



## REPORT OF THE ADJUDICATOR

<b>WASPA Member (SP)</b>	Cellfind
<b>Information Provider (IP)</b>	Lucky Mobile
<b>Service Type</b>	Commercial message and subscription service
<b>Source of Complaints</b>	Competitor
<b>Complaint Number</b>	#0409

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### Complaint

A complaint was received from a competitor of the IP, concerning a promotional message for the subscription service of the IP marketed under the IP's "Fresh Mobile" brand and provided through the SP. The complainant states:

*No opt-out option*

*Subscription service advertised and not adhering to explicit identification as subscription service.*

*FRESH MOBILE*

*Date Received: 03 August, 2006*

*Received via SMS*

*MSISDN: 0829051188*

*MESSAGE TEXT:*

*Love tips, poems, jokes, insults & lots more totally FREE!!! Join the FreshClub & start the fun right now. sms CLUB to 31181 (R5/week plus WAP charges)*

The complainant referred to the following provisions of the WASPA Code of Conduct:

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.

5.1.3. Where feasible, persons receiving commercial messages should be able to remove themselves from the database of a message originator using no more than two words, one of which must be 'STOP'.

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services".

While not referred to by the complainant, the following provisions of Section 11 of the WASPA Advertising Rules, which relates specifically to advertising of WAP services by way of SMS messages, were considered:

#### **11.1 SCOPE**

Applies to all SMS and MMS's to the general public where Access Channels are displayed.

While cognizant of the limited space in an SMS, senders must nonetheless abide by the General Terms.

11.2.4 Contact details of the sender are obligatory. The contact details must not use any premium rated fax, PSMS, USSD, WAP, or IVR lines. A web site address is the preferred method.

### **11.3 TEXT DISPLAY**

11.3.1 Display Text with full pricing information must be displayed on the SMS/MMS

11.3.2 The SMS must contain contact details of the sender, preferably a web site address

**11.11 DISTRIBUTION LISTS:** Indicate If Consumer Automatically Placed On List. // No sexual or sexually suggestive Content in list if the list recipient does not request or expect it. // Provide reasonable opt-out procedure // Sender must have direct and recent association with recipient

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- The sender to a distribution list must indicate the cost and T&C of access to a service in each and every communication, even the receiver was previously a user of that service. No assumption as to the knowledge of the recipient in respect of the costs and T&C of a service must be made for users who had previously used the service.

- If using SMS as the Access Channel and where has been no communication to a user of that service from either the general participants in that service or the controllers of the service for a minimum of ten (10) calendar days, then any further communication to that user must, at the first communication to that user after the tenth (10th) day, must indicate who the service is provided by and how the user may unsubscribe from the service, and the cost thereof.

- Opt-Out: Any further communication with a consumer in a distribution list must contain a relatively easy and unambiguous method for immediately opting-out of any further communications from that distribution list:

- o Fax: No premium rated fax lines [eg 0866 fax-2-email type numbers] may be used for the mandatory opt-out procedure.

- o SMS: The total cost of opting-out from any distribution list using a premium rated SMSs Access Channel may not exceed R1 total cost

- [See also "TOTAL ACCESS REQUIREMENTS" below]

- [See also v3.2 of "WASPA CODE OF CONDUCT"]

- o IVR (or any other time-based method): Where applicable, any IVR systems used for any opt-out procedure must be designed so that a reasonable user will not need to exceed 120 seconds (from the start of the IVR call or time-based method) for the entire opt-out process.

- [See also "PRICING" below]

- [See also "TOTAL ACCESS REQUIREMENTS" below]

**11.16 SUBSCRIPTION SERVICES:** Show Total Subscription Charge, Frequency of Charge, any bearer charges and any additional charge/s

(i) Must Use The Words "Subscription Service"

If the Content provider is providing a continuous, subscription-like or subscription-based service, then the words "Subscription Service" must be prominently displayed at the top section of the advertisement as well as at each Content or service section in the advertisement where various subscription types are displayed.

No acronym, letter (eg "S"), number, abbreviation (eg "Subs"), icon, or any other mark may be used as an alternative to the words "Subscription Service" anywhere in the advertisement when that Content is only available at all and/or at a particular cost as part of a subscription service.

(ii) Must Indicate Charge/s:

The advertisement must indicate:

(a) The TOTAL charge that the consumer will incur for the subscription component of their access to that subscription service.

(b) The frequency (and the minimum frequency, if applicable) at which they will be charged for the subscription component of access to that subscription service.

(c) Whether, in addition to the periodic subscription charges in (a) & (b) above, there are any additional charges applicable to obtaining any particular service, Content or class of Content on the advertisement. [See (iii) below]

This indication must include the potential and cost of any (additional) bearer charges.

(iii) Must Indicate Cost Of Any (Additional) Per-Content Access

If in addition to a periodic subscription charge the consumer could additionally be charged on a per-access basis for access to any particular service, Content or class of Content on the advertisement within the subscription period and terms, then the advertiser must make it clear to the consumer that access this Content or service will, over and above the periodic subscription cost, incur additional charges per Content or service access.

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## SP Response

The IP provided two responses. The first is informal in nature and the content thereof is largely subsumed in the second, more formal response. As such, only the second response is set out below:

*Here is our response to the complaint:*

1. 5.1.2 - the information provider, Luckymobile (LM), does indeed have a facility whereby a customer can be removed from its database so that further messages cannot be sent to that user. If a user replies with STOP, or any phrase that constitutes a stop command e.g. END, the system will opt that user out of the bulk sms database and that user will no longer receive commercial messages from LM. LM would like to make it clear at this point that it believes the complainant is finding fault with LM on the basis that the message does not contain a phrase explaining to the user how to opt-out. We believe that 5.1.2 and 5.1.3 merely require a facility. It is the confirmation message for subscription services and the monthly reminder per se that require the specific mention of how to unsubscribe - but from our reading of the code we cannot find a similar rule for commercial messages to contain such an instruction.

2. 5.1.3 - as explained above, the opt-out facility is triggered by the word STOP or a similar phrase with the same meaning. LM is one of the few service providers who have enabled this facility to function via a single word and not a combination of words - thus making opting-out simple for the end user.

3. 11.1.1 - this requirement pertains to "all promotional material". We submit that a sms message, being 160 characters, should be exempted from this specific phrase provided that the message itself sufficiently conveys to the user that the service is of a subscription nature i.e. a service which creates an

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*ongoing billing relationship with the user. LM used the following phrases to achieve this:*

- a. JOIN*
- b. CLUB*
- c. R5/week*

*All of the above phrases, when read together convey the impression that the user will be joining a service with an ongoing billing relationship i.e. that you join a Club, the Club gives discounts or benefits, the cost of the Club is R5/week. The message is 151 characters and the phrase "subscription service" is 21 characters making it very difficult to add the phrase in.*

*In the event that LM is found to have breached any of the rules, it would like to place the following argument in mitigation on record. The message in question was sent out prior to the commercial advertising campaign of the service. It was sent out to test user response and interest in the service. It was sent to 4700 (four thousand seven hundred) users. If there was anything wrong with the message the damage was narrowly contained to a small base. This is very different to a message sent to many thousands of users or an advert in a widely circulated magazine or a television advert.*

*In good faith and as a IP that adheres strongly to WASPA rules LM has suspended any further commercial messages of a similar nature pending the outcome of this ruling and we submit that the size of the base and the willingness to comply at all times be considered in mitigation.*

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### **Point in limine**

A consideration of the SMS advertisements giving rise to the complaint considered in this report appears, *prima facie*, to possibly give rise to multiple possible breaches of the section of the WASPA Advertising Rules dealing with SMS advertising, which is itself a breach of Clause 6.1 of the WASPA Code of Conduct. However, the complainant has made no reference to such WASPA Advertising Rules or Clause 6.1 of the WASPA Code of Conduct in the complaint being considered in this report.

As such, the Adjudicator had to consider whether he was entitled to consider the possible breach/es of the WASPA Advertising Rules and/or Clause 6.1 of the WASPA Code of Conduct, without the SP or the IP being given notice thereof.

In this regard, the Adjudicator considered the decision of the WASPA Appeal Panel in an appeal concerning complaints #0002, #0011, #0026, #0037 and #0058, which states:

*Clause 13.3 of the Code specifically requires the respondent to the complaint to respond to the complaint. In our view, this implies the right to respond to all allegations that make up the complaint. This is also a requirement of the Promotion of Administrative Justice Act 3 of 2000 (the "AJA Act"), which enshrines the right have a right to administrative action that is lawful, reasonable and procedurally fair. Core elements of procedural fairness include adequate notice of the nature and purpose of the administrative action and a reasonable opportunity to make*

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*representations (see specifically s3(2)(b)(a) and s3(2)(b)(b) of the AJA Act).*

This raises the question of what standard of fairness must be applied when considering the WASPA Code of Conduct and the actions of the Secretariat and the Independent Adjudicator in terms thereof. The Appeals Panel in its decisions concerning complaint #0001 and complaints #0002, #0011, #0026, #0037 and #0058, referred to the Constitution of the Republic of South Africa and the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA").

Section 33 of the Bill of Rights provisions of the Constitution provides:

**Just administrative action**

**33(1)** Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

PAJA contains the following definitions:

'administrative action' means any decision taken, or any failure to take a decision, by -

(a) an organ of state, when -

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

'administrator' means an organ of state or any natural or juristic person taking administrative action;

'decision' means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-

(a) making, suspending, revoking or refusing to make an order, award or determination;

(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;

(d) imposing a condition or restriction;

(e) making a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article; or

(g) doing or refusing to do any other act or thing of an administrative nature,

and a reference to a failure to take a decision must be construed accordingly;

'empowering provision' means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken;

### 3 Procedurally fair administrative action affecting any person

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) -

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

According to Lawrence Baxter (*Administrative Law* (1984) 2), general administrative law consists of the 'general principles of [common] law which regulate the organisation of administrative institutions and the fairness and efficacy of the administrative process, govern the validity of and liability for administrative action and inaction, and govern the administrative and judicial remedies relating to such action or inaction'. While Baxter's definition pre-dates both PAJA and the Bill of Rights, it is useful as it seems to exclude a voluntary industry representative body, such as WASPA, which is not an "administrative institution". Furthermore, judicial and quasi-judicial actions do not fall within the scope of administrative actions.

PAJA does recognise that juristic persons (such as WASPA) may perform administrative acts, but only "when exercising a public power or performing a public function in terms of an empowering provision", bearing in mind that the definition of an "empowering act" includes "an agreement, instrument or other document in terms of which an administrative action was purportedly taken". However this will not apply if the power or function is judicial or quasi-judicial in nature.

Ian Currie & Johan de Waal in Chapter 29 of *The Bill of Rights Handbook* (5th ed, 2004) are of the opinion that a voluntary procedure, such as the WASPA Code of Conduct procedure is not administrative as it is an exercise of private and not public power and therefore not subject to the administrative justice rights in the Constitution. They concur that judicial and quasi-judicial processes do not fall within the scope of administrative actions and as such are not subject administrative justice rights in the Constitution. They do indicate their view that the epithet 'judicial' should be reserved for dispute-resolution by individuals or entities possessing constitutional judicial authority. In this regard Currie and de Waal refer to *R v Disciplinary Committee of the Jockey Club: ex parte Aga Khan* [1993] 2 All ER 853 (Jockey Club's powers not 'governmental' in nature, not performing 'the business of government'). This is a more qualified and restrictive interpretation of the phrase than that proposed by Van Reenen J in *Van Zyl v New National Party* [2003] 3 All SA 737 (C) para 75 ('exercising a public power' conveys the ability to act in a manner that affects or concerns the public'). The phrase 'concerns the public' is certainly too wide. See *Marais v Democratic Alliance* 2002 (2) BCLR 171 (C) para 51 which makes the point that mere public interest in a decision does not make it an exercise of public power or the performance of a public function.

Consideration of the recent decision of Harms JA in *Telimatrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* [Supreme Court of Appeal, Case Number 459/04 – as yet unreported] seems to indicate that the WASPA Code of Conduct proceedings are quasi-judicial in nature, which accords with the view of Currie and de Waal above. This indication follows from Harms JA's consideration of the complaints adjudication function of the Advertising Standards Authority SA, which

has a procedure concerning complaints of breaches of its Code of Conduct and in light of the fact that the procedure of Advertising Standards Authority SA is similar to the procedure set out in the WASPA Code of Conduct.

Having regard to the above, it can be seen that the question of whether the WASPA Code of Conduct and the actions of the Secretariat and Independent Adjudicator in terms thereof are an administrative act or not, is a complex one. It is the view of the Adjudicator that such actions are not administrative acts, nevertheless the Adjudicator is willing to consider the standard set for administrative acts by the Bill of Rights and PAJA as a goal for the Secretariat and Adjudicator to strive towards and if possible meet or exceed, but not a requirement.

Bearing this in mind the Draft Code Of Good Administrative Conduct in terms of PAJA interprets the procedure in terms of Section 3(2)(b) of PAJA as requiring adequate notice of the nature and purpose of the proposed administrative action to be given to the affected person, before the decision is taken. "Adequate notice" is defined as meaning that "the affected person must be informed that an administrative action is being planned. The person must be given enough time to respond to the planned administrative action. The person also needs to be given enough information about the planned administrative action to be able to work out how to respond to the planned action.

As such, the Adjudicator was of the view that as the adjudication of a complaint is not an administrative action, the complaint **NEED NOT** refer specifically (that is by clause number) to the clause or clauses of the WASPA Code of Conduct alleged to have been breached, however the possibility of the finding of a breach of the WASPA Code of Conduct **MUST** be clear from the complaint itself, if no clause reference is provided. In opinion of the Adjudicator and in the instant complaint, the possibility of a finding of a breach of the WASPA Advertising Rules and/or Clause 6.1 of the WASPA Code of Conduct is not sufficiently clear from the complaint of the complainant for the SP and/or the IP to have responded thereto or to be expected to have responded thereto.

Moreover, the complainant is an information provider and a competitor of the IP and was assisted in filing its complaint by a WASPA member. As such, the complainant (and the member assisting it) is, or should have been, aware of the provisions of Clause 6.1 of the WASPA Code of Conduct and the WASPA Advertising Rules (and specifically section 11 thereof).

As such the Adjudicator made no finding as to a possible breach of the WASPA Advertising Rules and/or Clause 6.1 of the WASPA Code of Conduct.

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### **Adjudicator's Decision**

Regarding clauses 5.1.2 and 5.1.3 of the WASPA Code of Conduct, the Adjudicator accepted the IP's submission regarding a facility for a message recipient to be removed from a distribution list. It is only the WASPA Advertising Rules that specify (at 11.11) that specify that the method of removal must be stipulated in a message and the Adjudicator recommended to the IP that it take cognisance of such section of the WASPA Advertising Rules.

The complaint in respect of clauses 5.1.2 and 5.1.3 of the WASPA Code of Conduct is accordingly not upheld.

The Adjudicator expressed his reservations regarding the use of the phrase “totally FREE!!!” in the promotional SMS message sent by the IP, as this may cause confusion in the mind of a recipient of such message. As the complainant made no reference to this phrase in its complaint, the Adjudicator made no finding in respect thereof.

With regard clause 11.1.1 of the WASPA Code of Conduct, the IP submission is noted, but not accepted. The IP has elected to make use of a SMS message to promote its subscription service and as such must accept the technical limitations of the medium it has chosen to use. Indeed, there were many ways for the IP to shorten its promotional SMS message so as to allow for the use of the term “subscription service” including the deletion of the potentially confusing phrase “totally FREE!!!” (which phrase contains fifteen characters including the three exclamation marks). The terms the IP used in the promotional SMS message (and referred to in its submission) make it clear that the IP is not attempting to hide the ongoing nature of the billing for its subscription service, however the WASPA Code of Conduct is unequivocal in this regard, the term “subscription service” must be used.

As such, the complaint in respect of clause 11.1 of the WASPA Code of Conduct is upheld.

The IP’s further submissions in mitigation of a possible sanction are all compelling and indeed the IP’s self-imposed suspension of promotion of its subscription service by SMS obviates the need for the Adjudicator to impose such a sanction. However, while no breach of clause 6.1 of the WASPA Code of Conduct and the WASPA Advertising Rules was or could be found, the fact that the WASPA Advertising Rules have been available since late 2005 and were in effect from 1 January 2006, must be regarded as an aggravating factor in considering any possible sanction. Accordingly, the Adjudicator was of the view that sanctions involving rectification of the SMS message, as well as a punitive element, were appropriate.

As such, the Adjudicator imposed the following sanction:

- The SP is ordered to ensure that it does not transmit any promotional SMS messages for the IP’s subscriptions service, until such time as the SMS messages have been rectified so as to include:
  - the phrase “subscription service” therein, as required by the WASPA Code of Conduct and the WASPA Advertising Rules; and
  - the mechanism for recipients to have their contact details removed from the distribution list, as required by the WASPA Advertising Rules;
- The SP is fined R9 400,00 in respect of the IP’s breach of clause 11.1.1 of the WASPA Code of Conduct, being an amount of R2,00 in respect of each recipient of such message.

Should the SP elect to appeal this decision, payment of the fine shall be suspended pending the outcome of such appeal, however the prohibition on transmitting certain SMS messages on behalf of the IP until these have been rectified, shall not be suspended.