

WASPA Appeals Panel

SECOND REPORT OF THE APPEALS PANEL

Date of face-to-face hearing: 13, 14 and 15 May 2015.

Date of report:

WASPA Member: Buongiorno SA (“BSA”)

For the Appellant: V Movshovitch of Webber Wentzel Bowens

Complaint Numbers: 4677, 5564, 5568, 6180, 6756, 7250, 7251, 7257, 7314, 7452, 7789, 7841, 7907, 7986, 7994, 8038, 8085, 8235, 8309, 8326, 8330, 8392, 8411, 8530, 8780, 8874, 9150, 9334, 9502, 9508, 10019, 10479, 10489, 10576, 10756.

Applicable versions: 6.1 - 9

Preliminary issues

1. This appeal report sets out the findings of the Appeal Panel (“this / the Panel”) with regard to the rulings (each a “Ruling”) on the Complaints set out above (each a “Complaint”). The second part of the appeal hearing was part heard *vive voce* from 25 – 27 August 2014 (“Second Session”). The appeal was heard on 13, 14 and 15 May 2015 with a view to finalising the appeal of the Rulings on all grounds.
2. We wish to take this opportunity to again thank the Appellant for preparation and attending the hearing, and WASPA for their co-operation.
3. The panel notes that Mr Anthony Ekerold was in attendance at the appeal on behalf of WASPA, on an observation brief only.

Background issues

4. In the interests of clarity, we repeat the background issues that were covered in the first report of this panel.
5. The appeal hearing is subsequent to a Court Order granted to the Appellant in the matter of Buongiorno South Africa (Pty) Ltd v Wireless Application Service Provider Association, Case no. 18580/2013 (“the Court Order”).
6. The Court Order stated, *inter alia*, that:
 - 6.1 all adjudications made and sanctions imposed under the prior complaints are appealed to a single Wireless Application Service Providers Association (WASPA) appeals panel of three adjudicators;
 - 6.2 the relevant adjudications and sanctions are of no force or effect against Buongiorno UK Limited;
 - 6.3 the appeals shall be of a wide nature and WASPA shall not object to the contents of any ground of appeal. In this light, in any written ground of appeal and at the oral hearings, BSA may advance, without any limitation, any evidence, facts, legal arguments... or other material that it wishes...and is not precluded from arguing that the relevant adjudications and sanctions were handed down in respect of the wrong party or a party that was not a member of WASPA.
7. Therefore this Panel must consider the Appeals on the basis set out in the Court Order. The Panel also agrees with the submissions of the Appellant that this Panel must have regard to the principles of natural justice, including lawfulness, reasonableness, procedural fairness and the requirement(s) of the Promotion of Administrative Justice Act 2000.
8. We note that in this Appeal the complainants in respect of the Complaints were not represented and did not make submissions, and WASPA itself did not make submissions. Consequently, the Panel was presented with only one set of arguments with regard to the facts and the applicable law. In the interests of

equity, the Panel has, at times, interrogated the Appellant's arguments more robustly than it would otherwise have had to if the relevant interested party(s) had been given the opportunity to oppose the appeal.

9. We confirm that while a preliminary ground of appeal against the merits and the sanctions as set out above (being that "the adjudications were rendered against BUK") was disposed of in the first report of this Panel, the remaining grounds of appeal remained in respect of the Rulings. These grounds of appeal include the broad grounds of appeal ("broad grounds of appeal") as set out pages 7 to 31 of BSA's "Submissions to the Wireless Application Service Provider Association in respect of Grounds of Appeal dated 24 February 2014 ("Heads") being:

- Subscription process used by BSA;
- The process must be viewed as a whole;
- WASP and the Code are not immune from the law;
- Jurisdiction of WASPA;
- Retrospective application of previous versions of the Code;
- Code and Rules must be applied and understood as they stood at the time of the conduct in question;
- Mistake of legal requirements;
- The rules applicable to websites are not applicable to wapsites;
- Certain sections require a showing of intentional conduct;
- Findings are contrary to the evidence;
- Reliance on other complaints was inappropriate in a practical sense;
- Reliance on other complaints was inappropriate in a legal sense;
- Procedural unfairness and unlawfulness;
- Further obligations arising from the adjudicative and administrative role of the adjudicator;
- Reliance on purely academic points;
- Visual displays viewed in incorrect medium;
- Responsibility for conduct of third parties;
- Unnecessary referral to formal adjudication;
- BSA's reputation;

- Inappropriate sanctions imposed;
- Inconsistent application of sanctions; and
- Unlawful sanctions.

10. The broad grounds of appeal affect multiple Rulings – sometimes having the result of setting aside Rulings in their entirety, sometimes affecting only an aspect of that Ruling. We will address each of the Rulings giving clarity as to the reasons for our decision with as little repetition as possible. For that reason, some Rulings will be discussed collectively under general headings of the broad grounds of appeal principle and other Rulings singularly under the specific Complaint number.

11. While the Appellant discussed sanctions as a general issue, we have considered sanctions on a case-by-case basis, having regard to the original finding, the reasons given by the Adjudicator in that matter, the severity of any offence that has withstood appeal and considerations of consistency. Without detracting from our consideration of the Appellant's considerable submissions on sanctions, we particularly note that we do not consider WASPA sanctions comparable to other self regulatory organisations such as the Jockey Club or professional bodies. The measure that is relevant is the fairness of the sanction as a whole in the context of WASPA, previous decisions, and the particular WASP's history of transgressions.

12. It is also noted that there are 35 Complaints to be considered in this appeal. These Appeal Findings should be read together with the case files and submissions of the Appellant for a complete understanding.

Complaints - further representations

13. During the course of the hearing, the Appellant indicated that there were some Rulings that had only been addressed in its oral submissions on the broad grounds of appeal ("Outstanding Rulings") and that, if the Appeal Panel rejected

those grounds of principle, then the Appellant needs further time to address the Panel on the merits of each Outstanding Ruling.

14. The Appeal Panel accepts that in terms of the wide court order, the Appellant has the right to address the Panel on as many grounds it deems relevant. It is also noted that the Appellant has now had 6 full days of hearing to address the Panel. The Appellant has also filed full grounds of Appeal and Heads of Argument documentation supporting the face-to-face address.

15. With this in mind, at the end of the Second Session, the Panel asked the Appellant to identify which Rulings it felt had not been fully addressed. The Appellant confirmed that the Outstanding Rulings are the rulings in regard to Complaint No's 5568, 6180, 8038, 8530, 9150 and 9334.

16. In addressing the Outstanding Rulings in these findings the Panel will decide if the Rulings are to be set aside on the basis of the broad heads of appeal and evidence presented during the face-to-face hearings. If not then the Appellant shall be offered the opportunity to address the Panel on all aspects of the merits of the remaining Outstanding Rulings.

17. We turn now to the substance of the Complaints.

Reliance on other complaints

18. There are a number of Rulings where the adjudicators' finding rested substantially or entirely on a reasoning to the effect of – "because this advertiser has previously been in breach of the Code, they are probably in breach now". This ground is addressed in paragraphs 16.52 to 16.58 of the Heads.

19. In these cases there is a failure to investigate the complaint on its own merits and therefore a patent failure of natural justice. Consequently, the appeal in respect of the following Rulings are upheld and the decision of the adjudicator is set aside:

- 7789
- 6756
- 7907
- 7841
- 8038

20. The sanctions relating to these Rulings are therefore set aside in their entirety.

Not citing clauses from the Code

21. Appellant argued, in essence, that for a complaint to be valid, either clause sections of the Code must be cited in the Complaint, or the clause must be so closely echoed in the wording of the complaint as to allow no mistake as to which clause was identified.

22. In considering this appeal ground the Panel took into account a number of factors:

- the wording of Clause 14.1.3 (v9, previously Clause 13.1.3) which requires the a complaint should contain, 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;
- the wording of Clause 14.1.4 (v9, previously Clause 13.1.4) which states that any complaint lodged that does not contain the above information may be referred back to the complainant by the secretariat;
- Clause 14.3.10 (v9) that allows the adjudicator to request further information or responses from the complainant or WASP;

- the reality that a consumer complainant will not be conversant with the Code, and thereby balancing the interest of the Appellant with the public interest objectives of the Code in protecting consumers;
- that the Code did not, at the time, require that clauses be identified, either by the complainant or WASPA, prior to being furnished to a WASP;
- that a WASP responding to the complaint *bona fide* will attempt to reasonably interpret the complaint and address it;
- that the requirement of *audi alterem partem* is fundamental to natural justice and that the primary inquiry must always be whether that principle has been satisfied; and
- a number of WASPA Appeal precedents.

23. The Panel considered these factors in reaching the following decision.

24. In the first place, if the complainant cited clauses of the Code in his/her complaint, those clauses are a closed list. If the adjudicator wished to rely on another clause of the Code, he or she would be required to revert to the WASP for further response or clarification, and a failure to do so would be a failure of justice.

25. This is confirmed in other Appeal Panel findings:

- In Complaint No.16559, for example, the Appeal Panel found that:
“In a matter in which the complainant – in this case the Media Monitor – lodges a complaint in terms of particular clauses, those are the only clauses that are initially necessary for the respondent to the complaint to comment on, and those are the only clauses on which the adjudicator can fairly rule.”

The Code states:

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.

It is clearly the intention of the Code, in line with the principle of audi alteram partem, that in the event that the adjudicator wishes to go beyond the complaint and clauses before him or her, he or she must allow the respondent to the complaint a further opportunity to comment.”

- This is consistent with the finding made by the Appeal Committee in Complaints No.15477, 15722, 16851, 16977, 17184 and 17236, where the Appeal Panel said:

“To proceed with an analysis of whether a member breached provisions of the Code (or other regulatory framework) without affording the member an opportunity to review and respond to such allegations would result in a violation of the member’s rights to the principles of due process and natural justice which include the principle of audi alteram partem.”

26. Therefore, in Complaints where the clauses of the Code were cited, and different clauses were relied on by the adjudicator, the rulings on those uncited clauses will fall away and the Panel will only consider the merits of those issues on which clauses were actually cited.

27. However, there are also Complaints in which no clauses are cited. Given that the Code imposes no duty to cite clauses, this Panel is of the opinion that these Complaints come down to a simple assessment of natural justice and prejudice. We disagree with the Appellant’s submissions that the complaint must echo the

wording of the clause of the Code for a particular clause to be triggered. The Appellant referred us to the Appeal Complaint 11258 *et al* in support of this. However, that Complaint deals with the situation where an adjudicator, believing that “the breach is objectively so clear and definite that no response can remedy such a breach”, rules on an issue that has not been raised. It does not deal with the situation where a breach has been clearly raised in the complaint.

28. That being said, we also consider it fundamental that the WASP can have been in no doubt as to what case they had to answer. The Panel will consider these Complaints on a case by case basis.

29. This ground of appeal affects some aspects of most of the Rulings before us, but there are a number that can be completely disposed of under this heading.

30. In **Complaint 7314**, the complainant alleges that she was subscribed to a number of adult content services without her knowledge. The Appellant’s response focussed on the subscription process. The adjudicator ruled on the following clauses of the Code: clauses 11.1.3 (requiring two examples of content), 11.1.10 (format of message) and 11.6.2 (logs). These clauses of the Code are not cited or alluded to in the complaint. At the very least, they should have been put to the WASP for particular response. **The finding and sanction of Complaint 7314 are set aside.**

31. In **Complaint 8330**, the initial complaint was upgraded when the complainant said, “I want to know, seeing that I was automatically subscribed and *not by choice*, when the money on this phone number 082 8174373 will be refunded to me. I am not satisfied with the answer. It was 2 songs that were downloaded but nothing was said about the R5 a day. It is not legally correct and I WILL go to the papers. People are tricked into these subscriptions.” The adjudicator, however, upheld the complaint on clause 11.1.3 (v7.4 of the Code) relating to 2 samples of content for subscription services. This issue was not raised in the complaint and was never put to the Appellant in any manner. **The finding and sanction of Complaint 8330 are set aside.**

32. In Complaint **9334**, the complainant submitted a broad allegation that he did not subscribe. The adjudicator traversed a number of issues in the ruling, but eventually found a breach of Clause 11.2.5 and 11.2. Clause 11.2.5 (v8) relates to the format of the welcome message. This was not raised in the complaint, nor was it put to the WASP. The ruling in that regard is therefore void. Clause 11.2 has 6 subsections. An adjudicator cannot simply find a breach of Clause 11.2, but must specifically identify which aspects are breached. **The finding and sanction of Complaint 9334 are set aside.**

33. In Complaint **7986** the original complaint cited clause 11.1.3 (v6.2 of the Code) that there should be 2 samples of content in advertising of subscription services. The Appellant immediately remedied this. The Monitor then raised an issue around how the costs were displayed. The panel is of the view that the only complaint issue that was now validly before the adjudicator was that issue given in the request for upgrading the complaint – the issue of display of costs. The adjudicator, however, ruled on clause 11.1.3 in respect of the issue that had been disposed of. Clause 11.1.3 of the Code was not therefore validly before the adjudicator in this complaint. **The finding and sanction of Complaint 9334 are set aside.**

34. In **Complaint 10576**, the complaint related to auto subscription, and the ruling related to 11.3.2 and 11.3.3 of the Code relating to confirmation pages. Again, the adjudicator should have, at the very least, reverted for comment on those clauses. **The finding and sanction of Complaint 10576 are set aside.**

Complaint 5568

35. In Complaint 5568, the Appellant argued again that the clause citation was not clear enough. In that complaint, the complainant said, *“On the 23 December 2008 I send the required "stop" and "stop club" sms to 31009 and 31199 of which I have the proof. Why did the amount of R26,32 excl VAT go off the account again on the 27th of Dec and again on the 2nd of Jan ????? We demand a cancellation and a refund with immediate effect.”*

36. The Adjudicator found the Appellant in breach of Clause 11.2.2 (v6.2 of the Code) which states that “Customers must be able to unsubscribe from any subscription service via SMS using no more than two words, one of which must be STOP.”
37. The Appellant responded to the complaint by saying that the customer had failed to send the correct unsubscribe message which was clearly “stops”.
38. Given that the complaint and the response all centre around the unsubscribe request “stop” versus “stops”, the Panel finds it disingenuous for the Appellant to argue that they were not sufficiently alerted to the issue at hand.
39. In the Appeal document, the Appellant claims that the use of the words “stops” is to differentiate this service from another (at paragraph 5.32 to 5.38) and argued that to find this unacceptable would be an “unduly narrow and a contextual” interpretation of the Code.
40. The Panel disagrees. The Code is absolutely clear in this regard, and there are a number of other ways in which the WASP could have addressed its concern about differentiating services.
41. This is also a complaint in which the Appellant wishes to retain its right to address the Panel further.
42. The Panel finds that the Appellant has extensively argued its case in this Ruling. Clause 11.2.2 (v6.2 of the Code) is a clear rule of the Code that, in the Panel’s opinion, allows no further room for argument. The Appellant has, on numerous occasions, accepted that the key word was “stops”. This is an *ex facie* breach of the Code. The Panel finds that no further argument would be useful in addressing such a breach.

43. In addition, on this Complaint, the Appellant did not seem to wish to pursue any argument other than that of incorrect citation of the Code clauses at the hearing. The relevant portion of the transcript reads (our emphasis):

MS CHETTY: Is there anything that you are going to submit on the issue of Stop v Stops or is the argument limited to the issue of...(intervention)

MR MOVSHOVICH: I don't see any reason and **if the panel is not satisfied with that argument we will go through the authorities which make it abundantly clear**. I don't want to waste time in this I know WASPA itself is under, you know we've already had three days this must finish as far as possible within the time allocated.

CHAIRPERSON: Jeff are you satisfied do you want to hear more argument on this?

MR BOULTON: Thank you sorry...(discussion aside)

CHAIRPERSON: We'll continue our discussion of it but I think that what we're noting is we are all satisfied we've grasped your argument properly and **we're happy that you'd like to address us further**. Should we come to blows about it in our debate we might as you to re-address.

MR MOVSHOVICH: Okay thank you so the next one is 6180.

44. It seems from this that the Appellant did not wish to address any alternative argument around the issue, save to continue arguing the citation issue.

45. The Appellant was instructed to pay a refund and fined R25 000.

46. The Panel is of the opinion that this is a particularly egregious breach in that the Appellant reverted with an instruction to call the call centre (and not an instruction on how to unsubscribe) to the "STOP" instruction, and in that "STOP" was already (as is apparent from the Code) the well-established "catch all" manner to unsubscribe.

47. The fine of R25 000 stands.

Complaint 9150

48. In this complaint, the complainant submitted that she had no knowledge of having subscribed to the service and would not have done so. The adjudicator found that the WASP was in breach of Clause 11.1.2 of the Code, the clause that regulates the bundling of single item offers with subscription (we will discuss this clause in some detail below).

49. The Panel is of the opinion that there are two problems with this ruling. In the first place, the Appellant correctly argued that the case for clause 11.1.2 of the Code was not put to it. While the Panel understands why the adjudicator may have found it relevant on the facts, as this may have been the reason that the complainant did not realise that they had subscribed, the adjudicator or the WASPA secretariat should have put the clause to the WASP for response. This is especially true because the response clearly limited itself to the issue of “subscription” and not to the issue of bundling.

50. In addition, the adjudicator’s report states, somewhat barely, “On the evidence presented, even if the complainant had entered the brain age test, she did so without having a specific intention of subscribing to the SP’s subscription service.” The adjudicator does not address whether or not there was an independent transaction, and apparently bases the decision on the complainant’s averment that she did not have the requisite intention, rather than on the content of the website. The test in these complaints is objective not subjective.

51. Given this, the decision is fatally flawed and the appeal is upheld. **The finding and sanction of Complaint 9150 are set aside.**

Complaints 8392 and 8411

52. With regard to Complaints 8392 and 8411, the original subject matter of the complaints was accessed by links that are now inactive, meaning that the Appeal Panel was unable to review the content before the adjudicator.
53. There was some argument as to whether the material formed part of the record, whose responsibility it was to produce the material, and how the Panel should make a decision in the absence of the material.
54. These are also complaints in which the complainants cited clauses of the Code, but the majority of the clauses of the Code that the adjudicator relied on were not the cited clauses. In Complaint 8392, clauses 4.1.1, 4.1.2 and 11.1.2 of the Code were cited, and reference was made to advertising rules relating to font sizes. The adjudicator ruled on advertising rule 9.3.15 (relating to the words “subscription services”) and clauses 11.1.1, 6.1.1, 11.1.2, 4.1.1 and 4.1.2 of the Code. Only the finding on the originally cited clauses can possibly be regarded as valid and revisited, as the remainder is invalid. In Complaint 8411, following a similar analysis, only the ruling relating to clause 11.1.2 of the Code stands.
55. However, there was a further issue in these Complaints that was not canvassed by the Appellant. Both findings were based by the adjudicator on clause 11.1.2 of the Code, with Complaint 8392 making a consequential finding on clauses 4.1.1 and 4.1.2. In both, the adjudicator, having discussed the appearance of the words “subscription service” in detail, makes the following observation “The luring of consumers into subscription services by way of a quiz is a direct breach of section 11.1.2 of the Code of Conduct **and further analysis of the specific content is therefore irrelevant to this matter**, although also clearly a further violation of section 11.1.2” (our emphasis).
56. The Panel considers this indicative of a failure by the adjudicator to apply his mind to the specificity of the Complaint at hand. He specifically states that he has NOT embarked on an analysis of the material in relation to 11.1.2, and nothing that he has observed prior to that finding point to the elements of 11.1.2. The findings are therefore invalid in that the adjudicator failed to apply his mind to the

clause on which he was entitled to rule. **The finding and sanction of Complaint 8392 and 8411 are set aside.**

Complaint 8530

57. In Complaint 8530, the complainant says, “they offer free music downloads after u do a quiz correctly and then send a password to your phone to insert on site for free music. The sms advises that u now subscribed to FUN CLUB and it's R6 per day. Where is the free now or is this just deceitful business practice”.

58. The adjudicator ruled on two issues:

- That the subscription services labelling is not clear enough (Advertising rule 9, Clauses 11.1.1 and 6.1.1 of the Code)
- That the quiz acts as a “lure” (Clauses 11.1.2, 4.1.1 and 4.1.2 of the Code).

59. In relation to the quiz, the adjudicator made the identical ruling to that ruling in Complaints 8392 and 8411, and the ruling in respect of the quiz falls away for the same reasons.

60. The Appellant argued that the complaint does not clearly set out its case and it is unclear what clauses are triggered. The Panel disagrees. It is quite clear that the complainant engaged with the material, thinking that they were getting a “free item”, only to find themselves subscribed. This is a cut and dried clause 11.1.1 issue. The response was wholly directed at this question, and there can be no doubt that the Appellant knew what case it has to meet, and addressed argument on same. The Panel agrees, however, that the Advertising Rules are very specific and must be specifically raised, which they were not in this complaint.

61. This is also a complaint that the Appellant felt it had not addressed with arguments on the merits and wished to reserve the right to further hearing. The Panel would be sympathetic to this stand but for the fact that the material

discussed in Complaint 8780 is for all intents and purposes the same material and the issues canvassed are, *inter alia*, the same issues.

62. In this complaint, the Appellant also argued that this ruling is virtually identical in wording to others – including 8392 and 8411. It was argued that this type of ruling is indicative of a failure to apply one's mind. While the habit of "cut and paste" rulings is not encouraged by this Panel, it cannot be presumed to show that the adjudicator failed to apply their minds. If the wording of the ruling accords with the material before them, the cut and paste ruling may be indicative of a paucity of language, not a paucity of thought.

63. In Complaint 8530 therefore, the Panel proceeded to consider the breach of Clause 11.1.1 (v7) of the Code on the basis raised – that the complainant thought that he was following steps to get one free item and not a subscription.

64. Clause 11.1.1 of the Code states, "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".

65. The Panel is in agreement with the Appellant's submissions on this point and material made in Complaint 8780. The fact that this is a subscription service is clearly communicated in that:

- wording denoting that it is a subscription service appears at the bottom of each panel, with a price;
- wording denoting that it is a subscription service appears on the instruction to choose an operator;
- wording denoting that it is a subscription service appears at the top of the page saying "Congratulations";

- the SMS with the vital pin code says: “ur pin is 0497. Come join in the TONS of fun.Ur games & tones r waiting.By entering the pin number,ull be subscribed to Fun Club (R6/day subscription)”

66. Based on the above, we are satisfied that there was not a breach of the Code.

The finding and sanction of Complaint 8530 are set aside.

Complaint 8780

67. This complaint dealt with the same material as Complaint 8530, and the complaint is based on materially similar grounds. However, in this complaint, the complainant cited clauses 4.1.1, 4.1.2, 6.5.1, 11.1.1 and 11.1.2 of the Code.

68. These clauses of the Code were therefore validly before the adjudicator.

69. That being said, the bulk of them are fatally flawed in the adjudicator’s application as:

- the adjudicator’s ruling on Advertising Rule 9.2.2.1 falls away as this was not cited;
- the breach of 11.1.2 of the Code, while not necessarily the wrong finding on the merits, was not properly considered by the adjudicator as set out above;
- the ruling on Clauses 4.1.1 and 4.1.2 of the Code were linked to the ruling on 11.1.2 of the Code, and must therefore also fail;
- the breach of 11.1.1 of the Code was considered in relation to this material in Complaint 8530, and for the same reasons is overturned on appeal.

70. The appeal in relation to this Complaint is therefore upheld. **The finding and sanction of Complaint 8780 are set aside.**

Complaint 4677 and 7452

71. This complaint related to the use of the words “one week free” with the price in the top right corner. The adjudication was somewhat vague as to what clauses it relied on in making the decision, appearing to cite the whole of clause 6 (v6.2 of the Code).

72. The Panel was satisfied that the message around the price was clear and that the “free” offer was germane to the price. There was therefore no breach of clauses 6.1 or 6.2 of the Code.

73. Clause 6.5 of the Code was not relevant as the complaint did not involve the KEYWORD “free”. Clause 6.5 of the Code must be read with the definitions of the Code, and it is patently clear that a “keyword” is the word that a consumer would SMS for a service. The word “free” in this advertisement is not a keyword.

74. The appeal with regard to this Complaint is upheld. **The finding and sanction of Complaint 4677 are set aside.**

75. The subject matter of Complaint **7452** was a breach of Complaint **4677** and therefore the appeal with regard to Complaint **7452** is also upheld. **The finding and sanction of Complaint 7452 are set aside.**

Complaint 8874

76. In Complaint 8874 the complainant cited Clauses 4.1.1, 6.2.4, 6.2.5 and 6.2.6 of the Code. The Adjudicator ruled on Clauses 11.1., 6.1.1, 11.1.2, 4.1.1 and 4.1.2 of the Code. Of these, only 4.1.1 was before him and the remainder of the ruling therefore falls away.

77. In addition, the adjudicator bases his ruling in terms of Clause 4.1.1 entirely on the clauses of the Code that were not validly before him and applies no thought to clause 4.1.1. at all in isolation or in the context of the correct clauses. The Panel is therefore of the opinion that that finding must also, as a matter of fair procedure, fall away, and the appeal with regard to this complaint is upheld.

78. The finding and sanction of Complaint 8874 are set aside.

Complaint 8326

79. In this complaint the adjudicator ruled on clauses 4.1.1, 4.1.2, 11.1.2 and 11.1.4 of the Code. Only clause 11.1.2 was raised by the complainant and that was therefore the only clause of the Code validly before the adjudicator.

80. This complaint arose from an interaction which the Appellant's logs show occurred on 16 June 2009. On the 17 June 2009, version 7.4 of the Code came into force. This is significant because in version 7.4, the words "and may not be an entry into a competition or quiz" were added.

81. The adjudicator made the finding almost entirely on the weight of these words in the clause. The adjudicator's reasoning is therefore based on the wrong version of the Code and must fall away. **The finding and sanction of Complaint 8874 are set aside.**

Complaint 5564

82. In this complaint, the clauses cited were 3.1.1., 3.1.2, 3.7.1, 4.1.1, 5.1.6, 6.2.2., 11.1.1, and 11.1.4 of the Code. The adjudicator ruled on clauses 4.1.1 read with rule 9.2, and clause 11.1.1 read with rule 9.3.15, clause 8.1.3, and clause 11.2.2.

83. The advertising rules were not cited and should not have been considered. Similarly, clause 8.1.3 and 11.2.2 of the Code were not cited and fall away.

84. While the adjudication phrases the breach of Clauses 4.1.1 and 11.1.1. as "read with" advertising rules, and the advertising rules fall away, the actual substance of the ruling and the submissions prior to it are not around the advertising rules. The rulings on clause 4.1.1 and 11.1.1 are therefore valid and we looked at the merits.

85. However, the relevant version of clause 4.1.1. (v6.2 if the Code) states that “members are committed to fair and honest dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers”. The first part of the clause therefore involves a “commitment” and cannot be breached unless there is clear evidence that the member is not committed to honest and fair dealings. There was no evidence that the Appellant was not “committed”.

86. The Panel finds that the second sentence of the clause – commencing with “In particular” – does impose a separate positive burden to convey “clear and accurate” pricing. We note that this clause does not go so far as clause 11.1.1. does, in that it does not require that pricing to be explicit and prominent. In the matter before us, while the pricing was communicated somewhat further on than the first call to action, it was clear and accurate. There is therefore no breach of clause 4.1.1.

87. The next consideration was whether in this complaint there was a breach of clause 11.1.1 of the Code. In the relevant version of the Code the requirement in clause 11.1.1 is that “Promotional material for all subscription services must prominently and explicitly identify the services as ‘subscription services’”.

88. This subject matter of this complaint is an advertisement for a subscription to erotic material, with a chance to win an iPhone. The Panel is of the view that the call to action is too far removed from the information relating to subscription services. While it is arguable that by the end of the subscription process, the customer will know that they are subscribing, this is not the test for this clause, at this time. The communication that the service is a ‘subscription service’ is neither prominent nor explicit in relation to the initial call to action, in breach of clause 11.1.1 of the Code. The appeal with regard to the merits of this complaint is rejected.

89. In terms of the sanctions, the suspended fine, the R75,000 for clause 4.1.1, the R10,000 for clause 8.1.3, and the R50,000 for clause 11.2.2 fall away as those clauses were incorrectly cited.

90. The original adjudication imposed a fine of R250 000 for the breach of clause 11.1.1. The Panel notes that in this matter, the communication of “subscription services” was present although not prominent and explicit. In addition, it seems clear that the consumer would be aware that they were subscribing at the point at which they finalise the transaction. Given this, and given that the adjudicator gives no reasons to the contrary, the Panel considers this excessive for the nature of the breach, and reduces the fine to R 50 000.

Complaint 6180

91. This is a complaint in which no clauses of the Code were cited by the complainant. The adjudicator ruled on clauses 3.1.1, 4.1.1., 4.1.2, 6.5.1 and 11.1.2 of the Code.

92. The adjudicator also noted that he could not access the disputed webpages. From the wording of the ruling, it would appear that those pages were nonetheless before him as part of the complaint. The Panel is therefore satisfied that he did have the ability to consider the material.

93. The first question is therefore whether the clauses of the Code ruled on were correctly triggered by the complaint, or whether the adjudicator should rightfully have referred the complaint back to the secretariat or the complainant for further particulars.

94. Clause 3.1.1 of the Code sets out the requirement that members “conduct themselves in a professional manner”. This finding was triggered seemingly because the “page was not withdrawn during the time period offered by the SP”. This was not an issue that arose in the original complaint and does not appear to

have been put to the Appellant, arising out of the complainant's final comment on the Complaint. This aspect of the Ruling therefore fall away.

95. Clause 6.5.1 of the Code relates to the keyword "free". The word "free" in this Complaint is not a keyword and this aspect of the Ruling falls away.

96. The remaining finding is on Clause 11.1.2, with clause 4.1.1 and 4.1.2, which the adjudicator found to be breached. In relation to clause 4.1.1 of the Code, the wrong version of the Code was relied on by the adjudicator – version 7 being the correct version as per the date of complaint, rather than version 6.2, as recorded on the Ruling. As noted above, the relevant section of the clause is an 'aspirational' clause, requiring "commitment". Clause 4.1.2 of the Code similarly requires an element of deliberate misconduct – "knowingly". The Panel is satisfied that regardless of a potential breach, the complaint does not meet the very strict requirements of these clauses.

97. Clause 11.1.2 (v7 of the Code) 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."

98. The question is whether this was rightfully triggered by the complaint. The complaint says, *inter alia*, "Specific item of content used to mislead customers into subscribing to a subscription service".

99. The Panel finds that this complaint quite clearly indicates a cause of complaint founded in Clause 11.1.2.

100. The next issue in this Complaint was that the service was not in fact live at the time of the adjudication nor complaint – as is clear from the screenshots submitted by the complainant. The Appellant submits that this means the screenshot must have been bookmarked at some unknowable date – making it unclear what version of the Code applied at the time that it was bookmarked. Appellant argued that the scope of clause 11.1.2 of the Code is limited to

subscription services and that the fact that it was not live meant that it was neither a service in terms of Clause 1.4 (Scope of the Code) nor a subscription service in terms of the definition in Clause 2.24 of the Code.

101. This latter argument is, with respect, nonsensical. It would mean that at any time that a consumer is misled by material that has been removed between the time of the consumer seeing it, and the complaint, the complaint could not be heard. That is patently not the intention of the Code.

102. In addition, as long as the WASP allows a page to be accessible – no matter how unlikely the route of access is – the WASP must take responsibility for what appears on that page. While we accept that there is no knowing when the page was bookmarked, what is material is that at the time of complaint (and, *ex facie*, after), the page was still publicly accessible. The content of the page could therefore be considered by the adjudicator at the time of the complaint.

103. The page in question offers “FREE MUSIC” and gives the consumer a chance to enter their cell phone number. At the bottom, it states “subscription service”.

104. However, what is impossible to ascertain is what happened to the original subscriber after entering their telephone number, because the complainant hit a dead end at that point. Was he/she able to first get their free music content before being subscribed? Or did they have to subscribe to get the advertised content? That – as will be discussed in detail below – is the crux of the complaint to this Panel.

105. In this case, there was no evidence either way before the adjudicator and presumptions in this respect could not be made without putting them to the WASP.

106. The Panel is therefore satisfied that the finding in terms of Clause 11.1.2 was based on incomplete evidence, the missing aspects of which may or may not have been material.

107. The appeal is upheld with regard to this complaint. **The finding and sanction of Complaint 6180 are set aside.**

Complaints 7250, 7251 and 7252

108. This is a series of complaints involving clause 6.2.9 of the Code which sets a billing threshold of R200, after which the subscriber must be notified. The relevant period is clearly, from the clause, a “calendar” month (starting on the first day of each succeeding calendar month) and not an “anniversary” month (starting on the subscription date and the same day in each succeeding month).

109. In these complaints, the clause 6.2.9 threshold at the time of subscription was R300. It was changed in a revision of the Code, and the Appellant submitted that it experienced a technical hitch in its reprogramming to accommodate the change-over.

110. The Appellant was therefore in breach of clause 6.2.9 of the Code.

111. In reaching his/her decision, however, the Adjudicator took into account the Appellant’s “bad” history in terms of the Code as a whole. This was not correct, as the inquiry should have been restricted to breaches of this specific clause, which *ex facie* had not been a problem. The result was sanctions of suspension and a R20 000 fine. The Panel considers this completely excessive for a breach of this nature, and overturns the suspension for all three Complaints. The fine of R20 000 for each matter is upheld.

Complaint 7994

112. In this complaint the Appellant challenged whether the Media Monitor can add clauses to a complaint submitted by a consumer.

113. In terms of the Code at the time of the complaint, the Panel sees no reason that this cannot happen as long as the clauses are put to the WASP for response.

The question always centres on whether there was fair adherence to the rule of *audi alterem partem*, and in a case where the clauses were added and put to the WASP, this is satisfied.

114. Given that, the clauses of the Code cited in this Complaint were clauses 11.1.2, 11.1.5, 11.1.1 and 11.1.7 and 11.7.1.

115. The clauses ruled on were 11.1.2, 11.1.5, 11.1.1, 4.1.2, 4.1.1 and 11.1.7.

116. Clauses 4.1.1 and 4.1.2 were not cited and put to the Appellant and fall away.

117. Clause 11.1.7 of the Code states that, "Members must ensure that children accessing subscription services confirm that they have permission from a parent or guardian to do so." In the complaint, the advertising appeared specifically on Facebook which the monitor believed is accessed by children – hence triggering the citation of this clause. The Panel understands that Facebook is, in fact, not targeted at children and is specifically not accessible to children under 13. Given this, we find no basis for the allegation of a breach of clause 11.1.7 of the Code for the reasons set out in the complaint.

118. As regards to clauses 11.1.2 and 11.1.5 of the Code, it seems that the adjudicator based his decision not on a consideration of the actual subject material of the complaint but on his/her assumption of "continued behaviour" on the part of the Appellant. This conclusion is not borne out by the facts and this element of the complaint must fall away.

119. Clause 11.1.1 of the Code requires that promotional material prominently and explicitly identify the services as subscription services. The initiating banner in question quite clearly does not advise that the subject matter of the complaint is a subscription service. We do not consider that the blue on blue price of "R6 DAY" right at the bottom of the long banner is in any way a "prominent" or "explicit" indication that this is a subscription service, and we are conclude that there is a breach of Clause 11.1.1 of the Code.

120. The sanctions in relation to all clauses except clause 11.1.1 of the Code fall away, and in particular the suspension sanctions fall away – being excessive for a breach of clause 11.1.1 only, and on the banner only.

121. The Adjudicator issued a fine for a number of clauses together, and gives no insight into how he or she reached the fine and which breach accounted for which part of the fine. Having regard to the seriousness of a breach of Clause 11.1.1 and previous decisions on this clause, the Panel upholds a fine of R50 000.

Complaint 8085

122. This complaint was essentially a restatement of a complaint that is not part of this Appeal – Complaint 7631. The adjudicator – we submit correctly – found that the identical material had already been decided in that Complaint and could not be considered again.

123. The only new issue in this complaint was an alleged breach of Clause 3.7.1(b) of the Code which relates to services that result in an unreasonable invasion of privacy. The adjudicator found that the advertised service was a “Mobile Spy” service which claimed to be able to tell you the location of a person if you entered their cell phone number. It would appear that this was not possible and no person was actually ‘spied on”. While this raises other issues, those are not before us. We are satisfied that no-one suffered an actual invasion of privacy from this service and there was therefore no breach of Clause 3.7.1(b).

124. The appeal is upheld with regard to this complaint. **The finding and sanction of Complaint 8085 are set aside.**

Complaint 8235

125. The first issue in this complaint is that the complainant referred to clause 11.5.2 of the Code, and the Appellant submitted that this was therefore the only

clause of the Code that the adjudicator should validly have considered with regard to this complaint.

126. While the Panel considers that the complainant did not deliberately set out to cite clauses, and referred to Clause 11.5.2 “in passing”, it nonetheless was cited. In the circumstances, the adjudicator should have put any further clauses to the WASP before ruling thereon. This ruling is therefore set aside in its entirety. **The finding and sanction of Complaint 8085 are set aside.**

Complaint 8309

127. This complaint triggers several broad grounds of appeal before one can consider the material.

128. In the first place, a ruling was issued on clauses 4.1.1., 4.1.2, 11.1.1, and 11.1.2 of the Code, but only the latter two clauses were cited. The ruling in terms of clauses 4.1.1 and 4.1.2 therefore falls away.

129. The second issue that arises is to what extent the WASP is responsible for the actions of its third party “advertising agency”. What appears, according to the WASP, to have happened in this complaint is that the material in question went “live” before the Appellant had signed off the material. The Appellant therefore contends that it is not liable for any breaches arising from the material, and that it took all reasonable steps to bind the third party to the Code. The Appellant also contended that it could not be vicariously liable as the incidents of vicarious liability in South African law are limited.

130. The Panel agrees that this cannot give rise to a situation of vicarious liability, taking *Niselow v Liberty Life Association of Africa Ltd (1998 ILJ 752 (SCA))* as authority. (In that matter, the agent in question was a contractor canvassing insurance business, and was held not to give rise to vicarious liability). It cannot be ignored, however, that a service cannot be “live” without the co-operation of the WASP. However, this complaint related to the *ex facie* unapproved material,

and not the subscription process itself. The Panel therefore agrees that the WASP cannot be held liable for the actions of the third party.

131. There is a further issue in this complaint which is that the reason for adjudication – which related to the amended, and now allegedly “signed off” material-, in the form of a message received by the secretariat which read:

“Hi Lorraine

Please send this complaint for adjudication - we are not satisfied that this advert is not using a love quiz to lure subscribers into a subscription service.

Kind regards”

132. This message was not sent to the Appellant prior to adjudication and ostensibly relates to Clause 11.1.2 of the Code. The Panel agrees with the Appellant that this is irregular and that a ruling on the “new” material on this clause was incompetent without a further response.

133. This Complaint is therefore overturned in its entirety. **The finding and sanction of Complaint 8085 are set aside.**

Complaint 9502

134. The clauses of the Code that were ruled on in this Complaint were 3.1.1, 6.5.1, 11.2.2 as well as Advertising Rule 9.3.1. Clause 3.1.1 of the Code was not cited in the complaint and falls away.

135. In addition, Clause 6.5.1 of the Code and Advertising rule 9.3.1 relate to the keyword “free”. The use of the word “free” in this material is not a keyword in the context of the complaint, and those findings fall away.

136. The only clause that therefore ought validly to be adjudicated upon is Clause 11.2.2 (v9 of the Code) which 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”.

137. The Appellant submitted that its advertisement was in the testing phase – so while live, it was not generally accessible, and the Appellant expressed confusion as to how the Media Monitor might have accessed it. The Panel finds no reason to determine how it was accessed; the fact is, it was accessible and if a consumer happened upon it, they would be able to subscribe. The complaint is therefore validly before us.

138. The next issue raised by the Appellant was that by the time the consumer actually subscribes, they are aware that the process is one of subscription. This argument is based on a line of rulings that place some emphasis on the process of subscription. It is misdirected in that:

- the issue arose because of the wording of Clause 11.2.3 in later versions of the Code, which added an exception to clause 11.2.2, and makes reference to the “process” of subscription. That clause was not in the Code at the time of the complaint;
- in any event, in the appeal with regard to Complaints No. 16559/16659/17910, which dealt with the new version of those clauses, found that even on a reading of the “new” clause 11.2.3, there is a two pronged test and that the clarity of the process of subscription is merely one part thereof.

139. This Panel holds that the reading of Clause 11.2.2 of the Code at the time of this complaint is a simple question of “bundling” – that is was the specific content

item “bundled” with the subscription service, or was the subscription service a separate transaction from the specific content item.

140. In Complaint 9502, the customer is offered a “Banda of Farts”. In following the instructions the customer will inevitably become subscribed to a service known as “350350” – a full spectrum of music, games, ringtones and such. A customer cannot get the “Banda of Farts” without subscribing.

141. This Panel is therefore of the opinion that there is no independent transaction to subscribe. In other words, the request from a customer to join a subscription service is not an independent transaction, with the specific intention of subscribing to a service. It is bundled with a request for a specific content item. There is therefore a breach of Clause 11.2.2.

142. The fine for this breach was R200 000 and a suspension of services.

143. The Panel considers a suspension excessive in the circumstances, and unsupported by any compelling reasoning from the Adjudicator. That said, a breach of clause 11.2.2 is a serious breach, and in this case was particularly egregious in that it was not simply an issue of placement but one of overall communication. Given these factors, the Panel reduces the fine to R100 000.

Complaint 9508

144. In this complaint, Clauses 6.5.1, 11.2.2 of the Code and Rule 9.3.11 were ruled on. The word “free” was again not used as a keyword in the subject material of the complaint, and therefore the ruling with regard to clause 6.5.1 and rule 9.3.11 fall away.

145. The remaining issue is therefore whether there had been a breach of Clause 11.2.2 of version 9 of the Code.

146. The Appellant's offering in this Complaint is for consumers to find out what the cards hold for you with the "Tarot of Love". While this material does indicate slightly more clearly than in the previous Complaint that there will be "more", the fact remains that you cannot get the "Tarot of Love" without the subscription, and vice versa.

147. For the reasons set out above, the Panel therefore again finds a breach of Clause 11.2.2 of the Code.

148. The fine given for this breach was R50 000 and a suspension of the service. The Panel considers the suspension excessive in the circumstances but, given the seriousness of the breach, upholds the fine of R50 000.

Complaint 10019

149. This was a Complaint where the adjudicator found no breach of the Code but nonetheless imposed a sanction.

150. The Panel agrees that this is completely irregular and the Complaint is overturned in its entirety. **The finding and sanction of Complaint 10019 are set aside.**

Complaint 10479

151. In this complaint, the clauses ruled on were clauses 11.2.1, 4.1.2, and 11.2.2 of the Code, all of which were cited in the complaint.

152. However, Clause 11.2.1(v9 of the Code) deals with the issue of auto-subscription through a specific content item. The Panel agrees with the Appellant that in this complaint there was a clear subscription process and that it was not a case of auto-subscription. This aspect of the ruling is overturned.

153. However, the panel finds that there was a breach of clause 11.2.2 of the Code. There were two ways you might understand this communication – that you are subscribing to the meaning of your name/ names OR that you are subscribing to the highlighted and marked Baby Tjokuts item. In either event, you are attempting to access one content item, and not a subscription. You are unable to get the content item alone, and for the reasons set out above, the Panel considers this to be a breach of Clause 11.2.1.

154. The Panel also finds that in this particular case, the material is so clearly aimed at enticing consumers with the bundled offering without clearly communicating what the consumer is getting that it can be said that they “knowingly disseminated[d] information that is. . . likely to mislead by inaccuracy, ambiguity, exaggeration or omission”. There is therefore a breach of Clause 4.1.2.

155. This Complaint was decided together with Complaint 10489 and the sanction will be discussed below.

Complaint 10489

156. In this part of the ruling discussed above, clauses 4.1.2 and 11.2.2 were legitimately cited and ruled upon.

157. In relation to Clause 11.2.2, we deal with essentially the same issues as above – in this case an “IQ booster” is the single content item in question, and the overall communication is that you are subscribing to an “IQ Booster” service. In fact, you are subscribing to songs and wallpapers and, as a small part of the large offering, an IQ Booster” service. This is, again, a breach of Clause 11.2.2.

158. We are again also satisfied that this is a clear and deliberate enough breach that the Appellant was in breach of Clause 4.1.2 in that they “knowingly disseminated[d] information that is. . . likely to mislead by inaccuracy, ambiguity, exaggeration or omission”.

159. In Complaints 10479 and 10489, the Adjudicator felt that the Appellant failed to respond to fines, and that its services therefore needed to be suspended pending complete, across the board, compliance.
160. It is noted in this respect that this sanction, at this stage of the proceedings, has little meaning. The Code has changed many times and the services and format of the Appellant's advertising have also changed.
161. The Panel is, however, not prepared to allow the breach to go unpunished as a result of the dragging out of these Complaints. The sanction of suspension is therefore reduced to a fine of R50 000 in respect of EACH 10479 and 10489, as the material was different and therefore requires separate sanction.
162. Finally, Complaint **10756** deals with the identical material and issues as Complaint 10489. The Panel therefore finds that this issue was disposed of in the Complaint of 10489 and should not have been reconsidered. **The decision and sanction in Complaint 10756 are set aside.**

Costs

163. If this Appeal is considered as a whole, it can be divided into two parts: the issue of BUK/BSA traversed in the first report of this Panel, and the remaining issues on Appeal traversed in this Appeal Finding. The Appellant was unsuccessful in the first issue and successful in most complaints in the second issue. In addition, the Appellant was granted a further three days of hearing at WASPA's sole cost.
164. In the matter of *Competition Commission v Pioneer Hi-Bred International Inc & Others* [2013] ZACC 50, the Constitutional Court considered the question of costs orders against the Competition Commission and said, *inter alia*, "The principle that should inform the CAC's exercise of its discretion is that, when the Commission is litigating in the course of fulfilling its statutory duties, it is undesirable for it to be inhibited in the *bona fide* fulfilment of its mandate by the threat of an adverse costs award. This flows from the need to encourage organs

of state to make and to stand by honest and reasonable decisions, made in the public interest, without the threat of undue financial prejudice if a decision is challenged. . .”. While the situation with an appeal instituted through WASPA is not exactly analogous, we consider that the observations of the Court apply *mutatis mutandis*. It would not be desirable for WASPA to be discouraged from allowing appeals (a process which it is under no legal obligation to provide) through adverse cost orders. It is in the interest of consumers and WASPs that WASPA is able to operate without threat of financial prejudice if a decision is challenged.

165. Given all these factors, the Appellant is not refunded its costs.

Summary

166. We attach a summary of the findings of the Panel for ease of reference.

File	Finding	Sanction
4677	Appeal upheld	None
5564	Breach 11.1.1	R50 000
5568	Breach 11.2.2	R25 000
6180	Appeal upheld	None
6756	Appeal upheld	None
7250	Breach 6.2.9	R20 000
7251	Breach 6.2.9	R20 000
7252	Breach 6.2.9	R20 000
7314	Appeal upheld	None
7452	Appeal upheld	None
7789	Appeal upheld	None
7841	Appeal upheld	None
7907	Appeal upheld	None
7986	Appeal upheld	None
7994	Breach of 11.1.1	R50 000
8038	Appeal upheld	None
8085	Appeal upheld	None
8235	Appeal upheld	None
8309	Appeal upheld	None
8326	Appeal upheld	None
8330	Appeal upheld	None
8392	Appeal upheld	None
8411	Appeal upheld	None
8530	Appeal upheld	None
8780	Appeal upheld	None
8874	Appeal upheld	None
9150	Appeal upheld	None
9334	Appeal upheld	None
9502	Breach 11.2.2	R100 000
9508	Breach 11.2.2	R50 000
10019	Appeal upheld	None

File	Finding	Sanction
10479	Breach 4.1.2 and 11.2.2	R50 000
10489	Breach 4.1.2 and 11.2.2	R50 000
10576	Appeal upheld	None
10756	Appeal upheld	None