

REPORT OF THE ADJUDICATOR

Complaint reference number: 26752

WASPA member(s): Westbound Direct Limited (IP) / Basebone Pty

Ltd (SP)

Membership number(s): 1436 / 1344

Complainant: Public

Type of complaint: Unsolicited SMS

Date complaint was lodged: 30 June 2015

Date of the alleged offence: s/a

Relevant version of the Code: 14.0

Clauses considered: 4.2, 5.1, 5.4, 5.5 and 15.1

Related cases considered: 25976, 26003, 26416, 26420, 26610

Complaint

- 1. The complainant received the following unsolicited SMS from the IP: "Confirm your request for Westbound Direct Bluelima @R7.00 per charge, max 5 charges per day. Reply "Yes" to confirm/"No" to cancel. Free SMS".
- 2. The complainant states that he wanted to install WhatsApp on a new cell phone and clicked on the first link he found on a Google search report which directed him to a site which looked legitimate.
- 3. The site asked for his cell number to be entered and to reply "yes" to the sms that he would receive.
- 4. After replying yes (instinctively), he realised that this was a scam and no download took place.
- 5. After re-reading the SMS it was apparent that he had subscribed to the IP's subscription service.

IP's response

- 6. The IP states that the complainant clicked on a banner advert accessed on the website he found to download WhatsApp.
- 7. The banner advert contained a green call to action button with the words "Download WhatsApp Upgrade".
- 8. The banner advert was placed by one of the IP's contracted affiliate networks and was not authorised by the IP.
- 9. The IP then proceeded to justify the subscription process that follows from the complainant clicking on the advert, which it does have control over and which is compliant with the requirements of the Code.
- 10. The IP immediately suspended this campaign after being informed about this misleading promotion.
- 11. The IP also stated that it enters into contracts with all of its affiliate networks which include contractual remedies that the IP can implement if an affiliate breaches any of the provisions of the contract.
- 12. However, it cannot take any pre-emptive measures against such unauthorised practices.
- 13. The IP stated that it had taken all reasonable measures to make sure its affiliates use the assets provided for the relevant campaigns and had no control over other unauthorised campaigns being used.
- 14. It therefore should not be held responsible for the contraventions of the relevant provisions of the WASPA Code.

Sections of the Code considered

- 15. The following clauses of the Code were considered:
- 4.2. Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.
- 5.1. Members must not offer or promise services that they are unable to provide.
- 5.4. Members must have honest and fair dealings with their customers.
- 5.5. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

- 15.1 For all subscription services initiated by the sending of an SMS, there must be an additional specific confirmation step before the customer is billed. This confirmation step must be provided in one of two ways:
- (i) The customers mobile carrier may implement the confirmation step.
- (ii) The member can send a confirmation message to the customer. The customer must not be charged for the confirmation message.

Decision

- 16. It is common cause that the banner advert in question is misleading and deceptive, and contravenes sections 4.2, 5.1, 5.4, and 5.5 of the Code.
- 17. The IP has stated in its response, as has been the case in a number of other complaints of this nature which have been submitted to adjudication, that it uses the services of affiliate networks to promote its services, and, although it takes reasonable steps to ensure that these services are provided in compliance with the requirements of the Code, it cannot take pre-emptive measures to stop misleading campaigns which it has no knowledge of and which have not been authorised by it.
- 18. The IP also has no contractual relationship with the various publishers used by the affiliate networks and cannot control what promotional materials are used by these publishers.
- 19. Although version 14.0 of the Code does not deal directly with the responsibility of members for the services provided by contracted third party affiliates, section 3.7 of the Code provides for situations where a member is held responsible for contraventions of the Code committed by customers who are not members of WASPA, and I am of the view that these provisions must be extended by analogy to third party service providers, such as affiliates, who interact with consumers on behalf of the IP and contravene the Code when doing so.
- 20. The fact that the IP may be adjudged to have taken reasonable steps to ensure that its affiliates comply with the requirements of the Code must be taken into account in mitigation, but does not excuse the IP from responsibility.
- 21. The IP has confirmed that it enters into contracts with its affiliates and creates positive obligations on its affiliates to comply with the requirements of the Code.
- 22. These contracts also provide the IP with various remedies which can be enforced if the affiliate breaches its obligations.
- 23. Therefore, although the IP may not be in a position to take pre-emptive steps to prevent these forms of misleading campaigns, it is best placed to respond to these types of deceptive business practices by enforcing the contractual remedies set out in its contracts with its affiliates.

- 24. Based on the aforegoing, I am satisfied that the IP must be held responsible for the contraventions of the Code.
- 25. The complaint is accordingly upheld.

Sanctions

- 26. I am satisfied that the IP has taken steps to suspend the relevant campaign within a reasonable time after being notified of the contravention. I have taken this into account in mitigation.
- 27. The IP is fined an amount of R5 000 and is ordered to refund the amount of R49.00 to the complainant.
- 28. It is suggested that this fine and refund, once paid by the IP, can be recovered from the relevant affiliate by the IP in terms of its contract with them.
- 29. Hopefully once affiliates feel the commercial impact of using publishers who use deceptive and misleading promotional practices, they will in turn stop using those publishers.