



## REPORT OF THE ADJUDICATOR

<b>WASPA Member (SP):</b>	Lessa Ltd.   SP = Smartcall Technology Solutions
<b>Information Provider (IP):</b>	Not applicable
<b>Service Type:</b>	Several breaches of the Code.
<b>Complainants:</b>	Anonymous
<b>Complaint Number:</b>	9792
<b>Code Version:</b>	9.0
<b>Advertising Rules Version:</b>	2.3

### Complaint

The Complainant wrote:

A WAP push was received. Titled Splash: Emma 86 send you xxx vid.

Clicking on it took one to a page where one is shown an image indicating Video content and immediately below it text asking if you are over 18 and a confirm link. After 6 to 7 empty lines (requiring some scrolling) are terms and condition with pricing etc. A normal user would click on the Confirm link, thinking that they were confirming their age but in fact are instead subscribed to a R9.99 daily subscription without having seen pricing or subscription info.

This page was is a dynamic page on the link  
<http://7jb.in/bs7e23etpq20zsze4ezscsz02zw1r.wml>.

This changed the next time I went in. This might be a malicious attempt to hide the evidence.

Contraventions include: 5.2.1. Spam. This message appears to be SPAM. The originator should prove that there was a prior the subscriber gave permission to receive the communication or that there was a commercial relationship within the last 6 months.

#### 5.2. Identification of spam

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.

8.1.2& 8.1.4 Inappropriate sending of Adult marketing messages. This is an adult commercial messages. The originator must prove that there was prior use of an Adult service within the last 3 months.

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.

8.1.4. 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.

Hiding of terms and conditions. The service provider separated the Confirm link from the terms and conditions with 6 or 7 empty lines. This effectively requires users to scroll down some distance before they can view the Terms (if they actually work this out). The only pricing and indication that this was a subscription service were buried in the Terms. They were NOT in close association with the link as they should be. This is effectively:

- Hiding of pricing (6.2.3 and 6.2.5)
- Hiding of the fact that it's a subscription service (11.1.1)

6.2.3. Pricing must not contain any hidden costs. Where applicable, pricing for content services must include the cost of the content and indicate any bearer costs that may be associated with downloading, browsing or receiving that content.

6.2.5. The price for a premium rated service must be easily and clearly visible in all advertisements. The price must appear with all instances of the premium number display.

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.

6.2.12 b) and c) wap transactions. There is no pricing or subscription information clearly or immediately next to the link that results in a subscription and cost.

6.2.12. For any transaction initiated via WAP, USSD, web-browsing, a link in an MMS or by an application: (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 Complainant was not satisfied with the SP's response and wrote the following:

“Their response is completely dishonest.

*“first of all I want to thank you for giving us such an important information. Because we are very aware of our responsibility to the community and the sensitiveness of our business it always has top priority to us to avoid such mistakes. This is also documented in our very short time of reacting to ustomers inquiries as well as inquiries of WASPA. We investigated in this the whole day and this are the results: The customer has clicked on a Wap banner which is used for advertising our Wap portal.”*

Incorrect - My wife was spammed with a WAP push as explained in my complaint. Clicking on the link in this WAP push takes one to sign up page. NOT a WAP Banner ad. They have not dealt with the spam component of the complaint.

*“Our system was not able to recognize the MSISDN, so the user has been redirected to a page where he had to enter his MSIDN manually.”*

On seeing the contraventions of the service I tried to follow the link using my PC in order to get screen shots as proof however, as they indicate they redirect one to a different page so this wasn't possible.

*“We assume that the customer has entered the site via his WiFi enabled phone (Nokia N78) through a wireless Internet connection. This might be also the reason for not getting his phone number at the first time. After the user has received an SMS from us containing a link to our Wap portal landing page he had to confirm the T&C which he did. The T&C are displayed right under the confirmation button with only one line break in between (pls see the attached screenshot on that).”*

They are blatantly lying about there being only 1 space between the confirm and the T&C. I counted at least 6! In anticipation of this type of lie, I requested that Claudia test the service. I will need to check with her if she did and if so will send through proof. Please consider how a normal user would understand that page if there were 6 lines separating the T&Cs, as I experienced, from the confirm button. You would believe you were confirming that you are over 18 years, wouldn't you.

*“Please also find attached a proof of subscription including dates and IPs which documents that the customer gave us the permission to sell him content.”*

I made NO downloads, however, I did click on the confirm button in order to test the service.

*“Furthermore please find the records to the content downloaded from our Wap portal through this customer (pls see the attached screenshot on that too).”*

No content was downloaded. However, that is irrelevant here.”

Later the Complainant wrote:

“Further to my response I tested the link that was spammed to the phone.

From the MSISDN previously used, the page that renders, asked me for my MSISDN. This is new. Clearly they are not treating the number in the complaint differently.

I then inserted another sim card and tried again.

I was taken to a different page again. This time NOT requesting my MSISDN (as was my pre-complaint experience with the first SIM). While this page is completely different again it does demonstrate the intentions of this crowd.

This time the page promoted a Music portal. All one can see on the pages is a link when reads "16+ confirm". The T&C's which include the pricing are separated this time by a banner ad (rather than 6 empty lines). A user would get the impression that they are confirming their age and NOT a subscription service. See the T&C's as one scrolls down, indicating..

I photographed the screens this time.”

Finally the Complainant stated:

“With respect to testing of this service. Claudia had the same experience of being diverted to a music page rather than the naughty pictures page. So unfortunately I cannot produce hard evidence to the 6 empty lines so it's my word against theirs. I still however have the spam message saved on a phone, so this can be proved. Adult spam in particular is a very serious contravention.”

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

The SP requested the MSISDN to conduct further investigation:

“Please note that in order to respond to the below, we will have to pull the logs of the user and thus need the MSISDN of the complainant. Please could you provide us with the necessary information in order to proceed with the response?”

In its response the SP wrote:

“First of all I want to thank you for giving us such important information. Because we are very aware of our responsibility to the community and the sensitiveness of our business it always has top priority to us to avoid such mistakes. This is also documented in our very short time of reacting to customers' inquiries as well as inquiries of WASPA.

We investigated in this the whole day and this are the results:

The customer has clicked on a Wap banner which is used for advertising our Wap portal. Our system was not able to recognize the MSISDN, so the user has been redirected to a page where he had to enter his MSIDN manually.

We assume that the customer has entered the site via his WiFi enabled phone (Nokia N78) through a wireless Internet connection. This might be also the reason for not getting his phone number at the first time.

After the user has received an SMS from us containing a link to our Wap portal landing page he had to confirm the T&C which he did. The T&C are displayed right under the confirmation button with only one line break in between (pls see the attached screenshot on that).

Please also find attached a proof of subscription including dates and IPs which documents that the customer gave us the permission to sell him content.

Furthermore please find the records to the content downloaded from our Wap portal through this customer (pls see the attached screenshot on that too).

As we currently see no mistakes on our side we would like to ask you to close the file. If we could provide you with any further information we'll do our very best to deliver this as soon as possible.

If you also do have any further question please let me know.”

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

4.1.1. Members are committed to 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.

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.

5.3.1. Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.

6.2.3. Pricing must not contain any hidden costs. Where applicable, pricing for content services must include the cost of the content and indicate any bearer costs that may be associated with downloading, browsing or receiving that content.

6.2.5. The price for a premium rated service must be easily and clearly visible in all advertisements. The price must appear with all instances of the premium number display.

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.

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.

8.1.4. 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.

11.1.7. Members must ensure that children accessing subscription services confirm that they have permission from a parent or guardian do to so.

11.2.3. Members must ensure that children accessing subscription services confirm that they have permission from a parent or guardian do to so.

### **Decision**

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. The Adjudicator has taken note of the Complaint and the SP's subsequent response.

The Adjudicator was provided with a lot of material that revealed conflicting allegations and statements from both parties.

The Complainant alleged various breaches of the Code on which the Adjudicator will subsequently make a ruling.

Pertaining the pushing of a WAP message and subsequent allegation of SPAM, the Adjudicator can only rely on what was evidenced by the parties. The SP alleged that the Complainant interacted with the service via a WAP banner while the Complainant stated categorically that the message was pushed. Looking at the evidence provided and subsequent testing, the Adjudicator is of the opinion that there was in fact a breach of section 5.3.1 since none of the pre-conditions of section 5.2.1 was met. The ruling on section 5.3.1 is however pending the Complainant making the alleged message available to the WASPA Secretariat as proof. In the absence thereof, the ruling on section 5.3.1 will be withdrawn. The Adjudicator is therefore also of the opinion that this would indicate a contravention of section 8.1.4. This ruling on section 8.1.4 is however also pending the Complainant making the alleged message available to the WASPA Secretariat as proof.

After carefully reviewing the landing page, as well as the screenshots provided by the Complainant, the Adjudicator does concur with the Complainant on its allegation that the SP does not comply with section 6.12.2's paragraphs (b) and (c). This is clearly visible from the SP's music site.

The SP's screenshot of the landing page in question, although different in spacing from the page allegedly made available to the Complainant, does not conform with the term "adjacent" and is most definitely not "visible on the same screen as the link", therefore a clear breach of section 6.12.2(c).

The display of the subscription service is not prominently displayed and read in conjunction with 6.12.2's paragraph (c) the Adjudicator is of the opinion that there is a further breach of section 11.1.1. No clear parent or guardian permission is deduced from the terms and conditions and the wording would indicate a breach of sections 11.1.7 and 11.2.3.

The accumulative breaches also results in a further breach of sections 4.1.1 and 4.1.2.

The Complaint is upheld.

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## Sanctions

In determining an appropriate sanction, the following factors were considered:

- The prior record of the SP with regard to breaches of the relevant sections of the Code of Conduct; and
- The SP's subsequent response.

1. The SP is required to suspend the service and access to the site it is hosted on until such time as it complies with the orders set out below. The SP may not initiate any new or existing billing transactions for the service during such period of suspension; however it may process any unsubscription requests;

2. The SP shall send an sms notification, detailing such suspension, to all existing subscribers of the service (the SP shall furnish the WASPA Secretariat with confirmation that it has notified its subscribers);

3. The SP shall clearly indicate at the first point of contact with the service and all subsequent pages and sites (irrespective of medium) that the service is a subscription service and further precisely what the subscription entails. These indications must be **clearly visible and unambiguous**.

4. The SP is fined:

4.1. R10 000 for its breach of sections 4.1.1 and 4.1.2 on the basis set out above;

4.2. R 15 000 for its non-compliance with sections 5.3.1 and 8.1.4 pending the sending of the alleged message received by the Complainant to the WASPA Secretariat;

4.3. R 5 000 for its non-compliance with section 6.2.12 (c); and

4.4. R 50 000 for its contravention of sections 11.1.7 and 11.2.3,

payable to the WASPA Secretariat within 5 (five) days notice hereof.

The WASPA Secretariat is also ordered to instruct the WASPA Monitor to ensure that the SP is indeed complying with this.