



## REPORT OF THE ADJUDICATOR

<b>Complaint reference number:</b>	25974
<b>WASPA member(s):</b>	Tristar Trading LTD (1452) (IP) / Opera Telecom Pty Ltd (0068) (SP) / SMSPortal (Pty) Ltd (0139) (SP)
<b>Membership number(s):</b>	See above
<b>Complainant:</b>	Media Monitor
<b>Type of complaint:</b>	False and misleading services
<b>Date complaint was lodged:</b>	2015-02-20
<b>Date of the alleged offence:</b>	12 and 13 January 2015 and 19 and 20 February 2015
<b>Relevant version of the Code:</b>	13.6
<b>Clauses considered:</b>	3.4, 4.2, 4.8 (c), 5.4, 5.5, 5.15, 16.8-16.13
<b>Relevant version of the Ad. Rules:</b>	
<b>Related cases considered:</b>	25719 and 25724

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### Complaint summary:

Complaint #25974 is the formal complaint concerning unfair and false dealings with their customers.

The formal complaint was sent to the WASP on 2015-02-20.

The formal complaint was sent to the 1st SP on the 2015-02-20 and the 2nd SP on 2015-02-23.

The emergency panel notice was sent on the 2015-02-20.

The IP replied on the 2015-02-20, concerning the Emergency panel hearing.

The WASPA secretariat emailed the IP and both SP's on the 2015-02-23, with additional test information from the WASPA media monitor.

The IP replied on the 2015-02-23 twice to confirm that marketing had been stopped.

The WASPA secretariat emailed the IP on the 2015-03-02, concerning the Emergency Panel Report.

The IP replied on the 2015-03-02, to advise that they will be responding to formal complaint within time span.

The IP replied on the 2015-03-09 about the date to formal response.

The WASPA secretariat responded on the 2015-03-10 with advise of extension of response to formal complaint.

The IP replied on the 2015-03-10 to advise of the date the formal response is due.

The WASPA secretariat responded on the 2015-03-10 to confirm that the IP was correct in advise on the date due for formal response.

The IP replied to Emergency panel ruling on the 2015-03-11.

The WASPA media monitor responded to Emergency Panel Ruling on the 2015-03-25 and 2015-03-26.

The WASPA secretariat emailed the IP on the 2015-03-27, concerning the Emergency panel hearing request concerning opt in for direct marketing.

The IP replied on the 2015-03-27.

The WASPA media monitor requested confirmation concerning Head of Complaints approval on the 2015-03-30.

The WASPA secretariat emailed the WASPA media monitor on the 2015-03-30 to advise Head of Complaints approval.

The IP replied with formal response on the 2015-03-30.

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### **Initial Complaint**

The Media Monitor set out as follows:

Clauses breached: 3.4. A member is not liable for any breaches of this Code of Conduct resulting from services offered by a customer, if that customer is also a member of WASPA, provided that the member can demonstrate that they have taken

reasonable steps to ensure that that customer provides services in a manner consistent with the requirements of this Code of Conduct.

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.

4.8. Members must not provide any services or promotional material that:  
(c) induces an unacceptable sense of fear or anxiety;

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.

#### Description of complaint:

On 12 January 2015 the media monitoring team lodged complaint 25719 for the following Direct marketing SMS campaign:

“Your WhatsApp wall for [deleted] needs an UPGRADE! Open [www.i3y.us/u/a.php?m=\[deleted\]](http://www.i3y.us/u/a.php?m=[deleted]) and Click SUBSCRIBE (FREE MSG) 44617 2 optout smsStop”

The campaign ran through Oxygen 8.

On 13 January 2015 the media monitoring team lodged complaint 25724 for a similar message. This campaign ran through Smartcall Technologies.

Both these complaints have gone for adjudication and in both instances Tristar trading has been made aware of this. Please see attachments of two previous complaints.

(I am not attaching the previous complaints as these are available to all parties.)

Today 19 February 2015, through Oxygen 8 yet again, Tristar trading has sent another Direct SMS campaign. Please see attached test result.

This IP is blatantly ignoring WASPA's direction and guidance at all costs. These members are putting our industry into great dispute yet again. We have been consistently receiving negative press regarding campaigns such as this, and it is considered disrespectful towards WASPA as a governing body and our industry's consumers to continuously mislead against the advice of WASPA.

Please can the EMERGENCY PANEL consider the following requests:

1. Campaign to be stopped with immediate effect.
2. Refunds given to all subscribers.
3. All msisdn's removed from the database and no future marketing to those msisdn's permitted.
4. Membership to WASPA reviewed.

The WASPA Monitor has indicated that this is a repeat offence and cannot be resolved informally. The service provider is requested to provide a formal response to the alleged breaches so that this matter can be reviewed by an independent adjudicator

The matter went to an Emergency Panel which made the following findings on the Media Monitor's complaints.

#### Emergency Panel Findings:

[NOTE: the Emergency Panel referred to the Tristar Trading Ltd as the SP in their findings. The document pack refers to Tristar Trading Ltd as the IP and as such I have referred to them as the IP in my ruling. However, the extract below from the Emergency Panel's findings has them listed as the SP.]

Breach of sections 4.2, 4.8, 5.4, and 5.5:

1. Regarding the actual content of the messages sent by the SP, the panel agrees with the Monitor that these messages are prima facie misleading and deceptive in the following respects:
  - 1.1. The messages bear no relevance to consumers who are existing WhatsApp subscribers and are simply unsolicited messages aimed at misleading consumers into subscribing to the subscription services being promoted by the campaign;
  - 1.2. If a consumer is an existing WhatsApp subscriber, then the wording of the message is false or deceptive, and misleading if the "Wall" service referred to in the message is not actually going to expire and/or if there is nothing wrong with the receiver's WhatsApp subscription at that time.
2. The panel is therefore of the view that the SP has contravened sections 4.2, 4.8, 5.4, and 5.5 of the Code.

Breach of section 5.15:

1. The repetitive sending of multiple messages on the same day by the SP would also constitute an infringement of the privacy rights of consumers and would constitute a breach of section 5.15 of the Code.
2. It appears to be conceded by the SP that it was the SP's own system that resent the messages multiple times to the same recipient on the same day. However, the SP has stated that it can "only surmise" that this could have been caused by a technical problem with the Vodacom platform on 18 February.
3. In the panel's view, the SP's surmisal is an expression of an opinion not substantiated by any actual positive knowledge or evidence. The explanation is insufficient to absolve it of responsibility in this regard.
4. The panel is therefore of the prima facie view that the SP has contravened section 5.15 of the Code. Further evidence can be led by the SP in the course of filing its supplementary response in terms of section 24.77 of the Code.

Breach of section 16.8:

1. The Monitor has presented evidence that at least some of the SMS messages sent by the SP were sent at times and on days expressly prohibited by section 16.8 of the WASPA Code.
2. The SP's response that these particular messages were sent as a result of "leftover queues" from the previous day do not absolve the SP of responsibility in this regard.
3. The panel is therefore of the view that the SP has contravened section 16.8 of the Code.

Breach of section 16.11 (read with sections 16.9 and 16.10)

1. Based on the testing conducted by the Monitor on 19 February, the MSIDN referred to belongs to a consumer who had not consented to receive such messages, nor had they previously given their contact details to the SP for direct marketing purposes.

2. The SP has, in turn, alleged that the relevant MSIDN number referred to in the Monitor's complaint belongs to an existing subscriber to the SP's services.
3. There is a clear dispute of fact here which will have to be determined by the adjudicator hearing the formal complaint.
4. However a finding cannot be made by the panel at this stage.

### **WASP Response**

The IP denies being in breach of anything in the Code. I will not restate their argument as firstly, nothing new or of any material bearing was raised. In fact, the IP continues to stand by their initial response to the Emergency Panel. The second reason for my not restating their argument is that anything new that was raised was in my view an aggressive attempt to undermine the Media Monitor or relying on sweeping suppositions about the Media Monitor and Panel's view of the so-called tech savvy South Africans which allegedly are the only recipient's of these messages. In any event these arguments are shallow and of no value to determining a breach of the Code having no bearing in fact and being emotive only.

I will therefore rely on the facts presented by the IP in this response and the response to the Panel both of which are factually the same.

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### **Media Monitor's Further Response**

The Media Monitor requested the right to address the adjudicator on issues of factual inaccuracy presented by the Panel. In particular, the fact that the Media Monitor at no time stated that the IP did not have consent to contact the individual, merely that they had no What'sApp installed on their phone. Further, that the Media Monitor did not allege that all of the IP's data base details were obtained without consent.

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

#### Section 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.

#### Section 4.8:

Members must not provide any services or promotional material that ....(c) induces an unacceptable sense of fear or anxiety.

#### Section 5.4:

Members must have honest and fair dealings with their customers.

#### Section 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.

#### Section 5.15:

Members must respect the constitutional right of consumers to personal privacy and privacy of communications.

Section 16.8:

Unless a consumer has expressly or implicitly requested or agreed otherwise, a member may not engage in any direct marketing directed to a consumer on:

- (a) Sundays, public holidays contemplated in the Public Holidays Act, 1994;
- (b) Saturdays before 09:00 and after 13:00; and
- (c) all other days between the hours of 20:00 and 08:00 the following day.

Section 16.9:

A member may engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing, to a person who has given his or her consent.

Section 16.10:

A member may engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing, to a person who:

- (a) has provided the party responsible for sending the direct marketing communication with his or her contact details in the context of the sale of a product or services, and the responsible party's own similar products or services are being marketed, and
- (b) has been given a reasonable opportunity to object, free of charge, and in a manner free of unnecessary formality, to such use of his or her details at the time when the information was collected and on the occasion of each subsequent direct marketing communication sent to that person.

Section 16.11:

A member may not engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing other than as provided for above.

Section 16.12:

Any communication for the purpose of direct marketing must contain the details of the identity of the sender or the person on whose behalf the communication has been sent and an address or other contact details to which the recipient may send a request that such communications cease.

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## Decision

Section 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.

- I find the IP to be in breach of this based on the fact that they several times did not answer WASPA's queries but merely deflected with insults. See also my reasoning wrt 16.9 below.

Section 4.8:

Members must not provide any services or promotional material that ...(c)

induces an unacceptable sense of fear or anxiety.

- I find the IP to be in breach of this. Tech savvy individuals would probably respond to the call-to-action of the IP based on the fact that they would be aware that this was a sales tactic rather than a real risk to their What's App service. The majority of people would respond to this call-to-action based on the fear induced by the IP in telling them their service was at risk.

Section 5.4:

Members must have honest and fair dealings with their customers.

- I find the IP to be in breach of this for the same reasons outlined in 4.8 above.

Section 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.

- I find the IP to be in breach of this for the same reasons outlined in 4.8 above.

Section 5.15:

Members must respect the constitutional right of consumers to personal privacy and privacy of communications.

- I find the IP to be in breach of this due to the number and times of their messages being sent. I am not persuaded by their argument that this was a glitch on the part of Vodacom and the result of queued messages. They are a technically savvy company and should have mechanisms in place to deal with this.

Section 16.8:

Unless a consumer has expressly or implicitly requested or agreed otherwise, a member may not engage in any direct marketing directed to a consumer on:

- (a) Sundays, public holidays contemplated in the Public Holidays Act, 1994;
- (b) Saturdays before 09:00 and after 13:00; and
- (c) all other days between the hours of 20:00 and 08:00 the following day.

- I find no breach of this.

Section 16.9:

A member may engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing, to a person who has given his or her consent.

- I find no breach of this but wish to point out that when WASPA requests proof of opt-in it is the responsibility of the IP to provide it and not to hide behind their third party list provider and the Promotion of Access to Information Act.

Section 16.10:

A member may engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing, to a person who:

- (a) has provided the party responsible for sending the direct marketing communication with his or her contact details in the context of the sale of a

product or services, and the responsible party's own similar products or services are being marketed, and

(b) has been given a reasonable opportunity to object, free of charge, and in a manner free of unnecessary formality, to such use of his or her details at the time when the information was collected and on the occasion of each subsequent direct marketing communication sent to that person.

- I find no breach.

Section 16.11:

A member may not engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing other than as provided for above.

- I find no breach.

Section 16.12:

Any communication for the purpose of direct marketing must contain the details of the identity of the sender or the person on whose behalf the communication has been sent and an address or other contact details to which the recipient may send a request that such communications cease.

- I find no breach.

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### **Sanctions**

The IP is fined R300 000.00. Further, they must alter their messages so as to remove any allusion to a fault or risk to the What'sApp service. If their services are value adding, they should not require fear to hook clients.