



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Lessa Limited / Smartcall Technologies
Information Provider (IP):	N/A
Service Type:	Subscription Service
Complainant:	Public
Complaint Number:	10152
Code Version:	9.0
Advertising Rules Version:	N/A

Complaint

Complaint 10152 is the escalation of unsubscribe request 313504 - complainant requests proof of subscription.

The formal complaint was sent to the WASP on 2010-08-06 and the SP was also notified.

The SP also provided a response on 2010-08-06.

The WASP provided a response on 2010-08-10.

The SP provided a further response on 2010-08-18.

The complainant responded on 2010-08-19 requesting further information.

The WASP responded to the complainants request on 2010-08-23.

The complainant responded on 2010-08-24 refusing resolution.

The secretariat requested additional information from the complainant on 2010-08-25 before proceeding to adjudication.

The WASP provided a further response on 2010-08-30.

The complainant responded to the secretariats request on 2010-09-07 advising that she doesn't believe additional information is relevant.

The SP provided a last response on 2010-09-07.

The Complainant complained of receiving a WAP push message as SPAM. She stated that when she clicked on the link to the website she noticed that the website was sex related and wanted to exit. She states that it was not possible to click on anything as she could not move the cursor and as such she had to exit the site.

On complaining, she was provided with the details of her apparently having entered her MSISDN details into the website whereafter she was sent the message she complained of. Her complaint ultimately rests not on the process of the messages sent and the subsequent notifications but the fact that she never entered her details on the website and as such the WAP Push message confirmation itself was SPAM.

She also complains of sex-related phone calls from an unknown male caller after this experience.

Service provider's response

The WASP responded as follows:

1. Regarding SPAM:
 - a. The customer has clicked on a Wap banner which is used for advertising our Wap portal;
 - b. Their system was not able to recognize the MSISDN, so the user was redirected to a page where she had to enter his MSIDN manually;
 - c. We assumed that the customer entered the site via a WiFi enabled phone (Nokia N75) through a wireless Internet connection. This might be also the reason for not getting her phone number at the first time.
 2. Regarding the issue of no possibility to unsubscribe:
 - a. After the user received an SMS from us containing a link to our Wap portal landing page she had to confirm the T&C which she did;
 - b. The T&C are displayed right under the confirmation button with only one line break in between (pls see the attached screenshot on that);
 - c. At this page there are several ways of unsubscribing to the service offered;
 - d. Please also find attached a proof of subscription including dates and IP which documents that the customer gave us the permission to contact "him".
 3. Regarding sex-related phone calls:
 - a. We do not offer such services and furthermore her number was never published.
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Sections of the Code considered

The service complained of falls within the ambit of the sending of commercial communications, the identification of spam and the rules relating to advertising and pricing. The sections of the Code of Conduct applicable to this issue are sections 5 and 6 respectively.

The requirements of section 5 are set out below:

5. Commercial communications

5.1. Sending of commercial communications

5.1.1. All commercial messages must contain a valid originating number and/or the name or identifier of the message originator.

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. For SMS and MMS communications, a recipient should be able to stop receiving messages from any service by replying with the word "STOP". If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate. The reply "STOP" procedure should be made clear to the recipient at the start of any messaging service, for example by including "reply STOP to opt out" in the first message sent. If it is not technically feasible for the recipient to reply to a specific message then clear instructions for unsubscribing must be included in the body of that message.

5.1.4. For SMS and MMS communications, a message recipient must be able to opt out at the lowest tariffed rate available (with the exception of reverse billed rates). If replying "STOP" as set out in 5.1.3 will result in a charge greater than the lowest tariffed rate available, then instructions for the lowest tariffed rate opt-out must be included in every message sent to the customer.

5.1.5. Once a recipient has opted out from a service, a message confirming the opt-out should be sent to that recipient. This message must reference the specific service that the recipient has opted-out from, and may not be a premium rated message.

5.1.6. Where the words "END", "CANCEL", "UNSUBSCRIBE" or "QUIT" are used in place of "STOP" in an opt-out request, the service provider must honour the opt-out request as if the word "STOP" had been used.

5.1.7. Upon request of the recipient, the message originator must, within a reasonable period of time, identify the source from which the recipient's personal information was obtained.

5.1.8. Commercial communications may not be timed to be delivered between 20:00 and 06:00, unless explicitly agreed to by the recipient, or unless delivery during this period forms part of the up-front description of the service.

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 (within the last six months) 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.

5.2.2. WASPA, in conjunction with the network operators, will provide a mechanism for consumers to determine which message originator or wireless application service provider sent any unsolicited commercial message.

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.

5.3.2. Members will provide a mechanism for dealing expeditiously with complaints about spam originating from their networks.

The SP's message complied with some of the requirements of section 5 however I tend to feel they fell at a first principle level in that they didn't show satisfactorily where they initially got her MSISDN.

8. Adult services

8.1. Required practices

8.1.1. Any adult service must be clearly indicated as such in any promotional material and advertisements.

8.1.2. Promotions for adult services must be in context with the publication or other media in which they appear. Services should be in context with the advertising material promoting them. The content of a service should not be contrary to the reasonable expectation of those responding to the promotion.

8.1.3. Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult content services. Explicit confirmation of a user's age must be obtained prior to the delivery of an adult content service.

8.1.4. Marketing messages (including commercial communications) may no longer be sent to a customer of an adult service if that customer has not made use of the service during the preceding three months. This is to prevent the accidental marketing of such services to children as a result of a recycled telephone number.

8.1.5. A marketing message sent to initiate or re-initiate adult services may not:

- a. include any graphical or photographic content that includes full frontal images or portrayal of intimate parts of the body; or
- b. include any words or phrases that may be considered profane, including common popular or slang terms for excretory functions, sexual activity and genitalia; or
- c. include any links to any content described in (a) or (b).

8.2. Prohibited practices

8.2.1. Adult services must not contain references that suggest or imply the involvement of children.

8.2.2. Promotions for adult services must not appear in publications or other media specifically targeted at children.

8.2.3. Adult services may not be marketed via direct communications with a customer of non-adult services, unless that customer has explicitly given permission for such

marketing to take place and the customer has confirmed that they are, in fact, an adult.

11. Subscription services

11.2. Subscription process

11.2.1. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.

11.2.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item and may not be an entry into a competition or quiz.

11.2.3. Members must ensure that children accessing subscription services confirm that they have permission from a parent or guardian do to so.

11.2.4. If a subscription service is initiated by entering a customer's mobile number on a web page or WAP site, then a separate confirmation message must be sent to the customer's mobile handset in order to prove that the number entered matches the customer's mobile handset number. This message may either:

- a. contain a PIN number which is then confirmed or validated on the web page, or
- b. contain a URL with a unique identifier, which, when clicked, validates the handset number.

11.2.5. Where a subscription service is initiated by a user replying to a message from a service provider where that message contains instructions for activating a service and/or where that message contains an activation code that when inputted by the user activates a subscription service, then that message, along with the subscription initiation instructions and/or activation code, must also include the subscription service information in the following format, flow and wording:

[service activation instructions and/or activation code]. You'll be subscribed to [XYZ service] from [name of service provider] at [cost of service and frequency of billing].

11.2.6. For any subscription services that are initiated via WAP, and which are not confirmed by the customer using the validation process set out in 11.2.4, it is a requirement for the service provider who has a direct contract with the network operator to display a WAP confirmation page to the potential subscriber. This confirmation page must be displayed after the subscriber has first indicated an interest in the subscription service by clicking on a "join" or similar link.

11.3. WAP confirmation page

11.3.1. The WAP confirmation page must display the following information in a clear and easy to read manner:

- a. The name of the service
- b. The price and frequency of billing
- c. A phone number for customer support

11.3.2. Where it is necessary for a consumer to confirm that their MSISDN may be made available to an application, this may be done by including the following wording on the WAP confirmation page:

[Application name] has requested that your mobile number be made available.

11.3.3. The information listed above must be presented as text and not as an image.

11.3.4. The WAP confirmation page described above must also present a confirmation button. It must be clearly communicated to the customer on the confirmation page that clicking the confirmation button will initiate a subscription service.

11.3.5. The WAP confirmation page may not contain any marketing messages or other content that is likely to distract the customer from the required confirmation information and process.

11.3.6. The WAP confirmation page must offer all languages used in the promotional material for that service.

11.4. Welcome message

11.4.1. Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message must be a clear notification of the following information, and should not be mistaken for an advert or marketing message:

- a. The name of the subscription service;
- b. The cost of the subscription service and the frequency of the charges;
- c. Clear and concise instructions for unsubscribing from the service;
- d. The service provider's telephone number.

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. I also reviewed other complaints relating to this WASP.

I will deal with the following issues raised by the Complainant:

1. The issue of SPAM;
2. The issue of not being able to unsubscribe;
3. The sex calls.

Initially, my inclination was to be sympathetic towards the WASP as I felt that there was no way of proving that the complainant did not in fact enter her MSISDN details into the website of the WASP and as such the message could not necessarily be shown to be SPAM. But on reading the Complainant's responses I felt that more was required to determine whether or not someone had in fact entered their MSISDN. I decided to review other Case Reports to determine what other adjudicators had felt on the issue. That was when I came across the report for Case 9792 wherein the WASP had trotted out almost word for word what I now feel is a trite and boiler plate

response to this issue which leaves me inclined to feel that the subscription process is not altogether transparent and honest. In my view, the defence relied upon by the WASP is open to abuse. The WASP demonstrates that a MSISDN number had to be entered manually as they could not pick up the MSISDN from the phone that clicked on the portal. This removes any connection between the phone and the subscription process.

This in my view is further problematic due to the nature of the service being an adult one. I do not see that the WAP push message requesting confirmation of subscription complied fully with the requirements of section 8 of the Code, particularly 8.1.4 and 8.2.3.

The Complainant then states that it was not possible to unsubscribe. The WASP sets out various methods for unsubscribing but without going onto the website to test whether or not you can or can't click on anything I cannot validate either party's argument. What I did notice though (and this is also something picked up in Case 9792) is that the button requesting that you confirm that you wish to subscribe to the service sits directly below the statement "You must be 18+ to sue this service". In my view this is dishonest as people would click on the "confirm" button to confirm their age and not that they are subscribing to the service.

In my view the WASP in both utilising clear boilerplate defences around this particular issue and in their having breached the Code relating to both subscription services and adult content services has behaved in a manner contrary to the Code and the standards to which all WASPA members subscribe.

Claim upheld.

Sanctions.

In determining an appropriate sanction, the following factors were considered:

The prior record of the SP with regard to breaches of the relevant sections of the Code of Conduct; and the SP's subsequent responses. I have also taken my lead from a previous complaint on the same subject matter to ensure that the sanctions issued therein are entrenched.

1. The SP is required to suspend the service and access to the site it is hosted on until such time as it complies with the orders set out below.
2. The SP may not initiate any new or existing billing transactions for the service during such period of suspension; however it may process any unsubscription requests;
3. The SP shall send an sms notification, detailing such suspension, to all existing subscribers of the service (the SP shall furnish the WASPA Secretariat with confirmation that it has notified its subscribers);
4. The SP shall clearly indicate at the first point of contact with the service and all subsequent pages and sites (irrespective of medium) that the service is an adult subscription service and further precisely what the subscription entails. These indications must be **clearly visible and unambiguous** and should not be confused with other requests for action.
5. The SP is fined R50 000 for its breach of section 8 and R30 000 for its breach of section 11. The WASPA Secretariat is also ordered to instruct the WASPA Monitor to ensure that the SP is indeed complying with this.

