

REPORT OF THE APPEALS PANEL

Date:	10 June 2010
Appellant and Service Provider	Integrat (Pty) Ltd
Information Provider (IP)	Glomobi
Complaint Number:	5994 and 5995
Applicable versions:	Code V6.2

1 BACKGROUND TO THE APPEAL

- 1.1 This appeal concerns two complaints lodged on 10 and 12 March 2009, by an anonymous competitor against Integrat (Pty) Ltd, the Service Provider (SP) and Glomobi, the Information Provider (IP). The parties are the same and so is the complaint in both cases, so they were considered together by the adjudicator and we are considering the appeal against the findings on both.
- 1.2 The SP is a South African company and full member of WASPA. The IP is not a member of WASPA. The SP alone is appealing against the Adjudicator's findings and the sanctions imposed.
- 1.3 Both complaints relate to subscription services, more particularly, alleged breaches of clause 11.1.2 of the WASPA Code of Conduct (Code) which seeks to prevent "bundling" of content with a subscription service.
- 1.4 The complaints, the findings of the Adjudicator, the SP's response to and appeal against both complaints, are fully recorded in the case files provided to this appeals panel, and as these are, or will be, publicly available on the WASPA website, they will not be repeated in full in this appeal panel's report.
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2 CLAUSES OF THE CODE CONSIDERED

- 2.1 Both complaints relate to alleged breaches of section 11.1.2 of the Code, which reads:
- 2.1.1 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.
- 2.2 In this appeal, the panel will be guided also, by the general provisions and purpose of the Code:
- 2.2.1 1.2. Objectives of the Code of Conduct
- The primary objective of the WASPA Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured

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that they will be provided with accurate information about all services and the pricing associated with those services.

- 2.2.2 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.

3 FINDINGS AND DECISIONS OF THE ADJUDICATOR

3.1 Finding of the Adjudicator

3.1.1 Complaint 5994

- 3.1.1.1 The SP is only providing display of a single content item. Neither the voiceover nor the display informs a user that they would get anything else apart from the single content item. Although the subscription details are provided, only one item is being displayed. This form of only displaying a single content item, bundled with a subscription service, is therefore in the opinion of the Adjudicator a direct breach of section 11.1.2.

3.1.2 Complaint 5995

- 3.1.2.1 The SP did however provide a voiceover that states that a subscriber would get "this baby ring tone and many others". On the display in the top right hand corner, it states: "Baby Turbo". It also provides another content item offering the opportunity ("up for grabs") to get R40 airtime for free every half an hour. Whether this amounts to some sort of competition or lucky draw is unknown. In such an event, it would also contravene section 11.1.2 since it steers away from a specific request for a subscription service. Even if the contrary is proven, it will still be in contradiction of section 11.1.2.
- 3.1.2.2 If version 7.0 of the Code was applicable, section 11.1.3¹ would also not have provided the SP with any recourse in Complaint 5994 since only one item was displayed. It could have maybe provided a solution for Complaint 5995, but the Adjudicator is not willing to rule on a version of the Code that is not applicable to this specific ruling.

3.2 Sanctions of the Adjudicator

- 3.2.1 For a breach of section 11.1.2 of the Code in complaint 5994, a fine of R80 000, and;
- 3.2.2 For a breach of section 11.1.2 of the Code in complaint 5995, a fine of R50 000.

4 GROUNDS OF APPEAL

4.1 Grounds of appeal for complaint 5994

¹ Section 11.1.3 of V7.0 of the Code provides, "An advert for a 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.

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4.1.1 The SP's grounds for appeal are recorded (that is copied exactly as submitted, errors included) in an undated document as follows:

4.1.1.1 "Firstly, the complaint was made prior to 25 March 2009, and hence the Code of Conduct Version 6.1² should be used.

It is very clear from the video clip that this is a subscription service, as the required by the Advertising Rules, the SP has complied by providing the wording in the correct text, font and size as required.

Prior to the current Code of Conduct Version 7.4, there is no requirement that there should be more than one content displayed in the Code of Conduct for subscription service. Section 11.1.2 of Code version 6.1 does not spell it out that there is such a requirement.

Section 11.1.2 states that it "must be an independent transaction with the specific intention of subscribing to a service". The following clearly states that the television commercial is for a subscription service as its intention and not otherwise:

- (a) The words "Subscription Service" are stated in bold and capital letters;
- (b) The total charges payable is listed above on the right hand corner of the television commercial which is R24.95/week; and,
- (c) The T&C at the bottom of the television commercial states that there will be 5 SMSs/week at R4.99/SMS.

With such clear description, one could not deny that this is not a subscription service. If it [is] merely a single content item being sold via the television commercial, it would mean that the subscriber would be paying R24.95, but the word "week" would be redundant.

Hence, the television commercial has to be reviewed as a whole and not in pieces, whereby having displayed a single content item in the commercial, does not mean it could not be a subscription service. If this is so, that would then make the Advertising Rules redundant, as the aim of the Advertising Rules of having its terms and conditions, texts at certain font and size, so that it is clear to consumers subscribing to it on what their exposure of cost are, has been circumvented just because a single content item in the commercial would decide if the SP be selling a single content item or if it is a subscription service.

We will like to seek your kind indulgence to review this case again by considering the reasoning provided above."

4.2 Ground of Appeal for Complaint 5995

4.2.1 The SP's grounds for appeal is recorded (errors included) in the same undated document as follows:

² The SP is incorrect. Version 6.2 of the Code applied from 14 August 2008 to 25 March 2009 and was applicable to both complaints, which were lodged on 10 and 13 March 2009, respectively.

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4.2.1.1

“The complaint was made on 11 March 2009 which is prior to 25 March 2009, and hence the Code of Conduct Version 6.13 should be used and not Version 6.2.

The voice over clearly states that this is a subscription service as it states “... SMS Turbo to 31944 and you will receive this baby turbo ring tone and many others...”. The voice over do suggest that there is more than one content in this subscription as its states “you will receive this baby turbo ring tone and many others”. The voice over is simple and clear.

The concern was raised if the R40 airtime for free every half an hour is some sort of a competition or lucky draw. This is not so, as the R40 airtime would be given to any customer who subscribes for the content at the 30 minutes pass the hour or at the change of the hour. There is no extra cost incurred to the customer and there is no draw or competition in this. Therefore, we could safely state that the customers’ request from to join a subscription service is an independent transaction, with the specific intention of subscribing to a service as the R40 is merely a loyalty gift to customers for subscribing for the “baby turbo” service and customers are not “steer away” in anyway.

The display of the words “Baby Turbo” on the top right hand corner is just a label for the commercial and this should not cause any confusion to the whether this is an independent transaction for subscribing the service. If reference was made to the “SMS Joy” television commercial, it is labelled as “YMCA”. These labels are only for classification of the services by the SP.

Section 11.1.2 states that it “must be an in independent transaction, with the specific intention of subscribing to a service”. The following clearly states that the television commercial is for a subscription service as its intention and not otherwise:

- (a) The words “Subscription Service” are stated in bold and capital letters;
- (b) The total charges payable is listed above on the right hand corner of the television commercial which is R19.96/week; and,
- (c) The T&C at the bottom of the television commercial states that there will be 4 SMSs/week at R4.99/SMS.

With such clear description, one could not deny that this is not a subscription service. If it merely a single content item being sold via the television commercial, it would mean that the subscriber would be paying R19.96, but the word “week” would be redundant.

Hence, the television commercial has to be reviewed as a whole and not in pieces, whereby having displayed a single content item in

³ The SP is incorrect. See above and below. V 6.2 is the applicable version of the Code.

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the commercial, does not mean it could not be a subscription service. If this is so, that would then make the Advertising Rules redundant, as the aim of the Advertising Rules of having its terms and conditions, texts at certain font and size, so that it is clear to consumers subscribing to it on what their exposure of cost are, has been circumvented just because a single content item in the commercial would decide if the SP be selling a single content item or if it is a subscription service.

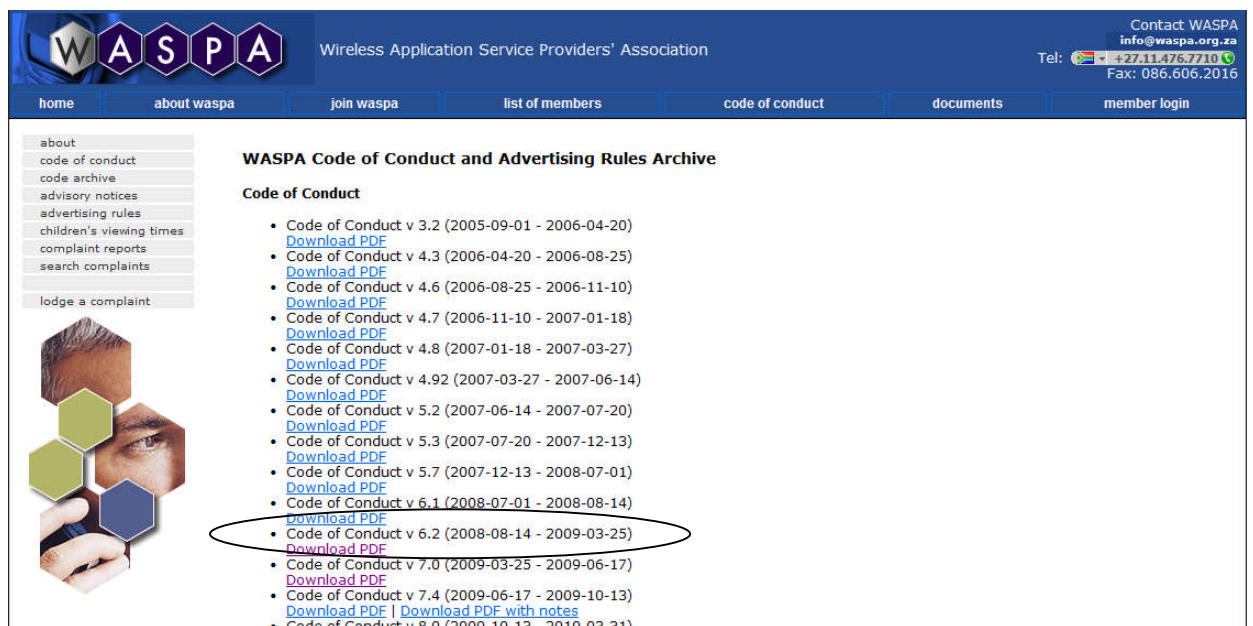
We will like to appeal that the Adjudicator to reconsider the decision upheld.”

5 FINDINGS OF APPEALS PANEL

5.1 Findings with regard to the SP's Appeal

5.2 Version of the Code

5.2.1 The complaints were made on 10 and 12 March 2009. Version 6.2 of the Code, in use from 14 August.2008 to 25 March 2009, applies.



5.3 “Bundling” in general

5.3.1 More than any other issue, the issue of “bundling” has from the inception of WASPA in 2004, plagued the mobile industry in South Africa. It is a common commercial concept but has unfortunately been abused in this industry in our experience. Simply put, “bundling” is the practice whereby service providers offer what appears to be a single content item for sale at a unit price but use the consumer's offer to purchase this single item as an opportunity to subscribe the consumer to an unwanted and ongoing service.

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- 5.3.2 Bundling can consist in genuine offerings of “bundles” of services for a particular fixed price, but our experience and the history of “bundling” and related WASPA complaints shows that this practice has led to lucrative income streams, wrongfully enriching WASPs prepared to bend the rules and ignore the spirit of the Code in order to keep subscribing consumers on the basis of their purchase of only 1 or a limited number of items in one transaction.
- 5.3.3 The period of benefit enjoyed by SPs from the ill-gotten gain has tended to be lengthened by obfuscation, confusion and debates on wording and interpretation of the Code’s provisions. While WASPs argued and debated the issues, consumers suffered.
- 5.3.4 The practice of “bundling” as it has developed, so contravenes both the spirit and the letter of the Code, most especially, sections 1.2 and 2.2, to say nothing of section 11.1.2 providing for subscription, that unusually high fines and harsh sanctions have been applied by WASPA Adjudicators in an effort to stamp out the practice.
- 5.3.5 At the same time, numerous versions of the Code have been drafted in an effort to bring clarity and certainty to the issues relating to bundling, one of which requires an offer of more than one content item to be illustrated (an amendment not in force at the time of these to complaints). While dialogue continued between the various bodies of WASPA, it is plain to the panel that any WASP not taking the issues relating to “bundling” seriously exposed their businesses to very high risk indeed.
- 5.4 Appeal Panels Finding with regard to Complaint 5994



- 5.4.1 Above is a screenshot of the advertisement. While the images change, the wording relating to the pricing and the fact that this is a subscription service does not. The static nature of the latter, for the

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full 28 seconds of the advertisement, is, in the view of the panel long enough to read and to understand the nature of the service, terms, conditions and pricing⁴.

- 5.4.2 The panel agrees that it is clear that this is a subscription service and accepts the SP's contention that the Advertising Rules have been complied with.
- 5.4.3 The panel agrees that there was no requirement in V 6.2 of the Code for more than one content item to be shown to illustrate the type of services being offered by way of subscription.
- 5.4.4 We find the "total charges payable", R24.95/week on the top right hand corner of advertisement somewhat confusing because the frequency relating to the cost per week is separately displayed in the text below as R4.99/SMS and is not part of the more noticeable "total charges payable".
- 5.4.5 However, the panel finds no breach of sections 11.1.2.
- The panel finds some confusion in respect of a breach of section 1.2 of the WASPA Code (The primary objective of the WASPA Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services), and section 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), but not sufficient to warrant the fines imposed by the adjudicator.
- 5.5 Appeal Panels Finding with regard to Complaint 5995

^{4 4} The images of both advertisements in this Report are small. The advertisement on a Television screen would have been substantially larger and therefore, clearer.

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- 5.5.1 Above is a screenshot of the advertisement. While the images change, the wording relating to the pricing and the fact that this is a subscription service does not. The static nature of the latter, for the full 26 seconds of the advertisement, is, in the view of the panel long enough to read and to understand the nature of the service, terms, conditions and pricing.
- 5.5.2 The voice over states that this is a subscription service and offers “this baby turbo ring tone and many others...”. The latter wording, introduces more than one content item as required by later versions of the Code. It is nevertheless not required in terms of V 6.2 of the Code.
- 5.5.3 The panel accepts the SP’s contention that the R40 airtime, free every half hour, is not a competition or lucky draw, but merely a give-away to attract consumers. We find this aspect of the advertisement somewhat confusing, both visually and in the voice over, but find no breach of section 11.1.2 of the Code.
- 5.5.4 The panel accepts that the words “Baby Turbo” on the top right hand corner is a label for the advertisement rather than an offer of a single content item. It seems reasonable that both SPs and consumers employ labels to properly identify the service offered and subscribed to. We repeat, V 6.2 of the Code had no requirement for more than one content item.
- 5.5.5 The panel agrees that it is clear that this is a subscription service and that it has been advertised correctly, in accordance with the Code.

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- 5.5.6 We find the “total charges payable”, R19.96/week on the top right hand corner of advertisement somewhat confusing because the frequency relating to the cost per week is separately displayed in the text below as R4.99/SMS and is not part of the more noticeable “total charges payable”. The contention that the words “per week” is redundant hardly counters this.
- 5.5.7 However, the panel finds no breach of sections 11.1.2.
- 5.5.8 As above, the panel finds some confusion in respect of a breach of sections 1.2 and 4.1.2 of the WASPA Code of Conduct, , but not sufficient to warrant the fines imposed by the adjudicator.
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6 DECISIONS AND SANCTIONS OF APPEALS PANEL

- 6.1 Decisions and sanctions with regard to complaint 5994
- 6.1.1 The appeal is upheld. The sanctions imposed on the SP are withdrawn.
- 6.2 Decisions and sanctions with regard to complaint 5995
- 6.2.1 The appeal is upheld. The sanctions imposed on the SP are withdrawn.
- 6.3 The appeal fee is not refundable. The SP is directed to pay the R10 000 appeal fee to WASPA within 5 days of receipt of this report.
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7 COMMENTS OF THE APPEALS PANEL

- 7.1 The appeals panel wishes to go on record as saying that our findings in the appeal are based on a strict interpretation and application of V6.2 of the Code on the facts of the complaints, - it is on this basis we found no breach.
- 7.2 We are of the opinion however that the spirit of the Code has not been fully respected, and it seems to us that these 2 advertisements and the related complaints might have been a “test” seeking clarity on “bundling”. Once again, given that the Code has been amended, it is no longer material.
- 7.3 Finally, we wish to comment that the SP’s contention that the complaints were “premature” is nonsense. Complaints relate to a version of the Code in force at a particular time. They will be upheld, or not.