



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno
Information Provider (IP):	N/A
Service Type:	Subscription service
Complainants:	Anonymous
Complaint Number:	10576
Code Version:	9.0
Advertising Rules Version:	2.3

Complaint

The Complainant escalated to formal after initially disputing that he ever subscribed to the service. In his escalation he said the following:

“This is in utter dispute, and I will be insisting on a full credit from the relevant government authorities. No one has access to my cell, I never activated the link.

A. Your attempts at subscribing me to a Pac Man game because I never sent an opt out message is frivolous and undermines the Electronic communications, Act and the New consumer protection Act. As a reasonable consumer I would never SMS anything to a strange company, whether opt in/opt out, or similar.

B. I never took delivery of this product, not once, thus there is no contract without delivery, and no payment due, Vodacom and yourselves have proof of this.

C. This contravenes the Vodacom code of conduct as well.

As per ICASA, WASPA, ECA and CPA regulations. I request this goes to senior management to review my dispute as stipulated above and resolve with urgency before we proceed otherwise. Can we agree that a reasonable time period is 48 hours from receipt of this email.”

The Complainant then responded to the SP’s response:

“They claim I clicked on a 'Pac man' spam image and they then began engaging me with SMS's as their defence, which is unacceptable and proof is available I never engaged them whatsoever. I am well aware of these content for cash scams and would never read, respond or engage with any unknown company via my cell or any other medium whatsoever. I never sent them an sms, clicked on any form of join Pac Man here or there, or accepted any terms and conditions, or opted in or out.

Furthermore, a contract in law only becomes applicable when delivery takes place. I never received anything whatsoever from Buongiorno. (3.1.2. Members are committed to lawful conduct at all times). This is also a clear contravention of the Consumer protection act, and therefore unlawful.

A claim to a click on a page that has a 'Pac Man' logo thereon is not sufficient acceptance of a R800.00 or so bill, for which ZERO was ever received, ZERO asked for or ZERO returned and I argue that this is one of the clearest cases of being vague, ambiguous and misleading that I have ever seen.

My total lack of engagement with this company, clearly proves I was totally unaware of this contract, as my complaint suggests, and Buongiorno's attempts to justify such have further proved my case.

This is nothing short of a frivolous claim to contract that never took place, and I demand a timorous return of these unsolicited funds.”

Service provider's response

In its response the SP wrote (please note that the logs and subsequent pictures have been omitted):

“Our investigation shows that the user had subscribed via wapsite banner advertisement.

Herewith the banner the user had selected:

In the pacman screenshot provided the user is informed of the subscription wording and cost that would incur during the subscription period.

The user is sent numerous sms communication following the wapsite interaction.

This may be verified in the delivery reports further below. The welcome message of the service as well as the reminder messages are informative of the mobile content subscription service, as well as the 24x7 contact details, should the user had experienced any problems with the service or during the subscription period. The messages sent to the user is instructive of the stop command in order to end the subscription. In the screenshot provided the user

in notified that by clicking Join Now he or she is agreeing to be subscribed to the 35050 Vip service at R3/day.

In the reporting information window you will find the user start and end date of the subscription as well the unsubscription processed as requested via our call centre.

Billing has been seized on the users msisdn, as of 2010-09-08 at 16:56:47.

In this regard, we do not deem a refund justified as all information was informative of a subscription service and at what cost to the user.

Please be advised that the user is no longer subscribed to any of the Buongiorno Mobile content subscription services.”

Sections of the Code considered

11.3.2. For any subscription services that are initiated via WAP, 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.

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

- a. The name of the service and an indication that it is a subscription service
- b. The price and frequency of billing
- c. A phone number for customer support

11.3.4. 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.

11.3.5. The information listed 11.3.3 and 11.3.4 must be presented as text and not as an image.

11.3.6. 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.

11.10.2. When requested to do so by WASPA, a member must provide clear logs for any subscription service customer which include the following information:

- a. proof that the customer has opted in to a service or services;
- b. proof that all required reminder messages have been sent to that customer;
- c. a detailed transaction history indicating all charges levied and the service or content item applicable for each charge; and
- d. any record of successful or unsuccessful unsubscribe requests.

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. The Adjudicator has taken note of the Complaint and the SP's subsequent response.

From the records provided by the SP there does not seem to be any doubt that the Complainant did subscribe to the services as purported by the SP.

That being said, it still remains a case of I said this, you said that and the Adjudicator has to evaluate why the Complainant is alleging otherwise.

The Adjudicator felt it necessary to review the process followed by the SP in this matter to subscribe a customer to its services.

The SP confirmed that the Complainant in this matter subscribed to its service via a WAP link.

In order to evaluate whether the process followed by the SP in this matter is in fact a contravention of the Code or not, section 11.3 and its subparagraphs would apply.

Section 11.3.2 states that for any subscription services that are initiated via WAP, 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.

It further states that 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.**

In reviewing the SP's process, it is the opinion of the Adjudicator that the SP did not comply with section 11.3.2 in that it omitted from making a confirmation page available as required.

The Adjudicator finds the SP in breach of section 11.3.2.

Even if the SP does allege that the existing page with the link is a confirmation page, then it is the opinion of the Adjudicator that the relevant page is not complying with section 11.3.3 subparagraph (c) in that it does not provide the potential subscriber with a telephone number.

The Adjudicator finds the SP in breach of section 11.3.3 (c).

The Adjudicator therefore does not form the opinion that the SP has followed the correct process in subscribing the Complainant, thereby making the "subscription" (whether proved or not), null and void ab initio.

The Adjudicator has also observed discrepancies in the mobile traffic report, where the application link was in fact delivered after the welcome message was received by the Complainant on the 18th of June 2010.11.09

The Complaint is upheld.

Sanctions

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

- The prior record of the SP and IP with regard to breaches of the relevant sections of the Code of Conduct;
- The SPs' subsequent response.

1. The SP is required to suspend the service in dispute until such time as the SP complies with the orders set out below:
 - 1.1. The SP may not initiate any new or existing billing transactions for the said service during such period of suspension; however it may process any unsubscription requests;
 - 1.2. The IP shall send an sms notification, detailing such suspension, to all existing subscribers of the said service (the SP shall furnish the WASPA Secretariat with confirmation that it has notified its subscribers);
 - 1.3. The SP must rectify its service in terms of section 11.3 of the Code;
 - 1.4. The SP is formally reprimanded for its various breaches of the Code;
 - 1.5. The SP is instructed to refund the Complainant in full; and
 - 1.6. The SP is instructed in terms of section 11.10.2 of the Code to provide full details of the transactions and to explain to the WASPA Secretariat the Adjudicator's alleged discrepancies in terms of its (SP) report.

The WASPA Secretariat is also ordered to instruct the WASPA Monitor to ensure that the SP is indeed complying with this.