



REPORT OF THE ADJUDICATOR

WASPA Member	HP Computek
Information Provider (IP) (if any)	n/a
Service Type	SMS Competition
Source of Complaints	Public
Complaint Number	11370
Date lodged	9 December 2010
Code of Conduct version	10.0

Complaint

1. The complaint relates to a competition which the complainant alleged involved multiple serious breaches of the Code of Conduct, as well as “misrepresentation and consumer fraud, as well as Telecoms fraud, telemarketing crime of mass persuasion for personal financial gain”.
2. It appears that an SMS promoting a competition had been received by the complainant’s domestic worker, who had raised the issue with the complainant after she had lost money when interacting with the competition service. The complainant is involved in the wireless industry and made a photographic copy of the message before escalating the matter to WASPA.
3. The complainant raised the following specific issues:
 - 3.1. There was no pricing on the SMS indicating the cost of replying thereto / entering the competition.
 - 3.2. There were no terms and conditions.
 - 3.3. No response was received to the entry into the competition / response to the SMS.
 - 3.4. There was no STOP or opt-out facility.
 - 3.5. It was not clear how her domestic’s MSISDN had been obtained.
 - 3.6. The competition was in breach of the Lotteries Act.
 - 3.7. The SMS did not identify the sender or those operating the competition.

4. The text of the SMS as provided by the complainant is as follows:
"SMS ICON to 40536 to WIN Authentic Minted *The Nelson Mandela Commemorative R5.00 Coin Set*. Treasure for life. Competition ends 28 Feb 2011. This is not a subscription."
5. The WASPA member indicated in response that it had corrected its SMS promoting the competition. The complainant did not, however, regard this as a satisfactory resolution of the matter and opined that this was not an inadvertent error but an intentional act of dishonesty
6. The member filed only the following further response:

"We went through the number 073 XXX XXXX and it was not billed but an only the advertising sms was sent to this number. We have rectified our error on the sms by including the price of premium sms charge to the end user."

Sections of the Code considered

The following sections of version 10.0 of the WASPA Code of Conduct were considered.

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.

5.2. 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.

9. Competitions**9.1. Provision of information**

9.1.1. Any promotional material for a competition service must clearly display the full cost to enter the competition and any cost to the user to obtain the prize.

9.1.2. Any promotional material for a competition service must include details of how the competition operates.

9.1.4. Promotional material must clearly state any information which is likely to affect a decision to participate, including:

- a. the closing date;
- b. any significant terms and conditions, including any restriction on the number of entries or prizes which may be won;
- c. an adequate description of prizes, and other items offered to all or a substantial majority of participants, including the number of major prizes;
- d. any significant age, geographic or other eligibility restrictions;
- e. any significant costs which a reasonable consumer might not expect to pay in connection with collection, delivery or use of the prize or item.
- f. the entry mechanism and workings of the competition.

9.1.5. The following additional information must also be made readily available on request, if not contained in the original promotional material:

- a. how and when prize-winners will be informed;
- b. the manner in which the prizes will be awarded;
- c. when the prizes will be awarded;
- d. how prize-winner information may be obtained;
- e. any criteria for judging entries;
- f. any alternative prize that is available;
- g. the details of any intended post-event publicity;
- h. any supplementary rules which may apply;
- i. the identity of the party running the competition and responsible for the prizes.

Decision

7. There is no dispute that the SMS in question constituted promotional material for the competition underlying it and that it is also a commercial communication within the meaning given to that term in the Code.

8. The member has admitted that it omitted to include pricing information in the SMS promoting the competition.
9. The member has not responded to any of the further allegations raised by the complainant. The notification of the complaint from the WASPA Secretariat specifically recommends to members that in responding to a complaint the member information such as logs, statistics on number of entries and information on how the service was advertised. No additional information was provided by the member and no evidence of applicable terms and competitions was advanced.
10. In the absence of any specific responses from the member the version of the complainant is accepted.
11. The adjudicator has identified the following breaches of Chapter 9 of the WASPA Code of Conduct:
- 11.1. There is no mechanism allowing a recipient to opt out in breach of section 5.1.2.
 - 11.2. The full cost of entering the competition is not displayed as required by section 9.1.1.
 - 11.3. There is insufficient information about the prize and in particular the number of major prizes available as required by section 9.1.4.
 - 11.4. There is no indication that further terms and conditions apply or, if they do, no indication as to how a potential entrant is to access them. Either way this constitutes a breach of section 9.1.5.
12. As regards the balance of the matters raised by the complainant:
- 12.1. No decision can be made in respect of the aspect of the complaint alleging that the competition is in breach of the Lotteries Act as a determination of this matter falls outside of the scope of WASPA's jurisdiction and is more properly settled by the Lotteries Board and/or the courts. WASPA can only consider proceeding against a member once the contravention of the Lotteries Act has been authoritatively determined.
 - 12.2. The complainant indicated that the SMS did not identify the sender or the operator of the competition. Section 5.1.1 requires that commercial messages contain a valid originating number and/or the name or identifier of the message originator. An inspection of the photographs of the SMS provided by the complainant indicates that there was a valid originating number (which was used to identify the member as the subject of the complaint). Further, section 9.1.5.i requires that the identity of the party operating the competition form part of the required additional terms and conditions which are not required to be set out in promotional material for a

competition and any breach in this regard will be covered under the confirmed breach of section 9.1.5 in its entirety. This aspect of the complaint is not upheld.

12.3. While it appears to be standard practise, there is nothing in the WASPA Code explicitly requiring that a response be provided to an entry into a competition and this aspect of the complaint can accordingly not be upheld.

12.4. The adjudicator is of the view that there is insufficient evidence to sustain a finding of a breach of section 5.3.1. read with section 5.2.1.

13. In assessing an appropriate sanction to impose in respect of the breaches identified above, the adjudicator has taken the following into consideration:

13.1. The competition terminated on 28 February 2011;

13.2. The limited corrective measures undertaken by the WASPA member;

13.3. The WASPA member was notified of the complaint on 13 December 2010 and indicated on 6 January 2011 that pricing information had been included;

13.4. The serious nature of the breaches identified, particularly the lack of pricing information and the lack of any indication of the application of other terms and conditions;

13.5. The unavoidable impression that the member has not taken the necessary steps to acquaint itself with the requirements of the WASPA Code of Conduct pertaining to competitions;

13.6. The relatively clean record of the member as regards disciplinary proceedings under the WASPA Code and the fact that no adverse findings have been made against the member in respect of breaches of Chapter 9 relating to competitions; and

13.7. Relevant precedent, with particular reference to complaint 5318 in which a WASPA member was fined R20 000 and ordered to refund requesting entrants due to the advertising of a competition in a magazine without the necessary pricing information.

14. The following sanction is imposed:

14.1. The member is fined an amount of R50 000, payment of R40 000 of which is suspended for a period of 12 months from date of this adjudication subject to the WASPA member not being found to have breached any provision of Chapter 9 of the WASPA Code of Conduct during this period.

14.2. The member is required to confirm in writing to the WASPA Secretariat within five (5) days of notification of this adjudication that all prizes available through the competition have been awarded within the period specified in the Code. The Secretariat is requested to submit a further complaint should it not receive this confirmation or should the member indicate that such prizes were not duly awarded.