Wireless Application Service Provider Association

REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Independent SMS Telecommunications (Pty) Ltd
Information Provider (IP) (if applicable)	Uncertain, appears to be Promo D.o.o trading as Mob1, through Grodata Systems CC
Service Type	SMS Competition
Source of Complaints	Network
Complaint Number	#0078

Complaint

A complaint was received from one of the mobile cellular networks regarding an unsolicited SMS message received on or about 2 November 2005 and offering the conversion of "Mob1 bucks" from short code 39393 and with a reply number being 0820041472. The complainant provided a copy of the SMS message received (MT) as follows:

> Your account shows 12450 mob1 bucks! Convert them into a reward valued R2000. Secure code 5135. Send COOL to 0820041472. T&C on www.mob1.biz R15/SMS max9-R135

The complainant raised three specific breaches of the WASPA Code of Conduct, being Clause 5.3 relating to unsolicited commercial messages or "spam", the SP's commitment to lawful conduct in terms of Clause 3.1.2 and Clauses 4.1 and 6.2 relating to the provision of misleading pricing information and in particular "number of SMS MO's that are required to be sent exceed the maximum indicated in the SMS MT.

This is the fourth complaint in respect of the SP concerning the same (or a substantially similar) service. In addition, a fifth complaint has been received and dealt with concerning the same service conducted through a different SP. As such the SP is well aware of the possible breaches of the WASPA Code of Conduct in respect of the service, including but not limited to the three discrete issues raised by the complainant, specifically possible breaches of the following Clauses of the WASPA Code of Conduct:

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

SP Response

The SP responded to the complaint, as follows:

- The messages that are sent emanate from overseas and we are not in control of it. We have tried to control of it.

- From our initial checks we have NOT found any history on the ****** number [the number on which the complainant alleges the MT SMS message was received], appears that NO message(s) were sent to that number.

- However, we find the occurrence to be defensible but in light of the service being cut anyway we would like to close the door on this one and move ahead.

- It is our firm intention not to allow any further customers to offer services that display any ambiguity.

The SP requested confirmation of the number on which the complainant received the SMS message, this was provided however the SP denied that the message forming the subject matter of this complaint was sent to the complainant on the number provided.

The SP has indicated in a previous complaint [Complaint #0066] that: "Pricing is clearly shown. The messages has always shown the cost of the SMS, recently we have added R135 to avoid any possible confusion".

The question of the value of the "reward" referred to has also been raised in previous complaints and is considered in more detail below.

The question of the origination of the MT message received by the complainant was raised for the first time in respect of this complaint; however this contention applies in respect of the other complaints brought against the SP in respect of the service offered by the IP. This is dealt with more fully below.

Investigation

The Secretariat tested the SP's assertion of "the service being cut anyway". An SMS message sent on both the MTN and Vodacom networks to both 0820041472 and 39393 did not generate any response, thus giving the impression that the service has in fact been terminated.

The Secretariat reviewed the Internet web site referred to in the message to the complainant. 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 comercial 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

• What is this service about?
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.
• What do we mean by "reward"?
A selection of exclusive offers having a value of 2000 Rand.
• How do you get a "reward"?
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.
• What do we mean by "promotion"?
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!
• How did you become a customer / registered user?
Such a registration may have been done through: 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.

The SP's response indicates but does not explicitly state that it provides the service on behalf of an information provider. Having regard to the fact that:

- The Internet web site gives a contact address in Zagreb, Croatia;
- The Internet web site address (http://www.mob1.biz/) translates to IP address 195.190.136.132 and is hosted by a Croatian web host, Tomsoft D.o.o similarly located in Zagreb, Croatia. The .biz whois service reflects Promo D.o.o as the registrant of the domain mob1.biz;

It has been assumed that the SP has been providing the service on behalf of an IP, namely Promo D.o.o.

It should be noted that the Internet web site gives a South African support number "083 920 9000", which is the same number used by the defunct OptinSMS competition service <www.optinsms.co.za> accessible via <http://web.archive.org/web/*/http://www.optinsms.co.za>.

The Secretariat considered the wording of the SMS message, concerning the value or worth of the rewards. The Oxford English Dictionary defines "value" as "noun: 1 the regard that something is held to deserve; importance or worth. 2 material or monetary worth" and "worth" as "adjective 1 equivalent in value to the sum or item specified. noun 1 the value or merit of someone or something. 2 an amount of a commodity equivalent to a specified sum of money." The "reward" available to a participant is either a travel voucher or an online Internet based SMS bundle. Accordingly, in order to uphold the SP's contention that the vouchers and online SMS bundle are equivalent to a specified sum of money, in this case the amount indicated by the SP, being R2 000,00.

In order for the travel voucher reward (two nights for two persons) to have a value of R2 000,00 is trite that the daily per person rate must be R500 of higher on a room only basis.

The Secretariat contacted one of the establishments listed in the "travel voucher" at random. It should be noted that the contact details for this establishment were incorrectly listed in the voucher. The establishment indicated:

- The special weekend package they offer is priced at R1 360,00 (two persons for two nights, bed and breakfast);

- The requirement that the guest pays for breakfast as part of the Minimum Daily Expenditure (at an approximate figure of R50,00 each for breakfast for two persons for two meals), would indicate an approximate value of the voucher of R1 160,00;

- The establishment provides the accommodation through TLC Marketing PLC, a listed UK based company. It costs the establishment to promote itself in this manner, however there is a small recoupment on the Minimum Daily Expenditure and guests usually spend more than this amount during their stay.

The Secretariat further consulted Internet web sites for five other establishments listed in the voucher. Prices ranged from R112 per person per night to R460 per person per night. In addition, most of these prices are reflected on a bed and breakfast basis, while breakfast is an extra charge when using the travel voucher.

The Minimum Daily Expenditure ranges from R75 per person per day (ie R300,00 for the weekend) to R575 per person per day (ie R2 300,00 for the weekend) and is not disclosed in the IP's communications, only in the voucher itself.

The Secretariat accepts that its review is not comprehensive as it sampled only six establishments, however this limited review indicates that the value or worth of the travel voucher appears to be lower than R2 000,00 in most cases (as low as R448,00 in one case, not discounting the value further regarding the Minimum Daily Expenditure) and when it approaches R2 000,00, the Minimum Daily Expenditure increases proportionately, up to R2 300,00 at its highest.

Regarding the value of the Internet based SMS bundle, it is similarly trite that if the 5 000 SMS bundle has a value of R2 000,00 each SMS will have a value of R0,40. The question of value here is more complex, as the per SMS charge varies from network to network and package to package. At their most expensive SMS messages cost up to R1,75 each (Vodacom: R0,80 per SMS [peak] R0,35 per SMS [off-peak] and R1,74 per SMS [international], MTN: R0,75 per SMS [peak], R0.35 [off-peak] and R1,75 [international], Cell C: R0,80 [peak], R0,36 [off-peak]). However on standard packages, per SMS costs can drop as low as R0,19 per SMS (MTN) and R0,225 per SMS (Vodacom), although there is a subscription amount involved. If taken as a bundle together with an existing package, SMS costs can drop as low a R0,16 per SMS. Bulk SMS costs are typically lower than standard charges, without the need for a subscription amount. For example the publicly quoted Vodacom bulk SMS costs are R0,30 per SMS local and €0,044 international on a pre-paid bundle of 2 000 to 9 999. Thus a 5 000 SMS bundle would have a value of R1 500,00 local and approximately R1 638,22 international (depending on prevailing exchange rates).

Red Hot SMS (an Internet based SMS service of Grodata Systems CC, which is involved in the provision of the service by the IP through the SP) reflects the following pricing:

Type	**Deal price**	EXAMPLE ON SA SMS		O/SEAS SMS XAMPLE	
		PER EACH	QTY	PER EACH	QTY
Business	R1 140	0.24	4 750	0.48	2 375

As can be seen, trying to determine the value of an SMS bundle is extremely difficult, however it has been noted that it is possible to purchase an SMS bundle very similar to that offered by the SP for between R1 200 and R1 500.

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 drafting 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 *Gazette* 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:

Promotional competitions
54. (1) A promotional competition shall not be unlawful if -
(a) it is conducted in the Republic;
(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 -
(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;
(ii) is not increased by the opportunity to participate in that promotional competition; and
(iii) is the only consideration payable for those goods or services and includes consideration for the right to compete;
(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;
(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;

- 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 complaint:

- 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 (and, as indicated above, the "conversion" process appears to be focussed on collecting payment from the consumer, rather than on obtaining "correct" or "required" responses;

- 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 SP submitted that it has not found any history of the initial SMS message being sent to the complainant and thus it appears that no message(s) were sent to that number. In complaint #0066 a similar argument was presented by the SP and this was accepted by the Adjudicator as both the SP and the complainant had furnished information in good faith and the assumption has been made that the SMS message has been delivered to the complainant, however from a provider other than the SP. In that complaint, the complainant was a member of the public. In the instant complaint, the complainant is the operator of a mobile cellular network. As such it generates revenue from SMS messages sent to the SP and as its complaint could result in the service being terminated, the complaint may have a negative impact on revenue. Accordingly, this complainant and its complaint must be given greater credibility as it is against the complainant's own financial interests. The SP's submission regarding transmission of the initial SMS message to the complainant is accordingly rejected.

The SP's submission regarding its role (or rather the lack thereof) in the origination of the MT message received by the complainant was considered. The SP wishes the Adjudicator to believe that it is an innocent party that is not responsible for transmission of the MT messages, at the same time it wishes the Adjudicator to believe that it has sufficient access rights to the system used to transit these messages to state categorically that no message was sent to the complainant. In addition, the access the SP has to the transaction history in Complaints #0057 and #0067 indicate an intimate relationship with the IP, particularly as the transaction history in both aforementioned Complaints includes the MT message. Furthermore, the SP has made various arguments regarding these complaints on behalf of the SP and has not previously indicated that it is a mere conduit for the IP and has no involvement. It appears to the Adjudicator that the SP is attempting to approbate and reprobate: it protests its innocence, while displaying an intimate knowledge of the IP's service and in fact acting as the advocate of the IP's service in the face of numerous complaints.

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 "R15/SMS max9-R135" that is 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”. In other complaints a number of SMS messages in excess of the stipulated maximum have been required. In addition, SMS message dialogues previously provided by the SP indicate that the maximum of 9 SMS messages stipulated in the initial SMS message changes to a maximum of 12 messages (refer reports #0057 and #0067)

- 4.1.2 particularly concerning the value of the rewards. Having regard to the investigation of the Secretariat, the statements concerning the value of the rewards are at best likely to mislead by inaccuracy, ambiguity, exaggeration or omission (and the statement as to value appears to contain elements of one or more or all of inaccuracy, ambiguity, exaggeration and omission). At worst the statements regarding the value of the rewards are false and/or deceptive.

- 5.3.1 as the SMS message constitutes spam as determined in terms of clause 5.2.1. The SP’s submission that it is not responsible for the emanation of the messages is of little relevance, having regard to the provisions of Clause 3.9 of the WASPA Code of Conduct, discussed more fully below.

  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 SP’s response that the complainant’s number is on its client’s database “which could be from his own opt-in efforts or from lists that he buys” thus asserting compliance with clause 5.2.1 of the WASPA Code of Conduct, is rejected. 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. The SP’s SMS message history dialogue indicates a bulk transmission indicating the same number of “Mob1 bucks” and the same “Secure code” to a large number of recipients, without regard to their identity. 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. The SP’s response that it is now indicating the full cost of R135, is noted.

- 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.
- 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

The Adjudicator consolidated the sanctions in respect of Complaints #0066, #0067 and this #0078, as the complaints deal with substantially the same issues. 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 sanctions imposed on the SP and other SPs in complaints of a similar nature.

- The Adjudicator took note of the SP's submission that the MT message received by complainants emanate from outside South Africa, however the SP appears to have an close business relationship with the IP, which has allowed the SP to respond to complaints on behalf of the IP, advocating for the IP and making representations on its behalf. The SP is not a mere conduit for the service of the IP but a direct participant therein, inter alia by receiving income based on the IP's service.

- The Adjudicator noted that the service no longer appears to be operating, however that the numbers 39393 and 0820041472 used in connection with the service are recorded as being active in the database of at least one mobile network.

- 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 this is the fourth breach of the Code of Conduct found in respect of the SP and in respect of a substantially similar service, which appears to be provided by the same IP.

- The Adjudicator noted that the sanction imposed is in respect of the instant complaint, rather than in respect of the service provided by the IP through the SP as a whole. As such, further complaints regarding the same service may be entertained by the WASPA and additional sanctions could be imposed, should this be found to be necessary and appropriate in the circumstances.

The Adjudicator accordingly imposed the following sanction:

- The SP is reprimanded for allowing the numerous and egregious breaches of the WASPA Code of Conduct by the IP.

- The SP is required to remedy the breach. In order to do so, the SP is ordered to terminate the provision of services to the IP. As this may be easily circumvented, the SP is further ordered to terminate the provision of services:

- Relating to “mob1” and “bon4u”;
- Relating to any competition or service which is the same or similar to that of “mob1” and “bon4u”;
- In respect of any competition which contravenes the provisions of Clause 9.1.6(a) and/or 9.1.6(d) of the WASPA Code of Conduct,

Irrespective of the identity of the IP.

- The SP is required to notify the Secretariat of such information as is in its possession regarding the IP, including (without limitation) the full name of the IP, the name or names of any business, partnership, company or other entity with which the IP is associated, the national identity number of the IP and the IP’s full contact details, so that other WASPA members may be notified of his identity and conduct.
- WASPA will advise:
  - Vodacom to block the SP’s access to the number 0820041472 for a period of 12 (twelve) months; and
  - Cell C, MTN and Vodacom to block the SP’s access to the number 39393 for a period of 12 (twelve) months.
- The SP is ordered to pay a refund to the complainant in respect of Complaint #0067 in the amount of R90,00 in respect of the six R15 premium rated SMS messages dispatched, being a “reasonable and valid claim[s] for compensation” in terms of Clause 13.4.1(d) of the WASPA Code of Conduct.
- The SP is ordered to pay a fine of R100 000,00.

In determining the amount of such fine the Adjudicator considered the number and egregious nature of the breaches of the WASPA Code of Conduct and the serious repercussions that contraventions of the Lotteries Act and the Consumer Affairs Act may have on the wireless applications industry as a whole.

Clause 13.3.13 of the WASPA Code of Conduct indicates that the SP “must, within five working days, comply with any sanction imposed, or notify the secretariat that it wishes to appeal against the decision of the adjudicator.