



## REPORT OF THE ADJUDICATOR

<b>Complaint reference number:</b>	20858
<b>WASPA member(s):</b>	Buongiorno SA
<b>Membership number(s):</b>	0002
<b>Complainant:</b>	Competitor
<b>Type of complaint:</b>	Subscription service
<b>Date complaint was lodged:</b>	18 June 2013
<b>Date of the alleged offence:</b>	18 June 2013
<b>Relevant version of the Code:</b>	12.1
<b>Clauses considered:</b>	11.1 – 11.10
<b>Relevant version of the Ad. Rules:</b>	n/a
<b>Clauses considered:</b>	n/a
<b>Related cases considered:</b>	11863, 15183, 15477, 15664, 16313, 16479, 16559, 16659, 16832, 17831, 20817

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### Background

In a previous report in this complaint certain findings were made in favour of the SP relating to specific grounds of complaint lodged by the complainant. However in considering the complaint I found prima facie evidence that the SP had contravened sections 3.3.1, 4.1.1 and 4.1.2 of the WASPA Code in that the initial web pages used by the SP to promote its subscription service were misleading and served to promote the service in a dishonest manner.

The WASPA Secretariat was requested to refer the initial report back to the SP and to give it an opportunity to respond to these additional allegations.

The SP has responded to this request by taking the position that a finding was made in its favour and that it is under no further obligation to respond. It also believes that my *prima facie* view taken on a possible contravention of sections 3.3.1, 4.1.1 and 4.1.2 of the WASPA Code is irregular and tainted by bias.

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### **Sections of the Code considered**

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

4.1.1. Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

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.

14.3.10. The adjudicator may ask the secretariat to request that the complainant, the member, or both, furnish additional information relating to the complaint. Specifically, the adjudicator may request that the member respond to any additional breaches of the Code of Conduct discovered during the investigation of the complaint, but which were not specified in the original complaint.

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### **Decision**

Section 14.3.10 of the WASPA Code of Conduct empowers the adjudicator to request that the member responds to any additional breaches of the Code discovered during the investigation of the complaint, but which were not specified in the original complaint.

On the basis of the evidence presented, I discovered previously that the SP's promotional web pages were *prima facie* in breach of sections 3.3.1, 4.1.1 and 4.1.2 of the WASPA Code.

I have acted in accordance with section 14.3.10 in raising these matters so there is no merit in the SP's view that I have acted irregularly. The SP has been given a fair opportunity to respond to these allegations, and it has decided not to do so.

The SP has also not presented any evidence to substantiate its allegation of bias on my part and this allegation can also not be upheld.

In light of the foregoing, I remain of the view that the use of the words "*survey*" and "*offer*" interchangeably in the promotional web pages used by the SP to promote the subscription service which is the subject matter of this complaint, is deceptive and/or ambiguous, and is likely to mislead potential customers.

The SP has therefore contravened section 4.1.2, as well as sections 3.3.1 and 4.1.1 of the Code. The complaint in this regard is accordingly upheld.

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## **Sanctions**

I have taken into account previous complaints and appeal decisions relating to the SP's use of misleading or deceptive promotional methods for its subscription services which have been upheld and/or findings made against the SP.

I have also taken into account the previous sanctions that have been imposed on the SP for similar contraventions.

In light of the foregoing, the SP is fined an amount of R 60 000.00.



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### Complaint

The complainant lodged a formal complaint against the SP on 18 June 2013. The complaint concerned a promotional competition offered by the SP for its 35050 Gold subscription service. The relevant URL provided by the complainant is:

<http://data.cpalead.com/offer.php?id=82349894396&pub=153251&subid=MTc1NDE3fDQxLjg1LjE0MS4xMDY=>

The complainant alleged that the promotion breached clauses 9.1.1, 11.2.1, 11.2.2, and 11.2.3 of the WASPA Code of Conduct.

**SP's response**

In response to the allegation that it has breached section 9.1.1 of the Code, the SP stated that the charge of R6/day is for the subscription service and is not the cost of entering the competition.

The SP states that the opportunity to enter various competitions is an ancillary benefit to being a subscriber to the service. The SP referred to complaint #19557 wherein a similar answer was given to the same allegation and the complainant in that matter was satisfied with the response.

In response to the alleged breach of section 11.2.1 of the Code, the SP stated that numerous precautionary measures are put in place to safeguard against any automatic subscription by a potential customer. These measures will include:

- a) the placing of 'SUBSCRIPTION SERVICE' on the top left-hand corner of the campaign;
- b) pricing of R6/day; and
- c) reference to Terms and Conditions which are to be read, understood by the customer and a positive acceptance of the same.

The SP stated further that the nature of the campaign is also further highlighted in the Welcome and Reminder messages sent to the subscriber after completion of the subscription process.

The SP stated that the double opt-in process used by it creates a pause on the sometimes impulsive nature of customers to subscribe to mobile services. It too sufficiently notifies customers of the nature of the advertisement.

In response to the alleged breach of sections 11.2.2 and 11.2.3 of the Code, the SP states that in deciphering at which point the potential customer becomes a subscriber to the service, the adjudicator in their report for complaint #11863 noted the following at paragraph 18:

*“If this advertisement was viewed in isolation then it would be fairly straightforward to conclude that the member had further breached section 11.2.2 read with section 11.2.3 of the Code. However the intent of the person following the process should be measured at the time at which it is exercised, i.e. at the time when the customer takes the last positive step prior to being subscribed. This is not at the time at which the advert is viewed but rather at the time when the customer interacts with the confirmation webpage ...and inserts the PIN code received to his or her handset as a result of the inputting of his or her MSISDN on a previous page”.*

The SP submitted that the complaint is speculative in its nature as complete subscription and interaction with the campaign was not carried through, and it requested that the complaint be dismissed.

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### **Complainant's response**

The complainant argued in response that there is no emphasis whatsoever on the subscription service on many of the pages. The complainant attached screen shots of the relevant advert and affiliate pages leading up to it. The words subscription service and the price are in small black letters at the top of the landing page, whereas the rest of the advert relates to a competition.

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### **Sections of the Code considered**

9.1.1. The total cost for any entry into a promotional competition shall not exceed R1.50.

11.2.1. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.

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, all marketing and promotional material must make it 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.

14.1.1. Any person may lodge a complaint against any member who, in the view of the complainant, has acted contrary to the provisions of this Code.

14.1.2. Any complaint must be lodged with the WASPA secretariat using the contact information published on the WASPA web site.

14.1.3. A complaint should contain the following information:

(a) the name of the wireless application service provider against whom the complaint is being made, or if the identity of the service provider is not clear, the number of the service or other identifying information;

(b) the full names, address and contact details of the complainant;

(c) to the extent that the information is known or available, identification of the part or parts of the Code of Conduct which has allegedly been breached; and

(d) a detailed description of the actions (or inactions) that resulted in the alleged breach.

14.1.4. Any complaint lodged that does not contain the above information may be referred back to the complainant by the secretariat, together with a request to provide the missing information.

14.1.5. If a complainant requests anonymity, the complainant's identity may be withheld from the member at the discretion of the secretariat.

14.1.8. Where the complainant has lodged a complaint or dispute, or instituted an action with any other regulatory body or in a Court, and where the subject matter of that complaint, dispute or action is substantially the same as the subject matter of a complaint lodged by that complainant with the WASPA Secretariat, WASPA may decline to consider and deal with the complaint.

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## **Decision**

A point raised by the SP is that the complainant did not actually subscribe, or attempt to subscribe to the service, and so the complaint should be considered speculative.

I do not believe that a complainant needs to show that they took positive action in response to a misleading campaign, or that they were actually misled, before they are entitled to lodge a complaint against the SP.

Regarding the merits of the complaint, I am satisfied that the SP is not charging R6/per day for entry into a competition, and that the opportunity to enter a competition is an ancillary benefit to being a subscriber to the relevant service. The SP has therefore not breached section 9.1.1 of the Code.

With regard to the allegations that the SP has breached sections 11.2.1, 11.2.2 and 11.2.3 of the Code, I am satisfied that:

1. The SP has prominently and explicitly identified the services being promoted as "subscription services".
2. The subscription process used by the SP is in compliance with the WASPA Code.
3. A separate confirmation message with the required wording is sent to subscribers as part of the subscription process.



Based on the foregoing, I do not believe there has been a contravention of sections 11.2.1, 11.2.2 or 11.2.3.

However, a key issue which appears to have been overlooked in this complaint is the import and effect of the initial promotional web pages used by the SP. The SP has cleverly used the words "survey" and "offer" interchangeably in the initial promotional web pages.

"Bait and hook" marketing has been highlighted in the Consumer Protection Act, 2008 as an unfair and/or irresponsible marketing practice. The SP cannot promote its subscription services by advertising the possibility of winning prizes from completing a survey.

In this regard, I am of the *prima facie* view that the SP has contravened sections 3.3.1, 4.1.1 and 4.1.2 of the WASPA Code in that the initial web pages used by the SP to promote its subscription service, (see <http://fileice.net/download.php?file=3mimi>) when viewed in conjunction with the rest of the promotional campaign, is misleading and promotes the SP's services in a dishonest manner.

The Secretariat is requested to refer this report to the SP and to give it an opportunity to respond to these additional allegations.