

**WASPA appeals panel**  
**Complaint 17831**

**REPORT OF THE APPEALS PANEL**

<b>Date:</b>	<b>27 August 2014</b>
<b>WASPA Member (SP):</b>	Buongiorno SA
<b>Service Type:</b>	Subscription
<b>Complainant:</b>	WASPA Monitor
<b>Complaint Number:</b>	17831
<b>Code Version:</b>	12.0
<b>Advertising Rules Version:</b>	2.3

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**1. BACKGROUND TO THE APPEAL**

1.1 This appeal concerns a complaint lodged by the WASPA Monitor against Buongiorno. The appeal and others has been on hold pending the resolution of certain other matters but is now active again, and this Panel is charged with the resolution of the appeals in matter 17831.

1.2 The complaints relate to subscription services, more particularly, alleged breaches of clause 11.2.2 and 11.2.6 of the WASPA Code of Conduct (Code).

1.3 The complaints, the findings of the Adjudicator, the IP's response to and appeal against the complaint, are fully recorded in the case files provided to this appeals panel, and as these are, or will be, publicly available on the WASPA website, they will not be repeated in full in this appeal panel's report.

## 2. CLAUSES OF THE CODE CONSIDERED

The following clauses are relevant to the appeal:

- 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.
- 11.2.6 A confirmation message sent in response to a subscription request (such as that described in 11.2.5, or triggered by entering a mobile number on a web site) must include the subscription service information in the following format, flow and wording:
- [service activation instructions and/or activation code]. You'll be subscribed to [XYZ service] from [name of service provider] at [cost of service and frequency of billing].

## 3. FINDINGS AND DECISIONS OF THE ADJUDICATOR

### 3.1 Finding of the Adjudicator

In relation to clause 11.2.2, the Adjudicator summarised his/her findings as:

*“The member has contravened clause 11.2.2. in that the promotional campaign and opt-in process used by the member, particularly when directed at Vodacom subscribers, does not ensure that any request from a customer to join a subscription service will be an independent transaction, with the specific intention of subscribing to the service.”*

In relation to clause 11.2.6, the Adjudicator summarised his/her findings as:

*“The member has contravened clause 11.2.26 in that the confirmation message sent in response to a subscription request from a Vodacom subscriber does not comply with the requirements of the Code in relation to the subscription service information to be included, and the format, flow and wording prescribed for such information.”*

## 3.2 Sanctions

A fine of R50 000 was imposed.

## 4. GROUNDS OF APPEAL

4.1 The grounds of appeal, and therefore my discussion above, were limited to the following overarching issues:

- 4.1.1 That the wrong version of the Code was used.
- 4.1.2 That there are no breaches of Clauses 11.2.2 and 11.2.6;
- 4.1.3 That the sanctions are unduly harsh.

4.1.4 I will canvas the specifics of each ground as far as is necessary below.

## 5. FINDINGS OF APPEAL PANEL

### 5.1 Version of the Code

- 5.1.1 The complaints were made on 16 July 2012. Version 12 of the Code, in use from 8 June – 27 July 2012, applies.
- 5.1.2 The Appellant submitted that the Adjudicator erred in making reference to version 12.1 of the Code.
- 5.1.3 However, the Appellant did not indicate in what manner this was a ground for appeal nor how it was material.
- 5.1.4 This panel has compared the wording of Clauses 11.2.2 and 11.2.6 in the two versions of the Code and there is no difference.
- 5.1.5 The only case made out in the body of the appeal in relation to this error is in relation to Clause 11.2.3. However, Clause 11.2.3 was not considered by the Adjudicator nor is it the subject of this appeal.
- 5.1.6 It is therefore unclear to the Panel why this error is considered a ground of appeal by the Appellant.

### 5.2 Consideration of the clauses

5.2.1 The relevant pages for this matter start with:



Followed by:



Which scrolls down to:

**LED Monitor**  
Retail price: \*\*R1099  
**OneDayOnly: R777**

**Samsung Camcorder**  
Retail price: \*\*R3699  
**OneDayOnly: R2499**

**Dell Laptop**  
Retail price: \*\*R7450  
**OneDayOnly: R3249**

Plus everyday someone will get a blackberry\* or an ipad\* or an ipod\*

**Terms and Conditions (please read)** \*Available through the 35050 Gold Rewards program. T&Cs apply.

**35050 GOLD Terms and Conditions**

**35050 GOLD offering and pricing**  
35050 GOLD is a mobile subscription service charged at R5 per day and offers you unlimited downloads of the content available while you remain subscribed. The daily charge will be recovered directly from your service provider and you will in turn pay your service provider. You authorise us to recover the relevant amounts directly from your service provider who you authorise to pay us. You confirm that you are allowed to provide the authorisations mentioned. 35050 GOLD has a vast amount of content; we have lots of your old favourites plus an extensive amount of new content added on a regular basis. We are

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And is in turn followed by:

**Be a Celeb, Like Angelina**  
*With these trendy Roberto Cavalli or Tom Ford Sunglasses*

get Hot Deals on ur Fone **plus a chance to WIN a Polo\* & daily Prizes\***

**UP TO 70% OFF\***

You are about to receive an SMS on 0793829070

Reply **YES**  
For a chance to get a Brand new POLO\*

**tell me what I can WIN!**

By replying Yes, I agree to subscribe to 35050 GOLD subscription service R5/day. I accept the terms and conditions and confirm I am >18. For help dial 0214062688. [Terms and Conditions \(please read\)](#)

**TOM FORD**  
\*\*Miranda

5.2.2 Clause 11.2.2 states “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.”

5.2.3 The Appellant submits that the subjective specific intent of the consumer, as brought about by the advertising material, is one of the key considerations

for this clause. In appealing Clause 11.2.2 it embarks on an in depth analysis of Clause 11.2.3 and that the process of subscribing to a service must not be disguised as an entry into a competition. The gist of the submission is that because the subscriber knows by the end of the process that they are subscribing, there is no breach of Clause 11.2.2.

5.2.4 Clause 11.2.2 says, “Any request from a customer to join a subscription service must be an independent transaction, **with** the specific intention of subscribing to a service” (our emphasis).

5.2.5 The Appellant seeks to make a case that once the consumer can be shown to know that they were subscribing, the requirements of Clause 11.2.2 are met. It also seems to attach some significance to the fact that the Adjudicator found no breach of Clause 11.2.3. However, Clause 11.2.3 was not raised in the complaint and the Adjudicator presumably quite rightly did not consider him or herself able to consider a clause not before it. Similarly, this Panel is limited to a consideration of Clause 11.2.2 only.

5.2.6 Therefore, it is Clause 11.2.2 and not 11.2.3 that is under consideration in the matter at hand. The first part of the requirement is clear: A request to join a subscription service **MUST** be an **INDEPENDENT** transaction.

5.2.7 However, it is impossible to enter the competition without subscribing and it appears to be impossible to subscribe without entering the competition. It is in fact unclear what the subscription service **IS** if separated out from the competition as the only information given in the material is “Get Hot Deals on ur phone **plus** a chance to win. . .”. So it is clear that the subscription is something separate from the competition – some sort of advertising service – but it is impossible to subscribe independently from the competition. It is this lack of an independent subscription transaction that renders this a breach of Clause 11.2.2.

**5.2.8 We therefore agree with the Adjudicator that the WASP is in breach of Clause 11.2.2.**

5.2.9 Clause 11.2.6 states:

*A confirmation message sent in response to a subscription request (such as that described in 11.2.5, or triggered by entering a mobile number on a web site) must include the subscription service information in the following format, flow and wording:*

*[service activation instructions and/or activation code]. You'll be subscribed to [XYZ service] from [name of service provider] at [cost of service and frequency of billing].*

5.2.10 The Appellant submits that Clause 11.2.6 did not apply to it prior to version 12.0 of the Code. The Panel cannot see why this should be so, the relevant wording having been adopted in the previous version of the Code. However, the point is moot as the WASP itself has explained that Version 12.0 is the version of the Code applicable at the time of this complaint and therefore, even on its own version, it was bound by Clause 11.2.6.

5.2.11 The relevant message read:



5.2.12 It appears to be common cause that the message is not compliant. The WASP seeks to lay the blame for the non-compliant wording at the door of Vodacom.

5.2.13 The Panel is not sympathetic to this defence. There are a number of mechanisms by which the WASP could ensure that the wording of the message complies, or that Vodacom assume liability for same.

**5.2.14 The ruling in respect of Clause 11.2.6 is upheld.**

5.2.15 The Appellant enters a brief discussion of Clause 4.2.1 in paragraphs 4.32 and 4.33. This appears to relate to the Appeal that the sanctions are too harsh.

5.2.16 It is unfortunate that the Adjudicator does not set out what amount is allocated to each breach, and therefore what import the argument in respect of Clause 4.2.1 should have. However, the Appellant has not actually appealed the finding on Clause 4.2.1, and we are therefore faced with a matter in which all of the breaches upheld by the Adjudicator stand.

**5.2.17 We do not find compelling reasons why the fine of R50 000 should be reduced, and it stands.**