



REPORT OF THE ADJUDICATOR

WASPA Member	Mobimex
Service Provider (SP)	Opera Interactive
Service Type	Unsolicited Adult SMS, Subscription Service
Source of Complaints	Competitor
Complaint Number	8167
Date lodged	24 November 2009
Code of Conduct version	8.0

Complaint

This is a complaint lodged by a competitor to the WASPA Member alleging receipt of an unsolicited adult SMS and breaches relating to a subscription service.

It is important to note that the complaint is closely linked to two other complaints received on 23 and 25 November 2009 respectively. [Complaint 8148](#) is a WASPA Media Monitor complaint relating to the same service as that featured in this complaint. [Complaint 8180](#) is a complaint relating to unsolicited adult SMSs lodged by the Monitor pursuant to receipt by WASPA of letter of complaint from the South African Film & Publications Board.

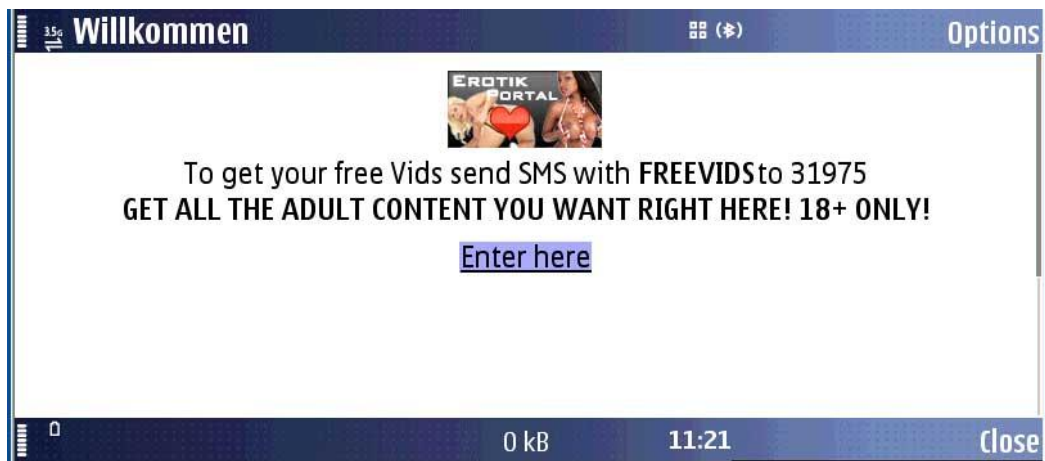
The original complaint read as follows (the images referenced are set out immediately below each section):

“I received a SMS from +27839200240975 on the 20th Nov 2009. The SMS said 5 Adult Vids for ZERO RAND and a link to [http://5ja.in/s3c23xc2ybxnac\)vayb20ayax4x.wml](http://5ja.in/s3c23xc2ybxnac)vayb20ayax4x.wml). (See Image 1)

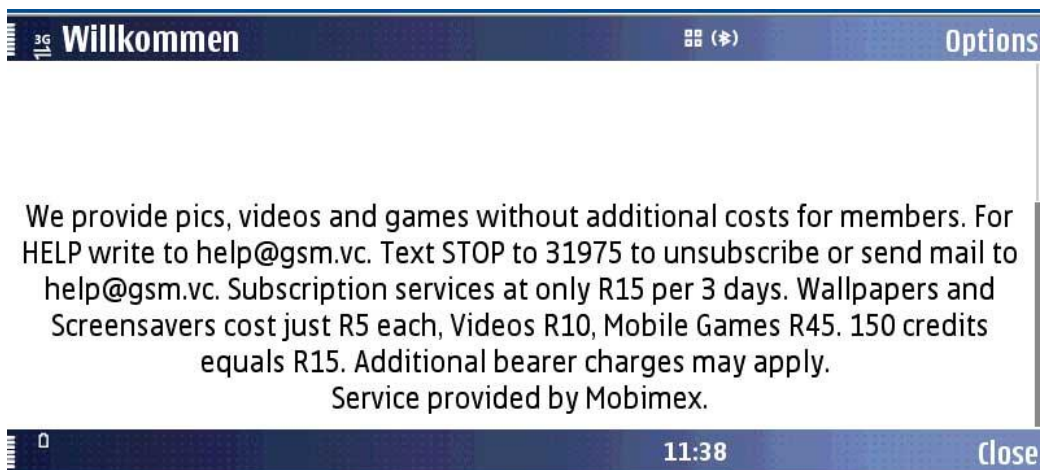


As there was no way to stop receiving these messages, I went to the WAP site to try and find contact details.

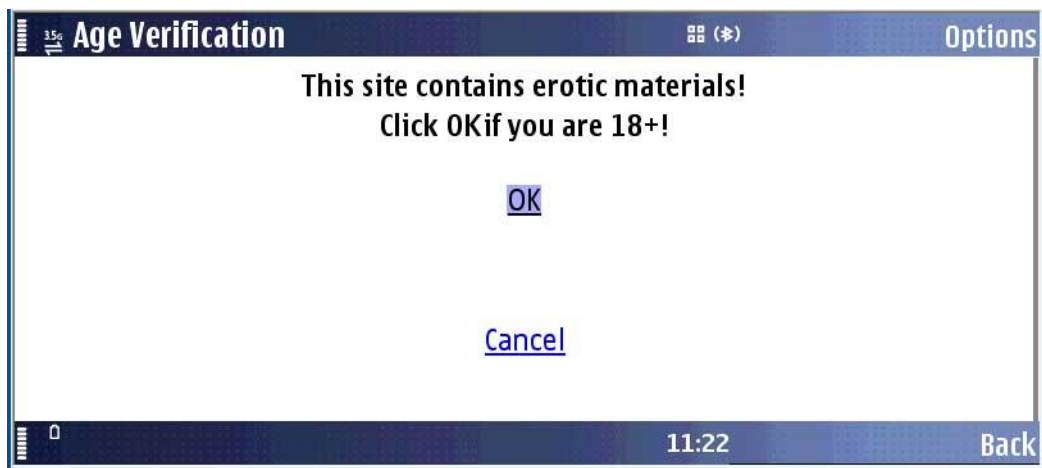
On entering the WAP site I was presented with Image 2.



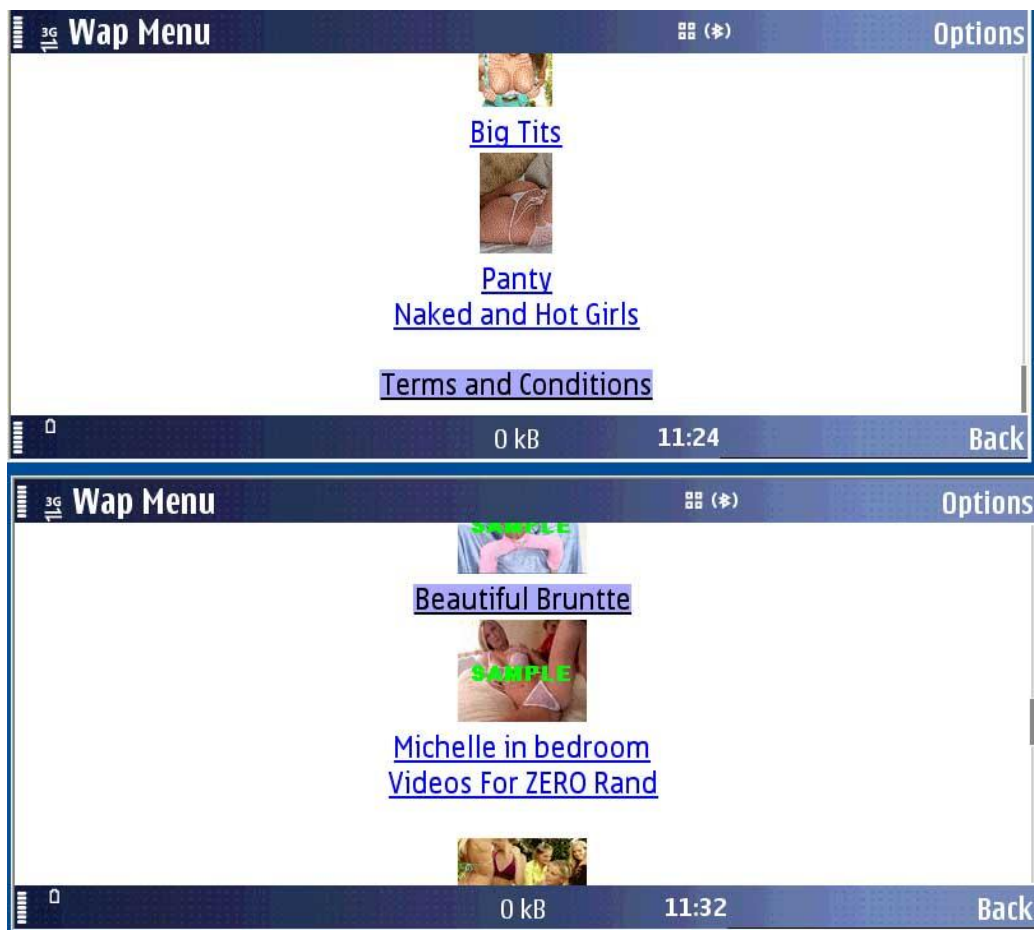
Only much later did I find that if I scroll down a few lines I will find Image 3.



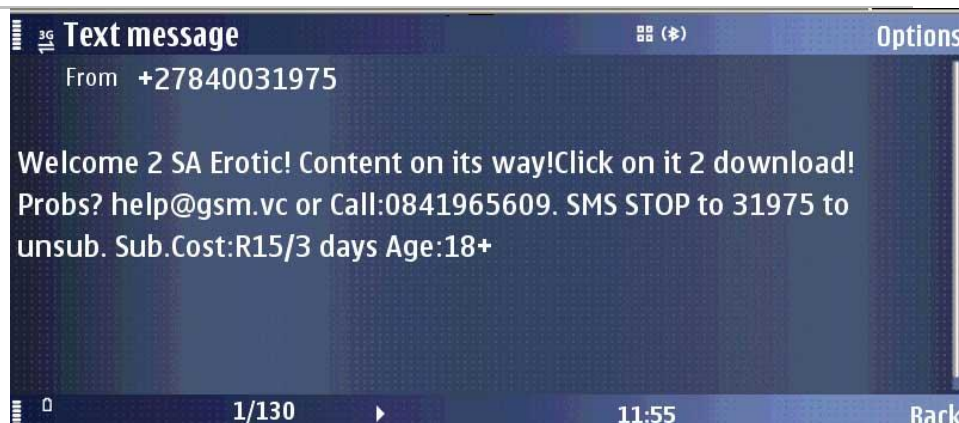
I was then presented with Image 4 for age verification.



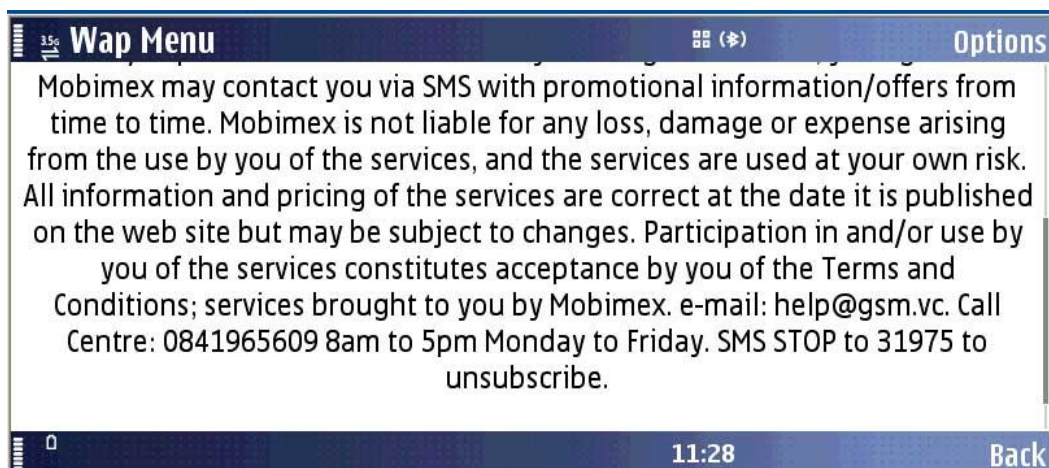
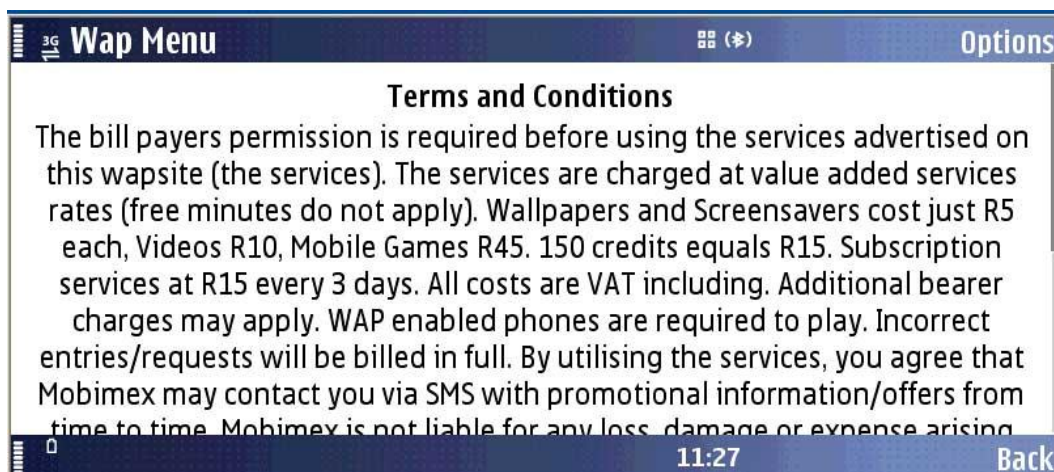
I was then presented with Image 5 and Image 6.



On selecting one of the images, I was given the option to download the image. I then also received a SMS (Image 9) Only at this stage did could I identify who was offering this service.”



[Although not specifically referenced in the complaint, the complainant also provided two further screenshots – images 7 and 8 – of the member's mobi site terms and conditions. These are set out below.]



An SP Notice was sent to the SP on the 25th November 2009 notifying it of the serious allegations raised against the WASPA member. The SP initially responded by stating that it had contacted the member who had informed it that the testing procedure undertaken was erroneous in that the tester used a link which was not sent directly to the testing device.

This contention was rejected by the Media Monitor:

Mobimex advised their Aggregator, Opera Telecom, that the link we tested was faulty and therefore the service did not work properly. We have tested 5 links and all of the links go to the Erotic portal. There was nothing wrong with the link we tested!

Given this response and the number of other complaints lodged against the member, the SP suspended all services provided to the member later on the 25th November.

The member requested further information on the allegations raised, which request was met with the following from the complainant:

"5.1.1. All commercial messages must contain a valid originating number and/or the name or identifier of the message originator.

See Image 1 : There is no identifier as to who sent this message.

[Mobimex] the commercial message was sent from a valid originating number and the complainant wrote that number in the complaint, which proves he was able to easily identify it.

5.1.2. Any message originator must have a facility to allow the recipient to remove his or herself from the message originator's database, so as not to receive any further messages from that message originator.

See Image 1. There is no way from this SMS to remove myself from the message originator's database.

[Mobimex] we have provided the industry standard facilities for recipients to remove themselves from our database and they are all described in details on the landing page, which is subscription free. The facilities are 1) send STOP message to our short code; 2) send an email to our customer support team; 3) call our local call center number.

5.1.3. For SMS and MMS communications, a recipient should be able to stop receiving messages from any service by replying with the word 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. The reply STOP procedure should be made clear to the recipient at the start of any messaging service, for example by including reply STOP to opt out in the first message sent. If it is not technically feasible for the recipient to reply to a specific message then clear instructions for unsubscribing must be included in the body of that message.

There is no way from the message received to stop receiving SMS like this. There are no instructions as to how to stop. There is just a link. No instructions as to how to stop.

[Mobimex] The detailed instructions are provided on the initial page where the link from the message is pointing to. Having in mind the standard size of the commercial WAP Push message, no meaningful instructions can be provided in it. Therefore all the full instructions are provided in details on the first page.

5.1.7. Upon request of the recipient, the message originator must, within a reasonable period of time, identify the source from which the recipient's personal information was obtained.

As per this, please advise where you obtained my number.

[Mobimex] The complainant did not provide his mobile number although the complaint details were requested. This put us in difficult situation to identify the MSISDN, which was done today. We are shortly sending the opt-in details, which are proving the number has agreed to receive adult marketing communications.

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;
- (b) the message recipient has a direct and recent (within the last six months) prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or
- (c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

I classify this as SPAM. I did not request this message. Please provide proof of a recent prior commercial relationship.

[Mobimex] The complainant did not provide his mobile number although the complaint details were requested. This put us in difficult situation to identify the MSISDN, which was done today. We are shortly sending the opt-in details, which are proving the number has agreed to receive adult marketing communications.

6.2.12. For any transaction initiated via WAP, USSD, web-browsing, a link in an MMS or by an application:

- (a) If the transaction is billed at R10 or more, the member initiating this transaction must obtain specific confirmation from the customer and keep a record of such confirmation.
- (b) If the transaction is billed at less than R10, the price for the transaction must be clearly indicated as part of, or immediately next to, the link or option that will initiate the transaction and must be visible on the same screen as the link.
- (c) If the transaction is to initiate a subscription service, then the price and frequency of the service must be included directly in the text of the WAP link or immediately adjacent to it and must be visible on the same screen as the link.

The pricing on the first screen is a few lines down. Unless you scroll down you do not see the pricing. I believe this is a deliberate attempt to hide the pricing. Considering

the SMS says Zero Rand, the first page of the WAP portal says Free Vids, then if you scroll down a few lines you see this is actually a subscription service.

[Mobimex] The commercial message is for delivering free of charge videos and detailed instructions of how to get them are provided on the very first line of the landing page. There is no price and no subscription associated with the free content.

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.

There are not reasonable steps taken to ensure only persons of 18+ access this service. Putting 18+ at the end of a sentence is not enough.

[Mobimex] The 18+ age requirement is clearly stated on the landing page. Further to that there is dedicated step (Image 4) which explicitly asks the visitor to confirm his or her age. This is an industry standard practice.

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.

Please provide proof within the past 3 months of where I have made use of this service.

[Mobimex] The complainant did not provide his mobile number although the complaint details were requested. This put us in difficult situation to identify the MSISDN, which was done today. We are shortly sending the opt-in details, which are proving the number has agreed to receive adult marketing communications.

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.

This is advertised as a Free Vids service. Only if you scroll down, do you see that it is a subscription service.

[Mobimex] The advertised Free Vids is not a subscription service and the free content is accessed via explicitly requesting it by sending a keyword to a short-code. This instruction is clearly provided and is the first text written on the landing page (Image 2). The complainant did not follow this instruction and therefore didn't get the free content.

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.

There is no independent transaction to join the subscription service. By downloading an item, you are automatically subscribed. I downloaded an item and received an SMS as per Image 9.

[Mobimex] The marketed Free Vids service is not a subscription service and the complainant didn't follow the one-step instruction how to access it via sending SMS to the short-code.

The complainant did subscribe to a service different from the marketed one, after reading its terms and conditions, which clearly state the subscription cost and period, and also confirmed the dedicated age verification page. The service he subscribed to was not marketed to this number.

11.1.3. An advert for a content subscription service which includes examples of the content provided as part of that service must include at least two examples of that content clearly displayed.

There are no examples of the content offered for the subscription. There are examples of videos which can be downloaded free. When you download one, you are subscribed.

[Mobimex] The marketed Free Vids is not a subscription service and the complainant didn't follow the one-step instruction to access it via sending SMS to the short-code.

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

There is no indication that you will be billed for this as a subscription service.

[Mobimex] The marketed Free Vids service is not a subscription service and the complainant didn't follow the one-step instruction to access it via sending SMS to the short-code.

The complainant did subscribe to a service different from the marketed one, after reading and confirming the terms and conditions, which clearly state the subscription cost and period, and after that did confirm the age verification page. The costs for the subscription service were also communicated in the Welcome message (Image 9).

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.

This is advertised as a free Vids service. When you download one, you are automatically subscribed to the service.

[Mobimex] The marketed Free Vids service is not a subscription service and the complainant didn't follow the one-step instruction to access it via sending SMS to the short-code. Instead he did subscribe to a different service by explicitly agreeing to its terms and conditions, including cost and billing period.

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 given a choice of service to terminate.

Sent stop multiple times and received no response.

[Mobimex] No STOP message was received from this number 27832740399 at our short code 31975. This is also confirmed by the aggregator Opera Interactive. It is possible that the STOP messages were sent from a different MSISDN, which will have no effect. The marketed Free Vids is not a subscription service.

11.5.5. Members must ensure that the termination mechanism is functional and accessible at all times.

I SMS STOP to 31975 twice and have never received a response. I had to call the call centre to be unsubscribed.

[Mobimex] No STOP message was received from this number 27832740399 at our short code 31975. This is also confirmed by the aggregator Opera Interactive. It is possible that the STOP messages were sent from a different MSISDN, which will have no effect. The marketed Free Vids is not a subscription service.

11.5.6. When a customer has requested that they be unsubscribed from a service, an unsubscribe notification must be sent to that customer, and must use the following text format, flow and wording:

You've been unsubscribed from [service name].

or

You've been unsubscribed from [service name]. To resubscribe [service activation instructions]. U'll then b resubscribed @ [cost of service and frequency of billing].

No Message has been sent to me advising me that I have been unsubscribed. Not from the SMS I sent nor from calling the call centre."

[Mobimex] No STOP message was received from this number 27832740399 at our short code 31975. This is also confirmed by the aggregator Opera Interactive. It is possible that the STOP messages were sent from a different MSISDN, which will have no effect. The marketed Free Vids is not a subscription service."

The complainant pointed out that the MSISDN which formed the basis of the member's response was not the MSISDN specified in the complaint. In response to this the member stated that it had no record of this MSISDN having any subscriptions to its services or that that MSISDN had used its services at all in November. It accordingly requested the WASPA close the complaint "because the given MSISDN was not marketed by us".

The complainant dismissed this, pointing out that screen shots taken from his phone formed part of the complaint, and requested that the complaint proceed to formal adjudication.

“Please go ahead with the complaint. I attached screen shots taken from my phone. How can they deny sending me the messages when I have sent proof in the form of screen shots. They send each person a unique URL, which is how they detect the MSISDN.

I received multiple SMS from them stating I have been subscribed. Screen shots included in the complaint. If they do not keep any records, they should not be in business.”

The member then provided opt-in information for the MSISDN which formed the basis of its response (as opposed to the MSISDN forming the basis of the complaint), stating that this formed proof that this user had agreed to receive marketing communications for adult services even from third party service providers. The date of the transaction reflected in the opt-in information is 14 April 2009.

Sections of the Code considered

Those listed in the Complaint section above.

Decision

1. No finding is made against the SP in this matter.
2. The response of the WASPA member is generally unsatisfactory. The pertinent MSISDN was specified in the complaint and it is not acceptable to base a response and provide information relating to a different MSISDN. The subsequent denial of any service provision to the MSISDN specified in the complaint is rejected by the Adjudicator.
3. The version of the complainant is accepted, notwithstanding the greater scrutiny thereof occasioned by the fact that this is a competitor complaint. The caution to be exercised in dealing with such complaints is further obviated by the testing done by the WASPA Media Monitor under Complaint 8148.
4. The distinction between this matter and Complaint 8148 is that the complainant in this matter clicked on the “Enter here” link set out in image 2 above, while the Monitor in Complaint 8148 proceeded by SMSing FREEVIDS to 31075.
5. It is accepted that the complainant received the message as evidenced by image 1 of the screenshots provided and that the screenshots represent an accurate reflection of the service.

6. The Adjudicator finds that this message falls within the definition of a “commercial message” as defined in the Code. This message does not:
 - 6.1. feature a valid originating number and/or the name or identifier of the message originator; or
 - 6.2. have a facility to allow the recipient to remove his or herself from the message originator’s database.
7. The omission set out in paragraph 4.1 above constitutes a breach of section 5.1.1 of the Code.
8. Even accepting the member’s averment that there are three mechanisms for unsubscribing from its distribution lists, these need to be communicated to the recipient without the need, for example, for such recipient to access a further WAP page. The omission set out in paragraph 4.2 above constitutes a breach of sections 5.1.2 and 5.1.3 of the Code of Conduct.
9. The complainant has requested the member to provide the source from which his MSISDN was obtained. The member has failed to provide this or to provide evidence which shows that the exceptions set out in section 5.2.1 (a) –(c) were met.
10. The above omissions are grounds for a finding that the member has breached sections 5.1.7 and 5.2.1 read with section 5.3.1 of the Code.
11. The “Enter here” link as found in image 2 above is a clear breach of section 6.2.12 (c) in that the price and frequency of the service is not indicated as part of the link or immediately adjacent thereto. The member’s statement that there is no subscription associated with the free content is rejected: the complainant was not trying to access the allegedly free content by SMSing FREEVIDS to 2975 – rather he clicked on the link which quite explicitly is offering a subscription service.
12. The finding that the SMS bearing the link to adult content was unsolicited leads to a further finding of a breach of section 8.1.3 – the member cannot be said to be taking reasonable steps to ensure that minors do not have access to adult content it is it sending out unsolicited communications of this nature. The Adjudicator accepts that image 4 represents a step to confirm the age of those subscribing the service and that the complainant’s statement that the adult nature of the content is indicated only by an 18+ at the end of an SMS is not accurate.

13. The complaint in respect of section 8.1.4 is dismissed. The Adjudicator interprets this section as requiring that the MSISDN was previously linked to the adult service in question, and there is no evidence in this matter that this was the case.
14. The marketing of the subscription service as set out in the images provided does not prominently and explicitly identify the service accessed through the "Enter here" link as being a subscription service. The member's response is not directly relevant to the complaint raised under this section.
15. This is a breach of section 11.1.1 of the Code.
16. The request to join the subscription service is not an independent transaction made with the specific intention of subscribing to the service. This flows from the failure to provide the required indications as to the nature of the service.
17. This is a breach of section 11.1.2 of the Code.
18. The complaint in respect of section 11.1.3 is dismissed: as the complainant himself points out there are no examples of content, and an example of content is what triggers the operation of this clause.
19. The complaint in respect of section 11.1.4 of the Code is dismissed as the complainant has not provided any evidence of billing which he received which does not comply with this section.
20. The complaint in respect of section 11.1.5 is dismissed. The Adjudicator does not view this section as being of application to the set of circumstances presenting themselves, which are better covered by sections 11.1.1 and 11.1.2.
21. It is accepted that the complainant twice attempted to unsubscribe from the subscription service by SMSing STOP to 31975 but did not receive any response and therefore had to unsubscribe via the member's call centre.
22. This constitutes a breach of sections 11.5.2 and 11.5.5 of the Code of Conduct.
23. Notwithstanding the complainant having (presumably successfully) unsubscribed through the call centre, no unsubscribe confirmation message was received by the complainant.
24. This constitutes a breach of section 11.5.6 of the Code of Conduct.

Sanction

25. The sanction to be applied in this complaint is subsumed and forms part of the sanction applied in respect of [Complaint 8148](#).