

Appeal hearing

WASPA Member:	Buongiorno SA
Membership number:	0002
Type of complaint:	Subscription Service
Complainant:	Public
Complaint Reference Number:	17657, 17734, 17894
Relevant Version of Code:	12.0
Clauses considered:	4.1.2, 9.1.7, 11.2.1, 11.2.2
Date complaint was lodged:	29 June 2012
Other Adjudications referred to:	11863, 15183, 15477, 15664, 16294, 16313, 16479, 16559, 16659, 16832 and 17831

1. This appeal is the result of the adjudicator's finding that clauses 4.1.2 and 9.1.7 of the WASPA Code of Conduct version had been breached and is an appeal against the sanction only rather than the merits of the matter. These clauses read as follows:

Clause 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.

Clause 9.1.7: Competition services and promotional material must not:

- (a) use words such as 'win' or 'prize' to describe items intended to be offered to all or a substantial majority of the participants;*
- (b) exaggerate the chance of winning a prize;*
- (c) suggest that winning a prize is a certainty;*
- (d) suggest that the party has already won a prize and that by contacting the promoter of the competition, that the entrant will have definitely secured that prize.*

2. The adjudicator did not uphold the complaint that the WASP has breached clauses 11.2.1 and/or 11.2.2 of the Code.

3. The WASP submitted the following mitigating factors which the appeal panel considered:

- 3.1. Previous adjudications have condoned the format of the landing pages (see adjudications 11863, 13744, 15183, 15664 and 16382). The appeal panel notes that all these adjudications deal with clauses in section 11 of the WASPA Code and as such are not relevant to this appeal, as the adjudicator in these complaints accepts that the WASP's double opt-in mechanism, its terms and conditions, and the other references in the campaign to the subscription element of the service are acceptable and not in breach of clauses 11.1 and

11.2. Only the last adjudication (16382) refers to clause 4.1.2, which the WASP is found to have contravened. Furthermore the adjudicator in complaint 16382 formally warns the WASP to ensure that all promotions for its subscription services comply with sections 3.3.1, 4.1.1 and 4.1.2 of the WASPA Code.

3.2. The WASP notes that *as regards complaint #17657, it does appear that its marketing could be interpreted to mean that that daily prize is an iPad 2, which is in fact not the case. As soon as this was pointed out to the WASP, references that could have been interpreted as meaning the iPad 2 was in fact a daily prize, were changed.*

3.3. Adjudication 11863 is often referred to in adjudications because the adjudicator ruled that *the reasonable customer would, when clicking on the confirm button on the subscription confirmation webpage, have the understanding that he or she was joining a subscription service.* However the panel notes, in the same case, the adjudicator mentioned that *he/she accepts that this intention (that the promotional competition was ancillary to the subscription service) may not be present when interacting through the banner advert and the initial promotional page* (see paragraph 20 of 1183 report).

4. Aggravating factors in this case include:

4.1. Ninety-five complaints have been lodged against this WASP according to <http://old.waspa.org.za/code/search.php> and of these, only 21% (20 complaints) have not been upheld. An appeal is pending on 37 of the adjudications. Twenty-three of the complaints with appeals pending involve a breach of clause 4.1.2.

4.2. For complaints 13039 and 16479, the appeals were apparently successful but a record to the appeal decision cannot be found. This is unfortunate because the adjudicator in complaint 13039 stated the problem very succinctly in his conclusion: *A service may not hook a customer into a subscription service by means of a competition.*
This service also needs to be more prominent in showing that they are in fact a subscription service.

4.3. Similarly in complaint 16479, the adjudicator's comment was relevant to this hearing: *a banner ad might form **part** of the process and as such the SP is responsible to comply in its banner ad with the following conditions:*

- *it **must be clear** to the customer that the promotional draw or competition is **ancillary** to the subscription service; **and***
- *the **process** of joining the subscription service **may not be disguised as an entry into a competition.***

He concludes that in *the current wording of the SP in its banner ad... the use of the word "Congratulations"[does] not conform to section 4.1.2 in the sense that it creates ambiguity.*

4.4. Of the seven complaints which involve clause 4.1.2, on which no appeal is pending, two have been referred to in 4.2 and 4.3 above. One is complaint 17910 which is dealt with in 4.9 below. Complaint 11278 was dismissed on the grounds that the WASP's service was not working as the WASP had indicated it should work. The complainant was therefore given the benefit of the doubt. Complaint 17220 was awaiting the result of the appeal against complaint 16479. That leaves complaints 16382 and 17831.

4.5. The adjudicator in complaint 16382 issued a formal warning on the grounds that clause 4.1.2 and 9.1.7 were breached in that *the banner advert...is misleading and promotes the SP's services in a dishonest manner.* Similarly the adjudicator in complaint 17831 states that *the member has contravened clause 4.1.2 of the Code in that it has used promotional material in this campaign which is false or deceptive, or is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.*

4.6. The poor record of the WASP with regard to WASPA complaints is detailed in adjudication 16313:

4.6.1. 120 complaints since 2005;

4.6.2. Numerous membership suspensions: the adjudication in complaint 20353 imposed a 3-month suspension of membership with no appeal; termination of membership in adjudications of complaints 9150,9334 and 10479, (but all pending appeal); suspensions imposed in adjudications of complaints 7452,6756,7994,8326,8411,8874,9502,9508,10479,10756, (but all pending appeal).

4.7. The WASP has been instructed to withdraw advertising campaigns three times (complaints 16382, 11278, 12488). There was no appeal on the first two rulings and the appeal was dismissed on complaint 12488.

4.8. On 27 July 2012, an emergency panel met to consider complaint 17910 that the WASP is *repeatedly and consistently running these campaigns, ignoring all advice from the WASPA monitoring team and not striving to abide by the WASPA Code of Conduct*. The ruling was that the WASP had contravened ad sections 4.1.2 and 9.1.7 among others and that for a period of one calendar year should *submit all new and amended campaign material contemplated in paragraph 1 above* [applying to ad sections 4.1.2, 9.1.7, 11.2.6 and 11.5.2] *for review by the WASPA Media Monitor prior to public placement, to ensure compliance with the Code*.

4.9. Adjudication 16559 in December 2012 again suspended the WASP and spoke of the need to protect consumers from *prejudice and harm ...through regular and on-going debiting of consumer cellphone accounts as a result of their participation in the promotional competition, prize and reward offerings of the WASP*.

4.10. Since the WASP is a long-standing member of WASPA, and has been aware of the complaints, this panel must agree with the adjudicator that the WASP *has knowingly included false and/or deceptive and/or misleading wording in certain elements of its promotional campaign for the subscription services in question*.

5. Weighing the mitigating factors against those aggravating the position of the WASP, the Panel has decided that the aggravating factors are in ascendance. As a consequence, the Panel has decided to dismiss the appeal and uphold the sanctions. The appeal fee is forfeited.