REPORT OF THE APPEALS PANEL

Complaint reference number:	22519
WASPA member(s):	Flexiba (IP); Mira Networks (SP)
Membership number(s):	1323; 0011
Complainant:	Public
Type of complaint:	Subscription service
Date complaint was lodged:	19 November 2013
Date of the alleged offence:	23 October 2013
Relevant version of the Code:	12.4
Clauses considered:	11.1 – 11.10

Introduction

1. WASPA-appointed adjudicators and appeal panels are regularly faced with the dilemma of weighing up a complainant's denial that they subscribed to a service against the logs provided by the member as evidence of its various interactions with the member or at least the member's MSISDN.

2. When resolving this dilemma, it should be noted that the complainant is at a distinct disadvantage as they often cannot provide any contradictory evidence to refute the information contained in the member's logs.

3. It is for this reason that a member's compliance with the formal procedures and requirements set out in section 11 of the WASPA Code of Conduct must be closely scrutinised.

Adjudicator's decision

4. The adjudicator in the current complaint was faced with this dilemma and they could not make a finding on whether the complainant had been validly subscribed to the IP's adult subscription service or not.

5. However, the adjudicator instead found that it was possible that the complainant, or someone using the complainant's SIM card, may have inadvertently subscribed to the service because they thought that they were accessing only one content item.

6. The adjudicator went on to find that the IP had contravened sections 11.2.1 and 11.2.2 of the WASPA Code in this regard.

7. In support of their finding, the adjudicator focused on the banner advert used for the campaign and took the view that the subscription information was ''*badly placed and indistinct*''.

8. In particular, the adjudicator noted that the subscription information was displayed in small print on the top left of the banner, while the much more overwhelming communication of the banner is the "striking" visual and the large blue words "PLAY".

9. The adjudicator was of the opinion that a consumer would click on the link in the belief that they were accessing one content item, i.e. an adult video involving the pictured visual.

10. The adjudicator went on to state that the subscription information on the landing page was also badly placed and indistinct without elaborating further on their reasons for reaching this conclusion.

11. The adjudicator held that it was not necessary to show that the complainant in the current complaint had actually been misled into subscribing when intending to access one content item, as this did not change the fact that the banner advert and landing page were, in their view, in breach of the WASPA Code.

12. The sanctions imposed by the adjudicator was a fine of R5 000 and a suspended fine of R25 000 should the IP again be found guilty of a breach of sections 11.2.1 and 11.2.2 of the WASPA Code.

Grounds of appeal

13. The IP appeals against the findings of the adjudicator and the sanctions imposed as being ‘’unwarranted and unfair’’.

14. The IP included screenshots of the relevant banner advert, landing page and confirmation page used for the campaign for this adult subscription service in support of its view that these materials are compliant with the WASPA Code.

15. In particular, the IP argues that the conspicuous wording used in the banner advert is necessary for publicity purposes in order to draw a potential subscriber’s attention to the advert.

16. However, the IP also states that the banner advert does clearly disclose that the service in question is a subscription service in the top left hand corner of the advert.

17. The IP argues that the landing page used contains all the required service information and if the user decides to proceed, they are redirected to a confirmation page which contains the same and additional information regarding the subscription service.

18. The IP disagrees with the view taken by the adjudicator that the complainant could have been misled into believing that they were accessing one content item as it is clearly disclosed throughout the subscription process that this is a subscription service.

    The IP is also of the view that the relevant section of the WASPA Code relevant to the adjudicator’s findings is section 11.1.1, which the IP argues was not referred to in the adjudicator’s report.

Sections of the Code considered

19. The following sections of the WASPA Code of Conduct were considered by the Appeal Panel:

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.

11.1.2 An advert for a content subscription service which includes examples of the content provided as part of that service must include at least two examples of that content clearly displayed, except as provided for in 11.1.3

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.

11.3. Subscription initiated via a browser (web or WAP)
11.3.1. If a subscription service is initiated by entering a customer's mobile number on a web page or WAP site, then a separate confirmation message must be sent to the customer's mobile handset in order to prove that the number entered matches the customer's mobile handset number. This message may either:

(a) contain a PIN which is then confirmed or validated on the web page, or
(b) contain the name of the service, an explanation of the confirmation process, and a URL with a unique identifier, which, when clicked, validates the handset number.

11.3.2. For any subscription services that are initiated via WAP, it is a requirement for the service provider who has a direct contract with the network

operator to display a WAP confirmation page to the potential subscriber. This confirmation page must be displayed after the subscriber has first indicated an interest in the subscription service by clicking on a "join" or similar link.

11.3.3. The WAP confirmation page must display the following information in a clear and easy to read manner:

(a) The name of the service and an indication that it is a subscription service
(b) The price and frequency of billing
(c) A phone number for customer support

11.3.4. Where it is necessary for a consumer to confirm that their MSISDN may be made available to an application, this may be done by including the following wording on the WAP confirmation page:

[Application name] has requested that your mobile number be made available.

11.3.5. The information listed in 11.3.3 and 11.3.4 above must be presented as text and not as an image.

11.3.6. The WAP confirmation page described above must also present a confirmation button. It must be clearly communicated to the customer on the confirmation page that clicking the confirmation button will initiate a subscription service.

11.3.7. The WAP confirmation page may not contain any marketing messages or other content that is likely to distract the customer from the required confirmation information and process.

11.3.8. The WAP confirmation page must offer all languages used in the promotional material for that service.

Findings of the Appeal Panel

20. The Appeal Panel were not unanimous in their decision on this appeal. However, the finding below was upheld by 2 of the 3 panelists. The opinion of the dissenting panellist is annexed.

Majority decision

21. The Appeals Panel agrees with the IP that section 11.1.1 is relevant to the matter but disagrees with the IP's assertion that section 11.1.1 was not referred to or considered by the adjudicator. In fact, at page 2 of the adjudicator's report, section 11.1.1 is expressly identified by the adjudicator as a section of the Code under consideration.

22. Section 11.1.1 of the Code requires 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.

23. The reference to *"any promotional material"* in section 11.1.1 would include the banner advert used by the IP in this campaign.

24. The word *"prominent"* is not defined in the Code. However the WASPA Appeals Panel has previously ruled on complaints 15477, 15722, 16851, 16977, 17184 and 17236 that:

"[t]he Advertising Rules effectively give much needed substance to many of the Code's prominence requirements by expanding on those requirements in many respects. The two frameworks have developed at different paces over the years and may well be due for a co-ordinated update but contrary to the Appellant's (SP's) assertions that adjudicators should have limited themselves to the Code's "prominence" provisions, our view is that adjudicators are correct to look to the Advertising Rules for clarity on what those prominence requirements are, where appropriate".

25. The Appeals Panel has further held that:

"[n]on-compliance with the Advertising Rules is, essentially, non-compliance with the Code (by virtue of section 6.1.1 of the Code) and, particularly where the Advertising Rules' requirements correspond with the Code's "prominence" requirements, failure to comply with the Advertising Rules is a breach of the Code's provisions".

26. Section 9 of the Advertising Rules applies to all advertising placed on internet-based web sites visible to the general public where access channels are displayed. This also includes advertisements placed on third-party web sites.

27. Where there is no access channel or number displayed, WASPA members have, in previous complaints, assumed that the required text for adult and subscription services can appear anywhere on the advert.

28. However, the Appeals Panel has previously held that *"[i]t would appear that WASPA members have assumed that the subscription services text may be placed anywhere on the email or Web page if no unique access number or Content access code exists. We cannot support this approach. Clearly a member is still required to place the subscription service text in a position of prominence"*.

29. Section 9 of the Advertising Rules also provides that where the services in question are of an adult nature, or where it would be undesirable for children to have access to those services because of the potential adult nature of the service, as in the present case, the advert must indicate that the services are age restricted using the term "18+" and/or that verification of the user's age may be required.

30. Section 9 also provides that for subscription-based services, the words "subscription service" must be prominently displayed as per specification within the advertisement.

31. No acronym, letter (eg "S"), number, abbreviation (eg "Subs"), icon, or any other mark may be used as an alternative to the words "Subscription Service"

anywhere in the advertisement when the content is only available at all and/or at a particular cost as part of a subscription service.

32. The advert must also indicate, in the font size, position and type as indicated, the total potential charge that the consumer may incur while being a member of the subscription service.

33. The frequency at which they will be charged for access to that subscription service must also be displayed.

34. In the screenshot provided by the IP, the words "*subscription R7/day*" appear in the top left hand corner of the banner advert.

35. The font size used, when compared with the remaining text and images in the advert, is very small and does not meet the guidelines set out in the Advertising Rules.

36. The words ‘'*subscription service*'' also have not been used as is required.

37. Finally, there is no indication in the advert that the content being advertised is of an adult nature. The IP only gives the necessary warning when a consumer has clicked on the banner ad and is linked to the IP's landing and confirmation pages.

38. The Appeals Panel agrees with the Adjudicator's finding that the subscription information was "*badly placed and indistinct*".

39. It is the finding of the Appeal Panel that the IP's banner advert, which is a promotional material within the meaning of section 11.1.1 of the Code, does not prominently and explicitly identify the services as "subscription services".

40. It also does not indicate that the content advertised and accessible to subscribers is of an adult nature.

41. It should be noted that the adjudicator made reference to sections 11.2.1 and 11.2.2 of the Code in their ruling. However, it is clear from the content and substance of their report that the correct finding should be one of breach of section 11.1.1 of the Code.

42. We are of the view that the IP has contravened section 11.1.1 of the Code and substitute this ruling for the ruling of the adjudicator regarding sections 11.2.1 and 11.2.2. We find no reason to interfere with the sanctions imposed by the adjudicator.

43. As the appeal has been substantially unsuccessful, the IP will not be entitled to any refund of the appeal fee paid.

DISSENTING REPORT OF THE APPEALS PANEL

Date:	December 2014
Appellant:	Flexiba
Complaint Numbers:	22519
Applicable versions:	12.4

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1. Dissenting Findings

1.1. I must respectfully disagree with the conclusions of my fellow-panellists as set out in the majority appeals panel report in this matter.

1.2. I agree that clause 11.1.1 of the WASPA Code of Conduct is relevant to the complaint at hand, and that the adjudicator should have applied that clause in the initial adjudicator's report. I also agree that the adjudicator did indeed refer to clause 11.1.1 in the initial report.

1.3. I can however not agree with my fellow panellists' conclusion that the above allows us as a panel to substitute the adjudicator's finding of a breach of clauses 11.2.1 and 11.2.2 with a finding of a breach of clause 11.1.1.

2. *Audi alteram partem* and previous decisions of the appeals panel

2.1. While no appeals panel has to my knowledge ruled on whether the Promotion of Administrative Justice Act 2 of 2000 ("PAJA") applies to the WASPA complaints process, it is trite that the principles of natural justice, and particularly the principle of "audi alteram partem" DO apply.

2.2. Appeals panels have been clear in several contexts that it is not competent for an adjudicator (and by extension an appeals panel) to find that a member has infringed any portion of the code if the member has not been given the opportunity to make representations on the specific accusation. I will briefly discuss a number of those decisions below.

2.3. While the WASPA Code of Conduct does not explicitly state that appeals panels are bound by each other's rulings, clause 14.3.15 enjoins adjudicators (and presumably appeals panellists too) to take into account precedent set by other adjudicators and panels. It also states that decisions of appeals panels should carry more weight than adjudicator's decisions.

2.4. Accordingly while I do not consider the panel to be strictly bound by previous panel decisions, I would be reluctant to stray from them unless they are clearly distinguishable or patently wrong.

3. Right to Proper Notice

3.1. It is an important principle of audi that an affected party be given proper notice of the allegations levelled against it. This forms part of the common law in that for example "…[a] man cannot meet charges of which he has no knowledge." *(Kaladie v Hemsworth NO 1928 TPD 495)*, and the principle expressly included as section 3(2)(b)(i) of PAJA. This was also the approach taken by the appeals panel in its decision in complaint numbers 16559, 16659 and 17910:

40. We turn next to the standing of the ruling in respect of Clause 11.1.1, which is complicated. The Emergency Panel found the Appellant in breach of Clause 11.1.1. The Adjudicator failed to consider 11.1.1 at all.

41. We find, reluctantly, that at the moment when the Adjudicator failed to consider Clause 11.1.1, the Emergency Panel finding fell away, and the clause essentially was removed from the table. As much as we may wish to do so, the Appeal Panel cannot revive a clause that has not been revived by the Appeal.

42. We are therefore unable to consider Clause 11.1.1.

3.2. While in the above report the adjudicator had ignored the clause in question rather than deal with it and decline to make a finding on it as happened in the complaint under appeal, the ruling is nonetheless apposite: The clause was clearly "in play" at the commencement of the complaint, the facts were before the appeal panel, but the adjudicator had not considered the clause in

question. As a result the clause was not subject of the appeal and the panel declined to “revive” it.

4. Right to make representations

4.1. The Appeals Panel Report in respect of Complaints 11258, 11582, 11626, 13038 and 13039 addresses the question of members’ right to may representations on complaints made against them:

2.4.13 While it is clear that WASPA, as a body, is in principle committed to the fundamental principles of due process and natural justice, reflected in the manner in which the complaints procedure is administered, and in the Code itself, a concern arises when adjudicators (and appeal panels) don't uniformly provide the member against which the complaint is lodged an opportunity to respond to, or to provide information regarding, these additional breaches identified by the adjudicator or the panel.

2.4.14 The Code unfortunately is silent in this regard, in that it does not oblige an adjudicator (or a panel) to provide the member with an opportunity to respond.

2.4.15 Further, arguing that members do not need an opportunity to respond before an adjudicator makes a final determination at the adjudication stage, since an opportunity to respond is provided for in the appeal stage, is not sound. Such reasoning not only strips the member of the second opportunity to state its case and have an unfair or incorrect determination remedied - as was envisaged by the Code, but it inadvertently also ignores the principles of due process and natural justice, particularly the principle of audi alteram partem.

2.4.16 It bears mention that adjudicators may hold the view that the principle of audi alteram partem should not necessarily apply where the breach is objectively so clear and definite that no response given can remedy such a breach. It can theoretically be argued that such an objectively clear breach obviates the application of the principle of audi alteram partem. Even if this view can be defended theoretically, this panel cannot accept such an approach, considering the context of the objectives of WASPA and the Code

of Conduct. Even if just for the sake of being able to argue in mitigation of sanction, a member must be allowed to respond to additional breaches identified by the adjudicator before a final determination is made.

2.4.17 In the current instance, this panel finds that the SP was not provided with an opportunity to respond to the citation of a number of breaches not identified in the initial complaint, that it should have been provided with an opportunity to state its case (regardless of how clear or objective the adjudicator(s) considered the breaches to be), and that the SP's fundamental rights to due process and natural justice, particularly the principle of audi alteram partem, were not observed.

2.4.18 With good faith and fairness informing our decision, and with due consideration to the principle of "no difference", this panel upholds the SP's grounds of appeal that its fundamental rights to due process and natural justice, particularly the principle of audi alteram partem were not observed.

4.2. I could not find reference to the application of the audi principle to each and every stage of an administrative or disciplinary process other than the views expressed by the WASPA Appeals Panel. However the general rule as set out in LAWSA certainly appears to imply that the affected party has a right to make representations at every stage:

According to this rule a party to an administrative hearing or proceeding which may lead to action affecting his or her rights, privileges and liberties, is entitled to present his or her case and must be given an opportunity to do so. (Volume 1 "Administrative Law" paragraph 107)

4.3. In my view this panel's decision could have an effect upon the appellant's rights. Accordingly this appeal is a hearing in its own right and the appellant is entitled to make representations to this panel on the specific allegations made against it.

4.4. Moreover, clause 14.6.1 of the Code of Conduct provides members with a right to appeal an adjudicator's ruling. By failing to allow a member to make representations at appeal stage a panel would in effect remove the

appellant's right to appeal. What use is a right to appeal if the member is denied the opportunity to state its case again?

5. Did the appellant receive adequate notice of a hearing in respect of clause 11.1.1?

5.1. Turning now to the appeal before the panel: the adjudicator did indeed consider clause 11.1.1 of the code in her report, but went on to make a finding of a breach of clauses 11.2.1 and 11.2.2 based on the facts at her disposal.

5.2. My fellow panellists contend that clause 11.1.1 is a more appropriate clause to apply in dealing with the facts of the complaint. As it happens I am in agreement with them on that score. However they go on to argue (as I understand it) that by referring to clause 11.1.1 in her report, the adjudicator made it clear that she was taking the clause into account and hence that this clause is under consideration in this appeal. Accordingly they feel competent, using the record of proceedings at adjudication level, in addition to the appellant's submissions on appeal, to find that the appellant has infringed clause 11.1.1 even though the adjudicator did not make a finding in respect of clause 11.1.1 and the appellant did not make submission on that clause on appeal.

5.3. There is no basis for this conclusion in my view: it is not for the panel to guess what the adjudicator had in mind when making her ruling. It is more likely that if she had meant to make a ruling under clause 11.1.1 she would have done so, and that her failure to do so shows that she had found that no infringement of clause 11.1.1 took place. In the event we can rely only upon what the adjudicator actually said and not what she should or might have said. She made a ruling on clauses 11.2.1 and 11.2.2, not clause 11.1.1. We have to proceed on that basis alone.

5.4. The appellant was accordingly presented with an adjudicator's report in which it had been found to have breached clauses 11.2.1 and 11.2.2. It lodged its appeal on that basis and NOT on the basis of a breach of clause 11.1.1 of the code.

5.5. It is not relevant whether the adjudicator referred to or considered clause 11.1.1 in her report. What matters from the perspective of natural justice is whether she found an infringement of that clause or not. If she found an infringement of that clause, then the member would have had notice of the finding and would have been in a position to make representations on appeal on that basis. As she made no such finding, clause 11.1.1 cannot form a part of this appeal.

5.6. If we were to find otherwise we would in effect have failed to give the appellant adequate notice of the complaint against it and will have infringed its right to receive adequate notice of proceedings under audi.

6. Did the member actually make submissions on clause 11.1.1 on appeal?

6.1. Is it valid to argue that the appellant nonetheless raised clause 11.1.1 on appeal and that consequently this panel can take it that the appellant actually made representations on the point?

6.2. In my view the question is superfluous: whether the appellant made submissions on the point or not, the adjudicator did not make an adverse finding and accordingly the panel cannot make a ruling on that clause. But for the sake of completeness let us examine the appellant's submission on appeal.

6.3. While the appellant certainly mentions clause 11.1.1 in its appeal, it does so in passing in saying that the adjudicator misdirected herself in finding an infringement of clause 11.2.1 and 11.2.2. The appellant makes no substantive submission to this panel whether or not it has infringed clause 11.1.1. If the appellant thought that it was necessary for it to make a proper submission in respect of clause 11.1.1 it would surely have done so. A mere mention of the clause is not sufficient to allow this panel to reach the conclusion that the appellant made a submission on the point.

6.4. Finally, as discussed above, the adjudication and appeal stages of the WASPA complaints process should be considered separate hearings for the purposes of audi. Accordingly it cannot be argued that the appellant's submissions at adjudication level are sufficient for our purposes as an appeal

panel. The appellant is entitled to make fresh submissions on the complaints against it at appeals level, and if it has not been afforded the opportunity to do so we cannot make a ruling on those complaints.

6.5. Were we to make such a finding, the panel would have infringed not only the appellants right to make representations under audi but also effectively denied its right to an appeal as set out in clause 14.6.1 of the Code of Conduct.

7. Similar provisions?

7.1. Finally, could it be argued that clause 11.1.1 is so similar to clauses 11.2.1 and 11.2.2 that by receiving notice of and making representations on the latter two the appellant has also done so on the former?

7.2. A finding on 11.2.1 may be influenced by an infringement of 11.1.1 – if the service was not properly identified as a subscription service, the complainant would be more likely to subscribe in the mistaken belief that he was using a non-subscription service. This link is weaker in the case of 11.2.2. However, in my view an infringement of 11.2.1 and/or 11.2.2 does not imply an infringement of 11.1.1. These are separate clauses and an infringement of any of them has to be alleged and proven separately. Furthermore it is not clear to me that an allegation in respect of the one in any way implies or contains an allegation in respect of the other.

7.3. Crucially, the appellant would have had no reason to think that an allegation as to clause 11.2.1 and 11.2.2 included or implied an allegation to clause 11.1.1. Even if we as panellists and experienced WASPA adjudicators see that clauses are obviously related in this way, we cannot expect members to do so. To impute such knowledge to the appellant would again have the effect of not giving it adequate notice – once again a breach of its audi rights.

7.4. As a result this panel cannot simply substitute clause 11.1.1 for clauses 11.2.1 and 11.2.2 on this basis either.

8. Conclusion

8.1. By finding on appeal that the appellant has infringed clauses of the code where the adjudicator made no adverse finding in her report, this panel is breaching the appellant's rights under the principle of "audi alteram partem". Not only has the appellant not received notice of the allegation against it in respect of clause 11.1.1 at appeals level, it has also been denied the opportunity to make representations on the point. It has also been denied its right of appeal under clause 14.6.1 of the Code of Conduct.

8.2. It is my respectful opinion that the majority of the panel have infringed the appellant's rights under the principle of audi alteram partem in finding it to have infringed clause 11.1.1.

8.3. I agree with my fellow panellists that clauses 11.2.1 and 11.2.2 are not apposite to the facts of this complaint. As I cannot agree with majority's finding in respect of clause 11.1.1, however, my ruling is that the appeal should be upheld, the sanctions imposed by the adjudicator set aside, and the appellant's appeal fee refunded in full. As my ruling is a dissenting one, the decision of the majority of the panel is binding.

8.4. Finally, let me explain why I take a strict approach on matters of fairness. WASPA is a self-regulatory industry body. This self-regulation is effected largely through the WASPA complaints process. In order for its complaints process to be taken seriously by players in the WASP industry, the process must above all be fair – not only fair to consumers but to the members of WASPA too. WASPA members which feel that they have not been given a fair hearing will lose faith in the complaints process, which will undermine WASPA's ability to regulate the industry. As a result it is crucial in my view that adjudicators in general and the appeals panels in particular be fair to all parties to a complaint. I am not suggesting that the approach be blindly formalistic or rigidly procedural, but certainly adherence to the right to a fair hearing is essential.

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