

WASPA ADJUDICATION**MIRA NETWORKS**

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1 COMPLAINT NO. 0985

Complaint date:	1 February 2007
Code Version:	Code v4.8 and Rules v1.6
Complainant:	Consumer

1.1 Complainant's allegations

The Complainant states the following in her complaint:

"Hi, I received a message from a nr 40441 that say" Your life can change now, Guess who wants a relationship with you.... text the word WINK to 40441 to find our. maxR40+sms.

When you send this another message come from 0840040441 through that say: "Text back the cellphone number of the person you think it is starting with WINK, where 08xxx is cell number ie.WINK 08123123 to 40441. R20+sms"

1.2 **Member's response**

The Member was notified of the complaint on 5 February 2007. In the WASPA notification, the Member was referred to the Rules and advised that it had 5 days within which to respond to the complaint. On 12 February 2007 a further notice was sent to the Member advising that a reply had not been received and that the Member had until the close of business to submit a response. No response was received

1.3 **Provisions of the Code considered**

4.1.1; 4.1.2, 5.2, 5.3, 6.2.4 and 10.1.2

1.4 **Decision**

The Complainant does not identify any specific provision of the Code that has been contravened but it is clear that the SMS was unsolicited and that the Complainant was misled into thinking that someone fancied her. It is also apparent that she did not expect to have to send a further SMS at an additional cost of R20 to find out who this person was. It is reasonable of the consumer to assume to have assumed the answer would be sent back after one SMS and that it would not be necessary to provide the number of the person the consumer thought fancied her. The lack of response from the Member can only be indicative of the fact that it admits the allegations inherent in the complaint

1.4.1 ***With regard to 4.1.1 and 4.1.2 of the Code:***

The information is deceptive and misleading. It gives the impression that it the information provider has the details of someone who fancies the recipient when this is not the case. The consumer is tricked into responding to the initial SMS and the

reply does not provide the answer to the question. The information is neither clearly nor accurately conveyed to the potential customer.

The Member has breached 4.1.1 and 4.1.2 of the Code.

1.4.2 ***With regard to 5.2 and 5.3 of the Code:***

It can be inferred that the message is unsolicited as the consumer was not able to identify the sender. The Member has allowed its facilities to be used for the sending of spam and it does not appear from the SMS that there is any process in place for dealing with complaints about spam. Except for the short code there does not appear to be any means of identifying the sender of the message

The Member has breached 5.2.2, 5.3.1, and 5.3.2 of the Code.

1.4.3 ***With regard to 6.2.4 of the Code:***

The pricing contained in the SMS is extremely misleading – as is evidenced by the number of complaints received by WASPA regarding this "WINK" SMS. There is no indication that more than one SMS is required to receive the information offered.

1.5 **Sanction**

This adjudication deals with a number of similar complaints. WASPA has previously dealt with other complaints against this Member in relation to similar emails sent between November 2006 and January 2007. The issue of sanction will be dealt with at the end of this adjudication having considered all the complaints.

2 **COMPLAINT NO. 0987**

Complaint date: 1 February 2007
Code Version: Code v4.8 and Rules v1.6
Complainant: Consumer

2.1 **Complainant's allegations**

The Complainant makes the following allegation:

"On 1 February I received a SPAM message advertising a dating service.

I did not request this message nor gave my number to any party for this purpose;

The SMS was not clear about the cost associated;

The SMS did not provide any information to opt out;

The website address given in the message gave a R20/sms number for opting out.

Using www.smscode.co.za I identified Mira Networks (Pty) Ltd. They were not available telephonically to handle my complaint."

The Complainant alleges that the following provisions of the Code have been breached:

"3.1.2. Members are committed to lawful conduct at all times. [Breach of ECA]

3.3.1. Members will not offer or promise services that they are unable to provide.

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. [reasonable measures?. "MobileFuse" or under whatever name they operate now is a fly-by-night operation. Some check of the company would have revealed that.]

5.3.2. Members will provide a mechanism for dealing expeditiously with complaints about spam originating from their networks. [Could not reach company on telephone number registered]"

2.2 **Member's response**

Despite two notifications of the complaint and of the time periods from WASPA, the Member did not respond.

2.3 **Provisions of the Code considered**

3.1.2, 3.3.1, 5.1.2, 5.1.4, 5.3.1, 5.3.2, 6.2.4

2.4 **Decision**

The Member has not responded and in the absence of a response I take the allegations to have been admitted. Each allegation of breach must however be supported by evidence of the breach. The allegation cannot be a bald statement that the Code has been breached.

2.4.1 ***With regard to 3.1.2 and 3.3.1 of the Code***

The Complainant makes the conclusion that the service is unlawful. Without supporting evidence to show that why the SMS is unlawful I cannot make a decision on this allegation. Likewise, there is nothing in the complaint that gives specifics on the failure or inability to provide the service offered. The Complainant alleges that a dating service was offered but he does not adduce any evidence to support the allegation that the Member (or its information provider) was not able to provide the dating service.

Accordingly, the Member has not breached 3.1.2 and 3.3.1 of the Code.

2.4.2 ***With regard to 5.1.2 and 5.1.4 of the Code***

The Complainant makes the allegation that there is no information to "opt out". In his next allegation he states that the message directed him to a website which contained opt out information.

As there was information on the website regarding the procedure to opt out 5.1.2 of the Code has not been breached.

The Complainant's un-refuted allegation is that the mechanism for removing himself from the database came at a price of R20. The Code provides that the cost should be no more than R1.

The Member has breached 5.1.4 of the Code.

2.4.3 ***With regard to 5.3.1 and 5.3.2 of the Code***

The Complainant alleges that the SMS was unsolicited. The Member, in its failure to reply to the allegation, has not given any evidence to contradict this.

The Member has contravened 5.3.1 and 5.3.2

2.5 Sanction

The issue of sanction is dealt with at the end of this adjudication.

3 COMPLAINT NO. 0988

Complaint date:	1 February 2007
Code Version:	Code v4.8 and Rules v1.6
Complainant:	Consumer

3.1 Complainant's allegations

The Complainant makes the following allegation:

"I received the following unsolicited SMS(SPAM) from short code 40441 on 01 February 2007 at 16:32:

"Your life can change now, Guess who wants a relationship with you... text the word WINK to 40441 to find out."

This was the entire contents of this message. Other than the sender's short code, there is nothing that identifies the sender. There is no information giving the costs of replying to this SMS. This SMS was unsolicited.

I replied, in order to pursue the matter further. I with one SMS (containing only "Wink", approximately 20 minutes after I received the above message, and received no reply for around an hour. I sent another sms (this time "WINK") and received the following reply at 18:28, this time from +2782004315040441:

"Text back the cellphone number of the person you think it is starting with WINK, where 08XXX is cell number. ie. WINK 08123123 to 40441.

R20+SMS"

This was the only time the sender attempted to convey the cost of a reply. Notice that that line was at the bottom of the SMS and after some empty lines, requiring the recipient to scroll down further.

I did not reply to this message.

In my opinion, the sender - Mira Networks (identified by their short code 40441) - have invented a method to harvest cellphone numbers at a profit to themselves. As human nature is as curious as it is, one can expect a recipient to reply with multiple guesses as to who that person who "wants a relationship with you" costing R20.00 each time. Of course, if these guesses are incorrect, Mira Networks have more numbers to send the first number to. This is an adapted form of a Pyramid scheme.

Not only are Mira Networks guilty of violating WASPA's Code of Conduct, they are guilty of gross violations of consumers."

The Complainant specifically alleges the following sections of the Code have been breached:

4.1.1., 4.1.2., 5.1.1., 5.1.3., 5.2, and 5.3.1

3.2 **Member's response**

Comms International, the Member's information provider responded to the complaint on 21 February 2007.

3.2.1 Comms International alleges that both the price and the identity of the sender were disclosed in the initial SMS.

3.2.2 In response to the allegation that the service is a pyramid scheme, Comms International states:

"At no point have we marketed or attemptd to market to any numbers that have been texted in to us or any of our services to gain a fanancial advantage (or even build a pyramid)"

3.3 **Provisions of the Code considered**

4.1.1, 4.1.2, 4.1.4, 5.1.1., 5.1.3., 5.2, 5.3.1, 5.3.2, 6.2.4, 6.2.5, 10.1.2

3.4 **Decision**

3.4.1 ***With regard to 4.1.1, 4.1.2 4.1.4 of the Code:***

Assuming that the information provider did indeed include the pricing and contact information in the original SMS, it appears from the reply and the general *modus operandi* of these "WINK" SMSs contain the pricing and contact information below the screen and it is necessary to scroll down to see the pricing. Thus, even if the pricing and contact information were included in the initial SMS, it was by no means clear.

The suggestion that someone is interested in the recipient is also false and deceptive as set out above. The information provider is not in possession of any such information.

The Member has breached 4.1.1 and 4.1.2 of the Code.

There is no evidence that the terms and conditions were not available on request – the consumer was not able to make this request as the contact details were not clearly set out. The fact that the consumer was unable to obtain further information and make complaints due to the lack of clear contact details is an aggravating factor to be taken into account when considering the sanction in respect of the breach of clauses 4.1.1 and 4.1.2.

3.4.2 ***With regard to 5.1.1 and, 5.1.3:***

Given the other "WINK" SMS's, it is likely that the pricing and contact information were contained in the original SMS albeit that it was only visible after scrolling down. I find that the Member has not breached 5.1.1 of the Code.

The SMS that information provider claims was sent does not contain "unsubscribe" information and the information does not refute the allegation that the SMS did not have a facility to allow the recipient to remove himself from the database. Accordingly, the Member has breached 5.1.3 of the Code.

3.4.3 ***With regard to 5.2 and 5.3.1 of the Code***

The definition of spam is set out in 5.2 of the Code. 5.2 of the Code does not contain a provision capable of breach. The "offences" relating to spam are set out in 5.3.1 and 5.3.2 of the Code.

The Member's information provider does not offer any information to dispute the allegation that the message is spam and I take the allegation to have been admitted.

The information provider denies collecting the numbers sent to it in response to its initial SMS's. What then would be the purpose of requesting the number if not to use it? Clearly the information provider intended to use that number by, at the very least, sending an unsolicited SMS to the number requested by it. If this was not its intention then the only other conclusion to be drawn is that the information provider was offering a fictitious service.

I find that the Member has breached 5.3.1 of the Code.

3.4.4 ***With regard to 6.2.4 and 6.2.5 of the Code***

Pricing placed beneath the screen that may easily be overlooked by the consumer is misleading. The pricing is not easily and clearly visible. Even if the Member is given the benefit of the doubt and I accept that the pricing information was contained in the first SMS my finding remains unaltered. Even if the pricing information was contained in the first SMS, it does not specify the cost for all communications and does not indicate that more than one premium rated message is required.

The Member has breached 6.2.4 and 6.2.5 of the Code.

3.5 **Sanction**

The issue of sanction is dealt with at the end of this adjudication.

4 **COMPLAINT NO. 0989**

Complaint date: 2 February 2007
Code Version: Code v4.8 and Rules v1.6
Complainant: Consumer

4.1 **Complainant's allegations**

The Complainant makes the following allegation:

"Firstly they are sending me unsolicited SMS's and secondly they only offer an opt out option to a VAS number. Both are in violation of the ECT act.

The site, company and Vas number are: 40441 - <http://www.mobilelovematch.com> "

The complainant gave the following additional information upon request of the adjudicator:

"I never give my cellphone number out to anyone for marketing purposes including all companies / banks etc I deal with. I explicitly state that they may not contact me to market or sell anything. But most importantly what annoys me about this particular SMS is that only offered me a premium rate SMS option to opt out - That I find is very devious. When I contacted the service provider that they used for sending the SMS about this, they gave a contact number for the company actually sending the SMS but it was a UK number. To me it all seems they gear it to make it as difficult or expensive as possible to opt out - Devious is the word that springs to mind again. And at the end of the day, it is an invasion of my privacy if I did not request it.

The SMS stated the following: "You life can change now, Guess who wants a relationship with you. text the word WINK to 40441 to find out. Max R40+sms service by mobilelovematch.com"

4.2 **Member's response**

The Member did not initially respond to this complaint but responded to the request for further information on 13 March 2007. The Member indicated that the service had been suspended.

4.3 **Provisions of the Code considered**

4.1.1, 4.1.2, 5.1.2; 5.1.4, 5.3., 6.2.4

4.4 **Decision**

The 'service' is indeed deceptive. The pricing is not accurately conveyed and it is extremely difficult for the consumer to opt out of the service and it would cost the consumer more the R1 to phone the UK to opt out of the service. The SMS was unsolicited. The Member has contravened 4.1.1, 4.1.2, 5.1.2; 5.1.4, 5.3., 6.2.4 of the Code.

4.5 **Sanction**

The issue of sanction is dealt with at the end of this adjudication.

5 **COMPLAINT NO. 0990**

Complaint date:	2 February 2007
Code Version:	Code v4.8 and Rules v1.6
Complainant:	Competitor

5.1 **Complainant's allegations**

The Complainant makes the following allegation:

*"It is the opinion of the complainant that the SMS marketing message received was devised in such a manner so to mislead the user by not clearly disclosing the price. The following message was sent to ***:*

"Reply SEXY to 40441 to watch this SEXY BLONDE STUDENT get nailed by her lecturer!!!! Help: supportΔxmasairtime.com

Sexy student video costs R20+sms"

Points to note:

1. The space between the instructions and the pricing. User is led to believe that the entire message consists only of what is listed above the spaces and therefore is not immediately informed of the pricing associated to the service

2. There is no mention made of access requirements, i.e WAP, 3G etc...

3. There is no indication of an age restriction or that the service may be of an adult nature.

In addition to the above, on downloading the content it is noted that the video clip provided far exceeds what is deemed to be acceptable by the networks, WASPA or the FPB. The content, in the opinion of the complainant is rated X18 and clearly depicts anal penetration and oral stimulation. The content item was downloaded by accessing the following bookmark:

<http://wap.mms3.com/member.php?pincode=144966>

It is the opinion of the complainant that the IP is delivering the content from outside of South Africa in an attempt to avoid Local regulations.

Such marketing of services should not be allowed to continue as they cause untold damage to the industry."

The Complainant alleges that the following provisions of the Code have been contravened:

5.1.2., 6.2.4., 8.1.1., 8.1.3. as well as sections 2.1 and 2.2 of the Advertising Guidelines

5.2 **Member's response**

The Member responded on 21 February 2007 by forwarding an email from Comms International its information provider. Interestingly, Comms International's email is 9 November 2007.

5.2.1 ***With regard to the allegation that 5.1.2 of the Code has been contravened:***

"This is on the updated version of the website and the users can text or email to unsubscribe, we believe the fault here is the complainees ISP caching. This is common known fact that ISP's cache websites from other countries to reduce bandwidth. Since being aware of this issue websites have been changed to force zero caching...in theory this means the end user gets the latest version of the site."

5.2.2 ***With regard to the allegation that 6.2.4 of the Code has been contravened:***

"There was no multiple transactions required for this service"

5.2.3 ***With regard to the allegation that 8.1.1 of the Code has been contravened:***

"Do you not think that the wording within the message insinuates that this is of an adult nature?"

5.2.4 ***With regard to the allegation that 8.1.3 of the Code has been contravened:***

"The data we have obtained is all of an adult nature and have accessed adult services in the past."

5.2.5 ***With regard to the allegation that pricing is misleading (i.e. 4.1.2 of the Code):***

"I do not see where within the guidelines it says that this pricing structure and the way the message is layed out is against any rules or regulations"

and

"Again I fail to see how a 160 character message can be so misleading, it is not exactly an essay"

5.2.6 ***With regard to the allegation that the failure to mention access requirements is contrary to the Code:***

"Is compatability an issue within the guidelines? as the message states it is a video then surely it is obvious that WAP / 3G is needed"

5.2.7 ***With regard to the allegation that the SMS lacks an age restriction (i.e. contrary to 8.1.1 and 8.1.3):***

"Is the user under 18? Are there any complaints from under age users? the database is all over 18 and as far as we know there are no WASPA, Network, Inter Industry, FPB complaints with regards to minors and at no stage have we or WILL we promote these types of services to minors."

5.2.8 ***With regard to the allegation that the service is delivered from outside of the country to avoid regulations:***

"At what stage are we not allowed to deliver from outside of RSA? I see no guidelines with regards to this.

I refer you to your code of conduct 3.7 Decency which we fully comply with, furthermore may I also bring to your attention 8 Adult Services, again at no time are we breaching this".

5.2.9 *With regard to the allegation that the conduct is causing damage to the industry:*

"Whose view is this

We have sought Legal and Regulatory advice on this and stand by our points made above."

5.3 Provisions of the Code considered

4.1.1, 5.1.2., 6.2.4., 6.2.5, 8.1.1., 8.1.3. and sections 2.1 and 2.2 of the Advertising Code

5.4 Decision

5.4.1 *With regard to 5.1.2 of the Code:*

The information provider states, in essence, that this is a technical fault with the website which has since been corrected. Thus, at the time that this complainant wished to remove himself it was not possible to do so.

The Member has accordingly breached 5.1.2 of the Code.

5.4.2 *With regard to 4.1.1, 6.2.4 and 6.2.5 of the Code:*

A complaint regarding the spacing of the pricing was made under complaint #0819. The same information provider was the information provider in complaint #0819. The Complainant in that instance was also of the view that it was misleading to have the price below the screen. In response to that complaint Comms International stated on 12 January 2007:

"... this was a technical error at our point and we did not pick up on. To this extent we have rectified the problem

and the pricing is now within the body of the message rather than having the spaces".

This conflicts with the response that the Member gives to this complaint. Contrary to the early stance, the information provider seeks to vindicate the spacing between the message and the price. The most charitable interpretation of this conflict is that Comms International failed to rectify the "technical error". Comms International does not seek to rely on a "technical error" a second time and defends the spacing even though this was, according to its earlier response, an error that was to have been rectified in January. I cannot reconcile these two versions and I can therefore only conclude that the gap between the main body of the message and the price has been intentionally inserted. If it has been intentionally inserted, then the only reason for having the price below the screen would be to deceive consumers. Certainly the information provider offers no cogent reason for the gap that forces the consumer to scroll down to see the price.

The fact that multiple communications were not necessarily required to obtain content does not detract from the fact that the price is not easily and clearly visible. The information provider has purposefully placed the price below the screen so that it is not visible when the SMS is opened. It is easy to overlook as it is necessary for the consumer to scroll down to see the price.

This manner of dealing with customers is not honest or fair. The pricing, when visible, does not appear to be misleading however and 6.2.4 of the Code has not been contravened. The pricing however is not easily and clearly visible as it is easily overlooked.

I find that the Member has breached 4.1.1 and 6.2.5 of the Code.

5.4.3 ***With regard to 8.1.1 and 8.1.3 of the Code:***

It is not sufficient for the message to "insinuate" that the content is of an adult nature. A child receiving the SMS would probably only know the literal meaning of the word "nailed". There is no "clear indication" that the service is of an adult nature and the Member has accordingly breached 8.1.3 of the Code.

The information provider states that the database is all over 18. It is highly possible however that the SMS could be sent to a child user –the cellular subscriber is not always the user. Explicit confirmation of the user's age is a requirement to prevent such occurrences. There is no "explicit confirmation of the user's age" as required by the Code and the information provider, in failing to require this confirmation, seems reckless to the fact that explicit material could be sent to and accessed by persons under the age of 18. Accordingly, the Member has breached 8.1.3 of the Code.

5.4.4 ***With regard to Schedule 2.1 and 2.2 of the Advertising Code***

Given the findings made above and for the reasons therefor, I find that the Member has breached section 2.1 and 2.2 of the Advertising Code.

5.4.5 ***With regard to the allegation that the service is delivered from outside of the country to avoid regulations:***

Delivery of the service from outside of the country is not in contravention of the Code, whatever the motives are for this. The Member however remains under WASPA's jurisdiction. The information is carried on South African cellular networks all of whom are committed to upholding the Code. WASPA is therefore able to enforce the provisions of the Code regardless of the geographical situation of the information provider.

5.5 **Sanction**

The issue of sanction is dealt with at the end of this adjudication. It should be noted that the information provider's cavalier attitude to the provisions of the Code relating to the protection of children is an aggravating factor. The contradictory responses, made by the information provider in response to substantially similar complaints, is a further aggravating factor.

6 COMPLAINT NO. 0991

Complaint date: 5 February 2007

Code Version: Code v4.8 and Rules v1.6

Complainant: Consumer

6.1 Complainant's allegations

The Complainant makes the following complaint:

"I received an SMS from <http://mobilelovematch.com/> telling me somebody is interested in myself. (on the night of Wednesday the 31st January).

Right at the bottom (you have to scroll down) it says R40+ per SMS.

At this stage I was just curious to see what will happen further, so I replied to it. I replied with WINK to 40441 as per the instructions. (Also, I have asked several of my friends whether they have sent it, and they replied negatively). Nothing further happened.

On Thursday evening (the 1st February) they tell me that I must SMS somebody else's number with the word WINK to their 40441 number. (the reply to my SMS I've sent). I deleted this message."

I will refer to the above SMS's as the "WINK SMS's".

Further:

"On Friday the 2nd, I received another SMS from them, telling me that I can view a video SMS of a girl getting screwed by her lecturer. This I also deleted.

On their website (which I also visited) they state that if you want to opt out, you should send \"STOP\" to 40441, also at R20 a SMS.

Never, even on their website, do they have a warning of what they will do. Only an email address and the opt-out notice.

I haven't opted out yet, as I am not so sure as to what will happen next."

I will refer to the above SMS as the "Adult SMS".

6.2 Member's response

The Member did not respond to this complaint despite receiving two notifications from WASPA. The allegations contained in the complaint can be taken to have been admitted.

6.3 Provisions of the Code considered

4.1.1, 4.1.2, 5.1.3, 5.1.4, 6.2.4, 6.2.5, 8.1.1 and 8.1.3

6.4 Decision

The WINK SMS

- 6.4.1 I have previously considered these WINK SMS's. From the complaint, it is clear that the complainant was misled by the SMS. The information is false as it states that someone fancies the complainant and that the Information Provider is in possession of this information. The pricing is does not make it clear that multiple SMS's are required and the pricing is not clearly visible. Accordingly, the Member has contravened 4.1.2 as it does not have the information that it professes to have, and 6.2.4 as pricing is misleading, and, 6.2.5 as the pricing is not easily and clearly visible (which is over and above the finding that the pricing is misleading).

The Adult SMS

- 6.4.2 I have previously considered this Adult SMS (see 2 above). The SMS is clearly in contravention of 8.1.1 and 8.1.3. The Member does not deny that it charges more than one rand for the recipient to remove himself from the database in contravention of 5.1.4 of the Code. The SMS offers no means of determining of the recipient of the content is over the age of 18.

6.5 Sanction

The sanction for all the complaints in this adjudication will be dealt with below.

7 COMPLAINT NO. 1001

Complaint date: 6 February 2007

Code Version: Code v4.8 and Rules v1.6

Complainant: Consumer

7.1 Complainant's allegations

The Complainant states the following in her complaint:

"I wish to urgently bring your attention to the extortion that is currently taking place.

1. *I received an sms on 2007-02-01 at +/- 09:15 (04:16 according to message details) stating the following "your life can change now, guess who wants a relationship with you... text the word WINK to 40441 to find out. Max R40+sms, service by mobilelovematch.com."*

a. *Thinking it was my husband I responded, to see what he was up to.*

2. *I received a response "text back the cellphone number of the person you think it is starting with WINK, where 08XXX is the cell number i.e. WINK 08123123 to 40441.....R20+sms"*

a. *I responded with my husband's number.*

3. *I received a response "Thanks for using the WINK service. We have now sent an ANONYMOUS message to [my husband's cell number]. Why not try another cell phone number!."*

a. *I responded with my son's number, albeit suspiciously.*

4. *I received a response "Thanks for using the WINK service. We have now sent an ANONYMOUS message to [my son's cell number]. Why not try another cell phone number!."*

· *If you look up the website, you get a cutely decorated page, but with no further access points or text.*

This is theft under false pretences and should not be allowed to continue!!!!!!!!!!!!!!!!!!!!

I'm not the first and probably not the only person to be conned in this manner because if you look up 'mobilelovematch' via internet search engine you get a similar complaint from a teenage girl to a chat group friend that she also got caught out, this way.

Furthermore, by unwittingly giving them 2 more cellphone numbers to use to send more of similar messages to my husband and son, to potentially generate more revenue.

Please advise me as to the investigation into this matter".

The complainant provided the following additional information:

"Herewith please find further info to assist with the furtherance of my complaint

The anonymous message that was sent to my husband's phone reads as follows:

"Someone fancies you...just text the word WINK to 40441 to let them know. R20+sms"

Via Message Centre +27841000044

Clearly this message is "information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission."

7.2 **Member's response**

The Member's response is as follows:

"3.3.1 – Comms International dispute we offered something we didn't provide. The complainant responded in accordance with the instructions given. On this occasion she selected two numbers which were not compatible.

4.1.1 – We iterate our pricing was accurate and the complainant id pay the correct amount. Therefore we do not feel there is any dishonesty here.

4.1.2 – We wish to contend that we did not knowingly disseminate any information that is false or deceptive, and unfortunately there is nothing in the complainant statement that suggests we did so.

4.1.3 – Comms International does regret this oversight. We admit there were issues with the hosts of the web-site, but that does not excuse the fact we did not include all the information as requested and we apologise.

4.1.7 – Once again we apologise for the error and this is has been rectified

4.2.1 – Comms International does respect the privacy and confidentiality of consumers – We are entitled to market to this consumer as they have previously consented to such with their responses to earlier promotions.

4.2.2 – Comms International have not breached this section. We have not sold or distributed this consumers information to any 3rd party.

5.2.1 – We wish to draw your attention to the response provided

in 4.2.1 This consumer has consented to receive such promotions and therefore we do not consider to have breached this section

5.3.1 – We do not support nor condone the sending of Spam and our contractual obligations on this matter are clear. This promotion is not spam as the consumer has provided consent to receive promotions.

6.2.4 – We once again contend the pricing information is not misleading and therefore not to have breached the Code. The message clearly stated R20+sms. On the basis it is clear the promotion costs 20 Rand plus the cost of the SMS send which only the network can advise. We are unable to provide exact costs for SMS delivery as this depends on the consumer's cellphone network.

10.1.4 – We again refer you to the answers provided in 4.2.1 and 5.2.1.

Summary – Comms International is currently embarking on a major expansion of its services in English speaking territories across Europe, the USA and in Africa. We fully respect and support the role of regulators who are providing a valuable consumer and industry service. We would wish to say in our defence however, that many of the breaches must be considered 'double jeopardy' breaches, where the same breach is being re-applied on more than one occasion. For example in 4.2.1, 4.2.2, 5.2.1, 5.3.1 and 10.1.4. It is also clear however that the complainant does not feel she has obtained the service she thought she was going to get, and we would be very happy to refund her costs in full. However Comms International would wish the following points to be considered in mitigation.

The consumer did not pay to receive the initial promotion. The consumer has provided consent to receive such promotions (which again is at no cost to herself). We have provided the opt in information which we believe does entitle us to market to consumers accordingly.

Comms International has now employed a regulatory consultant who has any years of experience of providing best business practice advice and support, to networks, information and service providers in the UK, Europe, South Africa, Australia and the USA. This consultant will be pre-approving all new promotions prior to commencement in future.

We hope our detailed response and summary points in mitigation will re-assure WASPA of our determination and commitment to provide high quality Value Added Services and SMS campaigns in South Africa and we wish to once again, apologise for taking up the time of WASPA staff in this matter. Should you wish to speak with us further in relation to this matter, please do not hesitate to contact us.

7.3 Adjudicator's request for further information from the Member

This adjudicator made the following request of the Member (conveyed by WASPA secretariat):

"On a number of occasions in the response, the information provider states that the consumer consented to receive such promotions (i.e.love match promotions). The consumer says that the sms was unsolicited.

The member/information provider is therefore requested to provide proof of this consumer's consent to this type of promotion and, if

the consumer is prepared to give the cell numbers of her son and husband, the member/information provider is then requested to provide proof that it had the consent of the son and husband for this type of promotion to be sent to them."

The Member did not respond to the request for further information and it is taken that the Member is unable to give supporting evidence of the consumer's consent. I am therefore inclined to believe the version of the complainant.

7.4 **Provisions of the Code considered**

3.3.1., 4.1.2., 4.1.3. 4.1.7 4.2.1. 4.2.2. 5.2.1. 5.3.1. 6.2.4. 10.1.4

7.5 **Decision**

7.5.1 ***With regard to 3.3.1 of the Code***

The service is indeed deceptive and gives the impression that the SMS has been sent at the instance of someone who fancies the recipient. The recipient expects a response giving the details of that person (as is promised in the initial SMS) but is sent an email requesting the number of the person the *recipient* thinks fancies her. From what is stated in the complaint, it is clear that the numbers sent back are then re-used by the Information Provider. The Information Provider is clearly not in possession of the information that it professes to have.

The Member (through its Information Provider) has breached 3.3.1 of the Code.

7.5.2 ***With regard to 4.1.1 and 4.1.2 of the Code***

For the reasons set out in paragraph 7.5.1 above and for the reasons contained elsewhere in this adjudication dealing with the "WINK" service, my finding is that the pricing is not accurate (it is not clear from the initial SMS how much it will cost to get the identity of the person who allegedly fancies the recipient). The Member (through its Information Provider) has not acted honestly or fairly. Information is not clearly conveyed. The information that is conveyed is highly deceptive.

7.5.3 ***With regard to 4.1.3 of the Code***

The Member's admission and apology are noted.

7.5.4 ***With regard to 4.2.1 of the Code***

The Member was afforded the opportunity to provide proof that the Complainant had consented to receiving services such as the "WINK" service. The Member failed to do so. Further, the Complainant is a married woman and it is unlikely that she would be interested in a service such as the "WINK" service. In addition, the Information Provider used the information provided by the Complainant to generate more revenue for itself with the consent of the Complainant's husband and son who then received the self same SMS. I find the Complainant's version believable and accordingly I find that the Member has breached 4.2.1. by breaching the Complainant's privacy as well as that of her son and husband. The SMS's sent to the son and husband were unsolicited contrary to 5.3.1.

The Member has breached 4.2.1 of the Code.

7.5.5 ***With regard to 4.2.2 of the Code***

There is nothing to show that the information given by the Complainant was given to a third party. The Information Provider abused the information given by sending spam to the numbers given which is dealt with above.

The Member has not breached 4.2.2 of the Code.

7.5.6 ***With regard to 5.2.1 and 5.3.1 of the Code***

The definition of spam is contained in 5.2.1 and is therefore not a provision capable of being breached.

The Member has nevertheless breached 5.3.1 of the Code as, on preponderance of probabilities, the Information Provider did not have the Complainant's consent as alleged. Further, the

Complainant's son and husband were also the recipients of unsolicited SMS's.

7.5.7 *With regard to 6.2.4 of the Code*

It is my finding that the pricing is indeed misleading as it is by no means clear that a number of SMS's will be required to find out who "fancies" the consumer, information which is, actually, supplied by the consumer. In effect the consumer is paying for information that she already has and no service is actually being rendered.

7.5.8 *With regard to 10.1.4 of the Code*

There is no evidence adduced to the effect that the Complainant's contact information was made available to third parties.

On the information furnished, the Member (through its Information Provider) has not breached 10.1.4 of the Code.

7.6 *Sanction*

The Member's apology, given on its behalf by its Information Provider, is noted. The failure to provide the particulars of the Complainant's "consent" to the service leads me to doubt the sincerity of the apology.

The issue of "double jeopardy" has not been overlooked and this has been taken into account in the global sanction set out below.

SANCTION IN REGARD TO COMPLAINTS 0985, 0987, 0988, 0989, 0990, 0991, 1001

The Member (through the conduct of its Information Provider, Comms International) has shown scant disregard for the WASPA Code. Overall, the complaints go to show that the Member, in allowing its Information Provider to run rampant, is not committed to honest and fair dealings or to upholding the WASPA code. Ultimately, if the Member is unable to ensure that its Information Providers do not breach the Code, the Member must bear the consequence.

The various WINK SMS's mislead consumers and the pricing attached to the multiple SMS's is not clearly set out with the result that consumers are duped into spending twice as much as anticipated. The Information Provider has previously acknowledged that the WINK service is misleading and yet the Member allows the Information Provider to continue disseminating the SMS's.

The Member offers no explanation for the grossly inflated opt out fees complained of.

Contraventions of the Adult Services provisions of the Code are very serious as these contraventions could potentially harm children. As previously stated the Adult SMS, could easily be received by a child and the content accessed by that child. The contemptuous response to the allegations does not assist the Member whatsoever.

It is noted that one instance of misconduct can give rise to many contraventions of the code. For example, a breach of 4.1.2 will automatically give rise to a breach of 4.1.1. This has been taken into account when considering the sanction so that the Member will not be penalized twice for the same conduct.

The sanctions for the contraventions of the Code are set out below. Given the potential damage to the industry and its credibility as a self regulating industry as well as the potential to damage more vulnerable recipients of the SMS's, a harsh sanction is warranted:

1. The Member is ordered to pay a fine of R200,000:
2. The Member is instructed to suspend the Information Provider used for the deployment of the services considered herein for a period of 6 months, effective immediately;
3. WASPA is directed to inform the network operators as well as other WASPA members of the suspension of the Information Provider and the reasons therefor;
4. The Member is suspended from operations for a period of 1 month, which period is suspended for 2 months from date of notification of this adjudication provided that should the Member commit a breach during the 2 month period (i.e. the incident of breach must have occurred during the 2 month period) the Member shall be suspended for 1 month upon a finding of breach.

DATED AT JOHANNESBURG 25 MAY 2007

