertised price must include the cost for all communications required for that transaction. A clear indication must always be given that more premium messages are required.

6.2.5. The price for a premium rated service must be easily and clearly visible in all advertisements. The price should appear with all instances of the premium number display.

6.2.6. Unless otherwise specified in the advertising guidelines, the name of the WASP or the information provider providing the service must appear in all advertisements for premium rated services.

9. Competitions

9.1. Provision of information

9.1.1. Any promotional material for a competition service must clearly display the full cost to enter the competition and any cost to the user to obtain the prize.

9.1.2. Any promotional material for a competition service must include details of how the competition operates.

9.1.3. Interactive competition services with an ongoing incremental cost, must, at reasonable intervals, inform the customer of any additional costs, and must require the customer to actively confirm their continued participation.

9.1.4. Promotional material must clearly state any information which is likely to affect a decision to participate, including:

- (a) the closing date;
- (b) any significant terms and conditions, including any restriction on the number of entries or prizes which may be won;
- (c) an adequate description of prizes, and other items offered to all or a substantial majority of participants, including the number of major prizes;
- (d) any significant age, geographic or other eligibility restrictions;
- (e) any significant costs which a reasonable consumer might not expect to pay in connection with collection, delivery or use of the prize or item.

9.1.5. The following additional information must also be made readily available on request, if not contained in the original promotional material:

- (a) how and when prize-winners will be informed;
- (b) the manner in which the prizes will be awarded;
- (c) when the prizes will be awarded;
- (d) how prize-winner information may be obtained;
- (e) any criteria for judging entries;
- (f) any alternative prize that is available;
- (g) the details of any intended post-event publicity;
- (h) any supplementary rules which may apply;
- (i) the identity of the party running the competition and responsible for the prizes.

9.1.6. Competition services and promotional material must not:

- (a) use words such as 'win' or 'prize' to describe items intended to be offered to all or a substantial majority of the participants;
- (b) exaggerate the chance of winning a prize;
- (c) suggest that winning a prize is a certainty;
- (d) suggest that the party has already won a prize and that by contacting the promoter of the competition, that the entrant will have definitely secured that prize.

9.3. General provisions

9.3.1. Competition services must have a specific closing date, except where there are instant prizewinners. An insufficient number of entries or entries of inadequate quality are not acceptable reasons for changing the closing date of a competition or withholding prizes. Once the closing date for a competition is reached, the advertised prizes must be awarded, notwithstanding the number of entries.

9.3.2. Prizes must be awarded within 28 days of the closing date, unless a longer period is clearly stated in the promotional material.

9.3.3. All correct entries must have the same chance of winning.

Investigation

While the complainant had not submitted a copy of the SMS message received, the Secretariat has received a number of complaints concerning the conversion of "Mob1 bucks" as well as several SMS messages directly. The content of such SMS messages varies slightly, however the consistent features are:

- The recipient's account shows an alleged number of "mob1 bucks" the number is often the same on SMS messages sent to different recipients;
- These can allegedly be converted into a reward valued at R2000;
- A "secure code" is given, even though this code is often the same on SMS messages sent to different recipients;
- The recipient is required to send a keyword to a premium rated number. In most cases the cost of the initial SMS message response is given (usually R15);
- Further SMS messages are then sent to the recipient, each requiring a reply to a premium rated number. Some SMS messages indicate the total number of responses required from the recipient.

The SP responded to the complaint on 20 October 2005, as follows:

- No SMS message has been sent via the SP's systems to the mobile number of the complainant. The company that sent the SMS (ie the IP) is called MOB1 and is a client of the IP for premium rated services in South Africa. MOB1 makes use of the short code: 39006 and only use the SP for incoming (MO) messages. MOB1 sends all outgoing (MT) SMS messages via another provider; however the SP is not aware of the identity of such provider. MOB1 is not based in South Africa.
- The SP prides itself on the effective and helpful way it assists all complainants to resolve their complaints in their best interest. The SP has even assisted to resolve complaints not relating to the SP at all. The details of the SP's Connectivity Manager are listed on the SMS Code Internet web site at www.smscode.co.za, so that any person is able to contact him directly with their complaint. In addition, complaints laid with the mobile cellular network operators are directly referred to him as the mobile cellular network operators use the information on the SMS Code Internet Web site. The SP's Connectivity Manager deals with the vast majority of complaints personally and if a complaint is raised with the SP's Service Centre they are immediately escalated to him. Nevertheless, the SP's Connectivity Manager is not aware of the complainant having contacted the Sp in regard to this complaint.
- The SP is not aware of any staff member of the SP ever refusing to allow any person to speak with a manager of the SP, nor has the SP ever attempted to block any person from making contact with any manager of the SP. The SP alleges its managers are at all times available and willing to deal with any client / person.
- The SP confirmed that it has received complaints regarding MOB1 messages. Even though the MT messages were not sent via the SP, the SP has:
 - discussed the nature of these messages with MOB1 to better understand the services;
 - validated that in fact it is a valid competition with valid prizes;

- reviewed the text of the messages sent out by MOB1 and offered advice on how to customise them to fit in with the WASPA Code of Conduct;
 - requested information on how clients were opted in; and
 - corresponded with the IP to unsubscribe any number in respect of which a complaint was received, after which the SP's Connectivity Manager personally contacted each complainant to confirm that he/she has been unsubscribed, all while the original SMS complained about was in fact not sent over the SP's systems.
- The SP has prepared a notice (which will also form part of its Terms and Conditions) to be communicated to all its clients (ie IPs) shortly that any client who uses the SP for premium rated MO messaging services must also use the SP for the outgoing MT. This is in an effort to have tighter control over messaging in general and to ensure that the SP's name is not brought into disrepute for messages not delivered via the SP's gateway. In some cases such messages are associated with the SP, as a SP owned short code is registered in the message text.
 - The SP offered its assistance to resolve this matter, whether that be providing assistance directly to WASPA, to the complainant, or both. The SP indicated it was more than willing to contact the complainant directly to discuss the matter, as well as to provide WASPA with MOB1's contact details, or on behalf of WASPA communicate with MOB1 regarding this matter.

The SP did not leave the matter there and on 28 October 2005 indicated:

- It had ascertained the originator of the MT SMS messages on behalf of the IP, being a UK based company named "Dialogue".
- The SP has decided to suspend the service to the IP on short code 39006 with immediate effect. The service was suspended/terminated that same day while the SP continued its investigations. The suspension notice to Dialogue was provided and the SP indicated that a signed copy has been returned by Dialogue to the SP.
- Dialogue confirmed that 'Mob1' has stopped their campaign on 24 October 2005, after an earlier warning/notice from the SP.
- The SP's notice to Dialogue indicates the text of the SMS message received by the complainant as follows:

"Your account shows 12450 mob1 bucks! Convert them into a reward valued R2000. Secure code 5135. Send MOBILE to 39006. T&C on www.mob1.biz R15/SMS max9".

The SP went further and on 31 October 2005 indicated to the Secretariat that it had requested the network operators to block the 39006 short code so new messages to such number are not charged at a premium rate. At that stage Cell C had confirmed that the blocking was effective.

The SP further indicated on 4 November 2005 that MTN and Vodacom had confirmed the blocking of the 39006 short code at the SP's request until this matter is resolved.

The Secretariat reviewed the Internet web site referred to by the IP in its initial message. The contents of such Internet web site are not repeated here in their entirety, however certain key issues were noted:

The "home page" of such web site indicates:

Home Page

Welcome to mob1 Client Reward System You may be asking yourself what this promotion is all about and why we are giving away rewards worth 2000 Rand for Client Bucks earned by our customers.

The answer is simple! Over our last 3 years of operation we have gathered a database of over 10,000,000 mobile phone subscribers. Each such subscriber represents a valued customer who has either consented to receive further messages from us or has given us their details in the course of a sale or negotiations for sale for similar products or services to those which we, as a business, offer. All those on our current data list are qualified to participate and by doing so, to claim a reward.

In order to enhance our existing relationship with our customers we want to recognize their valued custom by giving them the opportunity to spend their mob1 Client Bucks on a reward.

In 2005 we propose to reward 30.000 of our qualifying customers with a selection of exclusive offers having a value of 2000 Rand! Rewards are randomly allocated by our computer.

It is imperative that you understand that this promotion is genuine and that subject only to your complying with the requirements, you will receive your award.

This promotion is not connected to any mobile operator.

Enjoy!

Yours,
mob1 Team

Section 1 of the "Terms and Conditions" section of such web site indicates, inter alia:

Terms & Conditions

- Customers will be led through the service and during that time they will have to provide complete and precise information.

- By accepting the membership with activation of the messaging service (500 text messages at no cost) after sending the activation keyword from their mobile phone to the corresponding shortcode number (15 Rand per SMS, minimum 5 SMS), customers are confirming and understanding that they are a subscriber of the messaging service where they will receive invitations to other services. These services might include, but are not limited to mobile content (i.e. ringtones, wallpapers, video, horoscope, animations, jokes etc) or accept other promotions or competitions from mob1.biz or associated companies. By using our messaging service customers agree to receive further information or offers that we hope will be of interest to them.
- The prizes, products and services offered in this promotion, can only be granted subject to mob1.biz receiving correct and faithful commercial and ethical treatment from all our downline partners in the billing and distribution (physical and telephony) processes.
- If you have problems accessing our service or you are not happy with it, we offer you alternatively a Hotel Break Voucher worth 2000 Rand. Just follow the instructions given to you by SMS.
- If you decide on the Hotel Break Voucher, your 500 Free SMS will be cancelled.
- Please allow 4-6 weeks for the delivery of your reward.

The frequently asked questions (FAQ) section of such web site indicates:

FAQ

<ul style="list-style-type: none"> • What is this service about?
<p>In order to enhance our existing relationship with our customers we want to recognize their valued custom by giving them the opportunity to spend their Mob1 Client Bucks on a reward worth at least 2000 Rand.</p>
<ul style="list-style-type: none"> • What do we mean by "reward"?
<p>A selection of exclusive offers having a value of 2000 Rand.</p>
<ul style="list-style-type: none"> • How do you get a "reward"?
<p>By participating in one of our promotions. Our computer randomly matches mobile numbers stored on our database with a reward. It is programmed to ensure that during any one calendar year mobile phone owners receive a selection of exclusive offers having a value of R2000. If the promotion is a SMS promotion you have to send at least 9 text messages to complete the promotion and to claim your reward.</p>
<ul style="list-style-type: none"> • What do we mean by "promotion"?
<p>We mean that at various times during the year, we promote ourselves to you (initially contacting you either by text message or phone) and when we do that, based on the information retained on our database, we offer you the opportunity both to receive a reward and to have a little fun!</p>
<ul style="list-style-type: none"> • How did you become a customer / registered user?
<p>Such a registration may have been done through:</p>

a) Participation in a game of chance, subsequent to ordering a logo/ring tone,
b) b) Sending a free SMS and consent of the sender's terms & conditions
• How did you earn your Mob1 Client Bucks?
By participating in one or more of our services over the last years.
• How can I sign off?
Please go to http://www.mob1.biz/eng/signoff.php .

Lawfulness of Service

The key element of the complaint is a possible breach of Clause 9.1.6(d) of the WASPA Code of Conduct, which specifically prohibits competition services and the promotional material for competitions from suggesting "that the party has already won a prize and that by contacting the promoter of the competition, that the entrant will have definitely secured that prize." Clause 9.1.6(d) of the WASPA Code of Conduct was drafted having regard to the provisions of the Lotteries Act, Act 57 of 1997 (the "Lotteries Act"), as amended and the Consumer Affairs (Unfair Business Practices) Act, Act 71 of 1988 (the "Consumer Affairs Act"). While the key determination of this report concerns Clause 9.1.6(d) of the WASPA Code of Conduct, national law was also considered to ascertain the possible contravention of Clause 3.1.2 of the WASPA Code of Conduct as well as any extenuating or exacerbating circumstances regarding a possible breach of Clause 9.1.6(d) of the WASPA Code of Conduct.

The provisions of the Lotteries Act, Act 57 of 1997 (the "Lotteries Act"), as amended and the Consumer Affairs (Unfair Business Practices) Act, Act 71 of 1988 (the "Consumer Affairs Act") were considered.

The Lotteries Act provides the following definitions:

(xii) "lottery" includes any game, scheme, arrangement, system, plan, promotional competition or device for distributing prizes by lot or chance and any game, scheme, arrangement, system, plan, competition or device, which the Minister may by notice in the <i>Gazette</i> declare to be a lottery;
(xxii) "prize" means the prize awarded to the winner of a lottery;
(xxiii) "promotional competition" means a lottery conducted for the purpose of promoting the sale or use of any goods or services;

The Lotteries Act further provides, inter alia:

<p>Promotional competitions</p> <p>54. (1) A promotional competition shall not be unlawful if -</p> <p>(a) it is conducted in the Republic;</p> <p>(b) the consideration payable in respect of the purchase of goods or the use of services in respect of which that promotional competition is conducted -</p> <p>(i) is the price usually or ordinarily paid for such or similar goods or services without the opportunity of taking part in a promotional competition;</p> <p>(ii) is not increased by the opportunity to participate in that promotional competition;</p> <p>and</p> <p>(iii) is the only consideration payable for those goods or services and includes consideration for the right to compete;</p> <p>(c) the opportunity of participating in the promotional competition is not the only or the only substantial inducement to a person to purchase or use the goods or services to which the promotional competition relates;</p>

- (d) the promotional competition is conducted in accordance with the regulations prescribed by the Minister in terms of subsection (2) or (3);
- (e) the promotional competition or any conduct under it is not substantially comparable to -
- (i) a business practice which has been declared unlawful in terms of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988); or
 - (ii) a restrictive practice which has been declared unlawful in terms of the Competition Act, 1998 (Act no. 89 of 1998);
- (f) the Minister has not in terms of subsection (4) declared the promotional competition unlawful;
- (g) the goods or services manufactured, sold, supplied, distributed or delivered in connection with the right to participate in a promotional competition are usually or ordinarily manufactured, sold, supplied, distributed or delivered by the person for whose benefit the promotional competition is held;
- (h) the promotional competition is not substantially similar to any competition, game or sports pool conducted by or on behalf of the National Lottery; and
- (i) the consideration paid for the purchase of the goods or the use of the services promoted by a promotional competition is not increased by the opportunity to take part in that promotional competition to such an extent that that promotional competition does not mainly serve as a means, method or mechanism of promoting the relevant goods or services, but substantially as consideration for the opportunity to take part in that promotional competition.
- (2) The Minister shall, after consultation with the board, with due regard to the effect of promotional competitions on the National Lottery, lotteries incidental to an exempt entertainment and society lotteries, make regulations which are necessary for the proper conduct and regulation of promotional competitions in general.
- (3) Without derogating from the generality of subsection (2), the Minister may make regulations in respect of -
- (a) the minimum age of a person who may participate in any particular competition or category of competitions;
 - (b) the conditions or circumstances under which the board or any person designated by it may without the consent of the person who conducts the promotional competition inspect any aspect, including any process or procedure, relating to a promotional competition, including the accounting procedures and the process of identifying the winner or winners of that promotional competition;
 - (c) any matter relating to the conduct of a promotional competition which may reasonably have a negative influence on or consequence for the public or a part or group thereof;
 - (d) offences and penalties for the contravention of the regulations.
- (4) The Minister may on the recommendation of the board by notice in the *Gazette* declare a promotional competition to be unlawful.
- (5) Any person conducting a promotional competition which in terms of subsection (4) has been declared unlawful, shall immediately cease to conduct such competition and shall immediately instruct all his or her or its agents and any other person connected with that competition to immediately terminate any action connected with the conduct of that competition, and any person who fails to comply with this subsection or an instruction thereunder is guilty of an offence.

Unlawful lotteries and competitions

56. Unless authorised by or under this Act or any other law, no person shall conduct through any newspaper, broadcasting service or any other electronic device, or in connection with any trade or business or the sale of any article to the public -

- (a) any competition or lottery other than one authorised by or under this Act in which prizes are offered for forecasts of the result of either -
 - (i) a future event; or
 - (ii) a past event, the result of which has not yet been ascertained or is not yet generally known;
- (b) any competition other than a promotional competition contemplated in section 54 in which success does not depend to a substantial degree on skill; or
- (c) any promotional competition which is the subject of a declaration contemplated in

section 54(4).

General offences

57. (1) Any person who -

(a) participates in; or

(b) conducts, facilitates, promotes or derives any benefit from a lottery, promotional competition or sports pool, shall, unless such lottery, promotional competition or sports pool is or has been authorised by or under this Act or any other law, be guilty of an offence.

(2) Any person who -

(a) contravenes or fails to comply with any provision of this Act;

(b) forges or in any other fraudulent way changes any ticket or any other document or thing pertaining to any lottery or promotional competition;

(c) knowingly sells or in any other way disposes of any forged ticket or any other document or thing pertaining to any lottery or promotional competition;

(d) with intent to defraud, alters any number or figure on any ticket or any other document or thing pertaining to any lottery or promotional competition;

(e) obtains any direct or indirect financial gain, which is not solely a share in the prize payout, by forming, conducting or in any other way promoting a syndicate for the purchase of a ticket; or

(f) sells a ticket -

(i) at a price higher than that which is printed on the ticket;

(ii) on condition that the seller of the ticket shares in the prize in the event of a ticket sold by him or her being the ticket in respect of which a prize is paid;

(iii) on any condition not provided for in the rules of the lottery concerned;

(iv) on credit or with the financial assistance in any form of the seller; or

(g) conducts, organises, promotes, devises or manages any scheme, plan, competition, arrangement, system, game or device which directly or indirectly provides for betting, wagering, gambling or any other game of risk on any outcome of any lottery unless authorised by or under this Act or any other law, shall be guilty of an offence.

Prohibition of activities in Republic in relation to lottery or sports pool conducted outside Republic

59. In a prosecution arising from any thing done or not done in the Republic in connection with a lottery or sports pool, it shall not be a defence merely to prove that the management, conduct or business of or concerning the lottery or sports pool in question is or was wholly or in part carried on at a place outside the Republic.

From a review of the competition provided by the SP and the IP's Internet web site and the Lotteries Act (particularly those clauses indicated above) it appears that:

- The competition conducted by the IP is a lottery for the purposes of the Lotteries Act (see the IP's web site where the statement is made "Our computer randomly matches mobile numbers stored on our database with a reward" and in the SP's interaction with the IP it indicated that this is a "competition");
- Lotteries may only be conducted in South Africa in terms of a licence granted by the National Lottery Board or if they are Lotteries Incidental to Exempt Entertainment, Private Lotteries, Society Lotteries and Promotional Competitions, conducted in accordance with the Lotteries Act and the Regulations promulgated in terms of the Lotteries Act);
- The competition conducted by the IP does not fall within the definitions of Lotteries Incidental to Exempt Entertainment, Private Lotteries or Society Lotteries;

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- The competition conducted by the IP may possibly be regarded as a Promotional Competition and the IP on its Internet web site attempts to create this impression, however it does not appear to comply with the requirements in respect of Promotional Competitions as outlined in the Lotteries Act and the relevant Regulations (Regulation 672 of 2003 published in Government Gazette Number 24874) *inter alia* in the following respects:
 - the promotional competition or any conduct under it is substantially comparable to a business practice which has been declared unlawful in terms of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988) [in respect of which see below];
 - there is no discernable promotion of goods or services, despite numerous references to undisclosed “services” on the IP’s web site;
 - consideration is payable for the opportunity to enter the competition.
 - There is accordingly a very strong *prima facie* indication that the competition conducted by the IP is being conducted in contravention of the Lotteries Act and particularly the prohibition in Section 56 (b) of the Lotteries Act.

Competitions of a similar nature to that conducted by the IP have been the subject of an extensive investigation in terms of the Consumer Affairs Act. Pursuant to such investigation, General Notice 303 of 2005 was published in Government Gazette 27311 on 21 February 2005, in terms of section 12(6) of the Consumer Affairs Act. Such notice proclaims as an “unfair business practice” the business practice “whereby mail-order entities, inform consumers or potential consumers, by any means whatsoever, that they have won a sum of money or any other prize,

- (a) where the consumers have not won the money or prize mentioned in the headline; and/or
- (b) where such money or prize is subject to suspensive conditions prior to entitlement, and the suspensive conditions are not printed, immediately after the announcement of the prize, in the same letter type and size as the announcement of the prize; and
- (c) where consumers are required to send any sum of money in order to claim the prize, except such sum of money which is the purchase price for identified goods bona fide offered for purchase by the company and ordered by the consumer.”

The relevance of General Notice 303 of 2005 to the instant case is that the term “mail-order entities” is defined very broadly as “manufacturers, wholesalers or retailers who contact buyers through direct mail, catalogs, television, radio, magazines, and newspapers and deliver the goods ordered by their clients to a post office or a physical address nominated by the clients. **It also includes entities who do not necessarily offer goods but require of consumers to forward any type of fee on order to receive a prize**” (emphasis inserted). Additionally the term “prize” includes, but is not restricted to, “awards, donations, bonuses, gifts, grants, presents and rewards.”

In the instant case:

- the “reward valued R2000” referred to in the initial SMS message received by the complainant appears to fall within the definition of a prize in terms of General Notice 303 of 2005;
- the SMS message delivered to the complainant appears to have informed the complainant that he was entitled to the reward, namely “Your account shows 12450 mob1 bucks! Convert them into a reward valued R2000”. It could be argued that the wording of the initial SMS message does not indicate the winning of the prize, rather the conversion of some notional currency into a reward. This is a semantic distinction and it appears that the effect of the SMS message is to inform the complainant (a consumer or potential consumer) that has won a prize. The conversion process appears to be a procedural step in claiming such prize;
- the initial SMS message seems to fall within the meaning of informing the complainant “by any means whatsoever”;
- the return SMS message to the SP’s short code at a cost of R15, plus at least eight additional SMS messages required (a total cost of R135 or greater) appears to amount to a payment of a fee to the IP, collected on its behalf by the SP;
- while the IP may not be a manufacturer, wholesaler or retailer and while it may not “contact buyers through direct mail, catalogs, television, radio, magazines, and newspapers and deliver the goods ordered by their clients to a post office or a physical address nominated by the clients”, the IP appears to fall within the last sentence of the definition of mail-order entity in that it does “not necessarily offer goods but require[s] of consumers to forward any type of fee on [sic] order to receive a prize”.

General Notice 303 of 2005 goes further and provides that with effect from 1 May 2005, the unfair business practice (defined above) is “declared unlawful and persons are hereby directed to:

- (a) refrain from applying and/or perpetuating the unfair business practice; and
- (b) refrain at any time from applying and/or perpetuating the unfair business practice”.

There is accordingly a very strong *prima facie* indication that the competition conducted by the IP is being conducted in contravention of General Notice 303 of 2005.

Decision

The Adjudicator upheld the complaint in regard to the unsolicited SMS message and the competition promoted therein. The Adjudicator did not uphold the complaint with regard to the SP’s failure to address the complainant’s complaint, as insufficient evidence was provided to justify such a finding and the SP’s conduct in regard to this complaint seems to indicate the contrary. In fact, the Adjudicator found the SP’s response to the complaint to be exemplary in all respects. The Adjudicator did not uphold the complaint in respect of Clause 3.7.1(b) of the WASPA Code of Conduct, as the invasion of privacy suffered by the complainant was not shown to be unreasonable, as stipulated in Clause 3.7.1(b) of the WASPA Code of Conduct.

The Adjudicator determined that the IP had contravened the provisions of the following Clauses of the WASPA Code of Conduct:

- 4.1.1 as pricing is unclear. The SMS message refers to a maximum of 9 messages, while the Internet web site refers to a “minimum 5 SMS” in the terms & conditions section while the FAQ section refers to “at least 9 text messages”;
- 4.1.2 particularly concerning the value of the rewards, considering that a 500 SMS bundle costs R100 on Vodacom and R85,50 on MTN;
- 5.3.1 as the SMS message constitutes spam as determined in terms of clause 5.2.1. The IP’s justification in the FAQ section of the Internet web site to the effect that registration “may have been done through: a) Participation in a game of chance, subsequent to ordering a logo/ring tone, b) Sending a free SMS and consent of the sender’s terms & conditions” is at best disingenuous and at worst blatantly dishonest. The Adjudicator found no indication that the complainant had “a direct and recent prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator”.

Furthermore, the IP’s answer as to the question of how the “Mob1 Client Bucks” have been earned, namely “By participating in one or more of our services over the last years” is not accepted, as the majority of SMS messages distributed by the IP reflect the same number of “Mob1 Client Bucks”, when the complainant has not made use of any of the IP’s services. It appears again that the IP’s answer is at best disingenuous and at worst blatantly dishonest.

- 6.2.2 in that initial SMS message is an advertisement and does not include the full retail price. The IP has gone some way to complying in indicating the cost of the reply SMS message and the maximum number of SMS messages required, however the IP’s Internet web site indicates that this is not factually correct.
- 6.2.4 again, the IP has gone some way to complying in indicating the cost of the reply SMS message and the maximum number of SMS messages required, however the IP’s Internet web site indicates that this is not factually correct.
- 6.2.6; and
- 9.1 (9.1.1 – 9.1.6) and specifically:
 - Clause 9.1.6(a) of the WASPA Code of Conduct in that the word “reward” is used to describe an item, which is intended to be provided to each and every participant;
 - Clause 9.1.6(d) of the WASPA Code of Conduct, which specifically prohibits competition services and the promotional material for competitions from suggesting “that the party has already won a prize and that by contacting the promoter of the competition, that the entrant will have definitely secured that prize.” The initial SMS message from

the IP to the complainant and transmitted by the SP falls squarely within this prohibition.

The Adjudicator noted that neither he nor the WASPA Secretariat is a Court of Law empowered to consider possible violations of national law. Although there may be overlap between certain national laws and the WASPA Code of Conduct, any findings and sanctions referred to in this Adjudication are founded purely on any infringements of the WASPA Code of Conduct. As such the WASPA Adjudicator cannot make a finding that competition conducted by the IP is being conducted in contravention of the Lotteries Act or in contravention of the Consumer Affairs Act (in respect of General Notice 303 of 2005). As contraventions of the Lotteries Act and the Consumer Affairs Act are criminal offences, making a finding of contravention of such legislation will require a trial to be held in accordance with South African criminal law. Clause 9.1.6(d) of the WASPA Code of Conduct overlaps to some extent the national law referred to above and the Adjudicator is empowered by the WASPA Code of Conduct to find breaches thereof and to impose sanctions in respect of breaches found.

Clause 3.1.2 of the WASPA Code of Conduct commits a member of WASPA, such as the SP, to lawful conduct. It is an affirmative statement requiring a positive effort on the part of the WASPA member. It is not stated in the negative (for example, "Members are committed not to participate in conduct which has been found by a court of competent jurisdiction to be unlawful and which is not the subject of an appeal"), which would obviate the need for positive effort on the part of a WASPA member.

Due to the affirmative nature of the SP's obligation in terms of Clause 3.1.2 of the WASPA Code of Conduct and the compelling *prima facie* indication of a breach of the Lotteries Act and the Consumer Affairs Act, the Adjudicator held that there was a breach of Clause 3.1.2 of the WASPA Code of Conduct.

Sanction

In considering the sanction to be imposed arising from the numerous and egregious breaches of the WASPA Code of Conduct raised in the instant complaint:

- The Adjudicator took note of the SP's submission concerning the origination of outgoing SMS messages and its role being limited to the receipt of incoming SMS messages.
- The Adjudicator considered Clause 3.9 of the WASPA Code of Conduct, which provides:

3.9. Information providers

3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.

3.9.2. The member must suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.

- The Adjudicator had regard to the prevalence of this and similar practices and the fact that there are a number of Information Providers using WASPA

members to provide services of the same or similar nature to that described in the instant complaint and General Notice 303 of 2005. Generally, when one member takes action to terminate the service, the Information Provider will move to a different WASPA member and obtain services from that member. While certain WASPA member's have been more proactive in dealing with practices of this type, no single WASPA member stands out as promoting services of this nature.

- The Adjudicator had regard to the fact that the SP had done more than simply submit a response to the complaint. It had suspended the service (as contemplated in Clause 3.9.2 of the WASPA Code of Conduct), suspended the short code used with the mobile cellular network operators, identified the provider sending the MT messages on behalf of the IP and communicated with it and changed its business rules so as not to allow receipt of MO messages unless the SP was also responsible for the provision of the MT messaging service.

The Adjudicator confirmed the correctness of the SP's action in terminating the service of the IP and the continuance of such suspension. Having regard to the SP's proactive and indeed exemplary conduct in this matter, the Adjudicator was of the view that no sanction was required.