



REPORT OF THE ADJUDICATOR

Complaint reference number:	17910
WASPA member(s):	Buongiorno SA
Membership number(s):	2
Complainant:	WASPA Monitor
Type of complaint:	Subscription Services
Date complaint was lodged:	19 July, 2012
Date of the alleged offence:	19 July, 2012
Relevant version of the Code:	12.0
Clauses considered:	3.3.1, 4.1.2, 4.1.12, 6.2.2, 11.1.1, 11.2.2, 11.2.3, 11.2.6
Relevant version of the Ad. Rules:	2.3
Clauses considered:	
Related cases considered:	Adjudicator Reports 11863, 15664, 13744, 16382, 14644, 15163, and 15183

Complaint

On 19 July, 2012, the WASPA Monitor investigated the operation of a service provided by the WASPA member, and alleged the following breaches of the WASPA Code of Conduct:

- *The banner advert is in breach of the code.*
- *The WASPA link in the Terms and Conditions of the WEB site is not a clickable link. - Both MTN and Vodacom double opt-in messages need to be worked on.*
- *Both MTN and Vodacom Welcome messages are not compliant.*

- The shortcode on the website (on page 8 of the test) does not have billing information adjacent to it.

This must be supplied.

- The campaign is misleading and making use of a competition to get consumers subscribed.

- Competition promotion should be ancillary to the content promotion and not the main focus.

- Subscription service info is not explicit and prominent.

And the overriding and consistent problem is that Buongiorno are repeatedly and consistently running these campaigns, ignoring all advice from the WASPA monitoring team and are not striving to abide to the WASPA Code of Conduct.

Emergency Panel Ruling

The Monitor invoked the emergency procedure set out in section 14.7 of the WASPA Code of Conduct. An emergency panel met on 27 July, 2012, and after considering the allegations, wrote:

Based on the evidence made available to the panel, the panel determined that Service was being operated in breach of sections 4.1.2, 9.1.7, 11.1.1, 11.2.2, 11.2.3, 11.2.6 and 11.5.2 of the WASPA Code for the reasons set out below.

1. Ad sections 4.1.2, 9.1.7, 11.2.6 and 11.5.2

1.1 Clause 9.1.7. although not specifically raised by the complainant is pertinent and relates to the complaint regarding section 11.2.6.

1.2 Clause 9.1.7 states that "competition services and promotional material must not:

1.2.1 use words such as 'win' or 'prize' to describe items intended to be offered to all or a substantial majority of the participants;

1.2.2 exaggerate the chance of winning a prize;

1.2.3 suggest that winning a prize is a certainty;

1.2.4 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."

1.3 Clause 11.2.6. states that "the 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:

1.3.1 [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].

1.4 The actual confirmation message sent was as follows “:>> ur CODE is 3930 << enter it in the web confirmation page. U'll be subscribed to WIN R7000 Weekly with Genio from Buongiorno @ R6/day. +Unlimited Downloads”.

1.5 The message should have stated “:>> ur CODE is 3930 << enter it in the web confirmation page. U'll be subscribed Genio from Buongiorno @ R6/day. WIN R7000 Weekly +Unlimited Downloads” It is required to scroll down to see the billing information.

1.6 Clause 11.5.2 requires that: The welcome message must start with the text "Welcome:" and must also be a clear notification of the following information, in the following order:

1.6.1 The name of the subscription service;

1.6.2 The cost of the subscription service and the frequency of the charges;

1.6.3 Clear and concise instructions for unsubscribing from the service;

1.6.4 The service provider's telephone number.

1.7 The welcome message in fact stated “Welcome to Genio! Weekly giveaway of R7000! Go 2 <link> R6/day. Unlimited apps & tracks 4 ur phone. To unsub send stop genio to 34567. Help 0214068686.”

1.8 The term “unsub” is not clear and is an abbreviation that is not allowed. Clauses 11.2.6 and 11.5.2 have therefore been breached.

1.9 The panel noted paragraph 27 of the SP's response in which it states that “WIN R7000 Weekly with Genio” is the registered name of the service. This appears to be its rationale for using the phrase “U'll be subscribed to WIN R7000 Weekly with Genio” in the space where it is required to advise the consumer of the name of the service being subscribed to.

1.10 The panel was of the view that the use of the words “WIN R7000 Weekly” as part of a service name rather than “U'll be subscribed to Club Genio” was deceptive and likely to mislead in breach of section 4.1.2 of the Code.

1.11 In addition, the panel was of the view that the phrase “U'll be subscribed to WIN R7000 Weekly” in the subscription confirmation message breached clauses 9.1.7 (b)-(d) due to the fact that these messages would form part of the promotional material and would exaggerate the chance of winning a prize, suggest that winning a prize is a certainty, suggest that the party has already won a prize or that by contacting the promoter of the competition, that the entrant will have definitely secured that prize.

2. Ad sections 11.1.1, 11.2.2 and 11.2.3

2.1 The Panel agreed that the purpose of section 11.2.2 was to prevent service providers from misleading users into becoming subscribed to subscription services. It further noted that section 11.2.3 was added to the Code so as to not deny service providers the opportunity to effectively market their services to potential customers.

2.2 The Panel iterated that Section 11.2.3 inter alia states that [emphasis added] it is permissible for a customer to be included as a participant in a promotional draw or competition, as an additional benefit to being a subscription service customer, BUT that such inclusion is made subject to the following conditions:

2.2.1 it must be clear to the customer that the promotional draw or competition is ancillary to the subscription service; AND

2.2.2 the process of joining the subscription service may not be disguised as an entry into a competition.

2.3 The panel agreed that the overall appearance of the SP's banner ad and website would rather suggest that the subscription service is ancillary to the competition and that the supposed ancillary nature of the competition, if any, was most definitely unclear.

2.4 The Panel further agreed that in this instance, the SP's banner ads and website are disguised as an entry into a competition.

2.5 The Panel based its finding on the banner ads by referring to section 11.1.1. of the Code which states that "promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material."

2.6 The process of joining the subscription service therefore has to identify that such service is a subscription service at any stage of the process, which would include the banner ad stage (i.e. any promotional material). The SP's contention that its use of the banner ad is accepted practise is contrary to the Code.

2.7 The Panel therefore concurred that the Service does not conform to these conditions and found the SP to be in breach of sections 11.1.1 and 11.2.2 read with 11.2.3.

2.8 A further breach of section 11.1.1 arises in that the promotional material did not prominently and explicitly identify the services as subscription services.

2.9 While the promotional web pages used by the SP to promote the service do contain "explicit" identification of the service as a subscription service, the identification was, in the opinion of the panel, certainly not "prominent".

2.10 The SP states that a determination of whether something is prominent is subjective. The panel agrees that there is no hard and fast rule for determining what is or is not "prominent" but respectfully cannot concur with the SP that its identification of the service as a subscription service was "prominent" within the subjective context of the promotional material used.

2.11 There is no doubt that the prizes are prominently advertised but the identification of the subscription service component does not stand out at all and certainly cannot be regarded as "prominent".

2.12 The panel was of the view that many consumers, in the midst of their enthusiasm to win the prominently displayed prizes, may miss the relatively small references to the subscription service.

The emergency panel determined the above breaches to be serious and requiring urgent remedy in terms of section 14.7.4 of the Code. **The panel therefore orders that:**

1. The Service Provider must immediately suspend all billing, subscription and advertising for the Service pending the outcome of the formal adjudication of this complaint.
2. With 48 hours the Service Provider must notify the Media Monitor of all other current subscription services making use of competitions, tests, quizzes, prizes, rewards, incentives or draws in any promotional marketing materials for that service and, pending the outcome of the formal adjudication of this complaint, any other subscription services that come into operation or resume operation at any time after delivery of this ruling that make use of any competitions, tests, quizzes, prizes, rewards, incentives or draws in any promotional marketing materials.
3. The formal adjudication is to be dealt with on an expedited basis.
4. The WASPA Secretariat is requested to forward a copy of this notice to the Mobile Network Operators, together with a request for them to confirm the Service Provider's compliance with the first sanction, above.

The Service Provider's Response

Following receipt of the Emergency Panel decision, the WASPA Member made submitted a detailed response, which forms part of the record in this matter, and which may be broadly described as follows:

1. It's formal response to complaint #17831; and

2. It's formal response to complaint #17910.

In view of the fact that the Emergency Panel did not consider complaint #17831, this Report likewise restricts itself to complaint #17910.

The WASPA Member's response (in its Attorneys correspondences of the 3 and 15 August, 2012) to the Emergency Panel's decision broadly refers, in addition to specific pleas in response to the decision, also to the following aspects:

1. Adjudicator Reports in earlier complaints which the WASPA Member maintains supports its interpretation of the 'ancillary rewards program', particularly that such a program does not breach the provisions of clause 11.2.2. and 11.2.3 of the Code of Conduct. On request, the WASPA Member cited, without limitation, Adjudicator Reports 11863, 15664, 13744, 16382, 14644, 15163, and 15183;
2. Its predicament at allegedly being in breach of provisions of the Consumer Protection Act, as a result of its being required to suspend billing, subscription and advertising of the service under consideration;
3. Its concern at the allegedly inconsistent application of the Code of Conduct and Ad Rules; and
4. Its contention that its campaigns promoting services should be considered in their entirety, and in context.

Sections of the Code Considered

3.3.1: Members will not offer or promise services that they are unable to provide.

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.

4.1.12: Members' web sites must include a link to the WASPA web site and/or this Code of Conduct.

6.2.2: All advertisements for services must include the full retail price of that service.

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.

11.1.1: Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

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.

11.2.3: Notwithstanding the above clause, it is permissible for a customer to be included as a participant in a promotional draw or competition as an additional benefit to being a subscription service customer. In such a case, it must be reasonably 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.

11.2.6: The 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].

Decision

Dealing first with the four issues introductory issues raised by the WASPA Member:

Ancillary Rewards Program:

This aspect of the complaint is one which the WASPA Member has faced on several occasions, and in addition to the Reports which it cites in its favour, there are additional Reports that hold a contrary position.

This Adjudicator is of the opinion that clauses 11.2.2 and 11.2.3 makes a clear distinction between instances in which a subscription service is offered in addition an ancillary services (notionally a permitted practice), and instances in which the 'ancillary services' dominate the offer, and the subscription services are a 'cloaked' offer (a prohibited practice).

In the current Complaint, this Adjudicator considers the fact that the promotional offer is clearly, repeatedly and prominently detailed; while the subscription service is by contrast absent in the initial offer, and in subsequent

interactions - while cited - mentioned in the briefest possible context without any detail of the nature of the benefits the subscription entails for a subscriber.

The logical conclusion is that the promotional offer can in no way be classed as 'ancillary', and that it is in fact the opposite position that applies. This Adjudicator concurs with the findings of the Emergency Panel in the complaint, and determines that the WASPA Member has breached the provisions of clauses 11.2.2 and 11.2.3.

Concerns pertaining to breaches of the Consumer Protection Act:

This Adjudicator notes the WASPA Member's concern that its subscribers to the subscription service may be detrimentally affected by a suspension in the subscription service, and confirms that it is out of concern for the interests of subscribers to services that WASPA has developed the Code of Conduct, as set out in clause 1.2 of the Code, '*... to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services.*'

It is the duty of WASPA to ensure compliance with the provisions of the Code of Conduct, and it is no defence to a complaint in terms of the Code that the suspension of a service, ordered to assist in the determination of the compliance of a service, is not in the interests of said subscribers.

Inconsistent application of the Code of Conduct and Ad Rules:

As with any forum mandated to determine compliance with rules of conduct - even in cases where a system of precedent applies, one is confronted with inconsistent application of those rules. This inconsistency is a function of humankind, and is remedied, as far as possible, by a system of appeals.

This Adjudicator does not find evidence of negligent nor intentional inconsistent application of the Code, and that were the case, that the WASPA Member would have submitted its arguments in that vein.

In the absence thereof, this Adjudicator concludes that this aspect of the Member's submission cannot be afforded any weight.

Campaigns to be viewed in their entirety:

There is no support in the Code of Conduct for the contention that the elements of the Code may not be applied to individual breaches of conduct, despite compliance with remaining provisions of the Code.

The conclusion is that relevant considerations in mitigation of sanctions, where appropriate, are properly applied, and that this aspect of the Member's submission does not take its case forward.

Dealing now with specific pleas as set out in the WASPA Member's Attorney's correspondence of the 3 August:

Ad Paragraph 7: Paragraph 1 of the Determination:

The WASPA Member's concession that the name of the service infringes clause 9.1.7 of the Code of Conduct is noted, and this Adjudicator agrees that the names 'Genio' and 'Club Genio' are not in themselves offensive.

Ad Paragraph 8: The WASPA Member's Rewards Program:

The exact wording of a welcome message to a subscription service is mandatory as set out in clause 11.2.6 of the Code of Conduct, and this Adjudicator notes the WASPA Member's implicit concession that the wording applied in the service under consideration was not compliant.

Ad Paragraph 9: Paragraphs 1.6 to 1.8 of the Determination:

The WASPA Member's denial of a provision that is clearly implicit in the wording of clause 11.5.2 of the Code of Conduct is noted, and this Adjudicator concludes that this conduct must be considered an aggravating factor in determining the appropriate sanction below.

Ad Paragraphs 11, 12, 13, 14 and 15: Paragraph 2 of the Determination:

Owing to the fact that subjective interpretation is a cause for concern in the formulation of the WASPA Member's campaign material, this Adjudicator orders that, in terms of clause 14.9.3, the WASPA Member henceforth submits all new and amended campaign material for review by the WASPA Media Monitor prior to public placement, to ensure compliance with the Code.

Sanctions

1. The WASPA Member is directed to immediately suspend all campaigns that use a promotional activity in association with an offer for a subscription service, and to submit it to the WASPA Media Monitor for review as contemplated in paragraph 2 below;
2. For a period of 1 calendar year, the WASPA Member shall henceforth:
 - a. Submit all new and amended campaign material contemplated in paragraph 1 above for review by the WASPA Media Monitor prior to public placement; and
 - b. Implement all recommendations by the Monitor prior to public placement, to ensure compliance with the Code;
3. In regard to the WASPA Member's breach of clause 11.2, the WASPA Member is fined an amount of R50,000.00;
4. In regard to the WASPA Member's breach of clause 9.1.7, which is a conduct which the Member has previously been found to have infringed, the Member is fined an amount of R10,000.00;

5. In regard to the WASPA Member's breach of clause 11.2.6 which is a conduct which the Member has previously been found to have infringed, the Member is fined an amount of R10,000.00; and
6. In regard to the WASPA Member's breach of clause 11.5.2, the Member is fined an amount of R20,000.00.
7. Should the WASPA Member appeal this Adjudication, the sanction in paragraphs 1 and 2 shall not be suspended.