



Wireless Application Service Providers' Association

Report of the Adjudicator

Complaint number	27549
Cited WASPA members	Smartcall Technology Solutions (0090) – SECOND RESPONDENT Allied Pacific Investments Ltd (1448) – FIRST RESPONDENT
Notifiable WASPA members	
Source of the complaint	Public
Complaint short description	Copyright and Trade Mark Infringement
Date complaint lodged	8 September 2015
Date of alleged breach	Not apparent
Applicable version of the Code	14
Clauses of the Code cited	4.2, 4.3, 4.5, 4.6, 4.7, 5.1, 8.8, 12.1, 12.2, 12.3, 12.4, 12.5, 15.4, 15.9, 15.10, 15.11, 15.12 and 15.13
Related complaints considered	26921, 27037, 27644
Fines imposed	The First Respondent must pay a fine of R15 000 within 7 (seven) days of publication of this report.
Other sanctions	The First Respondent must provide details of 3 rd party affiliate marketer and refrain from using them in the future.

Is this report notable?	No
Summary of notability	

Initial complaint

The formal complaint was sent to the First and Second Respondents on the 2015-09-18.

- The First Respondent responded on the 2015-09-18, acknowledging the complaint.
- The First Respondent responded on the 2015-10-02, requesting an extension.
- The WASPA secretariat emailed the First Respondent on the 2015-10-05, advising that the extension had been granted.
- The Second Respondent responded on the 2015-10-09 and 2015-10-19, requesting an extension for the primary response.
- The First Respondent responded on the 2015-10-23 and the 2015-10-24 with their primary response.
- The Second Respondent responded with their primary response on the 2015-10-23.
- The WASPA secretariat emailed the First Respondent on the 2015-11-03 advising that the complainant did not provide a response and the complaint is going to adjudication.

The initial complaint relates to the use of the Pick n Pay name and trademark unlawfully in a Whatsapp campaign run by the First Respondent using the Second Respondent's infrastructure. The following clauses were cited: 4.2, 4.3, 4.5, 4.6, 4.7, 5.1, 8.8, 12.1, 12.2, 12.3, 12.4, 12.5, 15.4, 15.9, 15.10, 15.11, 15.12 and 15.13.

Both the First and Second Respondent were notified and both provided responses.

Second Respondent's response

"The service was not marketed via the Second Respondent's platform and also not by using any bearer from the network. When we received notice that the service was sent on WhatsApp we immediately notified our client that took immediate action to stop the service...

The service was hosted by Allied Pacific and was disabled with immediate effect.

With regards to the name of Pick & Pay that has been compromised, this issue was dealt with legally with Adams and Adams attorneys and the matter has been resolved.

Attached hereto a copy of the legal letter received from Adams and Adams attorneys and confirmation of the matter resolved.

The complainant in this case did not supply his mobile number in order to provide logs of subscription to proof the flow of subscription, however the service is compliant to the WASPA code of conduct.”

They then went on to respond in detail to each of the clauses cited. I have highlighted their responses in bold:

“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.

We as a company conduct ourselves in a professional manner when dealing with our customers. The complainant did not contact our company directly.

4.3. Members must conduct themselves lawfully at all times and must co-operate with law enforcement authorities where there is a legal obligation to do so.

We responded immediately to the legal letter received from Adams and Adams. Please find attached hereto the correspondence to Adams and Adams. We co-operated with them and discontinued the services with immediate effect.

4.5. Members must respect the intellectual property rights of their clients and other parties and must not knowingly infringe such rights.

We have not done so knowingly and once we were notified the service was disconnected with immediate effect.

4.6. Members must not knowingly transmit or publish illegal content.

The content of the site was not illegal, there was only a problem with the advertising and this was terminated.

4.7. If a member becomes aware of illegal content under that member's control, the member must, immediately suspend access to that content. Where required to do so by law, the member must report the illegal content to the relevant enforcement authority.

The service was suspended with immediate effect when we became aware of the infringement.

5.1. Members must not offer or promise services that they are unable to provide.

All services offered on the site was available to the user.

8.8. Content that is promoted in advertising, must be the same content that is provided to the customer as part of the advertised service.

The advertising was conducted by a third party without our knowledge, we would never promote content to subscription customers that we could not provide. All content was available on the site.

12.1. For any web page, pricing information does not need to be displayed for services which are free, or which are billed at standard rates. For all other services, where there is a call-to-

action, pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action.

The pricing information was displayed immediately adjacent to the call to action as required.

12.2. There must not be any intervening text or images between the call-to-action and the pricing information. Pricing information must be legible, horizontal and presented in a way that does not require close examination. Pricing information must not be obscured by any other information. Pricing information must not be animated. It must not be a requirement that the viewer of an advert has additional software installed in order to see pricing information in the advert.

The pricing information was compliant with this clause.

12.3. A member must confirm that any MSISDN entered into a web page by a customer is, in fact, an MSISDN belonging to that customer. This must be done in one of the following ways, or in a functionally equivalent manner:

- (i) The customer's mobile carrier can provide the member with confirmation.
- (ii) The member can send an SMS to the customer's MSISDN containing a unique password or PIN which, when entered on a web page, validates the handset number.
- (iii) The member can send an SMS to the customer's MSISDN containing a unique link, which, when clicked, validates the handset number.

All DOI transactions are managed by the MNO.

12.4. For any web page advertising a service for which there is not a subsequent confirmation step containing a link to the terms and conditions, the minimum terms and conditions for the use of the service must be clearly displayed at the bottom of the web page.

The terms and conditions are available on the call to action page.

12.5. The minimum terms and conditions displayed on any web page must include at least the following information:

- (a) a customer support number, and
- (b) a link to a web page where the full terms and conditions for the service are available.

The terms and conditions contain the above information.

15.4. A member must not require that a customer join a subscription or notification service in order to claim an existing reward, to be able to redeem existing loyalty points or to claim a similar benefit. (Example of incorrect marketing: "to claim your prize, join this service".)

Our services are complaint with 15.4 of the WASPA code, customers can claim from us without subscribing by leaving their details with our support team via email or telephonically. Our sales staff would then try to up-sell the user on the benefits of our subscription service.

15.9. The confirmation step for any subscription service must require an explicit response from the customer of that service. The confirmation step may not be performed in an automated manner in such a way that the process is hidden from the customer.

All DOI transactions are managed by the MNO as an independent transaction.

15.10. For all subscription services initiated via a web page, there must be an additional specific confirmation step before

the customer is billed. This confirmation step must be provided in one of three ways:

- (i) The customer's mobile carrier may implement the confirmation step.
- (ii) The member can provide the customer with a "confirmation page".
- (iii) The member can send a "confirmation message" to the customer. The customer must not be charged for the confirmation message.

All DOI transactions are managed by the MNO as an independent transaction.

15.11. A confirmation page must contain the following information:

- (a) the name of the service,
- (b) the pricing information,
- (c) a customer support number,
- (d) instructions for confirming the initiation of the subscription service, and
- (e) a link to any applicable terms and conditions.

Additional information about the service may also be included, provided it follows the above information.

All DOI transactions are managed by the MNO as an independent transaction.

15.12. 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 customer's 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.

All DOI transactions are managed by the MNO as an independent transaction.

15.13. A confirmation message must contain only the following information, in this order:

- (a) the name of the service,
- (b) the pricing information,
- (c) a customer support number,
- (d) instructions for confirming the initiation of the subscription service, and (e) (optionally) additional information about the service.

All DOI transactions are managed by the MNO as an independent transaction.

The service was compliant with the WASPA code of conduct including pricing information, terms and conditions and subscription process.”

First Respondent’s response

The First Respondent set out their response as follows. I have bolded the sections where they have responded and left in normal text the sections where they have merely quoted the Code of Conduct:

“Please see find our response to the clauses listed below:

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. 4.3. Members must conduct themselves lawfully at all times and must co-operate with law enforcement authorities where there is a legal obligation to do so. 4.5. Members must respect the intellectual property rights of their clients and other parties and must not knowingly infringe such rights. 4.6. Members must not knowingly transmit or publish illegal content.

We, amongst many other WASPA members have fallen prey to some very unscrupulous marketing companies. We did not have any control of the marketing messages being used as this is not how the marketing networks do things. We believe that this situation is well known to WASPA and Industry body working group has been formed to combat this.

4.7. If a member becomes aware of illegal content under that member's control, the member must, immediately suspend access to that content. Where required to do so by law, the member must report the illegal content to the relevant enforcement authority.

We complied with section 4.7 of the WASPA code, the relevant enforcement authority is in the process of being set up by WASPA.

5.1. Members must not offer or promise services that they are unable to provide.

We would never do this with our clients, we wish to establish long term relationships with them.

8.8. Content that is promoted in advertising, must be the same content that is provided to the customer as part of the advertised service.

The advertising was conducted by a third party without our knowledge, we would never promote content to subscription customers that we could not provide.

12.1. For any web page, pricing information does not need to be displayed for services which are free, or which are billed at standard rates. For all other services, where there is a call-to-action, pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action.

Our services are complaint with 12.1 of the WASPA code, any infringement of the code was done by third party marketers and was out of our control.

12.2. There must not be any intervening text or images between the call-to-action and the pricing information. Pricing information must be legible, horizontal and presented in a way that does not require close examination. Pricing information must not be obscured by any other information. Pricing information must not be animated. It must not be a requirement that the viewer of an advert has additional software installed in order to see pricing information in the advert.

Our services are complaint with 12.2 of the WASPA code, any infringement of the code was done by third party marketers and was out of our control.

12.3. A member must confirm that any MSISDN entered into a web page by a customer is, in fact, an MSISDN belonging to that customer. This must be done in one of the following ways, or in a functionally equivalent manner: (i) The customer's mobile carrier can provide the member with confirmation. (ii) The member can send an SMS to the customer's MSISDN containing a unique password or PIN which, when entered on a web page, validates the handset number. (iii) The member can send an SMS to the customer's MSISDN containing a unique link, which, when clicked, validates the handset number. Display of minimum terms and conditions.

Our services are complaint with 12.3 of the WASPA code.

12.4. For any web page advertising a service for which there is not a subsequent confirmation step containing a link to the terms and conditions, the minimum terms and conditions for the use of the service must be clearly displayed at the bottom of the web page.

Our services are complaint with 12.4 of the WASPA code.

12.5. The minimum terms and conditions displayed on any web page must include at least the following information: (a) a customer support number, and (b) a link to a web page where the full terms and conditions for the service are available.

Our services are complaint with 12.5 of the WASPA code.

15.4. A member must not require that a customer join a subscription or notification service in order to claim an existing reward, to be able to redeem existing loyalty points or to claim a similar benefit. (Example of incorrect marketing: "to claim your prize, join this service".)

Our services are complaint with 15.4 of the WASPA code, customers can claim from us without subscribing by leaving their details with our support team via email or telephonically. Our sales staff would then try to up-sell the user on the benefits of our subscription service.

15.9. The confirmation step for any subscription service must require an explicit response from the customer of that service. The confirmation step may not be performed in an automated manner in such a way that the process is hidden from the customer.

Our Services are compliant with 15.9 of the WASPA code.

15.10. For all subscription services initiated via a web page, there must be an additional specific confirmation step before the customer is billed. This confirmation step must be provided in one of three ways: (i) The customer's mobile carrier may implement the confirmation step. (ii) The member can provide the customer with a "confirmation page". (iii) The member can send a "confirmation message" to the customer. The customer must not be charged for the confirmation message.

Our Services are compliant with 15.10 of the WASPA code.

15.11. A confirmation page must contain the following information: (a) the name of the service, (b) the pricing information, (c) a customer support number, (d) instructions for confirming the initiation of the subscription service, and (e) a link to any applicable terms and conditions. Additional information about the service may also be included, provided it follows the above information. Subscriptions initiated via an SMS

Our Services are compliant with 15.11 of the WASPA code.

15.12. 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 customer's 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.

15.12 of the code is irrelevant as we were not marketing via SMS

15.13. A confirmation message must contain only the following information, in this order: (a) the name of the service, (b) the pricing information, (c) a customer support number, (d) instructions for confirming the initiation of the subscription service, and (e) (optionally) additional information about the service.

Our Services are compliant with 15.9 of the WASPA code.”

The First Respondent has been sanctioned in terms of case 27037 with regards to this same campaign and as such I will only rule on the clauses not cited in that matter.

Complainant's response

The Complainant had no further response.

Member's further response

The member had no further response.

Sections of the Code considered

4.7. If a member becomes aware of illegal content under that member's control, the member must, immediately suspend access to that content. Where required to do so by law, the member must report the illegal content to the relevant enforcement authority.

8.8. Content that is promoted in advertising, must be the same content that is provided to the customer as part of the advertised service.

12.1. For any web page, pricing information does not need to be displayed for services which are free, or which are billed at standard rates. For all other services, where there is a call-to-action, pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action.

12.2. There must not be any intervening text or images between the call-to-action and the pricing information. Pricing information must be legible, horizontal and presented in a way that does not require close examination. Pricing information must not be obscured by any other information. Pricing information must not be animated. It must not be a requirement that the viewer of an advert has additional software installed in order to see pricing information in the advert.

12.3. A member must confirm that any MSISDN entered into a web page by a customer is, in fact, an MSISDN belonging to that customer. This must be done in one of the following ways, or in a functionally equivalent manner: (i) The customer's mobile carrier can provide the member with confirmation. (ii) The member can send an SMS to the customer's MSISDN containing a unique password or PIN which, when entered on a web page, validates the handset number. (iii) The member can send an SMS to the customer's MSISDN containing a unique link, which, when clicked, validates the handset number.

12.4. For any web page advertising a service for which there is not a subsequent confirmation step containing a link to the terms and conditions, the minimum terms and conditions for the use of the service must be clearly displayed at the bottom of the web page.

15.9. The confirmation step for any subscription service must require an explicit response from the customer of that service. The confirmation step may not be performed in an automated manner in such a way that the process is hidden from the customer.

15.10. For all subscription services initiated via a web page, there must be an additional specific confirmation step before the customer is billed. This confirmation step must be provided in one

of three ways: (i) The customer's mobile carrier may implement the confirmation step. (ii) The member can provide the customer with a "confirmation page". (iii) The member can send a "confirmation message" to the customer. The customer must not be charged for the confirmation message.

15.11. A confirmation page must contain the following information: (a) the name of the service, (b) the pricing information, (c) a customer support number, (d) instructions for confirming the initiation of the subscription service, and (e) a link to any applicable terms and conditions. Additional information about the service may also be included, provided it follows the above information.

15.12. 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 customer's 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.

15.13. A confirmation message must contain only the following information, in this order: (a) the name of the service, (b) the pricing information, (c) a customer support number, (d) instructions for confirming the initiation of the subscription service, and (e) (optionally) additional information about the service.

Decision

I will rule in this decision against only the First Respondent even though the Second Respondent also provided a response and at certain points it appears as if they were providing the service (see their response to clause 15.4). However, on a reading of all the documents submitted, it would appear that the service was only provided and advertised by the First Respondent.

Ruling in respect of the First Respondent:

As with the previous adjudication on this same campaign, the First Respondent puts forward the argument that their failure to comply with the Code was due to the fault of their third party marketing network. I understand that the 3rd party affiliate marketer very well may (or may not) have acted without their knowledge, however this does not excuse the fact that they appointed such 3rd party service provider (who they can contractually control) to market a service which they seek to benefit from financially.

Again it feels very convenient to be able to “rely” on the breaches of the 3rd party affiliate marketer (over whom they allege they have no control) to draw consumers onto the page they have control over.

As previously stated, the purpose of the Code is to protect consumers. In a purposive interpretation of the Code, clauses 3.5-3.7 should apply to 3rd party service providers appointed by the member to provide services covered by the Code. Accordingly, the member should be liable for their actions not in compliance with the Code. These clauses were referred back to WASPA in case 27037 and accordingly I will leave the ruling on these clauses to an adjudication process wherein the First Respondent is given an opportunity to respond to the citing of such clauses.

Specifically relating to the clauses cited here but not dealt with in case 27037, I rule as follows:

4.7. If a member becomes aware of illegal content under that member's control, the member must, immediately suspend access to that content. Where required to do so by law, the member must report the illegal content to the relevant enforcement authority.

No breach. This matter has been dealt with through legal channels outside of the WASPA forum and the campaigns were suspended.

8.8. Content that is promoted in advertising, must be the same content that is provided to the customer as part of the advertised service.

I find a breach of this clause. The advertised content was different to the content provided as part of the service advertised.

12.1. For any web page, pricing information does not need to be displayed for services which are free, or which are billed at standard rates. For all other services, where there is a call-to-action, pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action.

12.2. There must not be any intervening text or images between the call-to-action and the pricing information. Pricing information must be legible, horizontal and presented in a way that does not require close examination. Pricing information must not be obscured by any other information. Pricing information must not be animated. It must not be a requirement that the viewer of an advert has additional software installed in order to see pricing information in the advert.

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The member can send an SMS to the customer's MSISDN containing a unique link, which, when clicked, validates the handset number.

12.4. For any web page advertising a service for which there is not a subsequent confirmation step containing a link to the terms and conditions, the minimum terms and conditions for the use of the service must be clearly displayed at the bottom of the web page.

15.9. The confirmation step for any subscription service must require an explicit response from the customer of that service. The confirmation step may not be performed in an automated manner in such a way that the process is hidden from the customer.

15.10. For all subscription services initiated via a web page, there must be an additional specific confirmation step before the customer is billed. This confirmation step must be provided in one of three ways: (i) The customer's mobile carrier may implement the confirmation step. (ii) The member can provide the customer with a "confirmation page". (iii) The member can send a "confirmation message" to the customer. The customer must not be charged for the confirmation message.

15.11. A confirmation page must contain the following information: (a) the name of the service, (b) the pricing information, (c) a customer support number, (d) instructions for confirming the initiation of the subscription service, and (e) a link to any applicable terms and conditions. Additional information about the service may also be included, provided it follows the above information.

15.12. 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 customer's 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.

15.13. A confirmation message must contain only the following information, in this order: (a) the name of the service, (b) the pricing information, (c) a customer support number, (d) instructions for confirming the initiation of the subscription service, and (e) (optionally) additional information about the service.

I find no breach of the above clauses 12.1 – 12.4 and 15.9 – 15.13. The complaint was with regards to the illegal use of a trade marked name and copyright infringement in the advertising of a service. Although I cannot at this point verify whether the subscription process (should someone have subscribed) was compliant (this due to the links to the service having been disabled), due to the fact that the complaint relates to the use of the Pick n Pay name and not to the subscription service itself I will rule in favor of the First Respondent.

Sanctions

I sanction the First Respondent to a fine of R15 000 payable within 7 (seven) days of publication of this report.

I further sanction them to provide details of 3rd party affiliate marketer and refrain from using them in the future.