

**WASPA appeals panel  
Complaint 6413**

**REPORT OF THE APPEALS PANEL**

**Date: 17 January 2011**

**Service Provider: Integrat**

**Appellant and Information Provider (IP): Frisky Mobile**

**Complaint Number: 6413**

**Applicable versions: 7.0**

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**1. BACKGROUND TO THE APPEAL**

1.1 This appeal concerns a complaint lodged on 09 May 2009, by the WASPA Monitor against Integrat, a Service Provider (SP) and Frisky Mobile, an Information Provider (IP).

1.2 The SP is a member of WASPA and based in South Africa. The IP is not a member of WASPA and is appealing the infringements alleged.

1.3 The complaint relates to subscription services, more particularly, alleged breaches of clause 11.1.2 of the WASPA Code of Conduct (Code).

1.4 The complaints, the findings of the Adjudicator, the SP and IP's response to and appeal against the complaint, 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.

**2. CLAUSES OF THE CODE CONSIDERED**

2.1 The following clauses of the Code were considered:

- 2.1.1** 11.1.2. 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.
- 2.1.2** 11.1.10. Where a subscription service is initiated by a user replying to a message from a service provider where that message contains instructions for activating a service and/or where that message contains an activation code that when inputted by the user activates a subscription service, then that message, along with the subscription initiation instructions and/or activation code, must also include the subscription service information in the following format, flow and wording: [service activation instructions and/or activation code]. U'll b subscribed to [XYZ service] from [name of service provider] @ [cost of service and frequency of billing]. Help? Call [call centre number + "(VAS)" if applicable]. To unsubscribe, [unsubscribe instructions].

### **3. FINDINGS AND DECISIONS OF THE ADJUDICATOR (Please note that this extract is a verbatim copy of the Adjudicator's Report)**

#### **3.1 BUNDLING (11.1.2)**

- 3.1.1** It follows from section 11.1.2 that if a request to join any subscription service is dependent on a request being made for any specific content item, then the request would not be an "independent" transaction within the meaning of section 11.1.2.
- 3.1.2** "Content item" is not a term defined in the Code. However, section 2.11 of the Code defines a "content subscription service" as including "any subscription service providing or offering access to content including, by way of example only and not limitation: sound clips, ring tones, wallpapers, images, videos, games, text or MMS content or information."

- 3.1.3** A “content item” ought therefore to be construed to include a sound clip, ring tone, wallpaper item, image, video, game, text or MMS content or information.
- 3.1.4** Section 11.1.2 must therefore be interpreted as prohibiting the bundling of any request to join a subscription service with a request to receive any specific sound clip, ring tone, wallpaper item, image, video, game, text or MMS content or information.
- 3.1.5** In the present case, the subscription cannot be activated without requesting the IQ score that is generated as a result of the initial quiz that a consumer participates in.
- 3.1.6** The IQ score generated by the quiz is a “specific content item” as contemplated by section 11.1.2 of the Code. Following a request by the consumer, the content item is delivered in text form to the consumer simultaneously with the subscription confirmation message. The fact that a notice on the landing page invites a consumer to “find out your IQ and receive daily IQ improvement messages” does at least indicate that a subscription service will be activated when the IQ score is requested but it cannot detract from the fact that a request for specific content has been bundled with a subscription activation request. In fact, the subscription cannot be activated without the IQ score request being submitted; in this sense the subscription activation is entirely dependent on the content item request.
- 3.1.7** The subscription activation process would comply with the consumer protection offered by section 11.1.2 of the Code if the 10-question IQ score were first generated for free or for a once off content item fee and, thereafter, the consumer was invited to request and independently transact for his or her subscription to the daily IQ improvement message service at the rate of R4.99 per additional message.
- 3.1.8** Such a method would also not breach section 11.1.5 of the Code referred to above.
- 3.1.9** The complaint of a breach of section 11.1.2 of the Code is accordingly upheld.

## 3.2 ACTIVATION MESSAGE (11.1.10)

**3.2.1** The IP has conceded that the correct format for the activation message was not used. The complaint of a breach of section 11.1.10 is therefore also upheld.

## 3.3 Sanctions Imposed

**3.3.1** Subscription activation methods that fail to comply with the strict requirements of the Code are serious breaches of the Code as they frequently result in disgruntled consumers feeling duped into paying for an ongoing service that they did not actually intend to subscribe for. Complaints of inadvertent subscription to a service are frequent and pose a significant threat to the industry's ability to provide for a measure of self-regulation in future. If service providers do not adhere strictly to the provisions of the Code relating to advertising and transparent subscription mechanisms, then not only consumers, but the entire membership body of WASPA will be substantially prejudiced.

**3.3.2** In mitigation of the breach of section 11.1.10 the IP stated that the breach was due to an oversight and suggested that WASPA had given service providers a short time frame to implement the new activation message requirements. The IP revealed that the new requirement was communicated to members at the end of March 2009 and the requirement became effective less than 14 days later on 10 April. It should be noted however that the complaint arose on 7 May 2009 and that it is therefore obvious that the IP had still not implemented the required message within at least 37 days after the new requirement had been communicated.

**3.3.3** In the circumstances, the following sanctions are imposed:

**3.3.4** The SP is directed to:

- 3.3.4.1 immediately suspend the service and all billing for the service;
- 3.3.4.2 pay over to WASPA a fine of:
  - 3.3.4.2.1 R100 000 in respect of the breach of section 11.1.2; and
  - 3.3.4.2.2 R10 000 in respect of the breach of section 11.1.10;
- 3.3.4.3 within 5 days of the delivery of this report failing which the SP's membership of WASPA shall be suspended for a period of 30 days or until such time as the fines have been paid in full, whichever period is the longer; and
- 3.3.4.4 pending full compliance by the SP with the sanctions contained in paragraph 3 below:
  - 3.3.4.4.1 (a) withhold payment of all amounts due by it to the IP as contemplated by the provisions of section 13.4.1(i) of the Code; and
  - 3.3.4.4.2 (b) preserve and retain all revenue paid to it by any cellular network operator in respect of the any service offered by the IP and to refrain from dissipating such revenue in any way other than in fulfilment of the fines provided for in paragraph 1.2 above; and
  - 3.3.4.4.3 (c) send an SMS message to all current and past subscribers to the service advising them as follows:
    - 3.3.4.4.3.1 "The [name of service] has been suspended due 2 breach of WASPA Code of Conduct. Further communications will follow. For help contact [telephone number of SP]".

**3.3.5** In terms of section 13.4.2 of the Code, the sanctions contained in paragraphs 1.1 (3.3.4.1) and 1.3 (3.3.4.3) above may not be suspended pending any appeal that may be instituted in this matter but shall become effective immediately on the publication of this report.

**3.3.6** The SP is further directed:

- 3.3.6.1 within 5 days of the delivery of this report to send an SMS message to all current and past subscribers advising them that the service breached the WASPA Code of Conduct and advising such persons of their right to claim a refund of all subscription fees paid by contacting the SP's help desk by 5pm on a date falling 15 days after the sending of message or the first business day thereafter if that date falls on a weekend or public holiday; and
- 3.3.6.2 as contemplated by the provisions of section 13.4.3(g) of the Code, to issue a blanket refund to all subscribers claiming a refund within the period mentioned in paragraph 3.1 (3.3.6.1) above within 10 days of the expiry of such period.

**3.3.7** The suspension of the service shall continue until such time as all sanctions have been fully complied with and until the WASPA Secretariat has received a report on all refunds issued and approved of a detailed description of all advertising for and revisions to the service designed to ensure full compliance with the Code in future.

**4. GROUNDS OF APPEAL (Please note that this extract is a verbatim copy of the Appeal lodged by the Appellant, numbered by the panel for ease of reference)**

4.1 Grounds of appeal for complaint 6413.

**4.1.1** Frisky Mobile (IP) wishes to appeal the decision of the WASPA adjudicator in relation to Complaint Number 6413 both on the merit of the decision and the extent of the sanctions imposed.

**4.1.2** The basis for the appeal is documented below:

**4.1.3** Based on our interpretation of the code, it seems this clause was to prevent content providers from selling a particular content item that can be identified

i.e. a specific ringtone. With our service the customer cannot choose a specific content item.

**4.1.4** They simply go through the process and subscribe to IQ messages and not a quiz. We do not believe we are in breach of this section of the code.

**4.1.5** This version of the code does not include the words 'may not be an entry into a competition or quiz' – since these words were later added to add clarity WASPA itself concedes that this clause was not as clear as it could have been.

**4.1.6** We would further like to note that the Code of Conduct does not define what a quiz is. We would like the above to also be taken into account as a mitigating factor. The Code was not and still is not very clear in this regard.

**4.1.7** Furthermore the service is clearly a subscription service, various content items are provided and this made clear.

**4.1.8** Can the delay in the adjudication also be taken into account as a mitigating factor? The bundling clause has since been clarified and perceptions with regards to quiz services have also changed. At the time of the complaint this was not the case and this is leading to significant prejudice against the IP.

**4.1.9** The adjudicator has also ordered the IP to refund subscribers – this service was ceased at the time the complaint was lodged, which is about a year ago. The IP is not in any way responsible for the delay in adjudication and can therefore not be held responsible to refund subscribers for a year's subscriptions.

**4.1.10** Due to churn patterns in the market most of these subscribers will not be the users who subscribed to the service in the first place.

**4.1.11** Nevertheless Frisky Mobile has agreed to sms a message to all current and past subscribers from the past 6 months to the service advising that the service is under investigation by WASPA.

**4.1.12** Summary of mitigating factors:

4.1.12.1 There was no malicious intent

4.1.12.2 Immediate remedy

4.1.12.3 Delay in adjudication and practicality of sanctions; as well as

4.1.12.4 changing perceptions in the mobile market

4.1.12.5 Clarity of the Code and lack of proper definition of terms

4.1.12.6 SMS sent out to subscribers that received a message since 1/1/2010

4.1.12.7 Penalties are very high considering the number of subscribers the service generated.

**4.1.13** There were only 23 customers active as at 1 January 2010 and therefore the penalties seem extremely harsh and not appropriate to the level of customer base.

**4.1.14** The adjudicator explains his interpretation of section 11.1.2 and effectively concludes that every first item of a subscription service is a “specific content item” and should be sent out for free or alternatively at a cost with a further invite to join the subscription service.

**4.1.15** It is our understanding from reading the code and its interpretation and various emails with WASPA members that this is clearly not the intention of the code.

**4.1.16** It is our view that the adjudicator did not adequately consider the IP response and was erroneous in his interpretation of the IP’s response.

**4.1.17** Furthermore we also believe the sanctions imposed are extremely severe.

**4.1.18** It should also be noted that Frisky Mobile ceased marketing any content services in South Africa at the beginning of May 2009. The IP does not have the amount of funds required to pay the amount of the sanctions being imposed - in fact Frisky Mobile has very few customers and almost no



revenue flowing to it. Frisky Mobile has taken compliance with WASPA extremely seriously at all times and acted speedily to cease marketing the service as soon as notified of the original complaint.

**4.1.19** We ask the Appeal to court to kindly take into consideration the SP Appeal and reduce the sanctions to a warning.

## **5. FINDINGS OF APPEAL PANEL**

### 5.1 Version of the Code

**5.1.1** This matter is governed by the WASPA Code of Conduct Version 7.0 due to the fact that the alleged infringements occurred between 2009-03-25 and 2009-06-17.

5.2 For clarification it has to be noted that the Adjudicator's decision was levied against the IP in this matter.

5.3 It also has to be clarified that although the SP in this matter alleges to be a mere conduit on behalf of the IP, sanctions were levied in the Adjudicator's Report against the SP in this matter and not the IP, who is acting as the Appellant.

5.4 In the absence of clarity and taking paragraph 4.1.19 into consideration "SP Appeal", the Panel would therefore construe the Appeal by the Appellant as an Appeal on behalf of both the SP and IP.

5.5 This is done taking section 3.9.1 of the Code into consideration.

**5.6 The Panel has reviewed the interpretation of section 11.1.2 in the Code and has no hesitation in agreeing with the adjudicator's conclusion as referred to in paragraphs 3.1.1 and 3.1.6.**

5.7 The request for the IQ test score or result is in itself a single content item and can therefore not be bundled with a request to subscribe to the service, which in

itself is clearly a subscription service. It is not independent. The fact that the subscription service relates to the IQ test does not change the fact that the single content item must be separated from the subscription.

5.8 Even though the Appellant has raised various questions as to the interpretation of quizzes and the interpretation of section 11.1.2 in subsequent codes, the Panel does not agree with its contention and is not of the opinion that the relevance of a quiz plays any significant factor.

5.9 It is the Panel's contention that the service in this matter would also have failed to comply with any later version of the Code.

5.10 The decision is based on the dependency of the subscription on the IQ test score or result and the subsequent lack of independency and not whether it is a quiz. This position has remained unchanged in all versions of the Code.

5.11 The decision pertaining to section 11.1.10 is not appealed against.

5.12 The Panel however does agree that the lengthy time it took to reach adjudication in this matter might in this specific matter, without setting a precedent, have created a problem for the Appellant in terms of the practicality of the sanctions and the Panel concurs with the Appellant's appeal in paragraphs 4.1.9 and 4.1.10.

5.13 The panel has also taken into account that the SP and IP in this matter reacted swiftly in mitigating any harm caused to subscribers.

5.14 Although there are numerous decisions upheld against the SP for breaches of section 11.1.2 of the Code, none of these breaches occurred in conjunction with the IP in this matter.

5.15 That however being said, section 3.9.1 of the Code clearly states that Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.

5.16 It therefore remains the SP's responsibility to ensure compliance with the Code by its IPs and such responsibility and interpretation is made unambiguously clear in version 10 of the Code which states in its section 3.9.2 that where any information provider that is not a WASPA member conducts any activity governed by the provisions of this Code, and makes use of the facilities of a WASPA member to do so, that member must ensure that the information provider is made fully aware of all relevant provisions of the Code and the member shall remain responsible and liable for any breach of the Code resulting from the actions or omissions of any such information provider.

5.17 The Panel has also considered the number of subscribers (23) that has enlisted but wants to reiterate that the number of subscribers is not the only factor.

5.18 Consideration is also given to the offence in itself and potential harm.

**5.19 The finding of the Appeals Panel is:**

**5.19.1** The sanctions pertaining to refunds as referenced in paragraph 3.3.6 above are overturned due to the practicality thereof.

**5.19.2** The sanction of R 100 000, 00 as referenced to in paragraph 3.3.4.2.1 above is overturned and reduced to R 30 000, 00.

**5.19.3** The sanctions as referenced to in paragraph 3.3.4.1, 3.3.4.2.2, 3.3.4.3, 3.3.4.4 and 3.3.5 are upheld.

**5.19.4** The cost of appeal is non-refundable.