



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	MobileGate
Information Provider (IP):	Not applicable
Service Type:	Subscription contact/dating service
Complainant:	Member of the public
Complaint Number:	#6938
Code Version:	7.4
Advertising Rules Version:	2.3

Complaint

The complainant, a member of the public, lodged a complaint with WASPA against the member's service, which appears to be a combination of a subscription service and a contact or dating service. The complainant incurred costs of roughly R2 300 in call charges connected to the service. The complainant pointed out what appeared to be a series of problematic charges in her account from her mobile provider.

The complainant further indicated that she did not subscribe to the member's service which charged the complainant's account in increments of R8,77 almost continuously for the period 3 April 2009 to 8 April 2009. 197 calls were logged against the complainant's account at all hours of the day and night.

Service provider's response

The member initially furnished WASPA with a copy of 2 messages which had presumably been sent to the complainant and which read as follows:

*Hi Dean, Cindy can only chat to you if you reply YES! for help 0800981229
2end txtstop R10 msg+ R60sub*

And

Hi Dean,its Cindy from SPEED I want to chat to you maybemeet.me! TXT YES TO CONNECT NOW! for help 0800981229 2endtxtstop R10msg+ R60sub

The member failed to respond to WASPA's requests for logs and to its numerous reminders between 8 June 2009 and 21 October 2009 with the exception of an email dated 14 July 2009 stating that it had responded to WASPA and further that:

His opt in was compliant and valid.

In reply, the complainant stated the following:

To response to this email? Firstly my name is Doreen not Dean. I believe that you have received a copy of my Cell C account. If you look at the dates starting on Friday 3 April 2009 and again on Sunday the 5 April 2009 regarding the time frame on Sunday I happen to be sitting in church with about 40 to 50 people that can testify to this. Regarding Monday 6 April 2009 through to the Wednesday 8 April 2009. Firstly I work in an open office with 5 other people that are willing to testify to the fact that I was not on my cell phone on some chat line, and as for the evening my family is also willing to testify to the fact that I was not using my cell phone in this regard. On Tues 7th April I can prove that I was attending Bible Study classes and the Wednesday I was at prayer meeting. I would like to know where is your proof in this regard? I would like to take this further I am willing to go to court if need be. What gives you the right just to take money without having proof and who has given you permission to do that in the first place.

So I would like my money to be refunded to me as soon and possible.

The member does not appear to have submitted any further information to WASPA.

Sections of the Code considered

This complaint was filed prior to the most recent update to the Code to version 8.0. I have accordingly considered versions 7.4 and 8.0 for the purposes of this report in order to determine compliance with the Code (referencing version 7.4) and the remedy for non-compliance (referencing version 8.0). Having regard to the issues

raised in this complaint, I have also considered other sections of the Code, which are pertinent.

I have therefore considered the following sections of the Code:

Code version 7.4	Code version 8.0
<p>2.10: A “contact and dating” service is any service intended to enable people previously unacquainted with each other to make initial contact and arrange to meet in person.</p>	<p>2.10: A “contact and dating” service is any service intended to enable people previously unacquainted with each other to make initial contact and arrange to meet in person.</p>
<p>2.23: A “subscription service” is any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction.</p>	<p>2.23: A “subscription service” is any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction.</p>
<p>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.</p>	<p>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.</p>
<p>3.1.2: Members are committed to lawful conduct at all times.</p>	<p>3.1.2: Members are committed to lawful conduct at all times.</p>
<p>4.1.1. Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.</p>	<p>4.1.1. Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.</p>
<p>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.</p>	<p>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.</p>

Code version 7.4	Code version 8.0
<p>6.2.9. During any calendar month, if the total cost of any service exceeds R200 for that month:</p> <p>(a) Where the WASP is in control of the billing (e.g. an OBS), an additional communication is required from the customer, confirming acceptance of any costs over this amount, prior to any additional costs being billed.</p> <p>(b) Where the WASP is not in control of the billing (e.g. the customer sends an SMS to a premium rated number), the member must send a notification to the customer once they have reached this limit.</p>	<p>6.2.9. During any calendar month, if the total cost of any service exceeds R200 for that month:</p> <p>(a) Where the WASP is in control of the billing (e.g. an OBS), an additional communication is required from the customer, confirming acceptance of any costs over this amount, prior to any additional costs being billed.</p> <p>(b) Where the WASP is not in control of the billing (e.g. the customer sends an SMS to a premium rated number), the member must send a notification to the customer once they have reached this limit.</p>
<p>6.2.10. During any calendar month, when the total cost of any service reaches R400, and when it reaches any multiple of R200 thereafter, an additional notification must be sent to the customer notifying them of the total cost incurred for that service so far.</p>	<p>6.2.10. During any calendar month, when the total cost of any service reaches R400, and when it reaches any multiple of R200 thereafter, an additional notification must be sent to the customer notifying them of the total cost incurred for that service so far.</p>
<p>6.2.11. The member providing the service must keep a record of the confirmation provided by the customer (for 6.2.9 (a)) or the notification sent to the customer (for 6.2.9 (b)).</p>	<p>6.2.11. The member providing the service must keep a record of the confirmation provided by the customer (for 6.2.9 (a)) or the notification sent to the customer (for 6.2.9 (b)).</p>
<p>10.1.1. Contact and dating services with an ongoing incremental cost, must, at reasonable intervals, inform the customer of any additional costs, and must require the</p>	<p>10.1.1. Contact and dating services with an ongoing incremental cost, must, at reasonable intervals, inform the customer of any additional costs, and must require the</p>

Code version 7.4	Code version 8.0
customer to actively confirm their continued participation.	customer to actively confirm their continued participation.
<p>10.1.2. Providers of contact and dating services must warn users of the service of the risks involved when contact information is given out to other individuals and must give clear advice on sensible precautions to take when meeting people through such services.</p>	<p>10.1.2. Providers of contact and dating services must warn users of the service of the risks involved when contact information is given out to other individuals and must give clear advice on sensible precautions to take when meeting people through such services.</p>
<p>10.1.3. Providers of contact and dating services must ensure that customers' contact information is duly protected and not publicly available.</p>	<p>10.1.3. Providers of contact and dating services must ensure that customers' contact information is duly protected and not publicly available.</p>
<p>10.3.1. When so requested by a customer, the provider of a contact and dating service must ensure that the customer's details are removed from the service at the earliest opportunity and in all cases within 24 hours.</p>	<p>10.3.1. When so requested by a customer, the provider of a contact and dating service must ensure that the customer's details are removed from the service at the earliest opportunity and in all cases within 24 hours.</p>
<p>11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.</p>	<p>11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.</p>
<p>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 and may not be an entry into a competition or</p>	<p>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 and may not be an entry into a competition or</p>

Code version 7.4	Code version 8.0
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<p>11.1.4. Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.</p>	<p>11.1.4. Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.</p>
<p>11.1.5. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.</p>	<p>11.1.5. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.</p>
<p>11.1.8. 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:</p> <ul style="list-style-type: none"> (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. 	<p>11.1.8. 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:</p> <ul style="list-style-type: none"> (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.
<p>11.1.10. Where a subscription service is initiated by a user replying to a message from</p>	<p>11.1.10. Where a subscription service is initiated by a user replying to a message from</p>

Code version 7.4	Code version 8.0
<p>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:</p> <p style="padding-left: 40px;">[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].</p>	<p>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:</p> <p style="padding-left: 40px;">[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].</p>
<p>11.1.11. If a subscription service can be initiated by entering a customer's mobile number on a web page or WAP site, then a separate confirmation must be obtained from that customer's mobile handset before any billing may take place for that service.</p>	<p>11.1.11. If a subscription service is initiated by entering a customer's mobile number on a web page or WAP site, then a separate confirmation must be obtained from that customer's mobile handset before any billing may take place for that service.</p>
<p>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.</p>	<p>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.</p>
<p>11.5.1. Instructions on terminating a subscription service must be clear, easy to understand, and readily available.</p>	<p>11.5.1. Instructions on terminating a subscription service must be clear, easy to understand, and readily available.</p>
<p>11.5.2. Customers must be able to unsubscribe from any subscription service via</p>	<p>11.5.2. Customers must be able to unsubscribe from any subscription service via</p>

Code version 7.4	Code version 8.0
<p>SMS using no more than two words, one of which must be 'STOP'. If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate.</p>	<p>SMS using no more than two words, one of which must be 'STOP'. If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate.</p>
<p>12.3.2. Prohibited services:</p> <p>(a) Chat services where a customer is billed for receiving a message rather than being billed for sending a message. "Chat services" includes any service where facilities are provided for any form of conversation or dialogue between the customer and other customers of the service, between the customer and a software application, or between the customer and staff of the chat service provider.</p>	<p>12.4.2. Prohibited services:</p> <p>(a) Chat services where a customer is billed for receiving a message rather than being billed for sending a message. "Chat services" includes any service where facilities are provided for any form of conversation or dialogue between the customer and other customers of the service, between the customer and a software application, or between the customer and staff of the chat service provider.</p>

Sections of the Advertising Rules considered [if applicable]

Not considered.

Decision

I have considered a service, which, judging from the message the member quoted to WASPA, appears to be similar to the subject matter of this complaint. Assuming that to be the case, I have already found there to be a number of difficulties with the member's service. The service itself is, to a degree, misleading from the outset. It has the appearance of a sms chat service whereas it is, in fact, a subscription service alongside a premium sms service. The member has contended that the complainant opted in to the service. The complainant clearly denies participating in the service at all, let alone opting in to the service.

Pricing information

The Code specifies the format of any pricing information for mobile services. I am unable to comment on whether pricing information for the reasons I stated above. On the other hand the member has disclosed the pricing format in its messages, which I quoted above.

In the first message the member alleges was sent to the complainant, the price is in the format Rx although it is unclear what the billing frequency is. In other words, the quoted price, "R10 msg + R60sub" doesn't reveal whether the prices quoted are charged per message, once off, daily, weekly, monthly or otherwise. This pricing format also doesn't comply with the Code formatting requirement in rule 6.2.8 or in Rule 11.2.5.

Moreover, the quoted charges don't appear to correspond with the charges reflecting on the complainant's account. Although a matter of cents, the amounts charged to the complainant's account are less than the R10 quoted in the messages the member quoted. In addition, the service referred to in the member's messages appears to be a sms service whereas the complainant's provider registered a series of call charges with no duration and yet being, with the exception of an item priced at R26,32 for Wasp Content, the same charge.

Billing reminders

The Code requires members to notify users when charges incurred reach certain thresholds (R400 total charge or increments of R200). There is no evidence that any such notifications were sent to the complainant. This is particularly concerning because the complainant has informed WASPA that her total bill amounted to roughly R2 300 (most of that attributable to the member), a substantial amount of money, especially considering the complainant appeared to have been a subscriber for roughly 4 days in total.

The member's failure to notify the complainant of her mounting charges is negligent at best, calculated to profit unduly from the complainant's ignorance, at worst. Either way it is a gross violation of the Code's provisions in the circumstances. Compliant notifications could have helped the complainant avoid the high costs she faced in the short time she allegedly made use of the service. At least this is based on an

interpretation of the matter that is favourable to the member. The complainant's account from her mobile provider suggests that her usage is, in fact, artificially reflected and quite possibly was fabricated. The charges are incurred literally all day and night and irrespective of whether these "call" charges are really sms charges, the complainant would have to have been using her phone continuously for roughly 22 hours.

The member also appears to have failed to maintain proper records of the complainant's confirmation of the charges applicable to the service, or her election to opt-out of such requirement, as required by Rule 6.2.12 (a) or 6.2.13 (respectively). The member certainly didn't furnish WASPA with such records when it responded to the complaint.

Rule 10.1.1 contains a further notification requirement where a contact and dating service includes an "ongoing incremental cost". It is unclear whether the services charges qualify as "ongoing incremental" costs but this provision is worth noting.

In addition, the member failed to ensure that a message including the prescribed format specified in Rule 11.1.10 was sent to the complainant when the complainant apparently became a subscriber to the service. Such a notification would have clarified the nature of the service to the complainant and given her an opportunity to terminate an unwanted subscription.

Bundling

As I mentioned above, the service is somewhat misleading. It has the appearance of an sms based chat service but it is also a subscription service. Even unrealistically assuming that the complainant was fully aware of and consented to being charged for calls or sms's she exchanged with the service's operators/servers, there is no indication that the complainant entered into an independent transaction with a view to subscribing to the service as a subscription service. For this reason I believe that the service falls foul of the Code's "anti-bundling" provisions, specifically Rules 11.1.2 and 11.1.5.

The member's conduct

I have a number of concerns about the member's conduct towards the complainant and WASPA.

While there is no clear evidence before me, the service appears to be somewhat misleading and calculated to disguise the various charges associated with the service, along with their billing frequency. One reasonable conclusion to draw from this is that the service is designed to induce subscribers to use it frequently without being kept apprised of the associated costs, much to their dismay when they, like the complainant, find themselves having to pay excessive costs they perhaps did not anticipate initially. This conclusion is reinforced by the availability of clear guidelines in the Code that specify the format and frequency of various notifications and how such services may be conducted. The service is potentially fraudulent and the member in breach of its obligation to act lawfully in its dealings with the complainant and WASPA.

The tight grouping of charges on the complainant's account and the fact that she would have to be using her mobile phone continuously suggest that her usage has been fabricated and fraudulently reported to her mobile provider. This, if true, is disturbing to say the least.

Going further, the member's dealings with the complainant do not appear to have been fair and honest, based on the apparently deceptive nature of the service. Pricing information is not clearly communicated to subscribers at all.

The short history of this matter further indicates that the member has not responded to WASPA's communications with a reasonable diligence and with information it is required to collate and have available on request. The member failed to furnish WASPA with adequate logs (or any real logs for that matter).

Historical context

I have referred to the historical context of a previous matter I adjudicated, complaint 6875, in my report on that matter. Suffice it to say, this is not the first instance of the service causing its subscribers, unwilling or willing, to suffer substantial losses as a result of a series of violations of the Code.

Sanctions

The member has once again clearly failed to take notice of previous findings against it. It is appropriate for me to once again quote my colleague in complaint 6186 who said the following in that report:

I have previously adjudicated on a complaint involving this IP and in particular the manner in which it advertises and/or promotes its virtual chat service through the medium of online dating sites (see adjudication report for complaint 6371 dated 26 June 2009). This complaint, although lodged later than the current complaint, was dealt with through the emergency panel procedure and was referred to me on an urgent basis.

In my report for that complaint, I made the point that visitors to an online dating site do so with the intention of genuinely meeting someone, which is clearly distinguishable from engaging in a virtual chat service where users communicate with an automated operator. Even though, in that complaint, users were also requested to expressly opt-in to use the IP's virtual chat service, this did not excuse the misleading and/or deceptive manner in which the service was promoted.

Pursuant to complaint 6371, the IP was formally warned not, in future, to promote, advertise or market its virtual chat services in any manner or form which contravenes the WASPA Code of Conduct. ...

I therefore impose the following sanctions which will similarly not be suspended pending any appeal process:

1. The member is fined an amount of R250 000, payable to WASPA within 10 business days of receiving notice of this report;
2. The member is ordered to refund all amounts charged to the complainant for his use of the service from 3 April 2009 to date of termination of his subscription. Such refund must be paid within 10 business days of receiving notice of this report;
3. The member is ordered to cease all instances of the service for so long as the service (and its variations) continue to be in violation of the Code;

4. The member is ordered to send all the service's (and its variations) current subscribers a notification in the format prescribed by Rule 11.2.2 of version 8.0 of the Code, being the current version of the Code.