



## Report of the Adjudicator

Complaint number	#29047
Cited WASPA members	<i>Interband Enterprises LLC (1315)</i>
Notifiable WASPA members	<i>Smartcall Technology Solutions (0090)</i>
Source of the complaint	<i>Public</i>
Complaint short description	<b>Unsolicited marketing message Misleading advertising Information that is false or deceptive, or is likely to mislead by inaccuracy.</b>
Date complaint lodged	<i>2016-01-16</i>
Date of alleged breach	<i>2016-01-07</i>
Applicable version of the Code	<i>14.1</i>
Clauses of the Code cited	<i>5.4, 5.5, 16.9, 16.10</i>
Related complaints considered	N/A
Fines imposed	<ul style="list-style-type: none"> <li>• A formal reprimand for failing to take proper care to ensure the accuracy of its communications, and</li> <li>• R20 000 fine for the breach of clause 5.5</li> </ul>
Other sanctions	None

Is this report notable?	Not notable
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## Summary of Complaint:

### Initial complaint

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This complaint arose as a result of an SMS which was received by the complainant which read as follows:

*Reply YES or NO to confirm your request for Get R180 Airtime from STS at R7.00 Daily. SMS is free.*

The Complainant objected to this and said that this message was spam and in violation of Sections 16.9 and 16.10 of the Code of Conduct. The Complainant requested that the Member provide proof as to how it obtained the Complainant's details.

### Informal complaint process

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#### Member's first response (2016-01-29)

The Member responded by alleging that the Complainant clicked on a banner advert when visiting a website and provided a screenshot of a Chat27 website with a banner ad showing the words "Get R180 Airtime today!" (See Annexure A). The Member agreed that the SMS was received by the Complainant.

#### Complainant's first response (2016-02-02)

The Complainant requested the Member to confirm the date and time the banner was clicked.

#### Member's second response (2016-02-02)

The Member responded that the complainant clicked on a banner "on the 7<sup>th</sup> January after he received a message within 5 minutes".

#### The Complainant's second response (2016-02-04)

The Complainant then asked the Member to confirm the time the banner was clicked, the details of the message the Member alleges the Complainant received, and the IP address that accessed the banner of the Member.

#### The Member's third response (2016-02-08)

The Member responded as follows by confirming the date of the clicking on the banner and expressing confusion as to what message the Complainant was referring to.

#### The Complainant's third response (2016-02-11)

The Complainant then asked how the Member was unable to determine the time the Complainant clicked on the banner if, as the Member previously stated, 'The complainant clicked on the banner on the 7<sup>th</sup> January after he received a message within 5 minutes'. The Complainant also queried how the Member could indicate that the message was sent before the banner was clicked on. Once again the Complainant asked for proof that the MSISDN was involved in clicking on the banner and the time and date this occurred.

#### The Respondent's fourth response (2016-02-11)

The Member responded by denying that it had stated that the message was received before the Complainant clicked on the banner and reiterated that the message was sent within 5 minutes of the banner being clicked upon. The Member indicated the message was sent at 20h03 which in turn means that the banner must have been clicked on at approximately 19h58.

#### The Complainant's fourth response (2016-02-12)

The Complainant then reiterated that the Member was providing contradictory information to both the Complainant and to WASPA in that the Member had in fact indicated in previous correspondence that the message was sent before the banner was clicked. The Complainant then requested that clauses 5.4 and 5.5 of the WASPA code of conduct be considered as the Member had also been breached these clauses. The Complainant further indicated that his wife was in possession of the cell phone at the time the banner was allegedly clicked on and denied, on her behalf, that she would have clicked on the banner in question.

The matter was then escalated to a formal WASPA complaint.

### **Formal Complaint (2016-02-22)**

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#### First response from Member to formal complaint (2016-03-11)

At the start of the formal complaint process the Member provided logs showing, on the face of it, that the person using mobile handset associated with MSISDN (Redacted) clicked on the banner ad in question on 7 January 2016 at 19:58:49. The person was thereafter directed to a landing page providing space for a mobile number to be completed to subscribe to the subscription service.

The Member's logs show, on the face of it, that the Complainant's MSISDN was completed on the landing page and the subscribe button clicked. The Member's system then initiated a request to Complainant's MNO to confirm the subscription request submitted on the landing page. The MNO then sent the SMS to the Complainant's MSISDN. The SMS serves as the second or double opt-in request for the subscription services.

The aggregator's logs show the message was sent on 7 January 2016 at 09:00:39.

The Member noted that the content provider's systems are hosted outside of South Africa and the aggregator's systems are hosted in South Africa which accounts for variances in the time

stamps captured due to different time zones. The Member did not indicate in which time zone the content provider is situated.

The Member then addressed the specific complaints to wit:

1. The SMS message that the complainant received was not a direct marketing message, but rather a double opt-in message sent by the complainant's MNO following the first subscription request sent from the landing page. The Complainant did not respond to the message and was not subscribed to any service and did not receive any additional communication from Member.
2. The Member received the Complainant's contact details (MSISDN) when Complainant, or someone using Complainant's mobile device associated with the MSISDN, interacted with Member's banner ad and landing page, and completing the cell phone number in the space provided on the landing page and clicking the subscribe button, as evidenced from the logs provided. The Member therefore submitted that the Complainant interacted with the service and confirmed the MSISDN on the landing page, and the Member therefore did not obtain the number from any third party and cannot remove the number from the database or provide information of that source, as it is not applicable in this matter.
3. The Member then dealt with section 5.4 and 5.5 arguing that the information provided was factually correct and not deceptive, and further that it was entitled, as a result of a specific request for the subscription service, to respond with the required message and so this was not spam as the (apparent) consent of the recipient had been obtained.
4. The Member rejected the applicability of clause 16.9 and 16.10 arguing that the ostensible consent of the Complainant had been received and that the sending of the message was not 'direct marketing'.

#### Complainant's First Response to formal complaint (2016-03-30)

The Complainant continued the correspondence by providing an indication of how how 3 different explanations were offered by Member on how he came to receive the SMS. He highlights the discrepancies and contradictions in the responses from Member on 2016-02-02, 2016-02-08, 2016-02-11 and the Member's response to the formal complaint of 2016-13-11.

The Complainant then shows the contradictions in the information provided by Member with regards to the banner ad and landing page. The Member submitted that the following banner ad was clicked on:



According to the logs provided by the Member the URL of the banner that was clicked points to this banner ad:



The wording on the landing page (see the Annexures) is different from the wording on these banner ads. The Complainant submitted that this is misleading marketing and contends that Member is in breach of **Section 24.25, 5.4** and **5.5** of the Code of Conduct.

Thereafter the Complainant made submissions to prove that the logs provided by the Member are inaccurate and do not show that his wife's phone was used to interact with the banner ad or the landing page.

The Complainant also indicated that he had asked his MNO (MTN) to check their logs whether the phone his wife was using had the IP address provided in the logs. At the time of the response the Complainant has not received a response from MTN.

#### Member's second response to formal complaint (2016-04-08)

This response was provided after the deadline for providing a further response and does not provide any new information.

#### Complainant's request for WASPA to follow up with MTN regarding his request for information on IP addresses used on date of alleged interaction with banner ad and landing page (2016-04-18)

MTN provided their logs on 2016-04-19 showing the IP addresses that the MSISDN connected to on 6 and 7 January 2016. The logs do not show a connection to IP Redacted.

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

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Sections 16.9, 16.10, 5.4 and 5.5.

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."

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.”

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 service, 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.”

The Complainant cited section 24.25 in his response to the formal complaint (2016-03-30). This section was not included in the instruction provided by WASPA and was therefore not considered. The reason / complaint leading to the citing of section 24.25 is addressed when considering Sections 5.4 and 5.5.

## Decision

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First Complaint - The SMS message received by the complainant on 7 January 2016 is spam and in breach of sections 16.9 and 16.10.

The first question that needs to be considered is whether the SMS received by the complainant on 7 January 2016 is direct marketing.

The WASPA Code of Conduct defines Direct Marketing at section 16.2 as “Direct Marketing means to approach a person, either in person by mail or electronic communication, for the direct or indirect purpose of (a) promoting or offering to supply, in the ordinary course of business, any goods or services to the person; or (b) requesting the person to make a donation of any kind for any reason.”

In effect the Member is alleging that it was the Complainant who approached the Member by clicking on the banner and inserting his MSIDSN, rather than the Member approaching the Complainant. This position is supported by the fact that the message received is a confirmation message (a second opt-in) rather than the first communication between the parties.

The purpose of this second opt-in message is precisely to prevent an automatic subscription to a service as a result of fraud and in this case it achieved exactly this result. For example, it is perfectly possible for any third party click on the banner and to insert the MSIDSN of the Complainant’s into the space provided. The Member would have no way of knowing whether this action was in fact taken by the Complainant or by some third party and so a confirmation message is sent back to the MSIDSN to confirm that the person who requested the subscription service was in fact the owner of that MSIDSN. Apparently (judging from the response from MTN

indicating that the Complainant's cell phone did not access this web site) the request did not come from the Complainant but rather from either a third party or it was unilaterally begun by the Member itself.

The Member has indicated that it did receive a request for the subscription service and has provided logs to support this position. We do not have any evidence to contradict this claim. That this request did not come from the Complainant is not the Member's fault and so I find that **sections 16.9 and 16.10 have not been breached**. It should be noted that if this request emanated directly from the Member itself then this would indeed be an example of spam and this action would be a breach of clauses 16.9 and 16.10.

Second Complaint – The Member has acted in breach of sections 5.4 and 5.5 when responding to the Complainant during the informal and formal processes of this complaint.

The Member provided contradictory explanations why the Complainant received the SMS. In its 29 January 2016 response it stated that the user clicked on a banner ad on a website and afterwards received a SMS from them to claim airtime. In the next response of 2 February 2016 it stated that the Complainant clicked on a banner after he received a message within 5 minutes. In a later response (8 February 2016) the Member again confirms that the Complainant clicked on a banner after he received a message. In its response to the formal complaint (11 March 2016) it submitted that the Complainant found the banner while browsing the internet, clicked on it, was led to a landing page where the Complainant's MSISDN was completed, and thereafter received the SMS from its MNO.

The Member states in its response of 8 February 2016 that it is impossible for it to determine the exact time that the Complainant clicked on the banner. In its response to the formal complaint (11 March 2016) the Member provides logs showing the exact time that the banner ad was clicked and the subscription button was clicked on the landing page.

A closer look at all the responses by the Member show that the person responding to the complainant may have been struggling with the English language as there was an attempt to clarify the order of the events (i.e. clicking on the banner first and receiving the message after this) in subsequent communications. As a result the question is not whether the Member misled the complainant by its responses – as it clearly did on the ordinary reading of contradictory statements – but whether the Member 'knowingly' did this. In this regard the Complainant correctly raised the inconsistency of the Member's statements and it was at this point that the Member should have referred back to the previous communications and admitted to the mistake in the way its previous correspondence referred to the order of events. Instead the Member issued a blanket denial that it had ever alleged that the message was sent before the banner was clicked upon. As a result of the fact that the Member:

- 1) Did in fact provide contradictory statements, and
- 2) Persisted in denying that contradictory statements were made even after these were brought to its attention

we find the Member, in its response to this complaint, knowingly gave information that was false or deceptive, that was likely to mislead by inaccuracy, ambiguity or omission and therefore **acted in contravention of section 5.5.**

The Member further persisted that it was the Complainant (rather than any third party) that clicked on the banner advertisement. MTN's response denying that the Complainant's MSIDSN clicked on that particular IP address proves that this is not correct. While it is quite possible that some third party clicked on the banner advertisement and inserted the Complainant's MSIDSN, on the balance of evidence the person was not doing so from the Complainant's cell phone. For this reason, the Member would have been well advised to allege that someone (rather than the Complainant specifically) clicked on the banner advertisement and entered the Complainant's MSIDSN. In fact the Member has no proof to prove that the original request came from the Complainant at all and it should have admitted this from the beginning. For this reason, we find that the Member again breached clause 5.5 by knowingly disseminating information that was false.

Third Complaint – Member's campaign, which includes the banner ads and landing page is in contravention of sections 5.4 and 5.5.

The banner ad provided by the Member and which it claims was clicked by the Complainant contains the following text:

"Get R180 Airtime today!"

The landing page, also provided by the Member, has the wording:

"Get R180 Airtime"

followed in smaller letters by:

"Subscribe and stand a chance to get R180".

The word "chance" is only used in the last sentence, and not at all used on the banner ad. The wording of the third sentence containing the word "chance" is also in a smaller font than the other 2 sentences. In the third sentence there is also no mention of airtime, just that the consumer has the "chance to get R180".

While this text may be misleading this impression is able to be corrected by the landing page where the 'call to action' resides. It is worth noting that the graphic provided of the landing page is insufficiently clear to make out the text below the call to action. There has been no allegation that the advertising of the subscription service contravened the advertising requirements set out in clause 12 of the WASPA code of conduct and as a result we make no finding on whether the advertising of the subscription service as set out in these banner advertisements complied with the WASPA Code of Conduct.

### Other Issues not adjudicated.

The Complainant submits in his final response to the formal complaint that the Member breached section 24.25. This section was not included in the instruction provided to the adjudicator by WASPA and was therefore not considered. As the facts / complaint leading to the citing of section 24.25 are addressed when considering sections 5.4 and 5.5 it is unnecessary for this the potential breach of clause 24.25 of the WASPA Code of Conduct to be referred back to WASPA.

### **Sanctions**

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The Member seems to be a serial offender and continually acts in contravention of the Code of Conduct and specifically sections 5.4 and 5.5 as noted from the summary below:

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- In complaint number #28130 lodged 10 November 2015 Member sanctioned a fine of R2 000.00 for breach of section 5.4 and R10 000.00 for breach of section 5.5.
  - In complaint #28710 lodged 23 December 2015 Member was sanctioned a fine of R30 000.00 for breach of section 5.5.
  - In complaint #29230 lodged 27 January 2016 Member was sanctioned a fine of R20 000.00 for breach of sections 8.2, 15.13, 5.4 and 15.4, and a suspended fined of R50 000.00 if the Member be found guilty of a similar non-complying subscription campaign in the 12 months after the decision.
  - In complaint #29440 lodged 2 February 2016 the Member was sanctioned a fine of R50 000.00 in respect of breach of various sections, including section 5.4 and 5.5, and a suspended fine of R250 000.00 which will be triggered if the Member is found guilty of certain acts not applicable to this complaint.
  - In complaint #29743 lodged 8 March 2016 the Member was sanctioned a fine of R50 000.00 for breach of section 5.4 and a fine of R30 000.00 for breach of section 5.5
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Firstly we note that the suspended sanctions in the above complaints came from complaints which were lodged after this complaint. As a result this complaint does not trigger the lifting of those suspensions.

In the circumstances the following sanctions are imposed for the breach of clause 5.5:

- The Member is issued with a formal reprimand for failing to take proper care to ensure the accuracy of its communications, and
- The Member is fined an amount of R20 000 for the breach of clause 5.5.

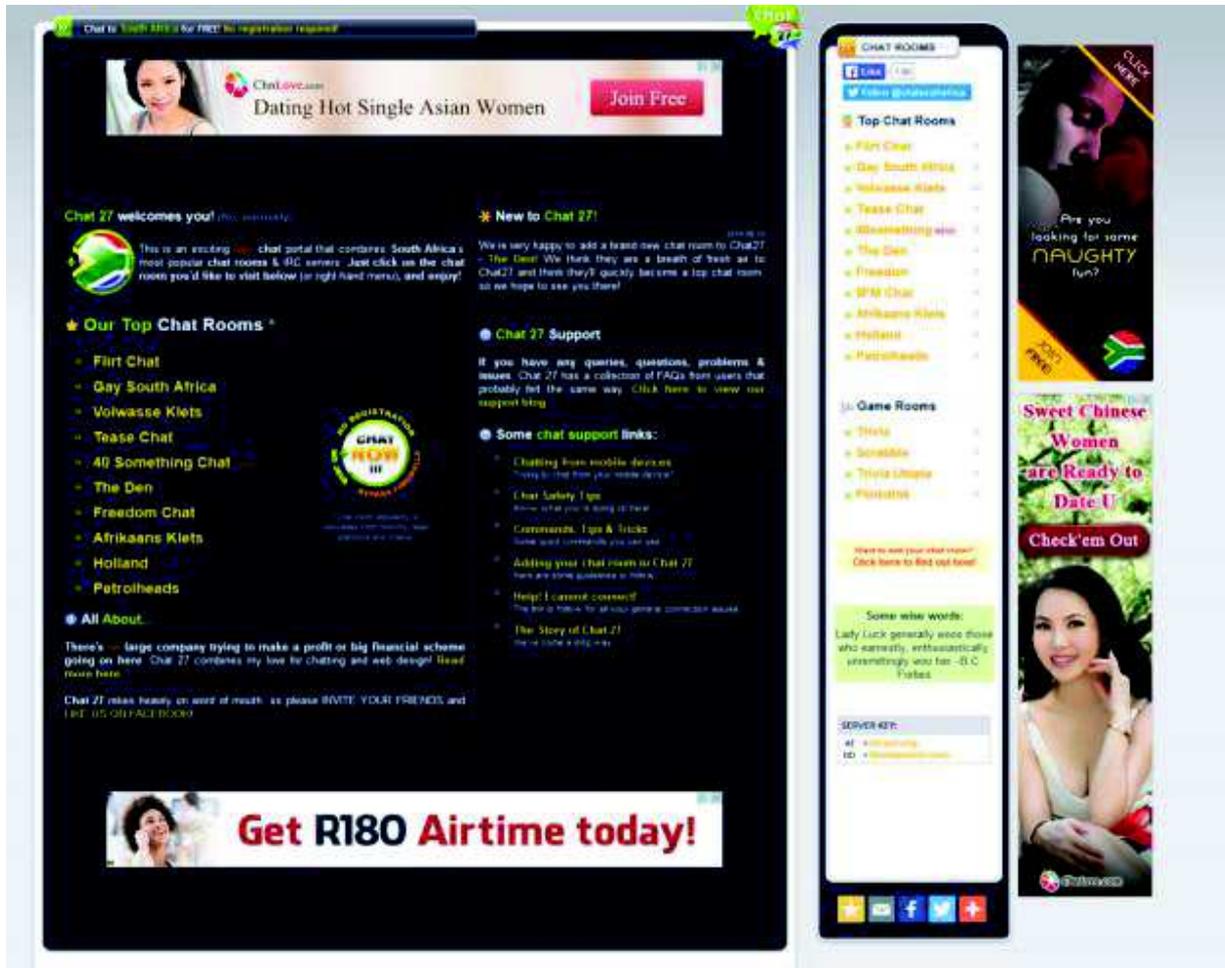
### **Matters referred back to WASPA**

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None

Annexures – Summary of important communications and graphics

Screenshot of banner advertisement



The Complainant's third response (2016-02-11)

Good day, WASPA Secretariat

Please forward to the member as follows:

The member previously stated:

"The complainant clicked on a banner on the 7th January after he received a message within 5 minutes."

If they can determine the time difference between receiving a message and clicking the banner then surely they should be able to tell me at what time the banner was clicked...

In addition, the above statement from the member states that the sms message was received first and THEN the banner was clicked. Therefore the message sent to me was spam.

If they disagree, please clarify exactly what sequence of events occurred and when? Was the banner clicked first or was the sms message received first?

**In their response I would like the date and time the banner was clicked and proof that my MSISDN was involved in clicking the banner. If the member cannot satisfactorily prove that they had my permission to spam me I will ask for escalation to formal.**

The Respondent's fourth response (2016-02-11)

Dear WASPA,

We explained the entire process and sent a screenshot showing where the user clicked on our banner.

In regards to the last response from the customer, we never stated that the number first received a message and clicked on banner afterwards.

First, the banner was clicked on the webpage from a screenshot that we sent in our previous emails. After clicking on a banner, customer received a message to subscribe within 5 minutes. We cannot state the exact time the customer clicked on a banner, but we can confirm that the message was sent at 20.03h which means the customer clicked on a banner approximately 5 minutes before the message was sent.

In conclusion, customer did not confirm subscription and never subscribed to our service nor we sent a message without approval from the customer.

The Complainant's fourth response (2016-02-12)

Dear WASPA Secretariat

Please escalate to a **formal complaint** for the following reasons:

1) The member is providing contradictory information to WASPA:

On Tue 2 Feb 2016 at 11:17:13 +0100 the member wrote to WASPA:

**"The complainant clicked on a banner on the 7th January after he received a message within 5 minutes."**

They also wrote to WASPA on Mon 8 Feb 2016 at 17:35:22 +0100 the following:

**"As we have already answered, the complainant clicked on a banner on the 7th January after he received a message"**

However, on 11 Feb 2016 at 17:02:04 +0100 the member wrote to WASPA:

**"we never stated that the member first received a message and clicked on banner afterwards. "**

The email from 11 Feb 2016 contradicts what was stated in emails on 2 Feb 2016 and 8 Feb 2016 – in the 1st two emails they clearly state the message was received first.

Therefore please add the following breaches of the code of conduct to my complaint:

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.

2) The member is unable or unwilling to provide exact times and chronology of events to WASPA.

3) On 7th January at 20h03 my mobile phone with MSISDN [Redacted] was in use by my wife on

vacation in Hermanus. She remembers exactly where she was when she received the sms message and did NOT click a banner either before or after the message was received. In addition, she does not use mobile phones for browsing the internet. The member has NOT proven that MSISDN [Redacted] clicked on the banner.

4) It would appear that the member alleges my wife clicked a banner on a website. The member provided a screenshot of the site with the banner at the bottom of the screenshot. I looked the site up. The site is [www.chat27.co.za](http://www.chat27.co.za) I attach a screenshot of the site with URL displayed at the top. The member alleges my wife clicked the "Get R180 airtime" banner which, at the time, was in place of the ABSA banner at the bottom of the site in my attached screenshot. (WASPA already has a copy of the screenshot the member emailed that shows the banner they allege my wife clicked)

My wife has absolutely no reason or desire to visit chat websites.

In conclusion, the member is either confused with another MSISDN, or is willfully providing misleading/wrong information to WASPA.

The member has NOT proven that a prior relationship with my MSISDN [Redacted] exists that warrants the member to send promotional smses to said MSISDN.

I request again that this complaint be escalated to a formal complaint.

First response from Member to formal complaint (2016-03-11)

## Landing page:



The screenshot shows a landing page with a light blue background. At the top, the text 'Get R180 Airtime' is displayed in a bold, dark red font. Below this, the text 'Subscribe and stand a chance to Get R180' is centered. A white input field with a thin border contains the placeholder text 'Enter Your Mobile'. Below the input field is a bright green button with the word 'SUBSCRIBE' in white, uppercase letters. Underneath the button, the text 'R180/day Subscription service' is centered. At the bottom of the page, there is a block of small, grey text providing terms and conditions, including a phone number for support.

**Get R180 Airtime**

Subscribe and stand a chance  
to **Get R180**

Enter Your Mobile

**SUBSCRIBE**

R180/day Subscription service

To unsubscribe the service, send STOP to 43444. Service is available to users from South Africa only. By subscribing to the service you are agreeing to be 18+, accepting terms and conditions and to receive text promotional messages about this and related services operated by content provider. If you have any queries about our service please contact our Support Office: [info@airtime.co.za](mailto:info@airtime.co.za), Terms & Conditions: [http://www.airtime.co.za/terms-conditions](#), Helpdesk: 0115674533

#### **ALLEGED CLAUSES BREACHED:**

15. Clause 5.4: We respectfully submit that we are not in breach of this clause. The Complainant initiated interaction with our services and provided confirmation of her MSISDN. When the Complainant did not positively accept/confirm the DOI confirmation step, the procedure ended and the Complainant was not subscribed or billed. The logs provided further support our submissions.
16. Clause 5.5: We respectfully submit that we are not in breach of this clause. The SMS complained of that has been identified by the Complainant as 'Spam', was in fact the DOI confirmation message which was sent and controlled by the Complainant's Mobile Network Operator. This DOI confirmation message is not an unsolicited marketing message as alleged by the Complainant. The DOI confirmation message is sent in accordance with the WASPA Code of Conduct and industry practices as agreed upon between WASPA members and the Mobile Network Operators. The Complainant was therefore not knowingly mislead as alleged and we therefore submit that this clause does not have relevance to the current matter.
17. Clause 16.9: We respectfully submit that we are not in breach of this clause. This clause has no relevance to the current matter in dispute. The Complainant responded to a banner advertisement that was displayed on a public platform and not directed at the Complainant specifically or personally. There was no direct marketing approach in the current matter and as such the clause is not relevant. Furthermore, the SMS complained of was not a direct marketing message, but in fact the DOI confirmation message sent and controlled by the Complainant's Mobile Network Operator.
18. Clause 16.10: We respectfully submit that we are not in breach of this clause. This clause has no relevance to the current matter in dispute. As stated above, no direct marketing approach was undertaken in the current situation and as such this clause is not applicable to the current matter.

Banner advertisements in Complainant's First Response to formal complaint (2016-03-30)

