



ADJUDICATOR'S REPORT

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|-----------------------------------|----------------------|
| WASPA Member (SP): | Integrat |
| Information Provider (IP): | Mobile Toe |
| Service Type: | Subscription Service |
| Source of Complaints: | WASPA Monitor |
| Complaint Number: | 6718 |
| Code of Conduct version: | 7.0 |

Complaint

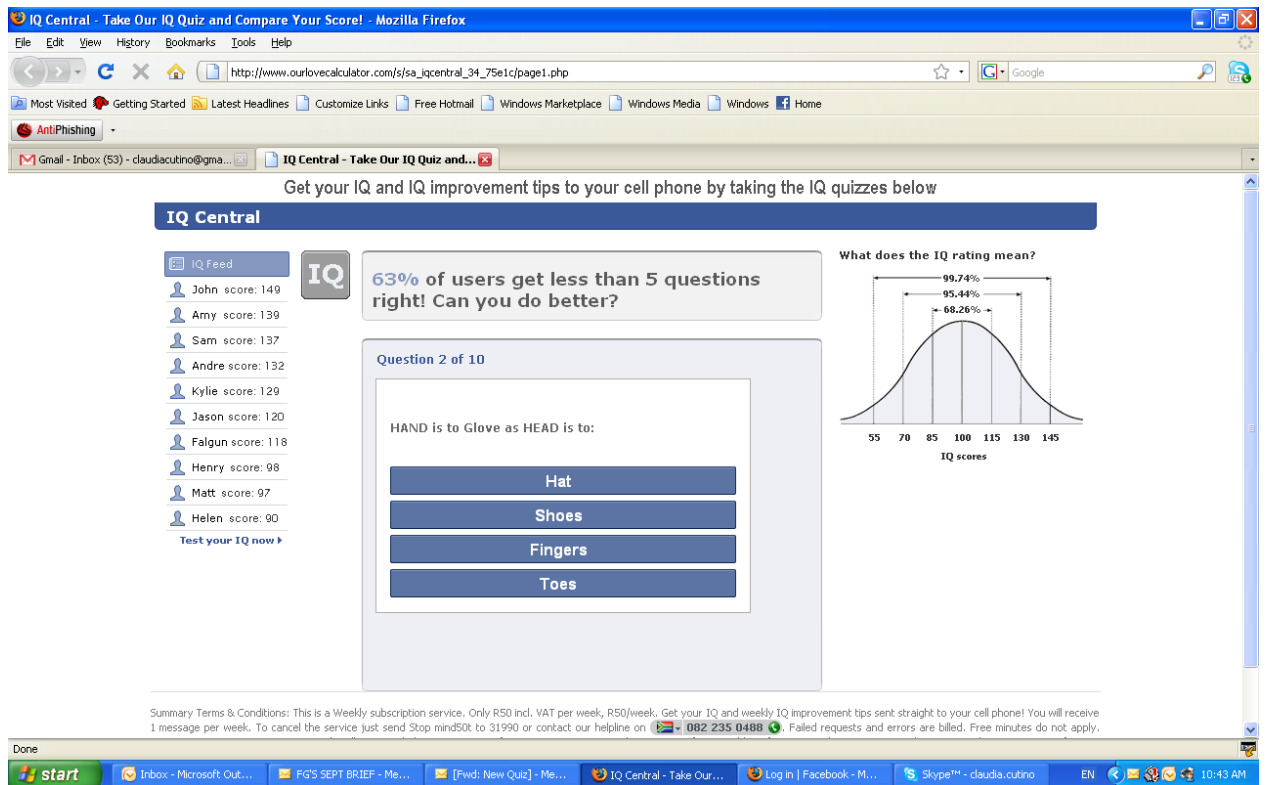
Complaint 6718 arose from an investigation carried by the WASPA Media Monitor on 2 June 2009 into a subscription service offered by the SP in conjunction with the IP.

The Media Monitor's report is set out in full below:

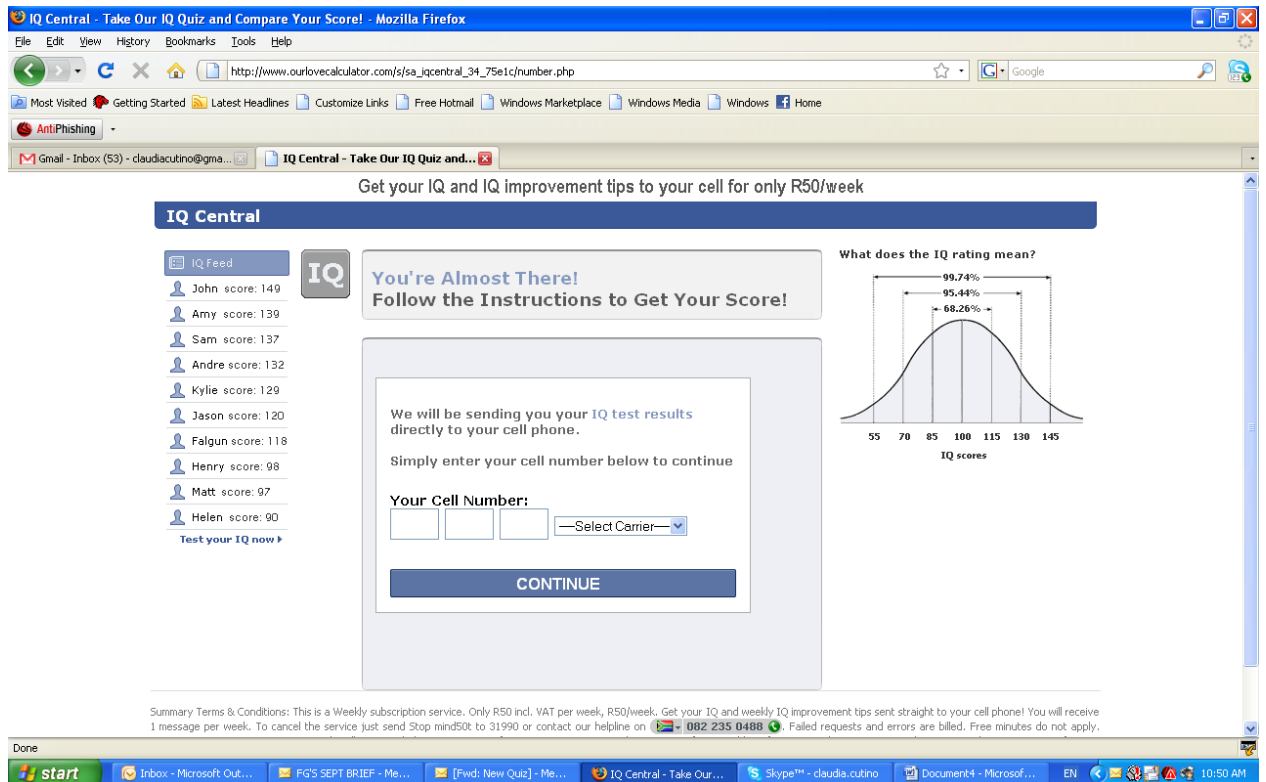
DATE: 2 JUNE 2009
STARTING BALANCE: R262.04
SERVICE PROVIDER: Integrat
SHORT CODE: 31990
TEST PHONE NUMBER: 0769596058
WAP LINK:

http://www.ourlovecalculator.com/s/sa_iqcentral_34_75e1c/page1.php

Integrat have had complaints of this nature against them already, so when I came across another similar IQ test from Integrat, I decided to test it as well, and below are the results.



I answered all ten questions.
Only after answering all 10 questions did the information on the top of the screen shot change from: *Get your IQ and IQ improvement tips to your cell phone by taking the IQ quizzes below* to: *Get your IQ and IQ improvement tips to your cell for only R50/week*



I entered my cell number and received a message with a pin number on my phone:

Enter pin 6199 U'll b subscribed to mind50t from Mobile Toe @ R50.00/2/week. Help? Call0822350400, VAS rates apply. To unsubscribe, sms STOP to 31990.

Get your IQ and IQ improvement tips to your cell phone by taking the IQ quizzes below

IQ Central

IQ Feed

- John score: 149
- Amy score: 139
- Sam score: 137
- Andre score: 132
- Kylie score: 129
- Jason score: 120
- Falgun score: 118
- Henry score: 98
- Matt score: 97
- Helen score: 90

Test your IQ now >

Check Your Phone!
We Have Just Sent You a Unique PIN!

Enter Your Unique PIN below so we can send your results to the correct phone.
PIN should arrive any time now...

Enter Your PIN Code:

I agree to the [terms & conditions](#)

CONTINUE

What does the IQ rating mean?

Summary Terms & Conditions: This is a Weekly subscription service. Only R50 incl. VAT per week, R50/week. Get your IQ and weekly IQ improvement tips sent straight to your cell phone! You will receive 1 message per week. To cancel the service just send Stop mind50t to 31990 or contact our helpline on 082 235 0488. Failed requests and errors are billed. Free minutes do not apply.

This time the top of the screen shot changed once again back to:

Get your IQ and IQ improvement tips to your cell phone by taking the IQ quizzes below

Also the 'I agree to the terms & conditions' box was already checked without me checking it. I then entered the pin code as prompted.

And then I received two smses:

U ve subscribed to IQ!U ll get ur link 4 unlimited access 2 Optical Brain Teasers weekly @ R50/SMS. Send STOP mind50t 31990 2unsub.call 0822350488 4help

If you divide 14 by $\frac{1}{2}$, what do you get? Answer: 28 > Go to <http://www.mofow.net/zaig/for> members only optical brainteasers. User password: 3072

I did not receive any results even though the screenshot said:

"Enter your Unique PIN below so we can send your results to the correct phone."

I checked my balance and it was R212.04 so exactly R50 had been deducted and I never even got my IQ test result!

I then decided to check out the wap link in the message I received in my inbox. I entered my cell number and pin number I was given as prompted and logged in.

The wapsite in question shows loads of different content members can download. From top ringtones, to pictures, love notes, optical illusions etc. No where did it show any IQ tips or anything to do with optical brainteasers as said in the message I received with the wap link.

Top Pictures and ringtones- Optical illusions

I then decided to download the **BLACK SPOT ILLUSION**. It said the regular price was R10 but free for members

All I received was a image with a black spot in the middle that you could zoom in but did absolutely nothing.

Conclusion:

On starting the IQ test one is not able to see that this is in fact a subscription service. The only way a customer would know is if they bother to look at the faint summary of the terms and conditions at the very bottom of the page. When your intent is to finish the IQ test and find your result one will not even bother to do this. Only after answering all 10 questions did the information on the top of the screen shot change from: *Get your IQ and IQ improvement tips to your cell phone by taking the IQ quizzes below to: Get your IQ and IQ improvement tips to your cell for only R50/week* nobody would notice this change and this is a total breach of the code that states in 11.1.1. *Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services".* It then tells you:

You're almost there, follow the instructions to get your score

Then you are prompted to enter your cell phone number:

"We will be sending you your IQ test results directly to your cell phone"

Once again no where does it state that by entering your number you will be joining a service or costs of the service etc... besides in the start of the terms and conditions below which isn't sufficient enough.

I then received another message with a pin number, all the information needed was there but all the cost is confusing *"R50.00/2/week"*

This time the top of the screen shot changed once again back to: *Get your IQ and IQ improvement tips to your cell phone by taking the IQ quizzes below* once again hiding the price or proof that by entering my pin I would be subscribing to a subscription service. I was also prompted: *"Enter your Unique PIN below so we can send your results to the correct phone."*

I entered the pin number and never received any results on my cell phone.

Also the *'I agree to the terms & conditions'* box was already checked without me checking it.

The welcome message I received clearly stated: *"ll get ur link 4 unlimited access 2 Optical Brain Teasers"* as well as the other message I received stating: *If you divide 14 by 1/2, what do you get? Answer: 28 > Go to <http://www.mofow.net/zaiq/for> members only optical brainteasers. User password: 3072* When going onto the site in question there are no brain teaser whatsoever only different pics, ringtones and "optical illusion" pictures to download. Therefore the content of the service I had been subscribed to had absolutely nothing to do with the IQ test I did at all.

Breeches of the code:

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

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.

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.

6.2.4. Pricing contained in an advertisement must not be misleading. If multiple communications are required to obtain content, then the advertised price must include the cost for all communications required for that transaction. A clear indication must always be given that more premium messages are required.

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.

11.1.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item.

11.1.4. Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.

11.1.5. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

11.1.8. Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message must be a clear notification of the following information, and should not be mistaken for an advert or marketing message:

- (a) The name of the subscription service;**
- (b) The cost of the subscription service and the frequency of the charges;*R50/sms how many smses weekly??**
- (c) Clear and concise instructions for unsubscribing from the service; *this isn't clear**
- (d) The service provider's telephone number.**

11.1.10. Where a subscription service is initiated by a user replying to a message from a service provider where that message contains instructions for activating a service and/or where that message contains an activation code that when inputted by the user activates a subscription service, then that message, along with the subscription initiation instructions and/or activation code, must also include the subscription service information in the following format, flow and wording:

[service activation instructions and/or activation code]. U'll b subscribed to [XYZ service] from [name of service provider] @ [cost of service and frequency of billing]. Help? Call [call centre number + “(VAS)” if applicable]. To unsubscribe, [unsubscribe instructions].

***Although all the information was included in the message, the pricing information is confusing and unclear.**

Response of SP

The SP acknowledged receipt of the complaint on 4 June and gave initial feedback on 5 June as follows: **“[W]e have informed our IP Mobile Toe of the complaint. Integrat is also of the opinion that the service has non [compliant] components and will by close of business today suspend the activation of any new subscriptions on this service, we have instructed our technical division to execute this. Service will remain suspended until the IP provides proof of rectification.”**

On the request of the SP, the SP was granted an extension until 17 June 2009 to deliver its formal response. On 15 June 2009 the SP delivered a short formal response and enclosed a copy of the IP's detailed response to the complaint. The response of the SP and IP are set out in full below:

DATE: 15 JUNE 2009
SHORT CODE: 31990

Integrat Complaint id: 6718

Integrat is a full WASPA member and as such committed to rules, guidelines and principles set out by WASPA. All new clients are made aware of WASPA rules and guidelines and are also offered to opportunity to submit their ads to Integrat for verification.

MobileToe Response:

We have thoroughly investigated this assessment and appreciate WASPA's diligence in monitoring the market for compliance. We pride ourselves in our adherence to WASPA guidelines and take every care possible to ensure that customers receive all the information they need to be able to enjoy our services. We further believe that we are one of the most compliant service providers in the industry.

We will now address the allegation of code breach as outlined.

ISSUE 1: No costs indicated

We note that the first page of the site was not included as a screenshot which states the costs of the service twice – at both the top of the screen and in the summary terms as below:

Get your IQ and IQ improvement tips to your cell for only R50/week

IQ Central

IQ Feed

- John score: 149
- Amy score: 139
- Sam score: 137
- Andre score: 132
- Kylie score: 129
- Jason score: 127
- Falgun score: 118
- Henry score: 98
- Matt score: 97
- Helen score: 90

Test your IQ now >

What's Your IQ?
Take the Quiz now and Compare Your Score!

Question 1 of 10

What animal is the least like the rest?

- Elephant
- Snake
- Lion
- Rat

What does the IQ rating mean?

99.74%
95.44%
68.26%

55 70 85 115 130 145
scores

Summary Terms & Conditions: This is a Weekly subscription service. Only R50 incl. VAT per week, R50/week. Get your IQ and weekly IQ improvement tips sent straight to your cell phone! You will receive 1 message per week. To cancel the service just send Stop mind50t to 31990 or contact our helpline on 082 235 0488. Failed requests and errors are billed. Free minutes do not apply. Premium rates. Free SMSs Do Not Apply. All prices include VAT. To sign up for our services, you must be 18 years of age or older. If you are under 18, you must obtain parental consent. Except for text plans, a web-enabled phone is required to download site content. Phones must be WAP/GPRS enabled. Normal carrier charges (WAP, MMS, GPRS, SMS) and taxes may apply for subscriptions, promotional text messages, and account related text messages. By clicking the button above you expressly agree to receive these communications by SMS, including our weekly newsletter. [Click here to see full Terms](#)

Done

It must be noted that the summary terms and conditions give customers even more detail as to the costs of the service clearly starting with the words: "This is a Weekly subscription service. Only R50 incl. VAT per week, R50/week".

By clearly stating the price twice on the screen we believe that any customer is clearly aware of any costs associated with the service. This service clearly conforms to clauses 6.2.3, 6.2.4, 11.1.1.

Further, the PIN message states clearly (in line with WASPA requirements) the cost, frequency and fact it is a subscription – "*Enter pin 6199 U'll b subscribed to mind50t from Mobile Toe @ R50.00/2/week. Help? Call0822350400, VAS rates apply. To unsubscribe, sms STOP to 31990.*"

As the PIN message also clearly states that the service is subscription, customers are clearly aware of this before they have joined the service. We make sure that customers receive all possible service information so that they are informed about all aspects of the service before they join.

Again, after joining the services, customers are welcomed with the required information:

U ve subscribed to IQ!U ll get ur link 4 unlimited access 2 Optical Brain Teasers weekly @ R50/SMS. Send STOP mind50t 31990 2unsub.call 0822350488 4help

ISSUE 2: PIN messages

We note the dissatisfaction with the format of the PIN message – specifically that the instructions to STOP are not clear and that the price point was extremely confusing. The PIN message that was sent was:

"Enter pin 6199 U'll b subscribed to mind50t from Mobile Toe @ R50.00/2/week. Help? Call0822350400, VAS rates apply. To unsubscribe, sms STOP to 31990."

We note in this PIN message that the instructions on how to stop are very clear and have been highlighted above. We do take note of the confusion of the price point and have cleared any offending characters.

ISSUE 3: WAP Site

It has been indicated that the content on the WAP site that was sent to the customer was not in keeping with the IQ test service.

We are very concerned with customer satisfaction and to further provide value for our customers we have provided this members only WAP site where customers can download content at no purchase charge. When customers first enter the site, the first content they are greeted with are optical illusion brainteasers – content that teases the brain by offering images that can be interpreted in different ways and that are visual puzzles. We view this as directly being related to brainteasers (definition of brain teasers is – "a question or problem raised for consideration or solution"). This content is directly in keeping with the IQ test. We also highlight this content by providing a second link to this content further down the page.

TOP CONTENT

exclusive mobile content
available only for members!

Top Pictures & Ringtones - Optical Illusions

[Next >>](#)

Click to view now!

[More Top Pictures & Ringtones Like These](#)

Other Fun Stuff

Click to view now!



[More Optical Illusions Like These](#)

See more like these

[Animal Love](#)

[Cute Love](#)

[Love Notes](#)

[Optical Illusions](#)

[Retro Love](#)

[Summer Love](#)

[Popular Ringtones](#)

[More Top Pictures & Ringtones Like These](#)

[Home](#)

[Terms & Conditions](#)

As a bonus, we also offer customers additional content to further increase the value of their service in the form of images and ringtones (this is like offering conditioner as a bonus extra when selling a bottle of shampoo). These have been included so that our service provides the best possible value for customers.

We have the option of removing the WAP site from the offering but we do consider it to be exceptionally valuable and the content is offered to the customer at NO ADDITIONAL cost. Considering each piece could cost the customer upwards of R5 else where, we believe this be great value and directly in line with the offering. We have taken note of the customers comments and are continually adding new content which further enhances the offering.

ISSUE 4: IQ Results

It has been stated that the IQ test results were not sent to the cell. To enhance customer satisfaction, the results are actually displayed on-screen as well. We

do take note of the customers issue though and due to a technical glitch the result did not reach the phone (even though the results were displayed online as well). We have amended the process to ensure we do not have similar issues. As an aside, if the customer had contacted customer care as soon as this error was found we would have been able to help immediately as well.

ISSUE 5: Service details

We understand that there was some confusion around the fact that by entering a cell number a subscription to a mobile service would take place.

We have been very careful to state throughout the site that by completing the IQ quiz a customer will have content sent to their phone. We also clearly state this information at the very start of the summary terms on every page in clear unambiguous text: *“This is a Weekly subscription service. Only R50 incl. VAT per week, R50/week”*; and we state at the top of the page the price a second time.

This information is again clearly stated in the PIN message which is sent to a customer before they join the service.

We are very concerned with clearly and simply stating to a customer that by taking the IQ quiz they will be sent mobile content and that the service is a subscription service. We have performed this by clearly stating on every page the link between the iq quiz and content sent to their phone; and expressly stating the price clearly at not only the top of the page on the first page and the page where a customer enters their mobile number but also at the very start of the summary terms at the bottom of the screen. Still, in line with our constant improvement, we do take note of the complaint and will endeavor to include yet more points to make sure customers are even more aware of the fact this is a subscription.

ISSUE 6: T&C Check box

We are concerned about customer awareness and understanding of our services and have highlighted the full the terms and conditions under the PIN submit field. We have balanced this with the fact that most customers are fully aware of mobile services and do not want to have to check tick-boxes and would like to move swiftly through the site and enjoy their mobile service. With this in mind we have pre-ticked the box so that customers do not have to check the tick-box.

We understand that there was little confusion around this and as this is not actually mandated in the guidelines as a requirement, we are going to remove the line entirely to avoid any customer confusion.

ISSUE 7: Content

We have investigated the communicated fault with the **item of content** called: **BLACK SPOT ILLUSION**. The identified fault is that the content is **just a black dot**.

The content (shown below) is an optical illusion. The illusion is that when the black dot at the centre of the screen is stared at for a long time, the eye no longer sees the grey circle surrounding it. To assist customers in understanding the nature of this content we have also included a clear description on the content item (this can be read underneath the image).



stare at the black spot- did the grey circle disappear?

As can be seen above, there is no fault with the item of content and it is a quite effective optical illusion that is very popular.

Where possible above, we have indicated conformance to indicated clause breaches. There has also been an indication that we do not conform to the following clauses: 3.3.1, 4.1.2 and 11.1.5. We can see no instance where the service has breached any of these clauses and consider our site to be fully compliant and offering great value to customers.

We at all times conduct ourselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA. There is no evidence to suggest otherwise. We have taken considerable time and resources to ensure we are compliant to WASPA guidelines. In line with this, we are indeed always making strides to improve the product and looking at new ways to even raise the levels of compliance above that which WASPA has mandated. To this end we have fully evaluated the customers complaints and while we believe we have covered these points, will be making changes in line with what was raised to ensure no further confusion arises in these respects. We always welcome comments on how to improve our services. Please feel free to contact us as any time so we may clear any issues up. Thank you for allowing us the opportunity to respond to this.

Decision

The IP addressed the allegations of breach as separate numbered issues and, to begin with, it is convenient to follow the same delineation of the issues in this decision.

Issue 1 – No costs indicated

The Monitor has complained that pricing information was not contained on each page of the website and alleged that the screens on which IQ questions 1 to 10 were displayed did not contain clear pricing information. The Monitor included a screenshot of the second IQ question screen. The IP's response included a screenshot of the first IQ question screen which showed pricing information that the Monitor alleged was first displayed only after answering all 10 questions. The IP did not dispute that the 2nd IQ question screenshot omitted the pricing information contained on the 1st and final screens, accordingly the allegations of the Monitor regarding these screens are taken to have been admitted by the IP. The question

that then falls to be determined is whether this pricing information is required to be displayed on each and every web page that forms part of the IQ test.

Section 6.2.5. of the Code provides as follows:

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.

Furthermore, section 9.2.1.2 of the WASPA Advertising Rules dealing with website advertising provides, inter alia, as follows:

- ***For each unique access number, the full and final cost of the access must be displayed immediately below, or above, or adjacent to the unique access number or Content access code in a non-serif font.***
- ***The T&C text must be placed close as possible to the unique access number.***
- ***T&C information must be placed horizontally.***
- ***While cost information associated with an access number may be displayed elsewhere on a web site (for example cost information also placed in the T&C page of a web site), this must be done as part of a duplication of the pricing. Hence, cost information cannot solely be placed on, for example only the T&C page where accessing the T&C page requires that the user click away from the initial page that displayed the access number.***
- ***The consumer should thus not have to scroll down significantly on that same page or follow any links to other pages to be made aware of the full pricing and T&C associated with a unique access number.***

The Code and Advertising Rules do not expressly require that the cost of access be displayed on each and every page of a website by means of which a consumer may access content or services. The Code requires that pricing must be displayed with each display of a premium number or access number. The web pages in question do not display a premium number or access number therefore no breach of section 6.2.5 of the Code or section 9.2.1.2 arises in this complaint. Further issues related to pricing information will be addressed below.

Issue 2 – PIN messages

Section 11.1.10 of the Code provides as follows:

Where a subscription service is initiated by a user replying to a message from a service provider where that message contains instructions for activating a service and/or where that message contains an activation code that when inputted by the user activates a subscription service, then that message, along with the subscription initiation instructions and/or activation code, must also include the subscription service information in the following format, flow and wording:

[service activation instructions and/or activation code]. U'll b subscribed to [XYZ service] from [name of service provider] @ [cost of service and frequency of billing]. Help? Call [call centre number + "(VAS)" if applicable]. To unsubscribe, [unsubscribe instructions].

Section 11.1.10 requires the **“cost of service and the frequency of billing”** to be presented, not the cost per SMS or the number of SMS sent in the billing period. Section 11.2.5 of the Code further provides that the cost of service and frequency of billing must use the format **“RX/day”, “RX/week” or “RX/ month”**. In other words, it is not the cost per SMS that is required, but the amount that will be charged to a consumer and the frequency of the charge.

The service that forms the subject of this complaint requires an activation code to be inputted by a user to activate the service and the activation message is accordingly required to comply with section 11.1.10 of the Code read with section 11.2.5. The activation message sent out by the SP in this matter stated as follows:

Enter pin 6199 U'll b subscribed to mind50t from Mobile Toe @ R50.00/2/week. Help? Call0822350400, VAS rates apply. To unsubscribe, sms STOP to 31990.

The use of the string of characters **“R50.00/2/week”** is confusing. It is capable of at least the following interpretations:

1. The service is billed at $R50 \div 2$ per week, i.e. R25 per week
2. The service is billed at R50 every 2nd week
3. The service is billed at $R50 \times 2$, i.e. R100 per week.

It is worth noting that the subscription confirmation message sent out by the SP states that the service is billed at **“R50/SMS”** so of the three possible interpretations outlined above, option 3 seems likely to be the correct interpretation of **R50.00/2/week** given the content of the confirmation message. This differs from the ordinary mathematical interpretation of “R50/2” and also differs from the plainer price notifications given on the website of “R50/week”.

The IP’s response states that it had **“take[n] note of the confusion of the price point and have cleared any offending characters”**.

Whatever the SP’s intention is or was, the pricing information in the activation message was ambiguous and did not conform strictly to the requirements of sections 11.1.10 and 11.2.5. Accordingly, a breach of sections 11.1.10 and 11.2.5 was committed, as well as a breach of section 4.1.1 and 4.1.2 which requires pricing information to clearly conveyed and not likely to mislead.

Issue 3 – WAP Site

The WAP site supplied by the IP offers optical illusions as downloads. An optical illusion is not what an ordinary consumer would expect to receive as an **“IQ improvement tip”** which is how the nature of the service is prominently advertised on the web page. Although the subscription confirmation message refers to **“Optical Brain Teasers”**, this description does not appear until after the service has already been subscribed for. Prior to subscription, an ordinary consumer is led to believe that they are subscribing to **“IQ Improvement Tips”**.

Section 4.1.1. of the Code provides that **“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.”**

Section 4.1.2. provides further that ***“members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.”***

The advertising of ***“IQ improvement tips”*** is not an accurate description of what the service actually offers access to, which is a set of optical illusions and not IQ improvement tips. As such, the complaint of a breach of section 4.1.2 in this specific regard is upheld.

Issue 4 – IQ Results

The Monitor complained that while the service clearly advertised that the IQ test result score would be sent to her phone, no such score was received on her phone. Section 3.3.1 of the Code provides that ***“members will not offer or promise services that they are unable to provide”***. The IP conceded that the failure to deliver the IQ score occurred as a result of a ***“technical glitch”*** but stated further that the result was displayed online. The IP also stated that the result communication process had been rectified to ensure that such issues did not arise again. In the circumstances, and insofar as the IQ score result is concerned, it appears as though the SP was technically able to generate the IQ score and technically able to send it, even though a technical glitch prevent it from doing so in this case. In the circumstances I do not find that the SP was offering a service it was ***“unable”*** to provide. The complaint of a breach of section 3.3.1 of the Code is dismissed.

It is convenient under this 4th issue to also consider the actual subscription activation method used by the service.

Section 11.1.2. of the Code which provides as follows:

Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item.

It follows from section 11.1.2 that if a request to join any subscription service is dependent on a request being made for any specific content item, then the request would not be an ***“independent”*** transaction within the meaning of section 11.1.2.

“Content item” is not a term defined in the Code. However, section 2.11 of the Code defines a ***“content subscription service”*** as including ***“any subscription service providing or offering access to content including, by way of example only and not limitation: sound clips, ring tones, wallpapers, images, videos, games, text or MMS content or information.”***

A ***“content item”*** ought therefore to be construed to include a sound clip, ring tone, wallpaper item, image, video, game, text or MMS content or information.

Section 11.1.2 must therefore be interpreted as prohibiting the bundling of any request to join a subscription service with a request to receive any specific sound clip, ring tone, wallpaper item, image, video, game, text or MMS content or information.

In the present case, it is apparent that a subscription is intended to be activated when the consumer requests his or her IQ score after completing the IQ test. The IQ score generated by the service would be a ***“specific content item”*** as contemplated by

section 11.1.2 of the Code. Following a request by the consumer for the service the subscription is activated. In this sense the subscription activation is not an independent request but a bundled request that is entirely dependent on the IQ score request.

The subscription activation process would comply with the consumer protection offered by section 11.1.2 of the Code if the IQ score were first generated for free or for a one off content item fee and, thereafter, the consumer was invited to independently request and transact for his or her subscription to the service at advertised rates.

The Monitor's complaint of a breach of section 11.1.2 of the Code is accordingly upheld.

Issue 5 – Service Details

Section 11.1.1 of the Code provides that ***“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.***

The use of the inverted commas with the term ***“subscription services”*** makes it clear that the words ***“subscription services”*** are the words that must be prominent on the promotional material. Although the terms and conditions at the bottom of the page contain the words ***“subscription service”***, the words are not prominent in my opinion when viewed within the overall context of the web page. As such, the complaint of a breach of section 11.1.1 is upheld.

Issue 6 – Terms and Conditions Check Box

The complaint made by the Monitor is that the terms and conditions check box was pre-checked by the website. The Monitor does not allege any specific breach of the Code in this regard. The IP's response was that the practice does not contravene any section of the Code and that most customers would prefer to move swiftly past the terms and conditions page.

I have considered this specific issue with reference to section 3.1.2. of the Code that provides that members are ***“committed to lawful conduct at all times”***. It goes without saying that any practice of a member that is illegal amounts to a breach of section 3.1.2 of the Code. Section 20(e) of the Electronic Communications and Transactions Act 25 of 2002 provides that ***“no agreement is formed where a natural person interacts directly with the electronic agent of another person and has made a material error during the creation of a data message and (i) the electronic agent did not provide that person with an opportunity to prevent or correct the error...”***. Properly construed, section 20(e) of the Electronic Communications and Transactions Act does not require an e-commerce site to require a consumer to actively select a check box to indicate their acceptance of any particular terms and conditions. However, if a website does not provide a consumer with a reasonable opportunity to prevent or correct any unintended acceptance of terms and conditions, then a risk lies with the website owner if the consumer later alleges that they did not mean to accept those terms and conditions. A common practice that has evolved is to require consumers to actively confirm their acceptance of terms and conditions to prevent them from escaping from agreements concluded

online. The practice employed by the service that forms the subject of this particular dispute introduces a risk of a consumer pleading mistake in order to rescind an otherwise binding contract, however it is not an illegal practice. I also do not consider it to necessarily be an unprofessional or unfair practice viewed in isolation of all other considerations. Provided a website properly conforms with all the other requirements of the Code and Advertising Rules, there is little risk of unintended agreement formation. However, in this particular complaint, the website did not conform with all the provisions of the Code and unintended subscription agreement formation posed a very real risk. In the circumstances, the pre-checking of the terms and conditions box compounded the general risks posed to consumers by the website. The design of the site has been explained as being useful in assisting consumers in moving swiftly past the terms and conditions page. Had the site rather forced consumers to actively confirm their acceptance of the subscription terms and conditions, it might have been a relevant factor to consider in mitigation of any sanctions to be imposed in this matter.

Issue 7 – Content

Section 11.1.5 provides that customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

In the present case, it does not appear to be the case that the content was specifically advertised or requested as non-subscription content and the complaint of a breach of section 11.1.5 is therefore dismissed.

Furthermore, it is not necessary to consider whether the “Black Dot” optical illusion is a particularly good optical illusion or not. The key issue relating to the content supplied by the service is whether it would have conformed to the reasonable expectations of a consumer subscribing to the service. As discussed under issue 3 above, the promotional material was not in line with the content and therefore breached section 4.1.2 of the Code.

Sanction

Subscription advertising, service descriptions, pricing and activation methods that fail to comply with the strict requirements of the Code are serious breaches of the Code as they frequently result in disgruntled consumers feeling duped into an expensive service they did not intend to subscribe for. Complaints of hidden charges and inadvertent subscription to services are frequent and pose a significant threat to the industry’s ability to provide for any measure of self-regulation in future. If service providers do not adhere strictly to the provisions of the Code relating to advertising and transparent subscription mechanisms, then not only consumers, but the entire membership body of WASPA will be substantially prejudiced. The format of the pricing information in the activation message was particularly misleading and has attracted a fine deemed to be appropriate in the circumstances.

The following sanctions are imposed:

1. The SP is directed to:

- 1.1 immediately suspend the service and all billing for the service;
- 1.2 pay over to WASPA a fine of:
 - 1.2.1 R50 000 in respect of the breach of section 4.1.2 of the Code;
 - 1.2.3 R50 000 in respect of the breach of sections 1.1.10 and 11.2.5 of the Code; and
 - 1.2.4 R100 000 in respect of the breach of section 11.1.2 of the Code;

within 5 days of the delivery of this report failing which the SP's membership of WASPA shall be suspended for a period of 30 days or until such time as the fines have been paid in full, whichever period is the longer.

2. In terms of section 13.4.2 of the Code, the sanction contained in paragraph 1.1 above may not be suspended pending any appeal that may be instituted in this matter but shall become effective immediately on the publication of this report.
3. The SP is further directed:
 - 3.1 within 5 days of the delivery of this report to send an SMS message to all current and past subscribers advising them that the service has been found to breach the WASPA Code of Conduct and advising such persons of their right to claim a refund of all subscription fees paid by contacting the SP's help desk by 5pm on a date falling 15 days after the sending of such message or the first business day thereafter if that date falls on a weekend or public holiday; and
 - 3.2 as contemplated by the provisions of section 13.4.3(g) of the Code, to issue a blanket refund to all subscribers claiming a refund within the period mentioned in paragraph 3.1 above within 10 days of the expiry of such period.
4. The suspension of the service shall continue until such time as all sanctions have been fully complied with and until the WASPA Secretariat has received a report on all refunds issued and approved of a detailed description of all advertising for and revisions to the service designed to ensure full compliance with the Code in future.