



Appeal Panel's Report

Complaint/s on appeal	16479
Appellant/s	Buongiorno SA
Date appeal lodged	2014-01-24
Appeal decision date	22 August 2014
Relevant Code version	11.6
Clauses considered	11.1.1, 11.2.2, 11.2.3 and 4.1.2
Relevant Ad Rules version	Not considered for the purposes of this appeal report
Ad Rules clauses	Not applicable
Related cases considered	The appeal decision regarding complaints 11258, 11582, 11626, 13038 and 13039 ("the 11258 appeal decision").

1. Parties

1.1. The Appellant is Buongiorno SA ("the Appellant").

2. Issues raised on appeal

2.1. The Appellant has appealed against the decisions on the following grounds:

2.1.1. Audi alteram partem;

2.1.2. No breaches to sections 11.1.1, 11.2.2, 11.2.3 and 4.1.2; and

- 2.1.3. The sanction imposed is unduly harsh.

2.2. *Audi alteram partem*

- 2.2.1. The alleged Code breaches which were before the adjudicator were apparent breaches of clauses 4.1.2 and 11.2.2 by documents labelled “B1” and “B2”.
- 2.2.2. The remaining banners were found to belong to parties other than the Appellant.
- 2.2.3. The adjudicator made the following statements which defined the scope of the adjudicator’s report:

The alleged breaches of certain sections of the Code in the formal Complaint were reduced to sections 4.1.2 and 11.2.2. The Adjudicator will however also take sections 2.9, 9.1.6, 11.1.1 and 11.2.3 into consideration.

- 2.2.4. The Appellant argued that the second sentence evidenced a disregard of the Appellant’s right to a fair hearing and cited the 11258 appeal decision as support for its argument.
- 2.2.5. The original complaint cited alleged breaches of clauses 4.1.2 and 11.2.2. The adjudicator ought to have confined him/herself to those alleged breaches. Expanding the scope of the complaint to additional clauses which the Appellant was not afforded an opportunity to address is a clear breach of the Appellant’s right to a fair hearing.
- 2.2.6. We therefore uphold the Appellant’s appeal insofar as it concerns alleged breaches of clauses 2.9, 9.1.6, 11.1.1 and 11.2.3 of the Code.

2.3. *Breaches of clauses 4.1.2 and 11.2.2*

- 2.3.1. We accept the Appellant’s submissions that annexures B3, B4 and B5 relate to campaigns which the Appellant is not responsible for and can not be held accountable for.
- 2.3.2. The complaint, to the extent it applies to B1 and B2, seems to be limited to the banners represented in those documents.
- 2.3.3. Those banners are, at best, invitations to proceed further and are not, in themselves, meaningful requests “to join a subscription service”, let alone such a

request that may be confused with “a request for a specific content item” or “an entry into a competition or quiz”.

2.3.4. In the absence of further information about how the Appellant’s subscription service was presented to prospective subscribers, we fail to see how the adjudicator could have found against the Appellant on the basis of apparent non-compliance with clause 11.2.2.

2.3.5. The adjudicator found that the wording of the two banners created ambiguity sufficient to trigger a breach of clause 4.1.2. Certainly the two banners make scant reference to an underlying subscription service but given what these banners amount to – an enticement to proceed to learn more about whatever it is the banners’ proprietor offers – we do not agree that these banners amount to a breach of clause 4.1.2 either.

2.4. The sanction imposed is unduly harsh

2.4.1. In light of our findings above, there is no basis for the sanctions imposed.

3. Appeal Panel’s Decision

3.1. We uphold the Appellant’s appeal and direct that the Appellant be refunded its appeal fee.