



REPORT OF THE ADJUDICATOR

Service Provider (SP): Allied Pacific Investments
Information Provider (IP): Nexus Enterprises Limited
Service Type: Subscription services
Complainant: WASPA Monitor
Complaint Number: 25553
Code Version: 13.0

Complaint

The original complaint read as follows:

We are aware that Direct marketing SMS campaigns, as detailed below, are being sent to consumers again (last week). This Subscription Service marketing approach created much unhappiness in our industry in the past year and was therefore extensively highlighted in the wasp industry as problematic.

We alerted SMS Portal (The Service Provider) to this problem on Friday am. It is our understanding that SMS Portal have made their IP's aware to refrain from sending these messages.

The message reads:

"Someone sent you a Photo MMS Message for 08: [REDACTED] Open it On [www.ph1.pw/a/a.php?m:\[REDACTED\]](http://www.ph1.pw/a/a.php?m:[REDACTED]) and Click SUBSCRIBE. mmsza.me to optout smsStop"

The media monitoring team had a look at this message and upon investigation found the following problem areas that could potentially be in breach of the WASPA Code of Conduct:

1. Subscription services must be marketed for the merits of the subscription service. The use of one piece of content (a photo) does not promote the Subscription service adequately or honestly. We request an adjudicator review whether the marketing is considered misleading.
2. There is no Pricing in the marketing.
3. We view the spacing of the OPTOUT instruction as problematic. SMS should be in capital letters (a format always used), and a space should be inserted between SMS and Stop . Currently it is confusing to read.

FURTHER IMPORTANT INFORMATION:

This message was again sent out this morning, 1 December 2014:

AlliedPacificLtd 2783930045254347 278: [REDACTED] 12/1/2014 9:39:50 AM 12/1/2014 9:39:49 AM DELIVRD 12/1/2014 9:39:59 AM
Somebody sent you an MMS Picture Message for 0832557778! Open it On [www.m2u.me/p1/h.php?m:\[REDACTED\]](http://www.m2u.me/p1/h.php?m:[REDACTED]) and Click ACCEPT (FREE MSG)
44887 2 optout smsStop

WASP's response

The IP responded.

In essence, it submitted that the pricing and subscription information does not need to be in the initial advertising and that all the relevant information was clearly displayed on the landing page and at the confirmation step.

The SP, in essence, aligned themselves with this response.

Sections of the Code considered

The following sections of the Code were identified in the complaint:

- 4.2 Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.
- 5.4 Members must have honest and fair dealings with their customers.
- 5.5 Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.
- 8.2 For a subscription service, the "pricing information" consists of the word "subscription" and the cost to the customer and frequency of the billing for the service. The cost and frequency portion of the pricing information must follow the following format, with no abbreviation allowed: "Rx/day", "Rx/week", or "Rx/month" (or Rx.xx if the price includes cents). For services billed at an interval other than daily, weekly or monthly, the required format is "Rx every [time period]", with no abbreviations permitted when specifying the time period. Examples of pricing information: "Subscription R5/week". "R1,50/ day subscription", "Rx every three days", "Rx every two weeks".

- 15.5 A member may offer an incentive for joining a subscription or notification service, provided that it is clear that the benefit only applies once the customer has joined the service. (Example: “if you join this subscription service, you will be entered into a monthly draw for a prize”.)
- 16.17 All WAP push direct marketing messages must contain a short code, or some other similar means by which the recipient can easily identify the members providing the service being marketed.
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Decision

I have considered this issue in matter 25556, and the bulk of my comments apply equally and will therefore be repeated verbatim.

I have considered all the clauses before me. This is a challenging exercise as this version of the Code is new and there is very little precedent on which I can rely. While the spirit of previous decisions on previous versions of the Code may be of guidance to me, it is imperative that the new code is applied in accordance with the wording of that Code.

I note in this regard that the same issue as that currently before me was considered in matter 23939, but that matter was considered on a previous version of the Code.

I agree with the WASP that there is no particular requirement in Clause 8.2 that the pricing information should appear in the first marketing communication. It is also true that the pricing information appears on the Call to Action page, and that a person who clicks on the “ACCEPT” button will be reasonably aware that they are subscribing to some sort of subscription service, and what the price is.

However, this is not the only clause before me.

Clause 5.5 states:

Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

In matter 25349, the adjudicator considered this clause. The gist of that ruling is that a member will be in breach of Clause 5.5 if they knowingly lead consumers to expect something other than what they are receiving.

In this matter, the first communication is “Someone sent you a photo MMS message. . . Click to open it. . .”.

The respondent appears to justify all its communication with the assertion that, “All relevant information is displayed on our landing page”.

In the first place, the message “Someone sent you a photo MMS message. . . Click to open it. . .” creates the impression that the recipient has been sent an MMS in the normal course of telecommunications, and that they need to click on the link to access this message. This is not true. The recipient has not received anything. The initial sms message is therefore misleading.

This reasoning is in line with the finding in matter 23939 in which the adjudicator found that the message was misleading in that a subscription service was being disguised as a consumer having received an MMS.

Given the above, the initial messages as well as the call to action page are in breach of Clause 5.5 in that “members must not knowingly disseminate information that is . . . likely to mislead by inaccuracy, ambiguity, exaggeration or omission.”

In addition to this, Clause 16.17 says, “All WAP push direct marketing messages must contain a short code, or some other similar means by which the recipient can easily identify the members providing the service being marketed.”

The response is that the message contains a url, and that a second message contains the shortcode. It is true that the second message appears to contain a short code, and this message therefore appears to be compliant. However, every direct marketing message must in itself be compliant. It is not sufficient to send a second, compliant, message.

The first message contains neither a short code nor any identification of the service. In order to identify the member, the user would have to follow the URL. I am of the

opinion that the specific intention of Clause 16.17 is to allow the user to identify who is sending them the message *without* having to access any further webpages.

The WASP is therefore also in breach of Clause 16.17.

I note that the Monitor has also taken issue with the spacing of the opt out message. However, none of the cited clauses are relevant to this issue and I am therefore not in a position to consider same.

Sanctions

Given that these matters were lodged concurrently, I do not consider it fair to give a sanction over and above the sanction in matter 25556.