



REPORT OF THE ADJUDICATOR

Complaint reference number:	#11147, #11150, #11212
WASPA member(s):	Boungiorno South Africa (Pty) Ltd ("the SP")
Membership number(s):	0002
Complainant:	Competitor, WASPA Monitor, WASPA
Type of complaint:	Subscription service
Date complaint was lodged:	Complaint #11147: 2010-11-17 Complaint #11150: 2010-11-18 Complaint # 11212: 2010-11-24 #11147: 2010-04-18 to 2010-11-17
Date of the alleged offence:	#11150: 2010-11-18 #11212: 2010-11-24
Relevant version of the Code:	9.0 and 10.0 Version 9.0: 11.1.8, 11.5.2, 11.7.1, 11.8.5, 11.8.6
Clauses considered:	Version 10.0: 11.1.8, 11.9.5, 11.9.6, 14.7.6, 14.7.9, 14.3.10
Relevant version of the Ad. Rules:	Not applicable
Clauses considered:	
Related cases considered:	#10896

Complaint

This adjudication relates to three complaints lodged against Boungiorno South Africa (Pty) Ltd ("the SP") under complaint reference numbers #11147, #11150 and #11212.

Complaints #11147 and 11150 concern allegations of non-compliance by the SP with the provisions of the Code relating to the provision of subscription services over the period 17 April 2010 to 11 November 2010.

Version 9.0 of the WASPA Code of Conduct ("the Code") applies to the relevant subscription services until 13 October 2010, thereafter version 10.0 of the Code applies.

Complaint #11147 was lodged by an anonymous complainant (apparently a competitor of the SP). Complaint #11150 was lodged by the WASPA Monitor. Both complaints deal with the same issue, i.e. whether the SP's mechanism for receiving and processing requests to be unsubscribed from its services breached the Code.

Complaint #11147 was initially lodged as an ordinary complaint however, following the lodgement of complaint #11150, both complaints were escalated to the emergency process and were considered by an emergency panel convened in terms of section 14.7 of Version 10 of the Code. The panel found the un-subscription mechanisms employed by the SP were not compliant with the Code and the panel ordered a suspension of the relevant services pending formal adjudication.

Complaint #11212 concerns an alleged contravention of the emergency panel ruling.

Service provider's response

The SP submitted that the lodging and processing of the complaints against it was procedurally unfair. In support of this submission, the SP alleged that complaint #11147 was lodged by a disgruntled competitor who was retaliating under a mistaken impression created by the WASPA Monitor that the SP had fixed the attention of the WASPA Monitor on the competitor's method of employing a double-opt in mechanism. In summary, the SP claimed that it had been engaged in communication with the Monitor about how other service providers, including the competitor, were implementing the double opt in mechanism. It appears as though this communication sparked a chain of events which included the Monitor instituting a somewhat expanded review of the competitor's services and ultimately resulted in the Monitor lodging a complaint against the competing service provider. The competing service provider was apparently informed that the SP was the cause of this complaint, which the SP denied. The SP alleged that if the Monitor had not acted in this manner, the competitor, whose identity it did not reveal, would never have lodged complaint #11147 against it.

The SP alleged further that the WASPA Monitor had acted irregularly in instituting complaint #11150. The alleged "procedural inconsistencies" are set out in paragraphs 11 to 13.6 of a letter from the SP's attorney to WASPA dated 2 December 2010. In his letter, the SP's attorney alleges that the Monitor's complaint contained factual inaccuracies and that these factual inaccuracies promoted procedural irregularities.

The SP also alleged that the emergency complaint was dealt with in violation of the principle of *audi alteram partem* in that the SP was specifically not afforded an opportunity to be heard before the emergency panel ruled.

As to the actual merits of the complaints against it, the SP claimed that its un-subscription mechanisms were, to the best of its knowledge, compliant with the procedures required by the Code.

On the specific request of the adjudicator, detailed message logs for the relevant services were provided by the SP in two separate tables. One table contained messages received by the SP and the other table contained messages sent by the SP.

For the purposes of this adjudication report, these two message tables have been merged chronologically and, for ease of further reference, each message has been assigned a message number as set out below:

N o	M O/ M T	DATE	TIME	SERVICE	PHONE	SENDER	MESSAGE
1	Mt	2010-04-17	18:32:12	club	+27829941814	27820048560	>>>Your CODE is 4295<< You'll be subscribed to Fun Club from Buongiorno UK @ R6/day Subscription Service. Enjoy the fun.
2	Mt	2010-04-17	18:35:28	Fun_club-Standard	+27829941814	27820048560	Click here to download your content
3	Mt	2010-04-17	18:35:28	Fun_club-Standard	+27829941814	27820048560	Welcome 2 FUN CLUB. Go to Wap.funfone.co.za on ur mobile 4 Unlimited games, Mp3's & more! Help: 0214178001 Sms STOP FUN to 36060 2 unsub (R6/day subscription)
4	Mo	2010-04-18	12:06:43	Error: generic: 36060	27820048560	+27829941814	stop
5	mt	2010-05-07	16:45:09	club	+27829941814	278300048353	>>>Your CODE is 5911<< enter it in the web confirmation page & get ur FREE item. 35050 best mobile service R3/day subscription GAMES & TONES enjoy the fun
6	mt	2010-05-07	16:46:24	35050_standard	+27829941814	27820048353	Welcome 2 35050. Go to WAP. 35050.co.za on ur mobile 4 Unlimited games, Mp3's & more! Help: 0214178001 Sms STOP VIP to 35050 2 unsub (R3/day subscription)
7	mt	2010-05-	16:46:2	35050_stan	+278299418	2782004835	CLIK ON THE

		07	4	dard	14	3	LINK TO GET UR 35050 APPLICATION
8	mt	2010-05-07	16:46:25	35050_standard	+27829941814	27820048353	Click here to download your content
9	mt	2010-05-19	17:15:00	fun_club_stim	+27829941814	27820048351	U r subscribed to Fun Club from Buongiorno. You get unlimited downloads. Cost R6/day. For help call 0214178001. To unsubscribe sms STOP FUN to 36060.
10	Mo	2010-05-19	18:13:31	Error: generic:31194	27820048351	+27829941814	stop fun
11	Mt	2010-06-18	17:15:00	fun_club_stim	+27829941814	27820048351	You are subscribed to Fun Club from Buongiorno. You get unlimited downloads. Cost R6/day. For help call 0214178001. To unsubscribe sms STOP FUN to 36060.
12	Mt	2010-07-07	17:20:00	fun_club_stim	+27829941814	27820048351	You are subscribed to 35050 VIP from Buongiorno. You get unlimited downloads. Cost R3/day. For help call 0214178001. To unsubscribe sms STOP VIP to 35050.
13	Mt	2010-07-16	17:09:00	fun_club_stim	+27829941814	27820048351	You are subscribed to Fun Club from Buongiorno. You get unlimited downloads. Cost R6/day. For help call 0214178001. To unsubscribe sms STOP FUN to 36060.
14	Mt	2010-08-06	17:15:00	fun_club_stim	+27829941814	27820048351	You are subscribed to 35050 VIP from Buongiorno. You get unlimited downloads. Cost R3/day. For help

							call 0214178001. To unsubscribe sms STOP VIP to 35050.
15	Mt	2010-08-16	17:15:00	fun_club_stim	+27829941814	27820048351	You are subscribed to Fun Club from Buongiorno. You get unlimited downloads. Cost R6/day. For help call 0214178001. To unsubscribe sms STOP FUN to 36060.
16	Mt	2010-09-06	17:15:00	fun_club_stim	+27829941814	27820048351	You are subscribed to 35050 VIP from Buongiorno. You get unlimited downloads. Cost R3/day. For help call 0214178001. To unsubscribe sms STOP VIP to 35050.
17	mo	2010-09-06	17:16:48	error:generic:31194	27820048351	+27829941814	stop fun
18	mo	2010-09-06	17:17:01	error:generic:31194	27820048351	+27829941814	stop
19	mo	2010-09-06	17:17:24	error:generic:31194	27820048351	+27829941814	stop vip
20	mo	2010-09-06	17:17:31	error:generic:31194	27820048351	+27829941814	stop vip
21	mt	2010-09-06	17:17:31	35050_standard	+27829941814	27820048353	You have been unsubscribed from 35050 VIP. To re-subscribe sms START to 35050. U'll then be resubscribed @ R3/day
22	mt	2010-09-16	17:15:00	fun-club_stim	+27829941814	27820048351	U r subscribed to ZAP from Buongiorno. You get unlimited downloads. Cost R6/day. For help call 0214178001. To unsubscribe sms STOP FUN to 36060.
23	mt	2010-09-16	17:15:00	fun_club_stim	+27829941814	27820048351	Dont forget, as a valued ZAP member u could drive away in a brand new Yaris this month! Plus u could be one of the

							lucky members to receive an ipod.
24	mt	2010-10-14	17:20:00	fun_club_stim	+27829941814	27820048351	U r subscribed to ZAP from Buongiorno. You get unlimited downloads. Cost R6/day. For help call 0214178001. To unsubscribe sms STOP FUN to 36060.
25	mt	2010-10-14	17:20:00	fun_club_stim	+27829941814	27820048351	Dont forget, as a valued ZAP member u could drive away in a brand new Yaris this month! Plus u could be one of the lucky members to receive an ipod.
26	mo	2010-10-14 17:23:35	17:23:35	Error generic:31194	27820048351	+27829941814	stop fun
27	mt	2010-11-16	16:20:00	fun_club_stim	+27829941814	27820048351	U r subscribed to ZAP from Buongiorno. You get unlimited downloads. Cost R6/day. For help call 0214178001. To unsubscribe sms STOP FUN to 36060.
28	mt	2010-11-16	16:20:00	fun_club_stim	+27829941814	27820048351	Dont forget, as a valued ZAP member u could drive away in a brand new Yaris this month! Plus u could be one of the lucky members to receive an ipod.
29	mo	2010-11-16	20:37:00	error generic:31194	35050	+27829941814	stop
30	mo	2010-11-16	20:37:41	error generic:31194	35050	+27829941814	stop fun
31	mt	2010-11-17	07:46:27	fun_club_standard	+27829941814	27820048560	ZAP: Ur membership has been cancelled. U've put an end to the fun & UNLIMITED DOWNLOADS.

							Remember, to join again, sms MORE to 36060. [R6/day service]
3 2	mo	2010-11-17	07:49:02	error generic:31194	36060	+27829941814	stop
3 3	mo	2010-11-17	07:49:09	error generic:31194	35050	+27829941814	stop fun
3 4	mo	2010-11-17	07:49:16	error generic:31194	35050	+27829941814	stop vip

Sections of the Code considered

In the course of this adjudication, various sections of both versions 9.0 and 10.0 of the Code have been considered. Due to the fact that the services in question were in operation during the transition from version 9.0 of the Code to version 10.0, some repetition of substantially similar provisions appearing in both versions of the Code was unavoidable.

Sections of version 9.0 of the Code considered:

11.1.8. It is acceptable to use the "@" sign in place of "at" in any activation message, welcome message or similar communication. Similarly, "u" may be used in place of "you", "b" may be used in place of "be", and "r" may be used in place of "are".

11.5.1. A monthly reminder SMS must be sent to all subscription service customers. This reminder must be sent within 30 days of the initial notification message, and once per calendar month thereafter.

11.5.2. The reminder messages specified in 11.5.1 must adhere exactly to the following format, flow, wording and spacing:

You are subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help, sms HELP [optional keyword] to [short code] or call [call centre number + "(VAS)" if applicable]. To unsubscribe, sms STOP [service keyword] to [short code].

or

You are subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help call [call centre number + "(VAS)" if applicable]. To unsubscribe, sms STOP [service keyword] to [short code].

11.5.3. The entire reminder message must be sent in a single SMS, may not contain any line breaks or carriage returns and may not include any additional characters other than those specified in 11.5.2.

11.7.1. For services where the primary means of interacting with the service is via WAP, either the format set out in 11.5.2 or the the following format must be used:

You are subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help call [call centre number + "(VAS)" if applicable]. To unsubscribe, click here [WAP link].

11.8.5. Where a service is linked to a specific short code in advertisements for that service, then sending a 'STOP' request to that short code should result in the termination of that service. If a request to a short code could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate.

11.8.6. If a message sent by a customer cannot be parsed by a WASP, then the resulting response to the customer should contain sufficient information for the customer to be able to unsubscribe from that service, or to be able to contact the service provider's customer support.

Sections of version 10.0 of the Code considered:

11.9.5. Where a service is linked to a specific short code in advertisements for that service, then sending a 'STOP' request to that short code should result in the termination of that service. If a request to a short code could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate.

11.9.6. If a message sent by a customer cannot be parsed by a WASP, then the resulting response to the customer should contain sufficient information for the customer to be able to unsubscribe from that service, or to be able to contact the service provider's customer support.

14.3.10. The adjudicator may ask the secretariat to request that the complainant, the member, or both, furnish additional information relating to the complaint. Specifically, the adjudicator may request that the member respond to any additional breaches of the Code of Conduct discovered during the investigation of the complaint, but which were not specified in the original complaint.

14.7.6. The member concerned must comply with the urgent remedy as soon as practicable. Failure to do so constitutes a breach of this Code.

14.7.9. The emergency procedure may be invoked for a complaint that is already being handled by the formal complaint procedure. In this case, the SP must be provided an opportunity to supplement any response already submitted to the formal complaint once the emergency procedure has been completed.

Decision

While the motivations of complainants and background histories to the institution of complaints may be relevant in certain circumstances, they do not automatically introduce procedural or substantive irregularities in the institution or adjudication of complaints themselves.

WASPA is a self-regulating, voluntary membership body and complaints against members are very frequently lodged by competing members whose motivations do not need to be altruistic for their complaints to be valid or upheld. In fact, whatever

the motives of a complainant may be, they are very often irrelevant as to whether or not a SP's services comply with the provisions of the Code.

Even if one was to accept the SP's averments regarding the Monitor's investigations and the misplaced motives of its competitor in lodging complaint #11147, I do not find that these averments are sufficient in the present matter to sustain an argument that the complaints against the SP are either procedurally or substantively unfair.

The complaints themselves do not, on the facts, appear to have been "trumped up" in any respect nor has the SP been unfairly prejudiced in the manner in which information relating to these complaints been presented nor in the manner in which the complaints themselves have been adjudicated.

At this point, some discussion of the role of the Monitor is perhaps relevant. The primary roles of the Monitor is to observe the conduct of members and to lodge complaints relating to apparently non-compliant conduct by any member. The role of the Monitor is *not* directly akin to that of a prosecutor in an adversarial legal system where an adjudicator would be largely limited to whatever information is placed before him or her by the parties to a complaint and where the prosecutor is therefore under a duty not to present evidence that has the potential to mislead by inaccuracy.

In terms of the WASPA Code, the adjudicator may play a quasi-inquisitorial role and he or she is entitled to request further and additional information directly from the parties in order to more fully investigate and establish whether a breach of the Code has been committed. Section 14.3.10 of version 10.0 of the Code gives the adjudicator broad inquisitorial powers as follows:

14.3.10. The adjudicator may ask the secretariat to request that the complainant, the member, or both, furnish additional information relating to the complaint. Specifically, the adjudicator may request that the member respond to any additional breaches of the Code of Conduct discovered during the investigation of the complaint, but which were not specified in the original complaint.

Therefore, while some degree of investigation of the merits of a complaint by the Monitor is envisaged, it is not for the Monitor to act as an arbiter of the truth but rather to ascertain whether there is a prima facie basis for suspecting that a breach of the Code has occurred. If such a suspicion is reasonably grounded, then the Monitor is entitled to lodge a complaint and to present information in terms of which the complaint is based. Even if there are several factual inaccuracies in a Monitor's complaint, these factual inaccuracies do not, of themselves, necessarily result in any procedural or substantive irregularity.

In the present matter, the Monitor became concerned that the SP's method of terminating a subscription had become a "*massive problem*". The SP specifically objected to this characterisation of what it alleged was, at best, a minor problem. However, it must be noted that the Monitor also expressly conceded that only a few cases had been brought to WASPA's attention when she stated that:

"Whilst we only have a few cases that has been brought to our attention, it is a great worry that many many subscribers could be attempting termination of a sub service, with no success, without realising it..."

The Monitor then requested that the complaints against the SP be dealt with on an emergency basis.

It is clear to me that the Monitor held that the SP's de-subscription mechanism may have been in breach of the Code and that, if this was the case, that *many consumers may* have been adversely affected. I do not find her concerns to have been unreasonable in the circumstances and do not regard her initiating the complaint or her requesting that the existing complaint be dealt with on an urgent basis to have been procedurally irregular.

The SP's attorney has alleged in paragraphs 20 to 22 of a letter of 2 December 2010 that WASPA failed to notify or explain to the SP that the initial complaint lodged against the SP by its competitor was to be dealt with by the emergency procedure. These paragraphs bear repeating *verbatim* below:

"20. Having advised that both matters were to be dealt with as formal complaints, WASPA then changed its mind without notice to our client and without explanation.

21. By way of amplification, on 23 November 2010, at 16:08, the secretariat issued an Emergency Procedure Notice advising that the Secretariat had invoked an emergency procedure to deal with the complaints. The Emergency Panel made a finding, and drew conclusions, which simply echoed what had been stated by the monitor as outlined in para 12 above. The conclusion that our client was ignoring attempts to de-subscribe was not a correct reflection of the facts. Our client had not yet had the opportunity to deal with either complaint, or to make representations to WASPA on the issue – having been advised that that both were being dealt with as formal complaints. Our client was prevented, by the manner in which the matter was dealt with by the secretariat, from presenting its case prior to decision. The secretariat likewise, by its unexpected and precipitate action in causing an emergency panel to be convened prevented itself from having the opportunity to engage with our client to advise precisely what it required of our client by way of compliance and to secure any such compliance voluntarily as a result of logical persuasion rather than sanction.

22. WASPA therefore caused a ruling to be made against our client in utter disregard to the fundamental procedural principle of "audi alteram partem" - there was no proper basis for an emergency panel to be involved to address the issue which had arisen, or for that panel to rule as it did, The emergency panel presumably exists for extreme situations – which this plainly was not."

To summarise, the SP's attorney has alleged that WASPA failed to give notice to the SP that the complaints had been escalated from the ordinary complaints process to the emergency complaints process. *"By way of amplification"* of this allegation, he states that an Emergency Procedure Notice was issued on 23 November 2010 at 16:08 advising that the Secretariat has invoked an emergency procedure to deal with the complaints.

Whilst the SP's attorney's allegation is, semantically speaking, true, it is not the whole truth. This must surely have been apparent to the SP's attorney at the time the averment was constructed.

Whilst it is correct that an emergency procedure notice was issued on 23 November 2010 at 16:08 advising the SP of the emergency procedure that had been invoked (and of the ruling made against it), this was the second emergency procedure notice. The first emergency procedure notice was sent more than 24 hours earlier, i.e. on 22 November at 15:21. It was in the first notice that the SP was first advised that the emergency procedure had been invoked. The second notice essentially contained further statement confirming that the emergency procedure had been invoked. The

SP's attorney has not commented on the first notice and drawn attention only to the second notice after the emergency panel had convened and ruled. There is little merit in the SP's attorney's submissions that the SP was denied an opportunity to address WASPA before the emergency panel ruled and that the emergency panel ruling was made "*in utter disregard*" for the *audi alteram partem* principle as alleged.

It bears repeating that the specific complaints against the SP concerned allegations that its de-subscription mechanisms were not working. In these circumstances, many consumers might find themselves "locked in" to having daily charges debited against their cellphone accounts, including in respect of services they no longer wished to be subscribed to. In these circumstances, I do not consider the use of the emergency hearing procedure to have been inappropriate.

In any event, the emergency panel ruling of 23 November 2010 was of the form of a temporary injunction against billing that would only remain in place pending the SP's de-subscription mechanisms being brought into conformance with the requirements of the Code. The ruling made it clear that the SP could notify the WASPA Monitor to re-test its services once they were compliant and that billing could continue after the Monitor had certified this. The emergency panel's ruling was not a permanent injunction against billing, or even an injunction against billing pending the final determination of the formal complaint. The ruling specifically empowered the SP to recommence billing as soon as its services complied with the Code.

Clause 14.7.9 of version 10.0 the Code deals with the situation where an emergency procedure may be invoked for a complaint already being handled by the formal complaint procedure. It provides that: "*[i]n this case, the SP must be provided an opportunity to supplement any response already submitted to the formal complaint once the emergency procedure has been completed.*"

In the present matter, the SP had not yet submitted any response at the time the emergency procedure was invoked, however the time period for submitting a response to the formal complaint had not yet expired. The question that falls to be considered is whether clause 14.7.9 should be interpreted as preventing a SP from submitting a response to an emergency complaint other than by supplementation of an answer already filed once the emergency procedure has been completed. Clause 14.7.9 does not lend itself to such a strict interpretation and the principles of administrative justice would dictate that the SP must have the right to submit a response, even if the time frame for doing so might be very severely limited due to the urgent nature of a complaint.

The emergency notice sent to the SP made it clear that, following the emergency hearing, an emergency ruling may be issued. The notice stated further that "*You do not need to respond to this notice*". The notice did not prohibit the SP from responding although it could have been more inviting of a response. Ideally, such a notice would say that, if the SP wished to submit a response, it may do so by a specific time, but that it is not obliged to do so, in which event the emergency hearing may proceed in the absence of any response.

The emergency procedure is an extra-ordinary procedure and its use should be confined to appropriate cases. The first complaint was lodged on 17 November 2010. No action appeared to have been taken by 22 November 2010. In the circumstances of the present matter, and having regard for the fundamental purposes of WASPA and the Code of Conduct in promoting consumer confidence in the WASP industry as a whole, I do not regard the emergency hearing procedures to have been

inappropriately invoked or applied given the potential prejudice to consumers that was at stake.

Having dealt with the allegations of procedural irregularities, I turn now to deal with the merits of the complaints. It is most convenient for me to do so by making reference to individual message numbers from the combined message log set out above.

Although not specifically in issue in this present complaint, I have noted that **message no. 3** was a welcome message for the Fun Club service that made use of the abbreviations "2" for the word "to" and "unsub" for "unsubscribe". These abbreviations are not expressly permitted in terms of section 11.1.8 of version 9.0 of the Code for activation messages, welcome messages or other similar messages.

The annotated version of version 9.0 of the Code reveals that section 11.1.8 *"was introduced in version 9.0 in order to provide clarity on alternate typography"*. Clause 14.3.8 of the Code, an adjudicator may make reference to the "annotated" version of the WASPA Code.

In particular, using the digit "2" immediately after the short code digits "36060" in the sentence phrase "SMS STOP FUN to 36060 2 unsub" could be misread at a glance into thinking that number that the STOP FUN command is to be sent to is 360602. Notwithstanding my observations and comments, I have made no ruling in respect of this message and simply draw it to the SP's attention.

Message no. 4 was the first attempt to unsubscribe from the Fun Club service by sending the word "stop" to 36060. The syntax of the message did not comply with the required message format for a subscription to be terminated as the specific keyword for the relevant subscription service did not follow the word "stop".

Section 11.8.5. of version 9.0 of the Code provides that *"Where a service is linked to a specific short code in advertisements for that service, then sending a 'STOP' request to that short code should result in the termination of that service. If a request to a short code could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate."*

Furthermore, section 11.8.6. of version 9.0 of the Code requires that *"[i]f a message sent by a customer cannot be parsed by a WASP, then the resulting response to the customer should contain sufficient information for the customer to be able to unsubscribe from that service, or to be able to contact the service provider's customer support."*

Following the receipt of message no. 4, if the SP could parse message no. 4, it should have either terminated all 36060 services to which the message originator was subscribed or it should have given the message originator (the "recipient" of the services) a choice of which specific subscription service to terminate. If it could not successfully parse the message, it should have sent a response to the message originator containing sufficient information for the message originator to be able to unsubscribe from the Fun Club service, or to be able to contact the service provider's customer support.

The SP's attorney claimed in paragraph 25.9.3 of his letter of 2 December 2010 that the SP had replied to the "stop" request by sending a message inviting the subscriber to contact the SP's call centre to clarify their instruction. However, following the adjudicator's request for copies of all message logs, the SP's attorney later admitted

in paragraph 10 of a subsequent letter dated 18 May 2011 that no such messages were actually sent.

The SP accordingly breached section 11.8.5 of version 9.0 the Code, alternatively section 11.8.6.

Although not specifically in issue in this present complaint, **message no. 6** was a welcome message for the VIP service that also made use of the abbreviations “2” for the word “to” and “unsub” for “unsubscribe”. For the reasons set out in relation to message no. 3 above, message no. 6 may also have breached section 11.1.8 of version 9.0 of the Code. Notwithstanding my observations and comments, I have made no ruling in respect of this message and simply draw it to the SP's attention.

Messages no's. 9, 11, 12, 13, 14, 15, 16, 22 were subscription reminder messages and all contained the words “*you get unlimited downloads*”. These words are not permitted in subscription reminder messages which have to adhere to the specific wording and format of section 11.5.2 of the Code. On the face of it, these messages all breach section 11.5.2 of version 9.0 of the Code read with section 11.7.1 thereof. Notwithstanding my observations and comments, as these messages were not part of the initial complaint, I have made no ruling in respect thereof and simply draw them to the SP's attention.

Messages no's. 29 and 32 were further “generic” attempts to unsubscribe from subscription services by sending the word “stop” to 35050 and 36060 respectively. The syntax of the messages did not comply with the required message format for any specific subscription to be terminated by the SP as the specific keyword for the relevant subscription services did not follow the word “stop”. Section 11.9.5. of version 10.0 the Code provides that “*Where a service is linked to a specific short code in advertisements for that service, then sending a ‘STOP’ request to that short code should result in the termination of that service. If a request to a short code could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate.*”

Furthermore, section 11.9.6. of version 10.0 of the Code requires that “*[i]f a message sent by a customer cannot be parsed by a WASP, then the resulting response to the customer should contain sufficient information for the customer to be able to unsubscribe from that service, or to be able to contact the service provider's customer support.*”

Following the receipt of messages no. 29 and 30, if the SP could parse the messages, it should then have either terminated all 35050 and 36060 services to which the message originator was subscribed or it should have given the message originator (the “recipient” of the services) a choice of which subscription services to terminate. If it could not successfully parse the messages, then it should have sent responses to the message originator containing sufficient information for the message originator to be able to unsubscribe from the specific services, or to be able to contact the service provider's customer support.

Again, while the SP's attorney initially claimed in paragraph 25.9.3 of his letter of 2 December 2010 that the SP had replied to “stop” requests by sending messages inviting the subscriber to contact the SP's call centre to clarify their instructions, following the adjudicator's request for copies of all message logs, the SP's attorneys admitted in paragraph 10 of the letter of 18 May 2011 that no such messages were actually sent.

The SP accordingly breached section 11.9.5 of version 10.0 the Code, alternatively section 11.9.6.

Notwithstanding the emergency panel ruling issued on 23 November 2010 requiring, *inter alia*, that the SP cease billing on its subscription services and ensure that its subscription termination mechanisms were fully compliant with the Code, the SP continued billing.

Section 14.7.6 of version 10.0 of the Code provides that “[t]he member concerned must comply with the urgent remedy as soon as practicable. Failure to do so constitutes a breach of this Code.”

Although the SP, through its attorney, alleged on 24 November 2010 that the SP did not, at that time, understand in what manner its termination services were non-compliant with the provisions of the Code, whatever ignorance it may have suffered should not have been any practical obstacle whatsoever to it terminating billing for the services as required by the ruling.

By continuing to bill, it adopted an attitude that until it was told exactly what it was doing wrong, it should be entitled to continue to bill, notwithstanding the emergency ruling. The SP placed itself above the provisions of the Code and its enforcement mechanisms. This conduct amounts to a most serious breach of section 14.7.6 of the Code.

Sanctions

The emergency ruling to suspend billing arose on 23 November 2010. By this date, the SP should have been aware of a very similar complaint that its subscription termination systems were not working in respect of its “Sexy Cherry” service (see WASPA Complaint # 10896). The facts of this complaint show that an attempt to unsubscribe from the service on 24 July 2010 was unsuccessful for much the same reasons as have been outlined above. The SP was informed of this complaint in October 2010. A further complaint was made on 17 November 2010. By 23 November 2010 it was still pleading ignorance. In its final letter of 18 May 2011, it blamed a former employee for incorrectly configuring its systems.

For the repeated breaches of section 11.8.5/11.8.6 and 11.9.5/11.9.6 of versions 9.0 and 10.0 of the Code the SP is fined an aggregate amount of R50 000.

Whatever the excuses for breach of 11.8.5/11.8.6 and 11.9.5/11.9.6 of versions 9.0 and 10.0 of the Code, the SP should under no circumstances have failed to adhere to an emergency panel ruling.

The SP's conduct undermines the very purpose of WASPA and the credibility of the WASP industry as a whole. WASPA plays a self-regulatory role in the WASP industry and the primary objective of the Code is stated in section 1.2 thereof as follows:

“The primary objective of the WASPA Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services. The Code aims to equip customers and consumers with a mechanism for addressing any concerns or complaints relating to services provided by WASPA members, and a framework for impartial, fair and consistent evaluation and response to any complaints made.”

The role played by WASPA in providing consumers with a mechanism for addressing complaints relating to WASP services is more or less akin to the role played by consumer affairs authorities in terms of the Consumer Protection Act. The highest complaints handling authority in terms of that Act is the Consumer Tribunal. In terms of section 109 of the Consumer Protection Act, any person who fails to comply with an order of the Tribunal commits an offence and is liable, on conviction, to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment. This example serves to illustrate the seriousness with which failure to any comply with the ruling of a consumer protection body is to be treated. The rulings of an industry consumer protection body should be no different, especially as the public framework makes specific allowance for the industry based management of the consumer protection role.

Subscription services that do not comply with the provisions of the WASPA Code have the potential to cause significant financial prejudice to consumers and a failure to comply with a ruling made by the WASPA Emergency Panel cannot escape with light or even moderate sanction. A heavy sanction must be imposed. In the circumstances, for the wilful failure to comply with the ruling of the emergency panel and the breach of section 14.7.6 of the Code, the SP is fined an amount of R100 000.

The total fine of R150 000 must be paid to WASPA within 5 days of the delivery of this report, failing which the SP's membership of WASPA shall be suspended until the full amount has been paid.