



## REPORT OF THE ADJUDICATOR

<b>WASPA Member (SP):</b>	AMV Holdings
<b>Information Provider (IP):</b>	Not applicable
<b>Service Type:</b>	Adult/subscription service
<b>Complainant:</b>	Member of the public
<b>Complaint Number:</b>	#7872
<b>Code Version:</b>	7.4
<b>Advertising Rules Version:</b>	Not applicable

### Complaint

The complainant has lodged a complaint regarding unsolicited adult service (“the service”) messages sent to his wife’s phone. His original complaint was as follows:

*On Sunday the 11th of October 2009 I received an SMS message on my wife’s phone [REDACTED]. Message read Jana has sent u a secret XXX Video on her Hotbook! with the following link attached <http://wap.mob365.net/mcs60p0a-z39ipl-s3dwx-elgwz.wml> This message had no information attached to it or telephone number of origin etc it was just a link. (unsolicited message)*

*Later that evening at 20:22pm I received a further message this time from the following number +27820048640922 with the following message Thanks 4 Adult Hotbook! Content link on its way! Click on it 2 get ur content! Probs? call 011-461-0317 sms stop to 31922 to end subscription.*

*R14.5/2days 18+ I ignored message and was going to phone Vodacom to find out what was going on.*

*On Monday 19 October I received another unsolicited message Jess has sent you a striptease on Adult Hotbook! with the following link <http://wap.mob365.net/ncs60p0a-z328p-s3ny1-elhid.wml>*

*I then contacted Vodacom (Operator Logan) I was informed that I would Have to contact the service provider and he would lodge a service request (service request no: 52y8b2k-k2w65)to find out who the service provider was. I then gave him the number on the second SMS I Received (011-461-0317)He then told me that provider was AMV and service was Bling mobile but also to contact Opera telecom 084 194 2222 or 084 194 5555. I called Opera and spoke to a person called Cheyenne who told me she would get someone to call me back.*

*At approximately 15:30 on Monday afternoon (19/10/2009) I received a call on number 0824551066 from a person named Shayna claiming to be from Bling mobile content provider. I was told that my phone had accessed their site on Sunday the 11th of October. when I asked how this was possible I was told that links to their website can be found on the internet via google etc. I was told that my phone number would be blacklisted from their site and I would have no further charges on my number, when I asked what was meant by, no further charges, I was told that I would be charge for originally accessing their site. I then contacted Vodacom again ( Mfundo and team leader Nana) informed me that they are only a service provider and cannot control what is accessed online. They also told me that they are aware of this sort of problem, being that as soon as you click on a link you are charged for content without any warning that you are accessing a pay for content site. Surely this sort of practice cannot be legally acceptable, if you purchase a product via the internet surely you must agree to payment via credit card or similar.*

*In conclusion I must state that at no time did I agree to receive any marketing material from Bling mobile or it's affiliates much less unsolicited messages. If I accessed their site it was due to the fact that it was done in error via a link sent to me via unsolicited message and not as they claim via the internet or explicitly by my own choice.*

*I feel that I have to complain due to the fact that I am of the opinion that I am not the only one receiving such unsolicited messages. My 8 year old daughter has access to my wife's phone and it is irresponsible of service provider to send such content without my explicit consent to receiving it. When I indicated*

*this to Shayna from Bling mobile I was told that it was my responsibility to protect my child from such content, I cannot do this if Bling mobile act so irresponsibly by send out unsolicited message aimed at enticing people to visit its website without explicit warning as to what is available on it.*

*I trust that further action will be taken to prevent such companies from profiting from such unscrupulous behavior.*

The two central issues here are the unsolicited messages and apparent subscription to a service the complainant did not request a subscription to and the adult nature of the service itself.

The complainant subsequently added that he had received a notification from Vodacom that he had been billed by Opera Telecom.

### **Service provider's response**

The response sent on the SP's behalf was interesting and raised a further issue:

*Dear Sirs,*

*Thank you for your email.*

*Please find our response below.*

*The number was originally opted-in for marketing via our partner's network and community site MJoy*

*MJoy is an international community site that provides free SMS texts and other benefits in exchange for user's registering online or via mobile.*

*The MSISDN was entered on MJoy on 26th July 2009 at 16:21.*

*See [www.mjoy.com](http://www.mjoy.com) for site layout etc. The user's MSISDN was entered on the opt-in web page. No further usage was made of MJoy mobile.*

*However by entering the number on the MJoy site the user's MSISDN was added to a marketing database for MJoy.*

*Several months later on the 11th October the user responded to a promotion for our Hotbook WAP site.*

*The user proceeded to browse onto the homepage of the site using a SonyEricssonK800iv handset.*

*The site states that:*

*CLICK TO SUBSCRIBE FOR*

*R14.5/2DAY*

*Please confirm you are aged 16+*

*Provider: BS Mobile.*

*YES*

*By clicking Yes you confirm subscription service entry. R14.5/2days.*

*Sms STOP to 31922 to end service.*

*At 18:08:01 the user clicked the 'Yes' button to accept the terms and join the subscription.*

*The user was then diverted through to the Hotbook site and sent the following welcome message:*

*Thanks 4 Adult Hotbook!Content link on its way!Click on it 2 get ur content!Probs?Call 011-461-0317.Sms STOP to 31922 to end subscription. R14.5/2day.18+*

*We have received no stops from the user.*

*We have now ensured the number has been removed from all future messages.*

*We are prepared to issue a full refund as a gesture of goodwill. We will contact the user directly to arrange this.*

*Regards*

*Carina Ellis*

*Customer Care Manager*

*Bling Mobile Help Team*

*011 461 0317*

I visited the MJoy site as this is what visitors using desktop browsers find if they visit the site today:

**mjoy**

Send unlimited **FREE** Text Messages to any mobile phone in the world. Enter your phone number below and we will send you a message with a link to our service.

1 Your country:

2 Your phone number:

Security code:

**JOIN**

**Latest news** Press

" Right now, mjoy has **366345** users from all parts of the world - **106** new members have joined today. People from **157** countries access mjoy mobile internet and send their free text messages with mjoy. "

Join | About mjoy | Advertising | Developers | Terms | Privacy | Contact

SHARE

The MJoy site appears to be a site dedicated to “unlimited FREE Text Messages”, not to database compilation and re-sale of personal information to other providers or for purposes other than to provide an “unlimited FREE Text Messages” service.

Bling Mobile’s response to WASPA clearly indicates that entering a mobile phone number into the relevant field on the website enters that number into a MJoy marketing database which appears to be shared with the service.

I was not briefed with a screenshot or copy from the MJoy website on the date the complainant allegedly visited the website so I can't comment on what the website may have stated at that time. To the extent the website gave the impression that it was an "unlimited FREE Text Messages" website at that point in time, the website may have been part of a fraud on visitors to the site who disclosed their personal information in exchange for access to an online sms service and instead found themselves subscribed to a paid adult subscription service.

The complainant responded to the SP's response and reiterated that he did not opt-in to the service. He further pointed out that the terms and conditions on the MJoy website precluded the possibility of personal information being used for marketing purposes. I am unable to verify this assertion given that I do not have access to the terms and conditions that prevailed at the time the events leading up to the complaint arose. In the event the complainant's assertions are correct, this cross-pollination of personal information between the MJoy website and the service is cause for considerable concern.

The complainant has been contacted for a refund by or on the SP's behalf but wishes to persist with his complaint given what he regards as the SP's unscrupulous practice of sending unsolicited messages in "total disregard of WASPA code of conduct."

### **Sections of the Code considered**

This complaint was filed shortly after most recent update to the Code to version 8.0. However, given the complaint's subject matter pre-dated version 8.0, I have reviewed this complaint in the context of version 7.4 in order to determine compliance with the Code. 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 which appear to be pertinent to this matter:

Code version 7.4

**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.

Code version 7.4

**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.

**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.

**3.1.2:** Members are committed to lawful conduct at all times.

**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.

**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.

**4.2.2** Members must respect the confidentiality of customers' personal information and will not sell or distribute such information to any other party without the explicit consent of the customer, except where required to do so by law.

**6.2.9.** During any calendar month, if the total cost of any service exceeds R200 for that month:

(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.

(b) Where the WASP is not in control of the billing (e.g. the customer sends an SMS to a premium rated number), The SP must send a notification to the customer once they have reached this limit.

**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.

**6.2.11.** The SP providing the service must keep a record of the confirmation provided by

Code version 7.4

the customer (for 6.2.9 (a)) or the notification sent to the customer (for 6.2.9 (b)).

**8.1.1.** Any adult service must be clearly indicated as such in any promotional material and advertisements.

**8.1.2.** Promotions for adult services must be in context with the publication or other media in which they appear. Services should be in context with the advertising material promoting them. The content of a service should not be contrary to the reasonable expectation of those responding to the promotion.

**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.

**8.1.4.** Marketing messages (including commercial communications) may no longer be sent to a customer of an adult service if that customer has not made use of the service during the preceding three months. This is to prevent the accidental marketing of such services to children as a result of a recycled telephone number.

**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.

**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 quiz.

**11.1.4.** Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.

**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.

**11.1.8.** Once a customer has subscribed to a subscription service, a notification



Code version 7.4

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.

**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].

**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.

**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.

**11.5.1.** Instructions on terminating a subscription service must be clear, easy to understand, and readily available.

**11.5.2.** Customers must be able to unsubscribe from any subscription service via 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

Code version 7.4
given a choice of service to terminate.
<p><b>11.6.2.</b> When requested to do so by WASPA, a member must provide clear logs for any subscription service customer which include the following information:</p> <ul style="list-style-type: none"> <li>(a) proof that the customer has opted in to a service or services;</li> <li>(b) proof that all required reminder messages have been sent to that customer;</li> <li>(c) a detailed transaction history indicating all charges levied and the service or content item applicable for each charge; and</li> <li>(d) any record of successful or unsuccessful unsubscribe requests.</li> </ul>
<p><b>12.3.2.</b> Prohibited services:</p> <ul style="list-style-type: none"> <li>(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.</li> </ul>

**Sections of the Advertising Rules considered** [if applicable]

Not considered

**Decision**

The SP appears to have violated a number of provisions of the Code. For the sake of brevity and ease of reference, I have highlighted those provisions in the table above.

There are a number of difficulties with the service, the manner in which it is presented to prospective subscribers and the manner in which the complainant became subscribed to the service.

The complainant contends that he made use of an online SMS service on the MJoy website, taking advantage of an offer for free sms's. The complainant also contended that the SP's terms and conditions on the MJoy website precluded the use of his personal information for marketing purposes (although, as I pointed out above, I am unable to verify this assertion). The complainant received messages that were clearly intended to initiate a subscription for adult services – a very different set of services to the online sms service.

The complainant then received a series of messages regarding his subscription to an adult service without the complainant first having independently subscribed to the service.

The sms service on the MJoy website appears to have been a ruse to obtain personal information to subscribe visitors to the MJoy website to adult services like the service. The SP's representative confirmed that personal information obtained on the MJoy website would be "added to a marketing database for MJoy", which database appears to extend to the service and added that the complainant was contacted by the service roughly two and a half months after making use of the MJoy website. This time period is just short of the three month limit the Code imposes in terms of 8.1.4 and suggests that a degree of dishonesty in the subscription mechanism. The complainant further appears to have been spontaneously subscribed to the service.

The SP has, on these facts alone, demonstrated a disregard for the complainant's privacy. It failed to secure the complainant's informed consent to make his personal information available for the service's purposes. The service's existence was not made clear on the MJoy website where visitors took advantage of the sms service. The service was further not promoted or made accessible in an appropriate context.

I could go on but the central issue here is that the SP trapped the complainant (and, no doubt, other visitors to the MJoy website) using a misleading mechanism. It did not obtain the complainant's informed consent to make use of his personal information for purposes other than providing an online sms service and proceeded to subscribe him to an adult service as part and parcel of the sms service he explicitly opted to make use of.

The complainant's concern that these unsolicited subscriptions and related messages could also become accessible to children where the unwitting subscribers are not prepared for and expecting these messages from these adult services. There are a number of provisions in the Code designed to protect children. These provisions underscore the necessity that members take steps to ensure that their content not fall into children's hands. I don't see any indication of the SP's awareness of this sensitive issue.

Going further, the SP exhibits no awareness of the extent to which the service is problematic and offered a refund as a "gesture of goodwill" rather than in acknowledgement of the challenges facing the service.

### **Sanctions**

I therefore impose the following sanctions:

- 1 The SP is fined an amount of R250 000, payable to WASPA within 10 business days of receiving notice of this report;
- 2 The SP is ordered to refund all amounts charged to the complainant for his use of the service from 11 October 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 SP 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; and
- 4 The SP is ordered to send all the service's (and its variations) current subscribers a notification in the format prescribed by Rule 11.5.2 of version 9.0 of the Code, being the current version of the Code.

The WASPA Secretariat may, at its discretion, suspend this order should the SP appeal this decision.