



## REPORT OF THE ADJUDICATOR

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<b>WASPA Member (SP):</b>	ViaMedia
<b>Information Provider</b>	Unknown
<b>Service Type:</b>	Subscription Service
<b>Source of Complaint:</b>	Competitor
<b>Complainant:</b>	Anonymous
<b>Complaint Number:</b>	9233
<b>Date Received:</b>	16 July 2010
<b>Code Version:</b>	9.0
<b>Advertising Rules Version:</b>	Not applicable

### Complaint

The formal complaint is the escalation of the initial complaint logged by the complainant on the 9<sup>th</sup> of April 2010 via WASPA's electronic complaints lodgement facility.

The complainant refers to the following message:

NEVER WORK AGAIN with a R 17 million POWERBALL JACKPOT!!! Reply BALL to play 500 tickets & share the WINNINGS! Subscription service. R3/day. reply out 2 stop.

The complainant listed the following grievance in respect of the advertorial: -

That the message was in breach of 11.2.2 of the Code of Conduct in that the advertorial requires the user to reply "BALL" to play 500 tickets constituting a subscription offer for an entry into a competition .

The WASPA Secretariat brought the initial complaint to the SP's attention for on the 12<sup>th</sup> of April 2010.

Service provider's response

**The SP's, response, on the 18<sup>th</sup> of April 2010 was as follows:**

- (i) that the service in question was a content subscription service in that:**
  - a. members are sent Lotto information, trivia and facts; and**
  - b. the service which includes benefits such as the subscriber belonging to a pool of subscribers (members) that benefits in equal amounts from the proceeds of winnings of the 500 "Power Ball" tickets bought by the SP,**
- (ii) that the service in question was not a competition service in that;**
  - a. whilst PowerBall in itself was a competition administered by the National Lottery that the service in question was not; and**
  - b. there was no competition amongst the subscribers as all subscribers benefitted equally from the proceeds of the winnings of the 500 "Power Ball" tickets bought by the SP.**
- (iii) that the service in question was dissimilar to the competitions prohibited by WASPA owing to the features described in (i) and (ii) above**

The SP recorded that in the event the wording of the “advert” led the complainant to the “wrong conclusion” regarding the type of service, that the SP shall attend to ensuring that the service is more clearly set out informing the subscriber that the service was an information service and of the benefits set out in (i) (b) above.

The SP recorded that the SP did not intend any harm and hopes that none has resulted in respect of “misinterpretations” of the nature of the service.

The SP in the email containing the SP’s response referred to the response as that of the “partner” of the SP. It is unclear as to whether this refers to the SP’s Information Provider.

Complainant’s Reply:

The complainant responded on the 30<sup>th</sup> of April 2010 to the SP’s response as follows:

- (i) more generally that the complainant’s request was not resolved;
- (ii) that the SP’s actions did indeed constitute a breach of the Code of Conduct;
- (iii) that the message required the recipient to “reply BALL to play 500 tickets & share the winnings” and not to reply BALL to receive content as claimed by the SP;
- (iv) that the content was not referred to in the message;
- (v) that the SP was acting as a reseller of the Powerball Jackpot and as per a certain Gidani who is the operator of the National Lottery, the SP was not an authorised reseller;

The complainant referenced provisions of the Lottery Act which prohibited (i) direct or indirect financial gain (not being a prize payout) by forming, conducting or in any other way promoting a syndicate for the purchasing of a ticket (ii) sale of a ticket at a price higher than that printed on the ticket and on condition of benefitting from shares in the prize should such ticket be a winning ticket.

Sections of the Code considered

## 2. Definitions

2.9 A “competition service” is any competition or game with prizes or entry mechanism into a draw. Where an action or a reverse auction has the characteristics of a competition service, it is considered to be a competition service.

2.11 A “content subscription service” includes 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. This includes any subscription service which describes itself as a “club” or which otherwise allows access to content to subscribers, at a cost which includes both a subscription element and a per content item element. Services which are not considered to be content subscription services include: dating services, chat services, location-based services, GSM terminal device services, corporate application services, reminder services, synchronisation applications, corporate communications applications, VOIP, etc.

2.24 A “subscription service” is any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction.

## 3.5. Content control

**3.5.1. Members must not knowingly transmit or publish illegal content. 3.5.2. If a member becomes aware of illegal content under that member’s control, the member must, immediately suspend access to that content. Where required to do so by law, the member must report the illegal content to the relevant enforcement authority.**

**3.5.3. Members must co-operate with any content orders lawfully issued by enforcement authorities.**

## 3.9. Information Providers

**3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.**

**3.9.2. Where any service provider that is not a WASPA member conducts any activity governed by the provisions of the Code, and makes use of the facilities of a WASPA member to do so, that member must ensure that the service provider is made fully aware of all relevant provisions of the Code and the member shall remain responsible and vicariously liable for any breach of the Code resulting from the acts or omissions of any such service provider.**

## 11.2 Subscription Service

**11.2.2. 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 and may not be an entry into a competition or quiz.**

### Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her.

*With reference to (i) the initial complaint, (ii) the SP's response to the complaint, (iii) the complainant's reply and (iv) the sections of the Code considered:*

**For ease of reference the message referred to in the complainant's initial complaint is set out hereunder:**

NEVER WORK AGAIN with a R 17 million POWERBALL JACKPOT!!! Reply BALL to play 500 tickets & share the WINNINGS! Subscription service. R3/day. reply out 2 stop.

**With specific reference to the definitions of a "competition service", "content subscription service" and "subscription service," I find that the service in question (as offered in the message) shall appear prima facie to a recipient of the message as a competition service and not a content subscription service notwithstanding the aspect of repeated billings that is typical of a subscription service.**

More specifically, the inclusion of the words “winnings” and “play” and the absence of any reference to the content that will be provided as part of the service further substantiates this finding.

Accordingly, the SP’s response that the service in question was a content subscription service in that subscribers are sent content is irrelevant under the circumstances as such content and the nature of the intended content subscription service is not communicated in the message and cannot reasonably be deduced. Further the contention that the confusion regarding the nature of the service is a mere misinterpretation is entirely rejected.

Further and in direct response to the complainant’s initial response, I find that the SP is in violation of 11.2.2 of the Code of Conduct in that the request to join the subscription service was not independent from the request for entry into the competition.

As regards the issue of the legality of the SP’s actions, I have reviewed section 3.5 of the Code of Conduct and cannot make a finding as to whether the content constituted illegal content in order to find a violation of section 3.5. I further direct the complainant to the appropriate forum for the complainant’s allegation of the violation of the Lotteries Act being the National Lotteries Board.

Regarding the reference in the SP’s email containing the SP’s response to the response of the SP’s “partner”:

*In the event that the SP is referring to a third party service provider, to whom the SP provides the SP’s facilities, for the rendering of such third party’s service, in accordance with 3.9.2 of the Code of Conduct, the SP shall remain responsible and vicariously liable for any breach of the Code resulting from the acts or omissions of any service provider.*

The complaint is accordingly upheld.

Sanctions

The SP is:

- (i) *Required to cease any further subscriptions to the service as it was constituted at the time the complaint was lodged as well as any similar service/s which operates in a similar fashion;*

- (ii) ***The SP is ordered to send reminder messages to all current subscribers in the format prescribed in section 11.5 of the current version of the Code, namely version 9.0;***
- (iii) ***Fined the sum of R50, 000.00, payable to the WASPA Secretariat within five (5) days of date of notification of this Adjudication or at WASPA's discretion should the SP appeal this decision.***