

## REPORT OF THE ADJUDICATOR

<b>Complaint reference number:</b>	#11210
<b>WASPA member(s):</b>	SMSNet (the Service Provider or "SP")
<b>Membership number(s):</b>	0084
<b>Complainant:</b>	Public
<b>Type of complaint:</b>	Subscription service
<b>Date complaint was lodged:</b>	2010-11-24
<b>Date of the alleged offence:</b>	2010-05-31 until 2010-07-22
<b>Relevant version of the Code:</b>	9.0
<b>Clauses considered:</b>	11.1.8, 11.4.1, 11.5.1, 11.5.2
<b>Relevant version of the Ad. Rules:</b>	Not applicable
<b>Clauses considered:</b>	Not applicable
<b>Related cases considered:</b>	#10467

### Complaint

Complaint #11210 is the escalation of unsubscribe request #479211 that was logged on the WASPA unsubscribe system on 9 September 2010. The Complainant escalated the request to a formal complaint on the grounds that he had not received any proof from the SP that he had actually subscribed to their service.

It appears from the history of unsubscribe request document that the SP initially refused to offer a refund, and that despite the Complainant's request for proof of subscription, the SP did not upload any proof as requested. The SP was notified of the escalation of the unsubscribe request to a formal complaint in terms of a notification sent to the SP on 24 November 2010.

### Service provider's response

The SP responded on 25 November 2010 and stated that the user was subscribed to its "Hugemob" service through its WAP portal on 31 May 2010 as shown in a subscription log table provided by the SP (see below) and that he was later unsubscribed on 22 July 2010. The SP advised that an SMS confirming deactivation of the service would have automatically been sent upon cancellation of the service.

The SP also confirmed that it had refunded the user in full. The SP provided the following log in support of its response:

Herewith subscription logs:

The screenshot shows a web interface for 'South Africa Administrative'. At the top, there is a red header with the text 'South Africa Administrative'. Below this is a navigation bar with several links: 'Sale Monitoring', '» HUGE MOB «', 'KENA', 'Send Free Content (BETA)', and 'Black List | Refund'. Underneath the navigation bar, there is a status bar with the following information: 'Start Date: 31/05/10 19:39 - End Date: 22/07/10 18:58', 'Tel No: 27835641088', and 'Subscription: DISABLED'. The main content area is divided into several sections. On the left, there is a section for 'Phone Type: NULL PHONE' and 'Pending Money: 0'. Below this, there are three tables: 'SUBSCRIPTION ACTION HISTORY', 'SUBSCRIPTION CHARGE HISTORY', and 'REFUND HISTORY'. The 'SUBSCRIPTION ACTION HISTORY' table has columns for 'TIME', 'ACTION', and 'TYPE'. It shows two entries: one on 22/07/10 18:58 with action 'HUGEMOB UNSUCSRIBED' and type 'HLP', and another on 31/05/10 19:39 with action 'SUBSCRIPTION' and type 'WAP'. The 'SUBSCRIPTION CHARGE HISTORY' table has columns for 'TIME' and 'CHARGE'. It shows one entry on 31/05/10 19:39 with a charge of 15. The 'REFUND HISTORY' table has columns for 'TIME' and 'CHARGE' but is currently empty.

In response to the furnishing of this information by the SP, the Complainant wrote to WASPA on 26 November 2010 confirming that his subscription had been cancelled and a full refund was made on 25 November 2010, but he stated further as follows:

**“I am still at pains, however, as to (1) what I supposedly subscribed to and (2) how this so-called subscription was effected. I would be pleased if I can get this explanation in “plain English” so as to avoid future occurrences. The attachment to your e-mail [i.e. the log provided by the SP] makes no sense to me, hence my request that it be explained.”**

In reply, the SP wrote as follows on 2 December 2010:

**“A client can reach our WAP portal; Hugemob.com; through various ways. It could be through Google search, operators links such as please call me and other advertisements. After clicking one of the above client will be re-directed to our main page which has got all terms and conditions and upon clicking on “I agree” button then they will be subscribed. They will also receive a notification SMS instantly.”**

The Complainant responded to this communication on 3 December 2010, stating that he found the SP to be evasive, and commenting that he still had no idea as to how he had allegedly subscribed to its service, nor did he know what the subscription service actually was. He expressed his frustration and also stated that he had never clicked “I Agree” to any service as alleged by the SP.

The SP responded again on 6 December 2010. The response does not set out any additional information over and above the information already provided by the SP prior to 6 December. It restated the times and dates of subscription and unsubscription and that subscription was via WAP. It stated that the user would have opened a WAP browser on his mobile phone and then would have either entered the hugemob.com url directly or accessed its WAP portal indirectly through a link, as previously explained, and that the user would have then seen the agreement page with the relevant terms and conditions and would have finally clicked on the “subscribe” button. On clicking this, the user would have become subscribed and directed to the Hugemob contents page to start downloading content. The SP reiterated that a subscription notification SMS would have been received by the complainant.

On 10 January 2011 the Complainant wrote to WASPA again expressing his dissatisfaction with the SP's response. He stated as follows:

**"I maintain that I have never clicked on any "I accept" button for any subscription. I maintain that I still do not know what I subscribed to. I maintain that no materials that I supposedly subscribed to have been delivered to me. If you are again going to forward me the same kind of bull\*\*\*\* received from SMSNet, please do not bother as it makes no sense to me and will make me even more angrier."**

Following the assignment of this complaint for formal adjudication, on 21 June 2011 I requested that WASPA obtain the following further information from the SP within 5 working days of the request:

1. A copy of all web pages, advertisements, banners, etc. that SMSNet alleges the Complainant reacted to in May 2010.
2. A copy of the WAP mobile internet landing page (in the form that it would have appeared to the Complainant at the relevant time in May 2010).
3. A copy of any WAP confirmation page displayed to the Complainant.
4. A detailed description of the subscription activation and subscription confirmation processes and mechanisms, including process flow charts where possible.
5. A statement of whether the service terms and conditions were actively "clicked" to indicate acceptance or whether the service terms and conditions were pre-populated with a tick which could have been "unclicked" to be rejected.
6. Copies of any and all welcome messages, subscription confirmation messages and monthly reminder messages sent to the Complainant in log format showing MO/MT numbers, date and time of sending, delivery status and detailed message content.

The SP replied on 27 June 2011, sending, *inter alia*, a number of screen shots showing the various steps in the subscription process, which it alleged would have been viewed by the Complainant during the subscription activation process. The SP also provided a screen shot of the welcome message that it alleges was sent, as well as the text of the relevant monthly reminder message.

The welcome message reads as follows:

**"Welcome to Hugemob. Enter hugemob.com to start the experience. R5/3days. To unsubscribe send STOP to 33912. (SP:0123428001)"**

The reminder message reads as follows:

**"U r subscribed to Hugemob.1game&unlimited contents:R5/3day. Hlp: 0123428001.Unsub sms STOP to 33912"**

Sections 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".

“11.4.1. 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.”

“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].”

## Decision

There are matters where it is difficult for an adjudicator to determine the veracity of one party's allegations over another's. This matter is such a matter. I am not in a position to determine whether or not the Complainant followed the specific subscription activation steps that the SP alleges the Complainant did. There is clearly a dispute of facts in this matter that cannot be resolved on the face of the information put up by the parties to this complaint. The screens provided by the SP are illustrative of its subscription activation process but cannot amount to proof that the screens were viewed by the complainant in this matter. However, when adjudicating on any alleged breach of the Code of Conduct that entails a disputed set of facts, where the disputed facts are not capable of clear resolution on the evidence placed before the adjudicator, the adjudicator is entitled, in appropriate circumstances, to determine whether any breach of the Code has occurred on the evidence that is put up by the respondent.

With this principle in mind, I have considered the content of the message logs adduced by the SP in this complaint. In this regard, it is convenient to repeat that the welcome message sent by the SP reads as follows:

***“Welcome to Hugemob. Enter hugemob.com to start the experience. R5/3days. To unsubscribe send STOP to 33912. (SP:0123428001)”***

Section 11.4.1 states that the welcome message must be a clear notification of certain prescribed information. Whilst all the categories of information listed in section 11.4.1 do appear in this welcome message, section 11.4.1 also states that the welcome message **“should not be mistaken for an advert or marketing message”**, i.e. in addition to covering the prescribed categories of information, that information must be given to a consumer in such a way that the subscription notification and welcome message is a clear and unambiguous notification to the consumer that he or she has in fact subscribed to a named subscription service. Having studied the wording of the SP's notification message, I am of the opinion that it could well be interpreted by a reasonable consumer to imply that the recipient has not yet subscribed to any service (i.e. the service has not yet “started”). The message could be interpreted as being an invitation to subscribe to a new service by visiting hugemob.com. In other words, the message could feasibly be mistaken for an advert or marketing message inviting for the subscription service, rather than a welcome message to an existing subscription service. I realise that the words “start the experience” can be interpreted to mean “start using the service you are already subscribed to and paying for” but this is not the only interpretation that the wording of the message permits. It is therefore not an unambiguous and clear notification that the reader is already subscribed to a service called Hugemob and already liable to pay R5 every 3 days for that service. Given that the welcome message is not unambiguous, the wording of the monthly reminder messages is even more important. Sections 11.5.1 and 11.5.2 deal with reminder messages in detail, and state as follows:

**“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].”**

The reminder messages sent by the SP read as follows:

***“U r subscribed to Hugemob.1game&unlimited contents:R5/3day. Hlp: 0123428001.Unsub sms STOP to 33912”***

In relation to permitted abbreviations, section 11.1.8 of the Code allows “u” in place of “you” and “r” in place of “are”, but there is no similar permission for “Hlp” to be used

in place of "Help" or "Unsub" to be used in place of "Unsubscribe" in the monthly reminder messages. The SP has used both of these abbreviations in its reminder messages. It has also not used the word "Cost" as prescribed before listing the cost of the service and frequency of billing. In addition, the last sentence of the prescribed format of the reminder message should be "To unsubscribe, sms STOP to...". The SP has left out the word "To" and simply used the prohibited abbreviation "*Unsub sms STOP to 33912*", which does not read as clearly as the expressly prescribed format for a reminder message.

It is notable that the wording of the Code in section 11.5.2 states that "**[t]he reminder messages specified in 11.5.1 must adhere exactly to the following format, flow, wording and spacing**" (emphasis added). Accordingly, the differences pointed out above are not insignificant. Furthermore, section 11.5.2 demands that the spacing of reminder messages must conform exactly to the prescribed format. The spacing used in the SP's reminder message appears to be non-compliant. Given that one SMS permits 144 characters, and given that the number of characters in the reminder message as quoted by the SP totals significantly less than 144, there does not appear to be any compelling reason for the SP to not have observed the required spacing. Using helpful spaces contributes to the clear meaning of a reminder message. As pointed out above, the welcome message is itself ambiguous and could be construed as a marketing message or advert, which makes the non-compliance of the reminder messages even more problematic because it increases the probability that a user may remain inadvertently subscribed to a service for a longer period of time than would otherwise be the case if the reminder messages complied with the prescribed format.

The SP is therefore in breach of section 11.5.2 of the Code in several respects.

While the complaint of involuntary subscription to the SP's service cannot be upheld on the evidence, a breach of section 11.5.2 of the Code has been established on the SP's own version.

## Sanctions

The primary purpose of the WASPA Code of Conduct is to ensure that consumers can use wireless application services with confidence. Given that claims of inadvertent subscription are frequent, non-compliance with section 11.5.2 is significant. The provisions of 11.5.2 are very clear. There can be no justification for non-compliance.

I have noted from adjudication report #10467 that, as at December 2010, 9 of the 21 complaints brought against the SP by that date concerned billing for unsolicited subscription services (6 of these 9 complaints were upheld). Non-compliance by the SP with provision of the Code dealing with subscription services on a repetitive basis cannot be ignored as their repeated non-compliance impacts negatively on the reputation and standing of the wireless application services industry as a whole.

As noted by the adjudicator in report #10467, the sanctions imposed to date against the SP include refunding subscription charges, a fine of R20 000.00 and a fine of R35 000.00. In complaint 8725, a six month suspension of membership was imposed by the adjudicator. This was revised on appeal to a R100 000 fine and a suspended 3 month suspension of membership. The following sanctions are now imposed in respect of this complaint:

1. In addition to the refund already made by the SP, the SP shall further compensate the Complainant in the amount of R500.00.
  2. A fine of R50 000.00 payable to WASPA is imposed on the SP.
  3. The above amounts shall be paid within 5 working days of the date of delivery of this report failing which the SP shall be suspended from WASPA until such time as the amounts have been paid in full (and proof of such payment delivered to WASPA). The suspension of membership contemplated by this paragraph shall run concurrently with any other suspension that may be triggered or imposed against the SP in respect of any other complaint.
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