

**WASPA appeals panel  
Complaint 6797**

**REPORT OF THE APPEALS PANEL**

**Date: 01 November 2010**

**Service Provider: N/A**

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

**Complaint Number: 6797**

**Applicable versions: 7.4**

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**1. BACKGROUND TO THE APPEAL**

1.1 This appeal concerns a complaint lodged on 12 June 2009, by the WASPA Monitor against Fun Mobile, an Information Provider (IP).

1.2 The IP is an affiliate member of WASPA and based in Hong Kong. The IP is appealing the infringements alleged.

1.3 The complaint relates to subscription services, more particularly, alleged breaches of clauses 4, 6 and 11 of the WASPA Code of Conduct (Code).

1.4 The complaints, the findings of the Adjudicator, the 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** 6.5.1 The keyword “free” or words with the same or similar meaning (in any language) may not be used for any service unless that service has no associated charges whatsoever, excluding network bearer charges.

**2.1.2** 11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”. This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

**2.1.3** 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 and may not be an entry into a competition or quiz.

**2.1.4** 11.1.8. Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message must be a clear notification of the following information, and should not be mistaken for an advert or marketing message:

2.1.4.1 a) The name of the subscription service;

2.1.4.2 b) The cost of the subscription service and the frequency of the charges;

2.1.4.3 c) Clear and concise instructions for unsubscribing from the service;

2.1.4.4 d) The service provider’s telephone number

**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 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.

**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 (Please note that this extract is a verbatim copy of the Adjudicator's Report)**

**3.1 INFORMATION NOT TO BE DECEPTIVE (4.1.2)**

**3.1.1** 26. Clause 4.1.2 of the CoC indicates that not only must the information be deceptive but that the IP (or SP as the case may be) must not knowingly disseminate deceptive information. This clause thus requires the element of intentionally deceiving customers. As a result of the responses by the IP it is not clear that the IP intended to deceive customers (whether or not it did in fact do so). As a result this clause has not been found to be breached by the IP.

**3.2 PRICING NOT MISLEADING (6.2.4) (AR 9.3.1)**

**3.2.1** 27. The IP has admitted that the prices of each individual communication were not included in its Terms and Conditions (i.e. R7.50 per SMS) and has rectified this problem. In the circumstances it is found that the web site as it then was contravened clause 6.2.4 of the CoC but that the proposed amended web site would not. Moreover the price does not include the frequency (weekly) which it is required to do. This too breaches clause 6.2.4 of the CoC.

**3.2.2** 28. Secondly the IP seems to have omitted to notice that it refers to "a paid subscription from R22.5\*" in blue text just below the "Get your complimentary (now "Hottest") ringtone". The use of the incorrect abbreviation (R22.5 rather than R22.50) is misleading and contrary to Advertising Rule 9.3.1.

**3.3 PROMINENTLY INDICATE SUBSCRIPTION SERVICES (11.1.1)**

**3.3.1** 29. The IP admitted that a prominent indication that the service was a subscription service was omitted due to a technical fault. While the fact that this was a technical fault is a potential mitigating factor, it does not cure the fact that clause 11.1.1 of the CoC was breached by the IP. In the circumstances this clause has been found to be breached.

**3.3.2** 30. The IP then contended that the inclusion of “subscription service – R22.50/weekly” in the upper right hand corner in black would cure this problem. I cannot agree. Basic usability relating to web sites indicates that the web site user’s attention would not be drawn to the upper right hand corner of the web site. Rather the user or customer’s attention would naturally be drawn to the “submit” button below where the customer’s cell phone number must be typed. In the circumstances only the inclusion of the same message directly below the “submit” button on the web site would cure this defect.

#### **3.4 BUNDLING OF SUBSCRIPTION SERVICES (11.1.2)**

**3.4.1** 31. It is apparent that a customer may be fooled that a specific content item which was “complimentary” would be able to be obtained without in fact subscribing to the service. As this was not the case clause 11.1.2 has been found to be breached in that the complimentary ringtone is bundled with the subscription service.

#### **3.5 AUTOMATIC SUBSCRIPTION (11.1.5)**

**3.5.1** 32. The IP did not “automatically” subscribe the customer but rather provided an SMS warning that it would be subscribed. In the circumstances the IP is not found to have automatically subscribed the customer.

#### **3.6 CONTENT OF WELCOME MESSAGE (11.1.8)**

**3.6.1** 33. The welcome message provided by the IP was a more difficult problem. From the message log it is clear that all four messages were provided to the WASPA monitor within minutes of each other. It would appear that the

premium messages were delivered first and the welcome message second. While it is possible that this is simply due to the inherently unpredictable nature of SMS delivery systems, it seems likely that the IP is capable of ensuring that the welcome message is sent before any other messages as clearly this was the intention of the CoC.

**3.6.2** 34. Looking at the content of the welcome message it was contended by the WASPA monitor that the welcome message was clearly not compliant. For the reasons indicated above I have given the IP the benefit of the doubt and will consider the text of the forth message provided in terms of the message log, to wit:

**3.6.3** 34.1. *“3 new credits granted, go to za.funmobile.com now! UR activated to Funmobile Polytones Club CS:01146133212. R22.50/week To Stop, text STOP PL to 31345”*.

**3.6.4** 35. The only obvious omission in this message is the lack of a telephone number as required by 11.1.8 (d). From the message above it could be inferred that the “CS” number refers to a telephone number but the number in question is a digit too long to be a valid telephone number. Moreover the lack of a clear indication that this is a telephone number would, on its own, breach 11.1.8 (d) of the CoC.

### **3.7** SIZE AND FORMATTING OF ACCESS COST TEXT (AR 9.2.1.1)

**3.7.1** 36. This clause has clearly been breached in that the access cost text in the original web site is far too small in a relative sense to the remainder of the text. The specific web site promotion has been discontinued as ordered by the Emergency Panel and thus the only evidence available in this regard are the screenshots of the service.

**3.7.2** 37. In order to rectify the problem the IP is required to ensure that the text size for the advertisement is at least 15 point sans serif font. Reference should also be made the placement of this text as indicated above.

### 3.8 SIZE AND FORMATTING OF TERMS AND CONDITIONS TEXT (AR 9.2.1.1)

**3.8.1** 38. The size of the terms and conditions text is less obvious and difficult to determine from the screenshots. However the IP has admitted in its responses that the text size was insufficient and has rectified this problem. As result this clause of the Advertising Rules has been breached.

### 3.9 USE OF THE WORD “COMPLEMENTARY” (AR 9.3.11)

**3.9.1** 39. The IP has already indicated that the word “complimentary” has been removed from the web site. I am in full agreement with the Emergency Panel that the inclusion of the word “complementary” was indicative of a “free” ringtone or content item and as such is prohibited in terms of Clause 9.3.11 of the Advertising Rules which has been found to be breached.

### 3.10 Sanction Imposed

**3.10.1** 42. While the IP clearly breached the CoC and Advertising Rules with regard to the web site it would appear that there are mitigating factors in favour of the IP. However one cannot lose sight of the fact that there was a significant lack of clarity on the service offering by the IP and that it is in the best interests of the industry for the WASPA members involved to be penalised – either financially or otherwise – in order to provide significant motivation for the WASPA member to avoid breaching the WASPA Code of Conduct in the future.

**3.10.2** 43. For various reasons, including the mitigating factors mentioned above, it is not considered to be appropriate to implement a harsher sanctions as would normally be due in this type of matter and so I exercise my discretion as the adjudicator to impose the following sanctions:

**3.10.3** 43.1. The IP is directed to send an SMS to every customer who signed up to the subscription service offering a full refund of their monies spent on the

service up until the suspension of the service OR the IP must refund all subscribers of the service up until the date of the suspension of the service. In the event that the IP chooses to implement the former sanction it will ensure that it has sufficient capacity to receive process and reply to all the subscribers of this service who claim the full refund. The IP is warned that a failure to have adequate systems in place to implement the former sanction would be regarded as a breach of the WASPA Code of Conduct which would be aggravated by the fact that this action is already part of a sanction which resulted from a breach of the WASPA Code of Conduct.

**3.10.4** 43.2. The IP is directed to pay a fine of R100 000.00 for the breach of the clauses indicated above.

**3.10.5** 43.3. The IP is directed not to re-introduce the subscription service until the breaches of the CoC as indicated above have been rectified.

**3.10.6** 43.4. The IP is warned that similar actions in the future could lead to the suspension of the IP as a WASPA member.

**3.10.7** 43.5. The WASPA Secretariat is ordered to bring this adjudication to the attention of the SP in this matter.

**4. GROUNDS OF APPEAL (Please note that this extract is a verbatim copy of the Appeal lodged by the Appellant)**

4.1 Grounds of appeal for complaint 6797.

**4.1.1 INFORMATION NOT TO BE DECEPTIVE (4.1.2)**

**Point 26 (p.7 of 29) –**

**No follow-up action is required by Funmobile as WASPA agreed that this clause is not breached.**

**4.1.2 PRICING NOT MISLEADING (6.2.4) (AR 9.3.1)**

**Point 27 and 28 (p.8 of 29)-**

**Funmobile rectified the pricing and billing information by adding “3 x R 7.50/ SMS” and updated “a paid subscription from R22.50” on the Funmobile’s promotional web pages since 18 June 2009.**

**4.1.3 PROMINENTLY INDICATE SUBSCRIPTION SERVICE (11.1.1)**

Point 29 and 30 (p.8 of 29)-

**The phrase “subscription service” was found missing due to a technical fault but the error was fixed up shortly after notice. “Subscription service” is displayed in 15pt font size and is compliant with AR 9.2.1 and 9.2.2 of Advertising Rule. Funmobile trusts the upper right hand corner of the webpage is a prominent position for displaying “subscription service-R22.50/weekly” and more user’s attention would be drawn there than displaying it underneath the SUBMIT button. Additionally, the CoC does not specifically state where the phrase needs to be displayed.**

**4.1.4 BUNDLING OF SUBSCRIPTION SERVICES (11.1.2)**

Point 31 (p.8 of 29) –

**Funmobile has not breached Clause 11.1.2 because Funmobile offers an extra credit to user as a welcome gift and user does not request for a specific content item when making the request. User can use the extra credit to download content from any categories in our website. Besides, “the offer with paid subscription” is clearly shown in Funmobile’s promotional web pages.**

**4.1.5 AUTOMATIC SUBSCRIPTION (11.1.5)**

Point 32 (p.9 of 29) –

**No follow-up action is required by Funmobile as WASPA agreed that this clause is not breached.**

**4.1.6 CONTENT OF WELCOME MESSAGE (11.1.8)**

Point 33, 34 and 35 (p.9 of 29) –

**In response to the CS hotline matter noted in point 35, the number 01146133212 fully complies with Clause 4.1.8 and 4.1.9 (p.6 of 21, CoC Ver. 7.4).**

**A South Africa number**

**Function effectively**



**Voice mailbox active in use**  
**Non-premium rated number**

**01146133212 is a South Africa national number and it is not a premium-rated number. Also, the CS number is tested regularly by our staff hence the CS number is a valid number.**

**4.1.7 SIZE AND FORMATTING OF ACCESS COST TEXT (AR 9.2.1.1)**

**Point 36 and 37 (p.9/10 of 29) –**

**Funmobile rectified the access cost texts to pt.15 font size and the action was completed on 18 June 2009.**

**4.1.8 SIZE AND FORMATTING OF TERMS AND CONDITIONS TEXT (AR 9.2.2.1)**

**Point 38 (p.10 of 29) –**

**Funmobile changed the T&C font size to pt.12 with effect from 18 June 2009. To enhance the service further, Funmobile also fixed the resolution and users can view the web page without scrolling down.**

**4.1.9 USE OF WORD “COMPLIMENTARY” (AR 9.3.11)**

**Point 39 (p.10 of 29) –**

**The word of “complimentary” is an indicative of an extra credit of download once user is subscribed to the service. The phrase “with paid subscription” is also clearly displayed in all our web pages. As well, “Subscription Service with pricing” is displayed in a prominent position in pt. 12 font size. Having said that, the word “complimentary” has been replaced with “hottest” in all promotional materials since 17 July 2009. Despite this change, user will still enjoy an extra credit as stated in the T&C.**

**4.1.10 WASPA Monitor Response (6.2.1)**

**Furthermore, below is the response to the breaches of the code noted in point 7 of WASPA Monitor Response (p. 3 of 29):**

**A – Point 7.1 and 7.2 - Content and Delivery of Welcome Message**

**B – Point 7.3 – Bundling of another service with the subscription service**

**C – Point 7.4 - Use of word “Complimentary”**

**D – Point 7.5 - Fail to mention “Subscription Service” in SMS**

**A – WASPA agreed that clause 11.1.8 and 11.1.5 of the code are not breached. For clarification, please refer to the response in “Content of Welcome Message” above.**

**B – There is no rule in the CoC stating that promotional message is not allowed in the welcome message. Funmobile has not bundled another service with the subscription service because user is required to opt-in to sign up for each subscription service. As the promotional message and welcome message are treated as an independent transaction, the welcome message is in compliant with clause 11.1.2 (p.12 of 21, CoC Ver. 7.4).**

**C – Funmobile has no intention to mislead user by alleging the ringtone as “complimentary”. An extra download credit is indeed offered to the user upon subscription. For clarification, please refer to response in “Use of Word “Complimentary” above.**

**D – The SMS texts that Funmobile has used, follows the exact format as Clause 11.1.10 (p.13 of 21, CoC Ver. 7.4). The phrase “*U’ll b subscribed to*” already makes it clear that it is a subscription service. Funmobile is using the exact wordings and format for the message per the CoC hence there is no breach in this clause.**

## **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 In the Appellant’s appeal the Appeals Panel finds it difficult to ascertain what the Appellant is in fact appealing.

5.3 The Appellant does not clarify whether it contests its innocence or whether it in fact only appeals the sanctions issued.

5.4 The Appellant has merely referenced the Adjudicator’s report and issued its own interpretation.

5.5 The Appeals panel will therefore assess the points made and assess the sanctions imposed.

5.6 With reference to paragraph 4.1.1:

**5.6.1** This is not a contested issue as the Adjudicator has ruled in favour of the Appellant.

5.7 With reference to paragraph 4.1.2:

**5.7.1** The Appellant contests that it rectified the pricing and billing information.

**5.7.2** This was in fact noted by the Adjudicator in its decision but, as was clearly stated, this did not justify the fact that a breach of clause 6.2.4 of the Code of Conduct did in fact incur.

**5.7.3** The frequency of billing was also omitted by the Appellant.

**5.7.4** A further breach in terms of abbreviation was also noted by the Adjudicator.

**5.7.5** The Appeals Panel acknowledges the fact that the Appellant rectified some of its information but does not take the point of the view that this justifies an amendment to the Adjudicator's report as referred to in paragraphs 3.2.1 and 3.2.2. and therefore rules that the Adjudicator's decision stands.

5.8 With reference to paragraph 4.1.3:

**5.8.1** The Appellant submitted that the phrase "subscription service" was omitted due to a technical fault which was rectified.

**5.8.2** The Adjudicator in its report acknowledged the fact but in its decision did not feel that this mitigation cured the fact that clause 11.1.1 of the Code was breached.

**5.8.3** The Appeals Panel concurs with the Adjudicator’s decision and is not of the opinion that rectification of an error nullifies a breach.

**5.8.4** The Appellant further contested that the Advertising Rules does not stipulate specifically where the phrase “subscription service” needs to be displayed. The Appeals Panel does not agree with this.

**5.8.5** Clause 11.1.1 reads, “11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”. This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.”

**5.8.6** This should be read with clause 9.2.1.1 of the Advertising Guidelines where the following is stated:

5.8.6.1 The pricing text must be clearly shown being independent of any other text or image, and not be placed or formatted in a manner where it may be obscured by other text information, graphics or marks that may be displayed around it.

**5.8.7** Although the Panel does not necessarily concur with the Adjudicator’s ruling that the message should be directly below the submit button, the Panel does not feel that the current scheme followed by the Appellant, follows clause 9.2.1.2 of the Advertising Guidelines which reads:

5.8.7.1 For each unique access number, the full and final cost of the access must be displayed **immediately** below, or above, or adjacent to the unique access number or Content access code in a non-serif font.

**5.8.8** The Appeals Panel therefore upholds the Adjudicator’s decision as referred to in paragraph 3.3.1.

**5.9** With reference to paragraph 4.1.4:

**5.9.1** The Appellant's failure, whether technical or not, to display the service as a subscription service renders its argument futile.

**5.9.2** The Appeals Panel therefore upholds the Adjudicator's decision as referred to in paragraph 3.4.1.

5.10 With reference to paragraph 4.1.5:

**5.10.1** This is not a contesting issue since the Adjudicator has ruled in favour of the Appellant.

5.11 With reference to paragraph 4.1.6:

**5.11.1** The Adjudicator gave the Appellant the benefit of the doubt but still found that a breach of clause 11.1.8(d) of the Code occurred. It stipulated that this was due to the fact that the number used was incorrect, and obtained one digit too many.

**5.11.2** The Appellant contested that the number was in fact correct and a number regularly tested by its staff.

**5.11.3** The Panel discovered that the number (s) was indeed South African, but that the Appellant in this case omitted to enter the sign "/" between the 1 and 2.

**5.11.4** The number should have been displayed as follow: 0114613321 / 2. This was the number (s) provided on the WASPA register.

**5.11.5** The Panel therefore agrees that the number displayed would have been invalid, but understands that this might have been due to a typing error or oversight. It is however striking that the Appellant did not make mention of this in its Appeal.

**5.11.6** In light of this, the Panel would view this as a mitigating factor and re-consider the sanction imposed due to this specific breach.

**5.11.7** The Panel upholds the Adjudicator's decision with reference to paragraph 3.6.4.

5.12 With reference to paragraph 4.1.7:

**5.12.1** Although the Appellant contested that it amended the format and size of the access cost text, it does not nullify its original breach of clause 9.2.1.1 of the Advertising Rules.

**5.12.2** The Panel therefore upholds the Adjudicator's decision with reference to paragraph 3.7.1.

5.13 With reference to paragraph 4.1.8:

**5.13.1** As is the case with paragraph 5.12.1, the Appellants admission of the fact that the original T&C font size was insufficient, provides testimony that clause 9.2.1.1 of the advertising Rules was in fact breached, irrespective of the Appellant thereafter rectifying it.

**5.13.2** The Panel therefore upholds the Adjudicator's decision with reference to paragraph 3.8.1.

5.14 With reference to paragraph 4.1.9:

**5.14.1** The Panel starts by noting that this is the section of the Appeal that has given it the most concern. It is of the opinion that this issue goes to the core of the original complaint – that the use of the word “complimentary” in its current context did not make it clear to the consumer that they would have to join the subscription service to get this “complimentary” product.

**5.14.2** The Adjudicator indicated that he / she was in full agreement with the Emergency Panel in the sense that the inclusion of the word “Complimentary” was indicative of a “free” ringtone or content item and as such is prohibited in terms of Clause 9.3.11 of the Advertising Rules which has been found to be breached.

**5.14.3** In making this finding, both the emergency panel and the Adjudicator relied on Clause 9.3.11 of the Advertising Rules. From the documents before the Panel, however, the Appellant was never given an opportunity to comment on this clause.

**5.14.4** In terms of clause 14.4.7, “no sanction may be applied to a member who has not been given an opportunity to respond to a complaint.” While the Appellant has been given an opportunity to respond to the complaint, they have not been given an opportunity to comment on Clause 9.3.11. For this reason, the Adjudicator’s ruling is flawed.

**5.14.5** The Appeals Panel did consider the Adjudicator’s ruling on the merits. It also considered other, uncited clauses of the Code in considering the merits. We include our findings on this issue below for the Appellant’s interest and education ONLY. What follows is not binding as a result of the incorrect clause.

*5.14.5.1 In its opinion the Panel has also considered Clause 6.5.1 of the Code from which Clause 9.3.11 of the Advertising Rules stem.*

*5.14.5.2 Regard is also given to the definition of “keyword” in the Code.*

*5.14.5.3 Section 6.5.1 reads as follow:*

*5.14.5.4 The keyword “free” or words with the same or similar meaning (in any language) may not be used for any service unless that service has no associated charges whatsoever, excluding network bearer charges.*

5.14.5.5 *The Panel felt it relevant to extract the following explanation of Clause 6.5.1 as contained in the Adjudicator's Report of Adjudication 9752:*

5.14.5.6 *A keyword is defined in section 2.14 of the Code to mean "any word used in an SMS or MMS sent by a customer to request a service". The question that falls to be considered is whether the use of "words" of section 6.5.1 in the component of that section which reads "or words with the same or similar meaning" relates to "keywords" only or includes words used for any other purpose in relation to a particular service that carries associated charges, such as for the purposes of promoting a particular service that carries associated charges.*

5.14.5.7 *Although some ambiguity is present in the wording of section 2.1.4, that ambiguity should be resolved in a manner that renders the interpretation of section 2.1.4 consistent with other provisions of the Code and its accompanying Advertising Rules (to the extent that this is possible).*

5.14.5.8 *In this regard, it is illustrative to note that the wording of section 6.5.1 of the Code is repeated verbatim in section 1.4.11 of the Advertising Rules and that section 1.4.15(v) of the Advertising Rules states further as follows: Taking into account the provisions in the WASPA Code of Conduct regarding subscription services, if an advertisement has components to it that promote: (a) Content that is ordinarily made available to a consumer on payment of a once-off payment for that individual Content without the need to subscribe to that service, and (b) Content that will be available at all, and/or at a particular price or even free only if the consumer subscribes to a subscription service, then this distinction between the availability of non-subscription and subscription charging must be made clear by unambiguously demarcating in separate sections (and not just wording) the nonsubscription portion from the subscription service portion or Content in the advertisement [own emphasis].*



5.14.5.9 *Furthermore, the introductory section to the Advertising Rules includes a paragraph that states as follows: For subscription services, providers should take all reasonable steps to ensure that all promotional material, whether in print media, on the Internet, television or transmitted via text message, clearly explains how the subscription service works. Consumers should have ready access to an explanation of their “purchase” and what, if anything, they need to do to access the Content. Great care should be exercised in using the word ‘free’.*

5.14.5.10 *Section 1.4.15(v) of the Advertising Rules and the introductory section thereof make it clear that “free” content may, in certain circumstances, be promoted in an advertisement for commercial content. In light of the above, it follows that section 6.5.1 should not be interpreted to mean that the word “free” can never be used in any advert that promotes commercial services and that the ambiguity in section 6.5.1 should be interpreted to mean that use of the word “free” is prohibited in the context of keywords only.*

5.14.5.11 *Provided that great care is taken in the use of the word and provided that all other rules relating to pricing information are adhered to, an advert for services with associated charges containing the word “free” would not ipso facto amount to a breach of the Code.*

5.14.5.12 *The panel is of the opinion that paragraph 15.14.5 and its subsequent sub paragraphs provide a detailed explanation as to the interpretation of Clause 6.5.1 of the Code and hence Clause 9.3.11 of the Advertising Guidelines.*

5.14.5.13 *The use of “complimentary” in this case does therefore not amount to an ipso facto breach of Clause 9.3.11 of the Advertising Rules.*

5.14.5.14 *However, as indicated in paragraph 15.14.5.4, the Code also states that for subscription services, providers should take all reasonable steps to ensure that all promotional material, whether in print media, on the*

*Internet, television or transmitted via text message, clearly explains how the subscription service works. Consumers should have ready access to an explanation of their “purchase” and what, if anything, they need to do to access the Content. Great care should be exercised in using the word ‘free’.*

*5.14.5.15 Although the Panel does not agree with the way in which the Adjudicator derived its decision as noted in paragraph 3.9.1, it is still of the opinion that the Appellant did not take great care when it exercised its use of the word “free”.*

*5.14.5.16 Therefore, the decision of the Adjudicator as referenced in paragraph 3.9.1 is overturned, but the Panel find that the Appellant breached the Advertising Rules in its failure not to display the phrase “subscription services” in conjunction with its subsequent lack of care when using the term “complimentary”. In particular, the Appellant failed to distinguish how the ringtone was free or complimentary in terms of section 1.4.15(v) of the Advertising Rules. The consumer would not initially realise that the ringtone would only be complimentary if the consumer subscribed to the service.*

5.15 The Appellant had no previous rulings against it. With reference to the various sanctions the Appeals Panel is of the opinion that the Adjudicator did not take the record of the IP into consideration and finds the fine of R 100 000,00 extremely harsh.

5.16 It must also be considered that the core issue – the use of the word “complimentary” – falls away due to a technicality of an incorrect clause. The Appellant can therefore not be sanctioned on this particular issue. As this issue was the “worst” transgression, it impacts the sanction significantly.

5.17 The Appeals Panel is disturbed by the lack of responsibility that the Appellant has taken in this matter. We find the poorly drafted appeal, and the lack of thought (for example, in solving the issue of why the telephone number had an extra digit)

indicative of a disregard of the WASPA process. We wish to point out that were it not for the technical flaw in this adjudication, the Appellant would doubtlessly be facing stronger sanctions. The Appellant is advised to carefully monitor its future actions in this regard.

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

**5.18.1** The sanctions pertaining to refunds as referenced in paragraph 3.10.3 are upheld.

**5.18.2** The sanction of a refund in itself is very onerous on any provider.

**5.18.3** The sanction of R 100 000,00 as referenced to in paragraph 3.10.4 is overturned.

**5.18.4** The sanction as referenced to in paragraph 3.10.5 is upheld.

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