



REPORT OF THE ADJUDICATOR

Complaint reference number:	19652
WASPA member(s):	SMS Portal (Pty) Limited (SP)
Membership number(s):	0139
Complainant:	Media Monitor
Type of complaint:	Non-compliant advert
Date complaint was lodged:	2013-02-15
Date of the alleged offence:	2013-02-07
Relevant version of the Code:	12.1
Clauses considered:	4.1.1; 6.2.2; 6.2.6
Relevant version of the Ad. Rules:	2.3
Clauses considered:	5.2.1.1; 5.2.1.2
Related cases considered:	19675, 20061, 20062 and 20129

Complaint

1. The WASPA Media Monitor lodged a formal complaint against the SP regarding a Budget Insurance advertisement which ran in the City Press Magazine on the weekend of 7 - 9 February 2013.
2. The advertisement provides various contact touchpoints through which a potential customer can make contact with Budget Insurance, including the use of a shortcode to which an SMS can be sent to invite a call-back from Budget Insurance.
3. The Media Monitor alleges that the price of the SMS to be sent to the shortcode is not clearly visible, nor explicit in the advertisement.

4. In her initial complaint, the Media Monitor advised the SP that the SMS rate applicable must be displayed explicitly and be placed adjacent to the advertised short code.
 5. The Monitor also invited the SP to provide a commitment and a clear plan of action for the current advertising to be pulled with immediate effect and for the revision of the advertisement to comply with the WASPA Code and Advertising Rules. If the SP complied and provided the WASPA Secretariat with a copy of the amended advertisement, there would be no need for the complaint to proceed to adjudication.
 6. The SP responded to the initial complaint and stated that its client had confirmed that the advertisement would be changed.
 7. However, the same advertisement was published again on 10 March 2013.
 8. The Media Monitor then tried to resolve the matter informally with the SP, but without any success. The matter was then escalated as a formal complaint to adjudication.
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Service provider's response

9. The SP's representatives submitted a consolidated response to this complaint and to four others involving the same SP (19675, 20061, 20062 and 20129).
10. The response states that all of the complaints relate to television advertising booked by the same IP, Telesure Upstream (Pty) Ltd. However, the current complaint involves an advert which appeared in print media and not on television. It is also not clear whether Telesure Upstream (Pty) Limited is the relevant IP for this complaint.
11. However, despite these inconsistencies, it is evident that the SP's submissions regarding the other complaints apply equally to this complaint and they will be considered on that basis.
12. In its response, the SP refers to a ruling passed by the Advertising Standards Authority of South Africa ("ASA") that it is not necessary to display the cost of standard-rated SMS responses in advertising of this nature.
13. In the ASA ruling, it was held that where there are no value added services being charged for, and consumers are only charged standard rates that they are normally charged by their respective service providers when sending SMSes, then the omission of the applicable SMS rate did not render the advertisement misleading to consumers in their expectations as to costs.

14. The SP relies on the view expressed by ASA in its interpretation of its obligations under section 6.2.6 of the WASPA Code, i.e. that it is only necessary to display the price of an SMS where a premium number is displayed.
15. The SP acknowledges that the wording of section 6.2.2 is not limited to "premium rated services" and applies to all services. However the SP argues that this should be interpreted to mean the actual services promoted as opposed to the cost of an SMS response and that the more explicit provisions of section 6.2.6 supersede 6.2.2.
16. The SP further denies that it has breached section 4.1.1 of the Code. The SP submits that there is no evidence presented that it has not had "honest and fair" dealing with its customers.
17. The SP reiterated that there was no intention on its part to mislead or be dishonest with consumers.
18. The SP argued further that there was no prejudice to customers or potential customers given that the shortcodes advertised utilised a standard rate and that in the absence of any prejudice, it could not be found that there had been a failure to act honestly or fairly or to clearly and accurately convey pricing information to customers and potential customers.
19. Notwithstanding the view taken by the SP, it confirmed that its client would review and amend its advertising where relevant on a without-prejudice basis.
20. The SP has also made the following submissions in mitigation of the sanction should it be found that it has breached one or more clauses of the WASPA Code of Conduct and/or Advertising Rules:
 - 20.1 The lack of clear prejudice to consumers and potential consumers flowing from the use of standard -rate response tariffs as opposed to premium-rate response tariffs.
 - 20.2 The reasonableness of relying on the view expressed by ASA.
 - 20.3 In the past three years there have been two formal complaints lodged against the SP, i.e. complaints 12662 and 16486. Both complaints related to unsolicited SMSes and therefore are not directly relevant to this complaint.
 - 20.4 The SP has not previously been found to have breached section 6.2.2 and that its record as regards WASPA complaints is relatively good.
 - 20.5 The Media Monitor has referred in her complaints to "repeat offences". This is patently erroneous as no adverse adjudications have been made in this matter as opposed to assertions made by the Media Monitor.

21. A copy of the SP's full response is attached to this report for ease of reference.
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Sections of the Code considered

22. Section 4.1.1:

Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

23. Section 6.2.2:

All advertisements for services must include the full retail price of that service.

24. Section 6.2.6:

The price for a premium rated service must be easily and clearly visible in all advertisements. The price must appear with all instances of the premium number display. (ONLY APPLICABLE IF MORE THAN STANDARD RATED SMS)

25. Section 6.4.1:

Where a short code is used as a brand, there is no requirement to display pricing information next to the short code, provided there is no directly associated call to action.

26. Section 6.4.2:

Where a short code is used as a brand and there is an associated call to action, the standard requirements for the display of pricing information are required, as set out in the Advertising Rules.

Decision

27. I have considered the submissions made by both the Media Monitor and the SP and find as follows:
28. *Alleged contravention of section 4.1.1 of the Code*

- 28.1 While I disagree with the submission made by the SP that an element of prejudice to customers or potential customers must be shown before a member can be held to have acted dishonestly or unfairly in terms of this section; I am satisfied in the circumstances of this complaint that the SP did not act dishonestly or unfairly without making any finding on the question of prejudice to customers or potential customers.
- 28.2 The SP responded to the initial complaint made by the Media Monitor and obtained confirmation from its client that the advertisements in question would be changed.
- 28.3 Furthermore, the SP did not act dishonestly or unfairly in relying on the position taken by ASA that it did not need to publish standard SMS rates with its advertised shortcodes based on the view expressed by ASA in this regard.
- 28.4 Therefore, the complaint in this regard is accordingly dismissed.
29. *Alleged contravention of section 6.2.2 of the Code*
- 29.1 Section 6.2 of the Code deals with the issue of pricing of “services” promoted by members.
- 29.2 While there is no express definition of the term “services” in the definition section of the Code, section 1.4 makes it clear that the scope of the Code is restricted to *wireless application services* accessed by a customer in South Africa, transmitted by a wireless application service provider and carried by a South African network operator; and does not refer to other types of services that the member may provide.
- 29.3 The Code then goes on to deal separately with various types of wireless application services, including, *inter alia*, children’s services, adult services, competitions, contact and dating services, subscription services, and notification services.
- 29.4 In the present complaint, the client, Budget Insurance used a short code as a means by which potential customers can contact Budget Insurance to illicit a call-back from them to further discuss their insurance offerings.
- 29.5 No wireless application services were promoted in the advertisement. Instead, a shortcode was used as a potential contact touchpoint for customers alongside a telephone number and website address.
- 29.6 I agree with the SP’s view that, on a proper interpretation of section 6.2.2, the section does not apply to the cost of SMS responses to an

advertised shortcode where no “*services*” which fall within the ambit of the Code are being promoted.

- 29.7 I therefore find that the SP has not contravened section 6.2.2, and the complaint is accordingly dismissed in this regard.
30. However, that is not the end of the matter. In the present circumstances, I believe that section 6.4 is the relevant section of the Code which is applicable.
31. The shortcode being used in the advertisement forms part of the client's brand and is directly associated with a call-to-action, i.e. that potential customers are invited to send an SMS to the shortcode to receive a call-back from a member of Budget Insurance's staff.
32. Section 6.4.2 provides that, in such circumstances, the standard requirements for the display of pricing information are required, as set out in the Advertising Rules.
33. The omission of such pricing information would constitute a contravention of section 6.4.2 of the Code.
34. However, as the Media Monitor did not raise this issue in its complaint and in light of the undertaking that the relevant adverts will be amended to display the correct pricing information, it is not necessary for me to make any ruling in this regard.