



ADJUDICATOR'S REPORT

WASPA Member (SP):	Integrat
Information Provider (IP):	Frisky Mobile
Service Type:	Subscription Service
Source of Complaints:	WASPA Monitor
Complaint Number:	6413
Code of Conduct version:	7.0

Complaint

An urgent complaint was lodged on 7 May 2009 by the WASPA Monitor regarding an IQ test and subscription service known as "Frisky IQ" offered by the IP in conjunction with the SP. The Monitor cited potential breaches of clauses 11.1.2, 11.1.5 and 11.1.10 of the WASPA Code of Conduct arising from the advertising for the service and the subscription mechanism employed by the service.

In particular, the Monitor complained that the Frisky IQ service requires a consumer to complete a series of ten questions and then to enter his or her cellphone number in order to receive a PIN code which, in turn, enables the consumer to receive an IQ score. In the process of doing so, a consumer is subscribed to a daily IQ message subscription service. The Monitor also complained that the message that would be sent to any prospective subscriber seeking to activate the service lacked some of the necessary information required by section 11.1.10 of the Code.

The SP was notified of an Emergency Procedure Hearing on 12 May 2009. The SP replied on the same day and, in its response, the SP advised that all advertising for the service which formed the subject of the complaint was being suspended by its client, the IP, in light of the complaint.

An Emergency Procedure Ruling was sent to the SP on 13 May 2009 in which the Emergency Panel ruled that the SP's notification regarding the removal of advertising for the service had addressed the urgency of the complaint and the matter could be handled using the normal complaints procedure.

On 14 May 2009 the SP was invited to deliver a response to the merits of the complaint.

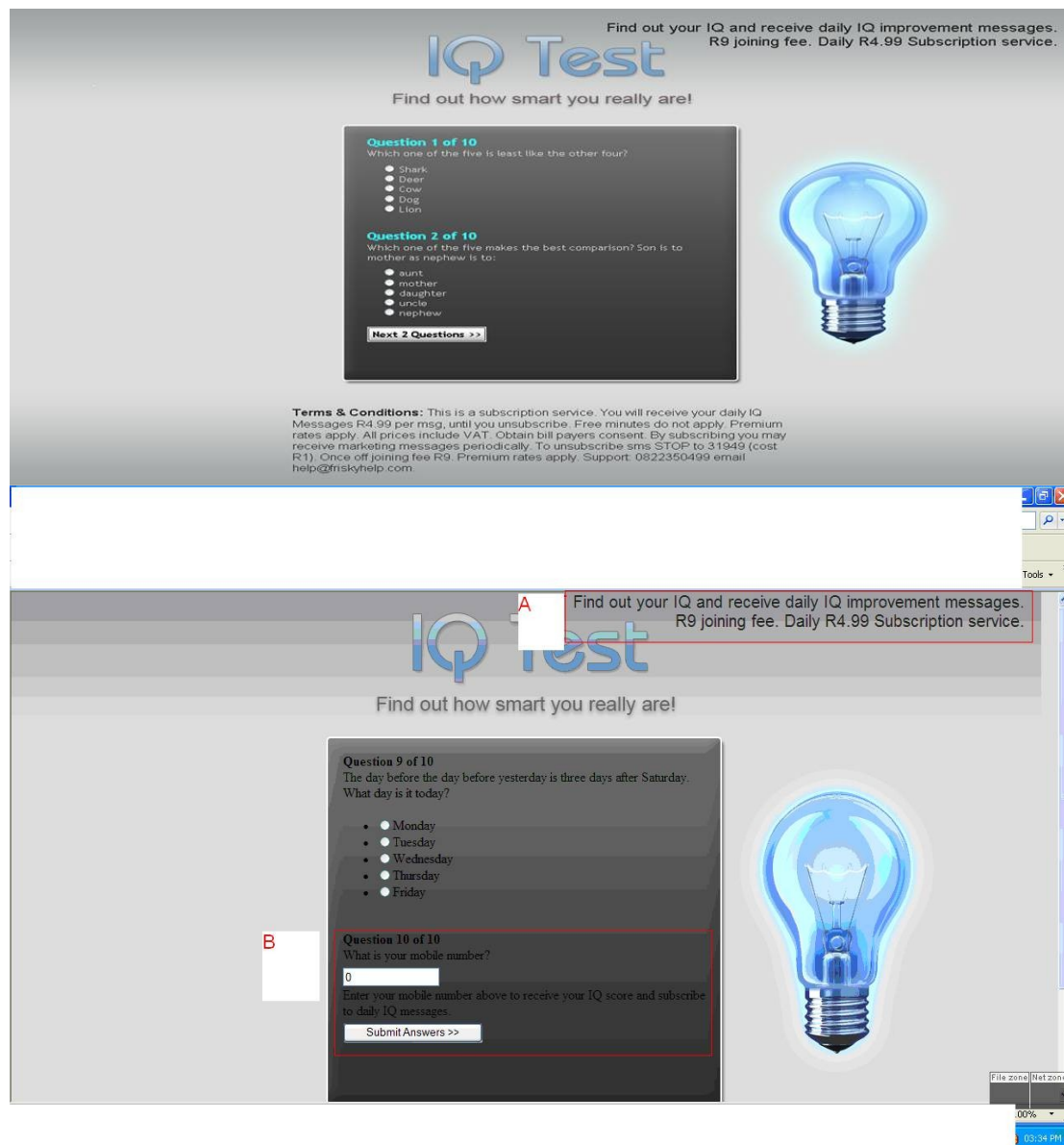
Response of SP

On 22 May 2009, the SP delivered its reply which consisted of (i) a response ostensibly prepared by the IP but submitted by the SP and (ii) the SP's own response.

The response submitted on behalf of the IP was to the effect that the website via which the service was offered indicated (right from the first “landing page” through to the page containing the final question in the IQ quiz) that the service was a subscription service and that the consumer would be charged a joining fee of R9.00 and a subscription charge of R4.99 per day. The IP drew further attention to the fact that this information was also contained in the Terms and Conditions section of the website. The IP submitted that the Terms and Conditions contained all mandatory information required by the Code.

The IP stated further that ***“the only request that [the customer] made was to subscribe to a service – being to receive daily IQ messages/IQ improvement tips initiated by the IQ test. The only offer to the customer was to subscribe to daily IQ Messages by participating in an IQ test as can be clearly seen if one studies the copy of the landing page for the subscription services inserted below.”***

The following two screenshots were included in the IP’s response:



The IP's response stated further that it was clear from the screenshots that ***"the consumer was clearly informed that the service was to find out your IQ and receive daily improvement messages at a cost of R9 joining fee and a daily subscription charge of R4.99 as blocked in red and marked A"***. The IP stated further that ***"the part blocked in red marked B on the webshot also clearly illustrates that the consumer was provided the following information when prompted to insert their cell phone number on the website: "Enter your mobile number above to receive your IQ score and subscribe to daily IQ messages.""***

The IP did, however, acknowledge that the correct format for the activation message was not used. The IP stated that this was due to an oversight and placed on record that WASPA had given service providers a short time frame to implement the new activation message requirements (by 10 April 2009) after they had been communicated to members at the end of March 2009 (i.e. less than 14 days).

The SP's own response was essentially limited to its confirmation that it acted only as a conduit for the IP and had not been involved in the design or creation of the website or activation messages.

Decision

No complaint or information regarding the advertising for the service other than the "landing page" and subsequent web pages has been produced in this complaint. "Landing page" is a term generally used to describe a web page that consumers will arrive at after responding to an advertisement, frequently by clicking on a web link on some other page that directs to the landing page. It is true that the landing page and subsequent pages that would have been viewed by a consumer refer to a subscription service. However, it is equally true that not all notices, terms and conditions on web pages are always read by consumers and the Code provides an extra level of protection against inadvertent subscription by a consumer to a subscription service where their attention is focused on the opportunity to receive one or other content item.

Section 11.1.5. of the Code provides that ***"customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service."*** In the present case, there is no evidence of an offer of any ***non-subscription content item or service*** and the complaint of a breach of section 11.1.5 is therefore dismissed.

Section 11.1.5 should however, not be interpreted to infer that a customer may be automatically subscribed to a subscription service as a result of a request for a specific content item. This much is clear from the plain language and meaning of section 11.1.2 which provides as follows:

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.

It follows from section 11.1.2 that if a request to join any subscription service is dependent on a request being made for any specific content item, then the request would not be an ***"independent"*** transaction within the meaning of section 11.1.2.

“Content item” is not a term defined in the Code. However, section 2.11 of the Code defines a **“content subscription service”** as including **“any subscription service providing or offering access to content including, by way of example only and not limitation: sound clips, ring tones, wallpapers, images, videos, games, text or MMS content or information.”**

A **“content item”** ought therefore to be construed to include a sound clip, ring tone, wallpaper item, image, video, game, text or MMS content or information.

Section 11.1.2 must therefore be interpreted as prohibiting the bundling of any request to join a subscription service with a request to receive any specific sound clip, ring tone, wallpaper item, image, video, game, text or MMS content or information.

In the present case, the subscription cannot be activated without requesting the IQ score that is generated as a result of the initial quiz that a consumer participates in. The IQ score generated by the quiz is a **“specific content item”** as contemplated by section 11.1.2 of the Code. Following a request by the consumer, the content item is delivered in text form to the consumer simultaneously with the subscription confirmation message. The fact that a notice on the landing page invites a consumer to **“find out your IQ and receive daily IQ improvement messages”** does at least indicate that a subscription service will be activated when the IQ score is requested but it cannot detract from the fact that a request for specific content has been bundled with a subscription activation request. In fact, the subscription cannot be activated without the IQ score request being submitted, in this sense the subscription activation is entirely dependent on the content item request.

The subscription activation process would comply with the consumer protection offered by section 11.1.2 of the Code if the 10-question IQ score were first generated for free or for a once off content item fee and, thereafter, the consumer was invited to request and independently transact for his or her subscription to the daily IQ improvement message service at the rate of R4.99 per additional message. Such a method would also not breach section 11.1.5 of the Code referred to above.

The complaint of a breach of section 11.1.2 of the Code is accordingly upheld.

The IP has conceded that the correct format for the activation message was not used. The complaint of a breach of section 11.1.10 is therefore also upheld.

Sanction

Subscription activation methods that fail to comply with the strict requirements of the Code are serious breaches of the Code as they frequently result in disgruntled consumers feeling duped into paying for an ongoing service that they did not actually intend to subscribe for. Complaints of inadvertent subscription to a service are frequent and pose a significant threat to the industry's ability to provide for a measure of self-regulation in future. If service providers do not adhere strictly to the provisions of the Code relating to advertising and transparent subscription mechanisms, then not only consumers, but the entire membership body of WASPA will be substantially prejudiced.

In mitigation of the breach of section 11.1.10 the IP stated that the breach was due to an oversight and suggested that WASPA had given service providers a short time frame to implement the new activation message requirements. The IP revealed that the new requirement was communicated to members at the end of March 2009 and

the requirement became effective less than 14 days later on 10 April. It should be noted however that the complaint arose on 7 May 2009 and that it is therefore obvious that the IP had still not implemented the required message within at least 37 days after the new requirement had been communicated.

In the circumstances, the following sanctions are imposed:

1. The SP is directed to:
 - 1.1 immediately suspend the service and all billing for the service;
 - 1.2 pay over to WASPA a fine of:
 - 1.2.1 R100 000 in respect of the breach of section 11.1.2; and
 - 1.2.2 R10 000 in respect of the breach of section 11.1.10;within 5 days of the delivery of this report failing which the SP's membership of WASPA shall be suspended for a period of 30 days or until such time as the fines have been paid in full, whichever period is the longer; and
 - 1.3 pending full compliance by the SP with the sanctions contained in paragraph 3 below:
 - (a) withhold payment of all amounts due by it to the IP as contemplated by the provisions of section 13.4.1(i) of the Code; and
 - (b) preserve and retain all revenue paid to it by any cellular network operator in respect of the any service offered by the IP and to refrain from dissipating such revenue in any way other than in fulfilment of the fines provided for in paragraph 1.2 above; and
 - (c) send an SMS message to all current and past subscribers to the service advising them as follows:

"The [name of service] has been suspended due 2 breach of WASPA Code of Conduct. Further communications will follow. For help contact [telephone number of SP]".
2. In terms of section 13.4.2 of the Code, the sanctions contained in paragraphs 1.1 and 1.3 above may not be suspended pending any appeal that may be instituted in this matter but shall become effective immediately on the publication of this report.
3. The SP is further directed:
 - 3.1 within 5 days of the delivery of this report to send an SMS message to all current and past subscribers advising them that the service breached the WASPA Code of Conduct and advising such persons of their right to claim a refund of all subscription fees paid by contacting the SP's help desk by 5pm on a date falling 15 days after the sending of such

message or the first business day thereafter if that date falls on a weekend or public holiday; and

- 3.2 as contemplated by the provisions of section 13.4.3(g) of the Code, to issue a blanket refund to all subscribers claiming a refund within the period mentioned in paragraph 3.1 above within 10 days of the expiry of such period.
4. The suspension of the service shall continue until such time as all sanctions have been fully complied with and until the WASPA Secretariat has received a report on all refunds issued and approved of a detailed description of all advertising for and revisions to the service designed to ensure full compliance with the Code in future.