

REPORT OF THE APPEALS PANEL

Date: 05 October 2011
Service Provider: Integrat (Pty) Ltd
Information Provider: Mobile Toe
Complaint Number: 6718
Applicable versions: Code v.7.0

1 BACKGROUND TO THE APPEAL

- 1.1 Complaint 6718 was lodged on 02 June 2009 by the WASPA Media Monitor who was concerned about the service offered and the fact that the complaint was in respect of a repeat offence.
- 1.2 The complaint related to automatic subscription to a subscription service provided by Integrat (Pty) Ltd, the Service Provider (SP) and Mobile Toe the Information Provider (IP). The SP is a full member of WASPA. The IP is an affiliate member.
- 1.3 The recordal of the Media Monitor's testing of the service, the complaint and the response of the SP and the IP are documented in great detail in the Adjudicator's Report and will not be repeated in the Appeal Panel's Report.
- 1.4 In summary, the Monitor cited breaches of the following sections of the WASPA Code of Conduct (Code):
 - 1.4.1 3.3.1 – members must not offer services they are unable to provide;
 - 1.4.2 4.1.2 – members must not knowingly disseminate information that is false, deceptive or likely to mislead;
 - 1.4.3 6.2.3 – pricing must not contain hidden costs;
 - 1.4.4 6.2.4 – pricing in advertisements must not be misleading. The cost of multiple communications must be included in the advertised pricing;
 - 1.4.5 11.1.1 – promotional material for subscription services must prominently and explicitly identify the services as “subscription services”;
 - 1.4.6 11.1.2 – a request to join a subscription service must be an independent transaction with the specific intention of subscribing;
 - 1.4.7 11.1.5 - customers may not be automatically subscribed to a subscription service as a result of a request for non-subscription content;

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- 1.4.8 11.1.8 - once a customer has subscribed, a notification message must be sent confirming subscription and providing details of the service; and
- 1.4.9 11.1.10 – where subscription is initiated by a user replying to a message and the message contains instructions for activating the services or contains an activation code, the activation message must include the subscription service information.¹
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2 DECISION OF THE ADJUDICATOR

2.1 Findings of the Adjudicator

- 2.1.1 In considering the matter, the Adjudicator followed the format of the response to the complaint provided by the SP and the IP, the SP having referred the complaint to the IP. For ease of reference, a summary of the Adjudicator’s findings is provided below, in the same order.
- 2.1.2 Issue 1 – No costs indicated
- 2.1.2.1 As no access or premium number was displayed on the website, there was no reason for the cost of access to be displayed on the website.
- 2.1.2.2 Sections 6.2.5 and 9.2.1.2 were not breached.
- 2.1.3 Issue 2 – PIN messages
- 2.1.3.1 Pricing information was ambiguous.
- 2.1.3.2 Sections 11.1.10, 11.2.5, 4.1.1 and 4.1.2 were breached.
- 2.1.4 Issue 3 – WAP site
- 2.1.4.1 The optical illusions provided were not consistent with the advertised “IQ Improvement Tips”.
- 2.1.4.2 Section 4.1.2 was breached.
- 2.1.5 Issue 4 – IQ results
- 2.1.5.1 The subscription service was activated when the consumer requested the IQ score (specific content item) and subscription was bundled with this content request.
- 2.1.5.2 Section 11.1.2 was breached.
- 2.1.6 Issue 5 – Service details
- 2.1.6.1 The words “Subscription Services” were not prominently displayed.
- 2.1.6.2 Section 11.1.1 was breached.

¹ The Adjudicator found also a breach of section 11.2.5

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- 2.1.7 Issue 6 – Terms and conditions check box
- 2.1.7.1 The terms and conditions check box was pre-checked for acceptance.
- 2.1.7.2 No provision in V7 the Code restricts this. No breach was found.
- 2.1.8 Issue 7 – Content
- 2.1.8.1 The content was not specifically advertised or requested as non-subscription content.
- 2.1.8.2 Section 11.1.5 was not breached.
- 2.2 *Sanctions imposed by the Adjudicator on the SP (alone)*
- 2.2.1 The Adjudicator ordered immediate suspension of billing on the service and imposed the fines below on the SP, with the condition that they were not to be suspended pending appeal.
- 2.2.2 For the breach of section 4.1.2² - R50,000.
- 2.2.3 For the breach of 11.1.2³ – R100,000.
- 2.2.4 For the breach of 11.1.10⁴ and 11.2.5⁵ – R50,000.
- 2.2.5 The Adjudicator's further directions to the SP, which included mandatory communications about the Adjudicator's finding of breach, suspension of the service and refunds to consumers, will not be considered by the Panel, because:
- 2.2.5.1 of the considerable lapse of time (2 years) in this matter coming before the Appeals Panel; and
- 2.2.5.2 this Panel is on record in numerous appeals (6577, 6219, 6839, 7070) confirming its position that such sanctions may be suspended pending appeal. Not to do so, given that the panel might find differently from the Adjudicator could be both prejudicial and unequitable.

² 4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

³ 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.

⁴ 11.1.10. Where a subscription service is initiated by a user replying to a message from a service provider where that message contains instructions for activating a service and/or where that message contains an activation code that when inputted by the user activates a subscription service, then that message, along with the subscription initiation instructions and/or activation code, must also include the subscription service information in the following format, flow and wording:
[service activation instructions and/or activation code]. U'll b subscribed to [XYZ service] from [name of service provider] @ [cost of service and frequency of billing]. Help? Call [call centre number + "(VAS)" if applicable]. To unsubscribe, [unsubscribe instructions].

⁵ 11 .2.5. The cost of service and frequency of billing must use the format "RX/day", "RX/week" or "RX/month" (or RX.XX if the price includes cents). No abbreviations of "day", "week" or "month" may be used.

3 GROUND OF APPEAL

- 3.1 The document providing the grounds for appeal appears to have been prepared by the IP and presented to WASPA by the SP. It states merely "...please find our appeal against the judgement in Complaint Number 6718...". The document is not on a company letterhead or signed for on behalf of either the SP or the IP.
- 3.2 Despite the fact that the IP is an affiliate member of WASPA, this report is addressed to the SP as the appellant, as the latter participated in the complaint process and it remains accountable for the actions of the IP. Any right of recourse between the SP and the IP will depend on agreements entered into *inter se* and will need to be independently pursued.
- 3.3 The appellant 'disagrees' with the 'penalties' due to 'harshness' on the part of the Adjudicator and a lack of 'maliciousness' or 'intention' on its own part to breach the Code. The SP contends further:
- 3.3.1 the service operated for only 4 days (01 – 04 June 2009);
- 3.3.2 the service affected only 44 customers;
- 3.3.3 once notified, the SP took immediate action to remedy problems;
- 3.3.4 applying harsh penalties, without warning, was unjust and the issues raised would have been better handled by a 'partnership oriented' approach from WASPA and 'notification' and 'warnings' that the Monitor was concerned about the service;
- 3.3.5 a delay of 12 months from the complaint to publication of the Adjudicator's Report led to the sanctions being unfair and impractical due to changes in market trends, industry views, amendments to the Code and the impossibility of refunding consumers.
- 3.4 In summary, the SP confirmed its intention to act in the best interests of the SA market and requested leniency and consideration of factors which might act in mitigation of the fines levied.
- 3.5 The specific grounds for appeal for sections of the Code which had been found to have been breached by the Adjudicator (Issues 2, 3, 4, 5) are set out below.
- 3.5.1 Issue 2 – PIN messages
- 3.5.1.1 *"We must stress that the activation message that is the focus of this issue contains all required compliance points and is in the correct format – except for a handful of erroneous characters added by human error. These extra characters were not created deliberately and in our opinion it is obvious that they have been added by mistake as they do not make any sense in relation to the price. The price is detailed*

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correctly on the website and in the welcome message – again leading weight to the fact that the extra characters are present in error.

Enter pin 6199 U'll b subscribed to mind50t from Mobile Toe @ R50.00/2/week. Help? Call0822350400, VAS rates apply. To unsubscribe, sms STOP to 31990.

We do understand the need for consistency in message format and the communication of pricing, but we also must stress that the errors found in the above message cannot be viewed as a determined act of miscommunication. We must also again stress that the correct format is stated in the summary terms and conditions on every page of the website; and in the welcome message sent to the customer: U ve subscribed to IQ!U ll get ur link 4 unlimited access 2 Optical Brain Teasers weekly @ R50/SMS. Send STOP mind50t 31990 2unsub.call 0822350488 4help.

A customer cannot miss the fact that they will be charged at least R50 per week for this service. They might not be certain if they will be charged more – but they cannot miss the R50 and week references.

We therefore feel the penalties imposed because of this issue are completely out of proportion to the actual weight of the issue. We would understand this level of penalty to be applied to others in the market that are being blatantly non-compliant, but we do not understand how such a level of penalty can be applied to us on the basis of the actual error explained above and present in this message.

We also cannot understand why such a level of fine was imposed without any communication of a warning on this matter. As can be seen from our original response, as soon as we were made aware of this error we immediately made the required changes. We are committed to providing enjoyable services to South African customers and work very hard to meet our compliance requirements. The error present in this message was caused by human error and we do not believe that the affect of this error would have been of a serious nature. We would expect WASPA to view this error in this way – not as a deliberate attempt to breach the industry code – and we would also expect WASPA to issue warnings prior to any penalties being imposed for such a mistake/ error.

We note the following statement made as part of the sanction section of the adjudicator's report: "The format of the pricing information in the activation message was particularly

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misleading and has attracted a fine deemed to be appropriate in the circumstances”.

We cannot agree that the level of the fines that have been imposed are appropriate. The adjudicator has explicitly stated above that the level of penalty has been imposed based on the format of the pricing in the activation message. We cannot believe that the fines detailed have been levied due to a mistake, a human error, that resulted in R50.00/2/week being stated instead of R50.00/week. We find this to be grossly unfair, unjust and not appropriate by any means. We must also again stress the fact that we had no prior knowledge of this error being in place and as soon as we were made aware of this error it was immediately corrected. We must also stress that all other communications of the price were accurate; and that the only affect to any reasonable customer able to interact with the service would have been to suggest that the service was going to charge them MORE than R50 per week”.

3.5.2 Issue 3 – WAP site

3.5.2.1 *“We completely disagree with the penalty imposed by WASPA for this concern. The fact that we and WASPA are in disagreement as to the description of our content for this service is not the basis for a penalty. We find it hard to believe that WASPA did not contact us to question and respectfully ask us to change the description of our content and rather have simply judged that we have obviously acted without the best interests of the customer in mind and penalised us for this. We do not believe that any form of penalty can be applied due to a difference in opinion on how a category of content is described”.*

3.5.3 Issue 4 – IQ results

3.5.3.1 *“We do understand the adjudicator’s comments and that whilst (sic) the complaint of a breach against section 3.3.1 (members will not offer or promise services that they are unable to provide) of the code is dismissed, a breach of 11.1.2 is upheld.*

However, we want place emphasis on the fact that 11.1.2 of the code was later clarified to include “...and may not be an entry into a competition or quiz”. WASPA itself conceded that the code was not clear on this point. IQ improvement tips clearly refer to an ongoing service and cannot be viewed as a single content item. A quiz is not clearly defined in the code even at this point in time and this clause remains ambiguous. The above must surely count in mitigation at the least but we

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are of the opinion that the ongoing nature of this service was clear and that no breach was involved in this regard.

We must stress these actions were not undertaken to intentionally breach the code, and has arisen from a misunderstanding of this area of the code due to this ambiguity. This area of the code is very difficult to navigate – as can be seen by the fact that the adjudicator has taken 7-8 paragraphs to explain why it has been breached. We ask that this be taken into account”.

3.5.4 Issue 5 – Service details

3.5.4.1 *“While we understand the adjudicators comments, we do ask for leniency in judgement in this regard as we did not intentionally or otherwise attempt to mislead in anyway. The end user must have known at multiple points in the process that this was a subscription service. We did not try and hide it (as many competitors in the market have). Whilst the phrase at the top of the website may not have included the statement “subscription service” due to an oversight, we challenge how anyone could not be aware of the actual intention of the service being a subscription service. We must note that the summary terms and conditions which are part of the site start with and explicitly state that IS a subscription service.*

The user is also clearly informed of the subscription nature of the service in the PIN message which is sent to their phone before they join the service: Enter pin 6199 to mind50t from Mobile Toe @ R50.00/2/week. Help? Call0822350400, VAS rates apply. To unsubscribe, sms STOP to 31990.

This must be read and action taken based on this message in order for the end user to subscribe to the service. It is impossible for the end user to otherwise sign up to the service.

Finally, after joining up, the user is again informed of the subscription nature of the service:

U’ll b subscribedU ve subscribed to IQ!U ll get ur link 4 unlimited access 2 Optical Brain Teasers weekly @ R50/SMS. Send STOP mind50t 31990 2unsub.call 0822350488 4help

As can be clearly seen we do attempt at multiple points to explicitly state this is a subscription service. We believe that the penalties that have been applied are more applicable to an IP who did not have any such indicators in their service”.

4 FINDINGS AND DECISIONS OF APPEALS PANEL

4.1 Findings of the appeal panel

- 4.1.1 With regard to Issue 2, the Panel agrees with the findings of the Adjudicator (2.1.3 above). Pricing information was ambiguous.
- 4.1.1.1 While claiming that the facts would be clear to consumers, the SP's admits (unintentional) error and confusion, even to the point that the subscription fee quoted might be lower than actually charged. This is not a mitigating factor.
- 4.1.1.2 Error and ambiguity remain, even where malicious intention is lacking. The point of the Code in relation to pricing is to ensure absolute transparency and full disclosure of relevant information in the clearest way possible.
- 4.1.2 With regard to Issue 3, the Panel agrees with the findings of the Adjudicator (2.1.4 above). Optical illusions were not consistent with the IQ Improvement Tips service advertised.
- 4.1.2.1 The Panel does not agree with the SP's contention that the issue is one of content description. An optical illusion is simply not a 'tip' in the sense of 'giving advice'.
- 4.1.2.2 The SP must accept that it alone is responsible for complying with the Code and Advertising Rules. While the WASPA Secreteriat and Monitor's functions exist to support members, it is not their function to identify and remedy all possible breaches, nor to be a 'partner'. The Code itself, together with a body of precedent setting adjudications and appeal panel decisions are warning enough of the consequences of breach. More than sufficient administrative and procedural controls have been incorporated into the the Code to ensure both fairness and due process.
- 4.1.3 With regard to Issue 4, the Panel agrees with the findings of the Adjudicator (2.1.5 above).
- 4.1.3.1 The SP was in fact technically able to provide the service advertised (tips). The fact that it did not do so had nothing to do with this not being possible.
- 4.1.3.2 The Panel cannot base its findings on a future version of the Code. The mechanism employed by the SP to subscribe consumers is linked to the request for the content / IQ Test service and breaches the applicable V7 of the Code at the relevant time.
- 4.1.4 With regard to Issue 5, the Panel agrees with the findings of the Adjudicator (2.1.6 above).

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- 4.1.4.1 Compliance by members with the Code and Advertising Guidelines (Rules) is mandatory. Compliance is not a matter of degree. Partial compliance, with or without intention to breach, remains breach.
- 4.1.4.2 The WASPA Code has been developed over time and is consistently amended in an attempt to prevent abuse and / or clarify vagueness. Each detail of the Code's provisions is important. Members must strive for absolute compliance and take responsibility for non-compliance. Members cannot expect WASPA to take accountability for member actions or shortfalls, be they wilful or negligent.
- 4.1.5 The Panel wishes to record that the Adjudicator's investigation was extremely thorough and his / her findings were the logical result of the application of V7 of the Code to the facts of this complaint.
- 4.2 *Sanctions of the appeal panel*
- 4.2.1 While the Panel is not wholly convinced of the SP's good intention or grounds for mitigation, it nevertheless finds the sanctions imposed, unduly harsh given sanctions applied in similar situations and taking into account possibly mitigating factors. The fines have been reduced accordingly:
- 4.2.2 For the breach of section 4.1.2 – R25,000.
- 4.2.3 For the breach of 11.1.2 – R50,000.
- 4.2.4 For the breach of 11.1.10 and 11.2.5 – R25,000.
- 4.3 The Adjudicator's further directions to the SP, which included mandatory communications about the Adjudicator's finding of breach, suspension of the service and refunds to consumers are not upheld for the reasons provided in 2.2.5 above.
- 4.4 The appeal fee is not refundable. Payment must be made within 30 (thirty) days of the date on which this report is published.