



REPORT OF THE ADJUDICATOR

Complaint reference number:	#7514
WASPA member(s):	Foneworx / MobiMedia
Membership number(s):	
Complainant:	Public
Type of complaint:	Unlawful Lottery / Pricing
Date complaint was lodged:	2009-09-02
Date of the alleged offence:	2009-09
Relevant version of the Code:	7.4
Clauses considered:	3.1.2, 3.5.1, 3.5.2, 3.9,
Relevant version of the Ad. Rules:	2.3
Clauses considered:	5.2.1.2, 8.2.2
Related cases considered:	7103, 7104, 7105, 7289, 7317

Complaint

1. On the 02 September 2009 a complaint was submitted to the WASPA secretariat by a journalist relating to short code 34704 which is operated by Foneworx (the SP) in which the complainant indicated that:
 - 1.1. the SP had contravened the Lotteries Act 57 of 1997 (hereinafter the "Lotteries Act");
 - 1.2. the SP/IP had failed to correctly position the premium rated SMS fee as required by clause 5.2.1.2 of the WASPA Advertising Rules.

SP Response

#7514

2. On the 10th September 2009 the SP responded (see Annexure C) indicating that:
 - 2.1. The advert was provided in PEP stores and was aimed at the lower income earners.
 - 2.2. It was never PEP's intention to hide or fail to display the SMS charges.
 - 2.3. The only error made was a failure to put the price in the correct place, which error has been accepted by PEP (as evidenced by a letter) and further accepted by the SP who undertakes to "take more care in this area".
 - 2.4. There was a further reference to an offer for the complainant to visit the SP's offices to resolve the matter there, which was not accepted by the complainant.
 3. Attached to the reply by the SP was a copy of the advert (see Annexure E) and the response from PEP (See Annexure D). In the letter PEP indicated that an "honest mistake" had occurred which would not reoccur.
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Complainant Response

4. The Complainant then responded by indicating:
 - 4.1. That the response of the SP was shocking in that the SP admitted a failure to place the price in the required place.
 - 4.2. That the SP had confused clause 3.1.2 of the WASPA Code of Conduct with "something else" and indicated that travelling to Cape Town to discuss this incident was not feasible for the complainant.
-

WASPA Secretariat request

5. The WASPA secretariat duly contacted the adjudicator and requested that this matter be put on hold pending the outcome of the appeal in the matter of complaints 7103, 7104 and 7105. The adjudicator duly agreed to this postponement as the appeal in the said matters dealt with the issue of the unlawfulness of competitions.
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Outcome of Appeal in complaints 7103, 7104 and 7105

6. The appeal in the above complaints was duly delivered on the 04 January 2011. Within the appeal it was duly found that WASPA adjudicators do not have the right to make a finding on the lawfulness or otherwise of WASPA members' conduct. As the merits of this argument were fully traversed within that adjudication which is easily available on the WASPA web site they are not repeated here.
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Complainant Dies

7. Thereafter on the 09 June 2011 the WASPA secretariat was informed by the complainant's wife that the complainant had passed away and further that she wished to close all complaints lodged by her husband.
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Portions of the Code of Conduct (version 7.4) considered:

8. **3.1.2.** Members are committed to lawful conduct at all times.
 9. **3.5.2.** 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.
 10. **3.9.1.** Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.
 11. **3.9.2.** The member may suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.
-

Decision

12. From the above facts it is clear that whether there has or has not been a breach of the Lotteries Act is irrelevant for the purposes of this adjudication as WASPA adjudicators do not have the jurisdiction to make a finding on this issue.

#7514

13. As regards the issue of pricing it should be said that it appears as though the medium in question through which the advertisement was published was an in-store booklet for PEP Stores. As such the booklet would be covered by section 5 of the Advertising Rules.
14. It is a requirement that the cost of the SMS be highlighted to consumers. While the cost of the SMS is clearly indicated within the terms and conditions it is not highlighted as is required. A reference to the Advertising Rules (clause 5.2.1) indicates that the cost of the service must be at least font size 11 and in close proximity to the short code to be used (“immediately below, or above, or adjacent to the unique access number”). This requirement was clearly not followed by the promoter in question (PEP Stores) and it is the SP and IP’s responsibility to ensure that it does. Both the SP and the promoter have acknowledged that this was incorrect and have agreed to remedy the problem in future promotions.
15. There only remains the question as to whether clause 8.2.2 or clause 5.2.1 of the Advertising Rules was breached. The two sections (clause 5 and clause 8) are intended to deal with different media where clause 5 is aimed at Magazines and clause 8 applied to below the line advertising. It would appear that the current promotion may fall within “promotional flyers/ leaflets” but this advertisement could also be an “in-house magazine” as provided for in clause 5. As I do not have access to the original medium it is difficult to definitively indicate which clause would be more appropriate in this matter. However, bearing in mind the similarity between the clauses (they are essentially identical) as well as the complainant’s use of clause 5.2.1 which was not challenged by the SP or promoter, I find that clause 5.2.1 of the Advertising Rules has been breached.
16. As regards mitigating circumstances it should be stated that the SP accepted responsibility and further that the cost of the SMS was available to the consumer if they read the first line of the terms and conditions of the promotion.
17. While the above conclusions essentially conclude the adjudication, three additional questions are of somewhat academic interest, which are:
 - 17.1. In the event that the complainant withdraws the complaint must the adjudicator abandon the complaint?
 - 17.2. Should this complaint be referred to the Lotteries Board for further investigation?

#7514

17.3. Does a delay in the adjudication of a matter influence the outcome of the adjudication?

18. These questions have been dealt with in complaint 7289 and reference should be made to the comments made therein.

19. For the above reasons the complaint in relation to the alleged breach of s3.1.2 must be dismissed. The complaint regarding clause 5.2.1 of the Advertising Rules is upheld.

Mitigation

20. The mistake was admitted by the SP and the promoter.

21. The cost of the SMS was available (although not in the manner required).

Aggravation

22. The advert in question targeted the less informed portion of the South African populace.

23. Complaint 7317 dealt with a similar issue of the failure to provide adequate notice of the price of the SMS but as the result was only provided after the breach in question had already been committed this is not taken into account in terms of aggravating circumstances.

Sanction Imposed

24. The SP is fined an amount of R4000.00 which is wholly suspended provided that the SP is not found guilty of an offence relating to either clauses 5.2.1 or 8.2.2 within 6 months of this adjudication.

Annexure A – Complaint

PLEASE NOTE THAT SOME IDENTIFYING PERSONAL INFORMATION HAS BEEN REMOVED BY THE ADJUDICATOR DUE TO THE FACT THAT THIS ADJUDICATION WILL BE PUBLICLY AVAILABLE.

----- Original Message -----

From: "<REMOVED BY ADJUDICATOR>

To: <REMOVED BY ADJUDICATOR>Cc: "Complaints" <REMOVED BY ADJUDICATOR>

Sent: Friday, September 04, 2009 2:19 PM

Subject: [WASPA.complaints] [formal] WASPA Code of Conduct complaintRef:#7514

Dear WASPA member,

The attached complaint has been lodged with WASPA against Foneworx. This complaint is being processed according to the formal complaint procedure described in section 13.3 of the Code of Conduct.

< template notice snipped by Bretton

--- A copy of the complaint follows below ---

Complainant : <REMOVED BY ADJUDICATOR>

<REMOVED BY ADJUDICATOR>

Referred :

Date : 2009/09/02

Wasp_Service : Foneworx

Description : See attached fax received from complainant

Status : Formal

Attached file : 27829734_Foneworx2.pdf

Annexure B – Fax Complaint

02/09 2009 16:57 FAX
Code of Conduct Complaint

001
Page 1 of 3

Code of Conduct Complaint Form

If you don't wish to send an electronic complaint you can print the following and send to WASPA via fax: 085.606.2016 or at the following postal address:

WASPA
PO Box 3143
Parklands
2111

Please ensure that:

- You include the correct email address as we use this for communicating with you
- You include the specific cellular number that is affected.
- You tick the Declaration by Complainant field in the form below. This is a requirement for accepting complaints.

Complainant's details:

Full Name: Hannes Senekal
Cellular Number: 0834680805
Alternate Contact Number: 0413601669
Email Address: s3n3kal@burst.co.za
Physical Address: 18 Cassington Place, Wexles Street, Cotswold Ext, Port Elizabeth, 6025
Postal Address: AS above
Post Code:

Affiliations (please tick one):

I am employed by, or otherwise associated with one of WASPA's member companies
 I am not employed by, or otherwise associated with one of WASPA's member companies

If you wish to provide additional information about your affiliation, please do so here:

<http://www.waspa.org.za/code/complaint.shtml>

9/2/2009

02/09 2009 16:57 FAX
Code of Conduct Complaint

002
Page 2 of 3

Details of Complaint

Name of the service provider (if known): Foneworx
WASPA can only process complaints lodged against members of WASPA. You can find a complete list of WASPA members [here](#)

Other Identifying Information: Shortcode 33720

Section of the Code of Conduct breached: CoC 3.1.2, AR 5.2.1.2

If you are able to identify the section of the WASPA Code of Conduct that you believe has been breached by the service provider, this will greatly facilitate the handling of your complaint. You can find a copy of the WASPA Code of Conduct [here](#)

Detailed Description of the Complaint:

Details: CoC 3.1.2 Allowing the running of an illegal lottery, AR 5.2.1.2 Cost of PRams positioned incorrectly.

Very Important: If your complaint involves a service provided to a specific mobile phone, you must include the phone number of that phone in your complaint. Please provide us with as much information about your complaint as possible in this section. This should include relevant dates wherever possible.

If you are complaining about a print, radio or television advertisement, please include the date of publication, or the date and time of broadcast. Without this information, WASPA may not be able to process your complaint.

If you wish to send additional supporting documents to WASPA to support your complaint please send them to the following email address after you have submitted your complaint.

complaints@waspa.org.za

Please Tick, as appropriate:

I have already contacted the service provider concerned regarding this complaint, but the service provider has not resolved the complaint to my satisfaction.
 I am unable to determine who the service provider is
 I have not contacted the service provider concerned because I believe that this complaint cannot be resolved by the service provider, and instead needs WASPA's attention.

Declaration by Complainant

I hereby declare that the information provided above is to my knowledge true and correct, and that I am submitting this complaint in good faith.

Wherein did you hear about WASPA? Internet

SEND RESET

<http://www.waspa.org.za/code/complaint.shtml>

9/2/2009

#7514

02/09 2009 16:59 FAX

005

BIG PRIZES for little babies!

WIN your share of R40000 worth of prizes!

Buy any Cuddlesome product and simply SMS Cuddlesome and the last four numbers of the bar code to 33720.

Prize pool: R10 000 cash

- 10 x Cuddlesome dot print & printed nappies
- 100 x Cuddlesome product nappies

Terms and Conditions:

More than just a change of **Cuddlesome**

20 Baby Wipes

Cuddlesome

Size: S

Cuddlesome DISPOSABLE NAPPIES & WET WIPES 2499

02/09 2009 17:00 FAX
:: FoneWorx (Pty) Ltd.:

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FoneWorx

Home | About | Business | Entertainment | Content | S

- Quick Link: Register for USSD
- Quick Link: Register for Premium SMS
- Quick Link: Register for RUSHSMS

INFOTAINMENT SERVICES

http://www.foneworx.co.za/index2.html

8/27/2009

Annexure C - Reply

----- Original Message -----

From: <REMOVED BY ADJUDICATOR>

To: <REMOVED BY ADJUDICATOR>

Sent: Thursday, September 10, 2009 4:46 PM

Subject: [WASPA.complaints] Fw: [formal] WASPA Code of Conduct
complaintRef:#7514

Dear WASPA

We refer to complaint Ref:- 7514 and respond as follows:

This is an in-store, on-pack promotion for one of PEP's in-house brands aimed at the lower LSM market. It was never Peps intention to not display or hide the sms charges. The only error they made here was to place the rate in the incorrect position, but it should be noted that the rate was clearly visible as per the document attached. Please also consider that Pep is very aware of their responsibilities to the community and thus put all their revenues back into their clients in the form of airtime etc

Pep have accepted the error and committed to be more careful in the future (see attached letter)

Furthermore, FoneWorx accepts that the promotion was not totally in accordance with WASPA's requirements and also undertakes to take more care in this area.

The complainant refers to clauses 3.1.2 with reference to the display of pricing. Perhaps he is a little confused and was actually referring to 6.2.5? Our previous interaction with this person has also proven that he does not have a proper understanding of the code of conduct and sometimes confuses the Code of Conduct, The Lottries Act and the Consumer Protection Act. We have also invited him to visit our offices to better understand the industry. Regrettably we never even given the courtesy of a reply. The offer however still stands.

Should you require any further details regarding this complaint, please do not hesitate to call the undersigned.

Regards

<REMOVED BY ADJUDICATOR>

----- Original Message -----

From: "<REMOVED BY ADJUDICATOR>

To: "<REMOVED BY ADJUDICATOR>

Cc: "<REMOVED BY ADJUDICATOR>

Sent: Friday, September 04, 2009 2:19 PM

#7514

Subject: [formal] WASPA Code of Conduct complaint Ref:#7514

Dear WASPA member,

The attached complaint has been lodged with WASPA against Foneworx. This complaint is being processed according to the formal complaint procedure described in section 13.3 of the Code of Conduct.

Accordingly:

- You have five working days to respond to the complaint, and to provide the WASPA secretariat with any information you deem to be relevant to this complaint.
- After five working days have passed, this complaint, together with your response (if any) will be assigned to an adjudicator for review, and if upheld, determination of appropriate sanctions.
- You do not have an obligation to respond to this complaint. Should the WASPA secretariat not receive any response from you within this time period, it will be assumed that you do not wish to respond.
- Your response, and any other correspondence relating to this complaint, must be sent to <complaints@waspa.org.za>. Correspondence sent to any other address may not be deemed to constitute a formal response.
- The WASPA Secretariat will confirm receipt of your response.

If you have any questions regarding the Code of Conduct or the complaints procedure, please address your queries to <complaints@waspa.org.za>.

Please confirm your receipt of this message.

Warm regards,
WASPA Secretariat

--- A copy of the complaint follows below ---

Complainant : <REMOVED BY ADJUDICATOR>

Email : <REMOVED BY ADJUDICATOR>

Referred :

Date : 2009/09/02

Wasp_Service : Foneworx

Description : See attached fax received from complainant

Status : Formal

#7514

Attached file : 27829734_Foneworx2.pdf

Annexure D – PEP Response

<REMOVED BY ADJUDICATOR>

<REMOVED BY ADJUDICATOR> 8 November 2011

FoneWorx (Pty) Ltd

1st Floor, Cnr Hendrik Verword Dr & Will Scarlett Rd

Randburg

2194

Re: Cuddlesome SMS Competition

Dear Graham

In response to the complain received regarding incorrectly advertising the Cuddlesome SMS competition, we would like to assure WASPA that an honest mistake occurred on the side of both PEP and Phoneworx and going forward, we will do our very best to ensure that this does not occur again. Please do not hesitate to contact me for any further information.

Yours sincerely,

<REMOVED BY ADJUDICATOR>

Annexure E - Attachment

WIN
your share of
R40000
worth of prizes!

Buy any Cuddlesome
product and simply SMS
Cuddlesome
and the last four
numbers of the
bar code to
33720.

Up for grabs are:

- R10 000 cash
- 10 x Cuddlesome cot, pram & product hampers
- 100 x Cuddlesome product hampers

Terms and Conditions:
SMSs charged at R1-50. Free SMSs do not apply.
Competition runs from 25 August till
20 September 2009. The Judges' decision is final and
no correspondence will be entered into.
By entering this competition you agree the promoter to
send you marketing material from time to time.
Winners will be notified telephonically.
The prizes will go to the first 100 winners drawn.
Winners of all prizes except the cash prize will receive a
voucher to the value of the prize to redeem in store.
All usual products to offer processes apply.
Competition valid within RSA only.

Annexure F – Reply

----- Original Message -----

From: <REMOVED BY ADJUDICATOR>

To: "<REMOVED BY ADJUDICATOR>

Sent: Wednesday, September 30, 2009 12:24 PM

Subject: [WASPA.info] 7514 Foneworx

Hello <REMOVED BY ADJUDICATOR>

The reply by the director of Foneworx is shocking! He admits to defaulting on the placing of the cost of the sms!

#7514

He then confuses 3.1.2 of CoC with something else.

This is the person that wants me to travel to Cape Town and learn about these matters. I think not! My previous correspondence with him and his reply clearly indicates that he does not understand the first thing about VAS rates.

His answers are not acceptable. Please refer for adjudication.

<REMOVED BY ADJUDICATOR>

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WASPA info/queries - Please CC your replies back to the list.

<http://lists.waspa.org.za/mailman/listinfo/info>