



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Smartcall Technology Solutions
Information Provider (IP):	Mobimex Group
Service Type:	Subscription/Content/Adult Services
Source of Complaints:	Public
Complaint Number:	5954
Code Version (CoC and AR):	Code of Conduct 6.2
Date of Adjudication:	11 August 2009

Complaint

1. On the 16th February 2009 WASPA received an unsubscribe request from the Complainant. The unsubscribe request was not specifically targeted at an SP as the Complainant had been unable to establish the identity of the Service Provider.
2. In response WASPA sent an unsubscribe response to 14 SP's on the 16th February 2009 asking them to unsubscribe the Complainant. All the SP's asked indicated that the Complainant was not subscribed to their service including Mobimex which provided this information to WASPA on the 17th February 2009.
3. Smartcall Technology Solutions also responded by referring the matter to the Mobimex Group.
4. Although all responses from the SP's were initially in the negative, on further questioning by WASPA on the 02 March 2009 the Mobimex Group confirmed that the Complainant was a subscriber who had been "already" unsubscribed on the 01st March 2009.
5. Mobimex went on to indicate that it would not offer a refund as the "customer has subscribed normally and also downloaded (sic) products". In support of this contention Mobimex provided the WAP menu image indicating that the Complainant's cell phone

#5954

number was subscribed to the service on the 25th November 2008 (see Annexure A).

Complainant's Reply

6. The Complainant then expressed his thanks for the assistance of WASPA in getting him unsubscribed and concluded that he was on the point of "closing his contract in total desperation" until WASPA was able to assist him.
7. Some further points are apposite from the complainant's second email. They are as follows:
 - 7.1. Had the Complainant been aware of the service he would have been able to take action sooner;
 - 7.2. The Complainant received no benefit from the service as all SMS' were unreadable, nor could the SMS' be forwarded to another cell phone;
 - 7.3. The Complainant was monitoring his SMS traffic for the last two months and was unable to establish the identity of the sender aside from the number of 084000147472.
8. Interestingly two days after the IP indicated that the Complainant was unsubscribed the Complainant received a further SMS which read:
 - 8.1. *"Free SMS: Thank you for using our service! This is R100 spending notification. Txt stop to unsubscribe. Problems?Mail to: help@mob.vc"*
9. The Complainant noted that the SMS gave no indication of the sender of the message and provided an email address which "looks suspect".
10. Moreover the Complainant notes that the only time he was aware of the name of the service was when a received the "final unsubscribe message" which, for the first time, indicated a way to unsubscribe and further indicated that the service was the "NEW Erotic Portal".
11. Once the Complainant had been unsubscribed he received the following message:
 - 11.1. *"FREE SMS. You have been unsubscribed from our service. Thank you!"*
12. The Complainant also asked to be made aware of the regulations controlling WASPA

#5954

members and ways in which regulations could “protect minor children from such exploits”.

Second IP Response

13. The SP then responded to the request by WASPA for the proof of subscription by attaching the WAP report (see Annexure A) in an email on the 19th March 2009 that is so short that it is able to be reproduced here:

“Hello,

*please see attached the proof with
handset details, the user subscribed
25th on November.*

*We also answered to this quest on the
WASPA page.*

*If you need additional information
please write directly to me, we
hope to solve this issue asap,*

best”

Portions of the Code of Conduct (version 6.2) considered:

14. **3.1.1.** Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.
15. **3.3.1.** Members will not offer or promise services that they are unable to provide.
16. **4.1.1.** Members are committed to honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

#5954

17. **4.1.5.** Members must have a complaints procedure allowing their customers to lodge complaints regarding the services provided. Members must acknowledge receipt of complaints expeditiously, and must respond to any complaints within a reasonable period of time.
18. **4.1.7.** Customer support must be easily available, and must not be limited to a medium that the customer is unlikely to have access to (for example, support should not be limited to email if a significant number of customers do not have access to email).
19. **5.1.1.** All commercial messages must contain a valid originating number and/or the name or identifier of the message originator.
20. **5.1.5.** Once a recipient has opted out from a service, a message confirming the opt-out should be sent to that recipient. This message must reference the specific service that the recipient has opted-out from, and may not be a premium rated message.
21. **6.2.11.** For any transaction initiated via WAP, USSD, web-browsing, a link in an MMS or by an application:
 - (a) If the transaction is billed at R10 or more, the member initiating this transaction must obtain specific confirmation from the customer and keep a record of such confirmation.
 - (b) If the transaction is billed at less than R10, the price for the transaction must be clearly indicated as part of, or immediately next to, the link or option that will initiate the transaction.
22. **8.1.3.** Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult content services. Explicit confirmation of a user's age must be obtained prior to the delivery of an adult content service.
23. **11.1.2.** Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item.
24. **11.1.4.** Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.
25. **11.1.6.** Members must ensure that children accessing subscription services confirm that

#5954

they have permission from a parent or guardian do to so.

26. **11.1.7.** 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.
27. **11.2.4.** Members must ensure that the termination mechanism is functional and accessible at all times.

Decision

28. In order to deal with this matter as comprehensively as possible this decision will be broken up into sections. Unless specifically stated all references to a CoC refer to version 6.2 of the WASPA Code of Conduct ("CoC").

PROFESSIONAL CONDUCT

29. On the 16th February 2009 the IP was asked by the WASPA secretariat to indicate whether it had subscribed the Complainant to any of its services. Just a day later the IP indicated that it had not. Notwithstanding this as a result of a second request by WASPA on the 02 March 2009, the IP indicated that it had unsubscribed the Complainant yesterday. Thus, by its own admission, the IP provided false information to WASPA after a specific unsubscribe request. This conduct contravenes clause **3.1.1** of the CoC in that the IP did not conduct itself in a professional manner.
30. Additionally the failure to stop the service to the Complainant's number as mentioned above contravenes clause **11.2.4** which provides that members must ensure that the termination mechanism is functional and accessible at all times.

INABILITY TO ACCESS SERVICES OFFERED

31. The Complainant alleges that the communications received by him did not include any usable links. In other words any content that he was meant to be able to access was inaccessible. This was not contradicted by the IP. This breaches clause **3.3.1** of the CoC.

CUSTOMER SUPPORT

32. The fact that the Complainant was forced to approach WASPA directly and the fact that WASPA itself needed to send messages to several SP's in order to ascertain the identity of the SP is of great concern. This indicates that customer support was clearly not "easily available" as required in terms of clause **4.1.7** nor was this complaint responded to within a reasonable period of time in that the IP did not respond to the complaint within the five working days afforded it by the WASPA communication on the 06 March 2009. Rather the IP belatedly provided a reply on the 19th March 2009 as can be seen in the Second IP Response above. This contravenes clause **4.1.5** of the CoC.
33. The inability to identify the sender of the messages contravenes clause **5.1.1** of the CoC. Indeed even the WASPA Secretariat was unable to establish the identity of the IP an SP involved.

SUBSCRIPTION SERVICES

34. This matter relates to the automatic subscription of members of the public and is a particularly sensitive area of WASPA complaints as it is open to the greatest abuse by Service Providers (SP) and Information Providers (IP).
35. In this matter the complainant alleges that he did not subscribe to the service and if he did he did inadvertently click on to a link, he was not notified of his subscription.
36. Clearly in this case, as the SP has indicated that the Complainant was "subscribed" the onus falls on the SP to prove that this particular complainant did request a specific service at a particular date and time.

#5954

37. To this end the SP provided “proof” (see annexure A) which appears intended to indicate that the complainant did subscribe to the service on the 25th November 2008.
38. A brief look at Annexure A makes it clear that the complainants cell phone number is contained in the annexure as well as a “WAP Menu(470)” and further on “Product Set (one page) – Anfema Porn Director(579)” and also “Product Set (one page) – FSK16 Paris Sex Tape(472)”. No explanation regarding these links or codes were provided, nor was any URL provided to the adjudicator to consider the service.
39. In the circumstances the IP has failed to prove that the Complainant specifically requested to subscribe to the subscription service which was an independent transaction. As always once it has been established that the Complainant was in fact subscribed, the onus rests on the IP (or SP) to prove that the service was specifically requested. The IP has failed to discharge this onus and as such breached **11.1.2** and **11.1.4** of the CoC.
40. The Complainant did indicate that confirmation of the termination of the subscription services was sent from the IP. However the unsubscribe message did not reference the specific service that the Complainant was unsubscribing from and thus the IP is found to have breached clause **5.1.5** of the CoC.

ADULT SERVICES

41. It is a requirement of clause **8.1.3** that a WASPA member must have specific confirmation that the customer is over 18. While it has been alleged that this section was breached by the WASPA secretariat there was no indication from the IP that specific steps were taken to confirm the customer’s age. As such clause **8.1.3** of the CoC has been breached.
42. In this matter there is no indication that there were in fact any children involved in this particular matter. As such clause **11.1.6** is not relevant as the required permission was not required as the customer was in fact an adult. However the IP’s attention is drawn to the fact that it would need to take specific steps in terms of this clause should a customer be a minor.

#5954

RETENTION OF RECORDS

43. Clause **6.2.11** requires the SP to retain the record of specific confirmation provided by the customer. This record was never provided to the adjudicator the request for the record by the WASPA secretariat and as a result this section has been breached.

PRICE OF SERVICES AND FAIRNESS AND HONESTY

44. There is no evidence on either side to indicate that the price of the services was incorrectly displayed or was misleading. In the absence of any proof relating to this clause there cannot be any finding relating to a potential breach of clause **4.1.1**. However the IP was clearly not "fair and honest" with the Complainant and as such has contravened the first part of clause **4.1.1**. This contravention stems from the initial denial that the Complainant was subscribed to its service as well as the automatic subscription of the Complainant without his consent.

CONCLUSION

45. This adjudication comes after the adjudication of complaint 5602, 5816 and 5696 (as yet unpublished by WASPA). In the latter adjudication a significant fine and sanction was imposed. As a result of the fact that the adjudication has not been provided to the IP yet it is premature to indicate that the IP has failed to rectify the problems listed in Complaint 5696. However there are several strikingly similar aspects to this Complaint which underline the need for the IP to take the WASPA Code of Conduct seriously and conduct itself in a professional manner. Certainly WASPA cannot retain a company as a Member which breaches so many of its clauses in such a blatant fashion, and unless the IP takes significant and drastic steps to improve its service and abide by the WASPA Code of Conduct, its membership of WASPA will almost certainly be terminated and all WASPA members be instructed not to do business with the IP in terms of 13.4.1 (h) of the CoC.

Mitigation/Aggravation**AGGRAVATION**

#5954

46. In aggravation of the circumstances (please refer to Complaint 5696):

46.1. the SP was unresponsive and uncooperative. Moreover the vast number of the breaches of the CoC point to a cynical approach to exploit South African consumers.

46.2. It is noted that the IP in this matter was sanctioned for extremely similar subscription model in terms of Complaint 5816. In this adjudication the adjudicator admonishes the SP and IP to be more forthcoming with regard to the facts of the matter. Moreover clauses 11.1.2 and 11.1.4 were also apparently breached in this adjudication.

46.3. Complaint 4755 deals with both the same SP and IP and also deals with "Quadra Mobile Media Limited". In this matter the adjudicator found there to be a breach of clause 6.2.3 (failure to mention bearer costs) and clause 4.1.1. (dealing fairly and accurately with customers).

MITIGATION

47. In **mitigation** of the circumstances:

47.1. The IP has not yet been afforded the opportunity to rectify the breaches of the CoC identified in Complaint 5696.

48. Reference is further made to the MANCOM advisory on sanctions which is referenced in Complaint 5460 where the following factors were considered to be additionally persuasive when considering suspension of services (amongst others):

48.1. Changing of effective pricing of a subscription service without prior or any notification to subscribers to that service of that change,

48.2. Consistently incorrect billing of a service from the price and frequency advertised, with a resultant effective increase in the pricing for that service,

48.3. Default judgments resulting from a continued lack of total response to requests from the WASPA secretariat, the WASPA Media Monitor, or an Adjudicator

#5954

for responses to a number of separate, and not necessary linked, formal and informal complaints.

Sanction Imposed

49. As a result of the large number of clauses of the various codes of conduct that have been breached it is not considered to be appropriate to refer to the breaching of each clause in order to arrive at a sanction.
50. The following sanctions are imposed:
- 50.1. The “New Erotic Portal” service and any service is immediately and indefinitely suspended.
- 50.2. The New Erotic Portal Service may only resume if all the breaches of the above clauses are rectified as certified by the WASPA Secretariat.
- 50.3. The IP (Mobimex Group) is suspended from WASPA until it is able to provide suitable proof to the WASPA secretariat that it complies with the requirements indicated in Complaint 5696. In addition to the requirements listed in Complaint 5696, the IP is required to indicate that it has specific measures in place to ensure the age of the customer as required by clause **8.1.3** of the CoC.
- 50.4. The IP is directed to refund the Complainant in this matter. Should the amount that the Complainant paid be unclear or be unverifiable, the IP will refund the Complainant the sum of R500.00.
- 50.5. Due to the fact that the IP has not had sight of Complaint 5696, the IP is fined the amount of R20 000.00 for the breaches of clauses indicated in the decision section of this adjudication. Should the IP fail to pay this fine within the required five day period then the SP will be liable to pay the said fine.
- 50.6. As indicated in Complaint 5696 it should be noted that the breaches identified in this section are numerous, serious and repeated. Should the IP fail to show the necessary commitment to compliance with the WASPA Code of Conduct as evidenced by future complaints, it would be appropriate for the termination of the membership of the IP to be considered.

#5954

Appeal

Please note that should the SP or complainant wish to appeal this decision it must inform the secretariat of this within five working days of this decision in terms of section 13.6 of the Code of Conduct version 7.4.

#5954

Annexures

Annexure A

WAP Optim information for #5954

Date	MSISDN	Type	Msgs/Prd. Num	Download(s)	Handset Details
25-Nov-2008 Tue 21:38	+27741733099	WAP Menu	475	3	3P1943031889 SAMSUNG-SGH-E710/G-E Pckts/MISD-2.0 Config/MS/CLDC-1.1 LP/Screen/2.2.1.1-1.201.0010/WAP/2.0
25-Nov-2008 Tue 21:38	+27741733099	WAP Menu	479	4	3P1943031889 SAMSUNG-SGH-E710/G-E Pckts/MISD-2.0 Config/MS/CLDC-1.1 LP/Screen/2.2.1.1-1.201.0010/WAP/2.0
Date	Product	Type	Session ID		
25-Nov-2008 Tue 21:41	Product Set (win page) - Antenna Firm Director(575)	Product Set (win page)	2169227		
25-Nov-2008 Tue 21:39	Product Set (win page) - FSK1s Paris Sen Tap(6472)	Product Set (win page)	2169187		
25-Nov-2008 Tue 21:38	WAP Menu(470)	WAP Menu	2169188		

SP response to provide proof that the complainant subscribed to the service. Complainant's cell phone number removed by adjudication for privacy reasons.