

WASPA APPEAL PANEL FINDINGS FOR COMPLAINT NO #0065

WIRELESS WARRIORS t/a Sexy Mobile

APPELLANT

30th of August 2006

DECISION

Background:

Following adjudication against Wireless Warriors (Pty) Ltd, the Appellant lodged an appeal.

This appeal relates to a breach of the *Wireless Application Service Providers' Association Code of Conduct* (version 3.2, dated 28 June 2005) (the "Code") by Wireless Warriors, a wireless Information Provider ("IP") and Appellant in this matter. The Appellant recently became a member of WASPA.

The original complaints alleged that services were offered on the Appellant's web site in breach of the following clauses of the Code:

6.2.5. The price for a premium rated service must be easily and clearly visible in all advertisements. The price should appear with all instances of the premium number display.

8.1.3. Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult services. Explicit confirmation of a user's age must be obtained prior to the delivery of an adult service.

The Adjudicator's ruling:

The Adjudicator ruled against the Appellant and found that the Appellant had breached clause 6.2.5 of the Code by displaying the premium number on the home page of the web site without the price of the premium-rated services.

The Adjudicator also ruled that the Appellant had breached clause 8.1.3 of the Code by not taking sufficient steps to ensure that only persons of 18 years of age or older have access to adult services. The Adjudicator also ruled that the Appellant had not obtained explicit confirmation of users' age prior to the delivery of adult services in respect of access to the WAP site and content downloads.

Grounds of Appeal:

The Appellant claims that the publication of the premium number on its home page (3 SEXY / 373999) was used for branding purposes only and not to sell anything. The Appellant states that it did not publish details of the price of the particular service for this reason. The Appellant has since removed the number from its website. The number, 3 SEXY / 373999 could nevertheless be used to access content services at a fee. The Appeal Panel therefore finds the Appellant guilty of breaching clause 6.2.5 of the code, which very clearly states that the price of a premium rated service must appear with all instances of the premium number display. We therefore confirm the Adjudicator's determination.

The Appellant denies liability for breach of clause 8.1.3. The Appellant's grounds of appeal are as follows:

The Appellant claims that it had taken reasonable steps to ensure only persons of 18 years of age or older have access to adult services as its terms and conditions are placed on the web site and in print advertisements. The Appellant argues that reasonable steps were thus taken.

The Appellant also claims that the confirmation of users' ages was obtained prior to access to the web site. The codes to request the delivery of content downloads via SMS were thus also subject to the age verification as the SMS codes whereby content may be obtained is only advertised on the web site.

The Appellants argue that the hyperlink to the terms and conditions provided by the WAP link that the Adjudicator claims did not resolve was only faulty as far as XHTML (WAP2) based handsets were concerned but was fully operational as far as WML (WAP) handsets were concerned. This technical error has since been rectified.

Findings of the appeals panel and reasons

The Adjudicator based his findings of the breach of clause 8.1.3 of the Code on the following three premises:

- (a) The steps taken to ensure access by adults only were not sufficient;

- (b) Users were allowed to download content without restrictions or age verifications; and
- (c) The terms and conditions displayed on the Appellant's WAP site were not accessible.

The Adjudicator had ruled that explicit confirmation of age was obtained from users that accessed the Appellant's web site. Content codes could only be obtained by users of the web site after agreeing to the terms and conditions on the home page, thus post the age verification process. It must then follow that users' ages were indeed verified before they could request content downloads. The Adjudicator had erred in that he had failed to appreciate the fact that the codes for content downloads are only accessible once the user had explicitly agreed to the terms and conditions on the home page of the web site.

The Appeals Panel therefore upholds this ground of appeal.

The failure to take reasonable steps to ensure access by persons over 18 years of age and explicit age verification mechanisms on the Appellant's WAP site were not part of the original complaint. The Adjudicator had raised this issue in his ruling as the WAP link was sent to him after he had downloaded the Appellant's content. The WAP link to the terms and conditions did not respond to the Adjudicator's attempts to access the linked information. The Adjudicator had ruled that because the terms and conditions were not accessible, the user could not agree to the terms and conditions. Therefore the Appellant did not take reasonable steps to ensure access to its WAP site by adults only and could not obtain explicit age verification prior to the delivery of adult services.

In our view, the Adjudicator erred in finding that there had been a contravention of clause 8.3.1 Clause 13.3 of the Code specifically requires the respondent to the complaint to respond to the complaint. In our view, this implies the right to respond to all allegations that make up the complaint. This is also a requirement of the Promotion of Administrative Justice Act 3 of 2000 (the "AJA Act"), which enshrines the right have a right to administrative action that is lawful, reasonable and procedurally fair. Core elements of procedural fairness include adequate notice of the nature and purpose of the administrative action and a reasonable opportunity to make representations (see specifically s 3(2)(b)(a) and s3(2)(b)(b) of the AJA Act).

It is noted above that the contravention of clause 8.1.3 of the Code in respect of the WAP site did not form part of the original complaint, and the Appellants accordingly did not have the chance to respond to this allegation in their response to the complaint. However, on appeal the Appellant argued that the hyperlink to the terms and conditions provided by the WAP link was only faulty as far as XHTML (WAP2) based handsets were concerned but was fully operational as far as WML (WAP) handsets were concerned.

The Electronic Communications and Transactions Act 25 of 2002 (ECT Act) makes provision for incorporation by reference. Section 11(2) provides that information is not without legal force and effect on the grounds that it is not contained in the data message purporting to give rise to such legal force and effect, but is merely referred to in such data message. The requirements for incorporation by reference are listed in subsection 3 of this ECT Act. The reference (hyperlink) must be:

(a) Referred to in a way in which a reasonable person would have noticed the reference thereto and incorporation thereof; and

(b) accessible in a form in which it may be read, stored and retrieved by the other party, whether electronically or as a computer printout as long as such information is reasonably capable of being reduced to electronic form by the party incorporating it.

The accessibility of a hyperlink must be judged objectively. The mere fact that the link was not accessible from a specific handset does not render that link ineffective. If the information referred to is in a form where it may be read, stored and retrieved it may be deemed to have been incorporated in that message.

The Appeals Panel therefore upholds this ground of appeal.

Decision

We find that the Appellant contravened clause 6.2.5 of the Code in relation to complaints #0065. This aspect of the Adjudicator's ruling is therefore confirmed.

We find that the Appellant did not contravene clause 8.1.3 of the Code in relation to complaint #0065. This aspect of the Adjudicator's ruling is therefore overturned.

The Appeals Panel agrees with the sanction imposed by the Adjudicator for breaching clause 6.2.5. The Appellant is ordered to pay a fine of:

R750.00 for breaching clause 6.2.5 of the Code in respect of complaint #0065

THE APPEALS PANEL

6th of September 2006

