



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Clickatell
Information Provider (IP) (if any)	34007
Service Type	Competition services
Source of Complaints	Mr H Senekal
Complaint Number	8228
Date received	2 December 2009
Code of Conduct version	8.0

Complaint

This complaint refers to a promotion conducted by the IP on behalf of Hisense. The complainant alleges that the promotion involved a lottery for which terms and conditions were not provided.

The matter was initially dealt with according to WASPA's informal complaint procedure. The IP responded directly to the complainant. Upon being asked by WASPA whether he was satisfied with the outcome, the complainant stated that:

"Open these complaints immediately as they have not been adjudicated. As I have mentioned before, I do not have to be satisfied with the actions but Waspa must be and decide on sanctions. Some offences are criminal and must be adjudicated. YOU MUST TAKE THIS UP WITH YOUR SENIORS! Just because an offender contacts me does not absolve him from being sanctioned or prosecuted. Remember this is about contravening WASPA rules, not mine!"

Based on the complainant's response as aforesaid, the matter was then referred to adjudication in terms of WASPA's formal complaint procedure.

IP's response

The IP sent an email to the complaint in response to his complaint advising him that the following remedial steps had been taken:

- 1. The client (Hisense) was contacted with regards to no Terms and Conditions being available on their website for reference. The client has apologised and is ensuring that the Terms and Conditions are being setup.*
 - 2. We requested a copy of the Terms and Conditions of the promotion, please see attached for your reference. We have also included the Terms and Conditions of the promotion as part of the sms reply in the form of a wap-enabled link. This means that when one receives the reply SMS confirming receipt of entry, the reply will include the following link:
www.34007.com/hisense the full Terms and Conditions have been included in this link and are viewable from wap-enabled cell phones.*
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Sections of the Code considered

9.1.1. Any promotional material for a competition service must clearly display the full cost to enter the competition and any cost to the user to obtain the prize.

9.1.2. Any promotional material for a competition service must include details of how the competition operates.

9.1.4. Promotional material must clearly state any information which is likely to affect a decision to participate, including:

- (a) the closing date;
- (b) any significant terms and conditions, including any restriction on the number of entries or prizes which may be won;

- (c) an adequate description of prizes, and other items offered to all or a substantial majority of participants, including the number of major prizes;
- (d) any significant age, geographic or other eligibility restrictions;
- (e) any significant costs which a reasonable consumer might not expect to pay in connection with collection, delivery or use of the prize or item;
- (f) the entry mechanism and workings of the competition.

9.1.5. The following additional information must also be made readily available on request, if not contained in the original promotional material:

- (a) how and when prize-winners will be informed;
- (b) the manner in which the prizes will be awarded;
- (c) when the prizes will be awarded;
- (d) how prize-winner information may be obtained;
- (e) any criteria for judging entries;
- (f) any alternative prize that is available;
- (g) the details of any intended post-event publicity;
- (h) any supplementary rules which may apply;
- (i) the identity of the party running the competition and responsible for the prizes.

9.1.6. Competition services and promotional material must not:

- (a) use words such as 'win' or 'prize' to describe items intended to be offered to all or a substantial majority of the participants;
- (b) exaggerate the chance of winning a prize;
- (c) suggest that winning a prize is a certainty;
- (d) suggest that the party has already won a prize and that by contacting the promoter of the competition, that the entrant will have definitely secured that prize.

9.3.1. Competition services must have a specific closing date, except where there are instant prizewinners. An insufficient number of entries or entries of inadequate quality are not acceptable reasons for changing the closing date of a competition or withholding prizes. Once the closing date for a competition is reached, the advertised prizes must be awarded, notwithstanding the number of entries.

9.3.2. Prizes must be awarded within 28 days of the closing date, unless a longer period is clearly stated in the promotional material.

9.3.3. All correct entries must have the same chance of winning.

Decision

Section 13.2 of the WASPA Code states that if a complainant is satisfied that a member has adequately addressed a complaint through the informal complaint procedure, then the complaint is considered closed and no further action is taken. If the complainant is not satisfied that the complaint has been satisfactorily resolved, then the formal complaint procedure will be used to handle the complaint further.

The complainant is therefore not correct when he states that it is WASPA that must be satisfied with the response to the complaint before it is escalated from the informal to the formal complaint procedure.

However, it appears from the complainant's response that he is not satisfied with the response received from the IP and so his complaint will therefore be adjudicated in terms of the formal complaint procedure.

A copy of the promotional material in question has been provided with the complaint. The promotion reads as follows:

Win a trip to CHINA and other great prizes to the value of R500 000.

The details of the draw are stated as follows:

Purchase any Hisense product over the value of R1000 and SMS "Hisense" followed by your name, invoice/receipt number and store name to 34007, sms charged at R2.00 per sms. Valid from 1st of November to 31st of December 2009.

It appears that further terms and conditions appear at the bottom of the page. However these terms are unreadable on the copy of the promotional material

provided. The complainant has not stated whether these terms were accessible to him or not on the original promotional material that he viewed.

Section 9.1.4 provides that any information which is likely to affect a decision to participate in a competition must be included in any promotional material used. The section does not set out comprehensively what this information would be. However it does specify the following information:

- a) the closing date;
- b) any significant terms and conditions, including any restriction on the number of entries or prizes which may be won;
- c) an adequate description of prizes, and other items offered to all or a substantial majority of participants, including the number of major prizes;
- d) any significant age, geographic or other eligibility restrictions;
- e) any significant costs which a reasonable consumer might not expect to pay in connection with collection, delivery or use of the prize or item;
- f) the entry mechanism and workings of the competition.

Section 11(3) of the Electronic Communications and Transactions Act of 2002 (ECT Act) permits information to be incorporated into a data message if such information is:

- (a) referred to in a way in which a reasonable person would have noticed the reference thereto and incorporation thereof; and
- (b) accessible in a form in which it may be read, stored and retrieved by the other party, whether electronically or as a computer printout as long as such information is reasonably capable of being reduced to electronic form by the party incorporating it.

It would therefore be legally valid for the promoter of a competition to incorporate the information required by section 9.1.4 of the Code by way of a hyperlink to a web page containing that information, provided the additional requirement of section 11(3) of the ECT Act, as aforesaid, have been complied with.

Section 9.1.5 of the WASPA Code of Conduct also provides that certain additional information must also be made readily available on request, if not contained in the original promotional material.

In the current complaint, the Hisense promotional material does not include all of the information required by section 9.1.4, nor has it been incorporated by reference using a suitable hyperlink. The subsequent presentation of the terms and conditions for the draw does not remedy the situation.

The IP has therefore breached section 9.1.4 of the Code and the complaint is accordingly upheld in this regard.

Sanction

It has been noted that this promotion was closed on 31 December 2009. There have also been no other complaints lodged with WASPA regarding this promotion.

The following sanctions are given:

1. The IP is issued with a formal warning to make sure that all future promotions it conducts on behalf of its clients for competitions and draws comply with the provisions of section 9.1.4 of the WASPA Code of Conduct.
2. The IP is fined an amount of R25 000.00, which is suspended for 3 (three) months, pending any further contraventions of any of the provisions of the WASPA Code.