

REPORT OF THE APPEALS PANEL

Date	26 October 2010
Information Providers (IPs)	Cell dorado
Service provider (SP)	Blinck Mobile
Complaint Number	6839 and 7070
Code Version	7.4

1 INTRODUCTION TO THIS APPEAL

- 1.1 This appeal concerns the adjudication of two separate complaints made by two different consumers, both members of the public, against the same service, 'WGame', offered by the same Service Provider, Blinck Mobile (SP).
- 1.2 The SP is the only appellant in both appeals.
- 1.3 Complaint 6839 was made on 19 June 2009 and complaint 7070 on 17 July 2009.
- 1.4 While the recorded experience of the two complainants differs slightly, on analysis, the complaints are identical in all other material respects.
- 1.5 The adjudicator's reports for both complaints, other than the complainants' recordal of their experience of the service, are identical. The sections of the WASPA Code of Conduct (Code) considered, the adjudicator's decision and even the sanctions are identical and copied from the report on 6839 to the report on 7070.
- 1.6 Likewise, the SP's appeals for review of the adjudicator's decisions in both 6839 and 7070 are almost verbatim, copied from 6839 for 7070. Only, minor differences appear, to which the appeal panel has had reference in consideration of its findings in 4.1.4.8 below.
- 1.7 Despite the short period of less than a month between the two complaints, the similarity of the complaints and the appeal documentation, the two complaints were separately adjudicated, separately appealed against and have come before this panel, simultaneously, but as two separate matters for appeal.
- 1.8 Given the similarity, the panel has decided to document its review of the two appeals in one appeal report. This decision in no way affects the passage of the two complaints through the WASPA adjudication process as two separate complaints. It must be emphasised that the amount of work involved in reviewing these two appeals, was not less, but rather, more, than two appeals, given the attention to detail required in assessing the facts and threading out the similarities of the two complaints and the

**WASPA appeals panel
Complaint 6839 and 7070**

appeal documentation. As such, we state up front, after due consideration, that the SP's contention that the two appeals should have been treated as one complaint, with one appeal fee, is rejected. We state also for the record, that WASPA is under no obligation to join complaints and that each complaint will be reviewed and considered on its own merits and its own facts.

2 THE CODE

Relevant sections of the Code considered by the adjudicator and this panel are section 3.1 (professional and lawful conduct), section 4.1 (provision of information to subscribers) and section 11.1 (subscription services).

3 DECISIONS OF THE ADJUDICATOR

3.1 *The Complaint*

3.1.1 In both 6839 and 7070, the adjudicator records that the complaints relate to the complainants being induced to subscribe to a service via Facebook in an apparent attempt to respond to a challenge by a friend. In one instance, this is referred to as the 'IQ challenge' and in the other, the 'IQ test'.

3.1.2 The 'IQ challenge' and 'IQ test' are the same and we will refer to these interchangeably, throughout this report.

3.2 *Findings on Complaint*

3.2.1 The adjudicator finds the SP to have breached section 11.1 of the Code and also finds the promotion of the subscription service to be a form of 'bait marketing', both misleading and dishonest, finding a breach of sections 3.1 and 4.1 of the Code in both complaints.

3.3 *Sanctions Imposed*

3.3.1 The adjudicator imposes the following identical sanctions upon the SP in both cases, in so doing, (effectively) duplicating the sanctions and doubling the fine imposed to R300 0000.00:

3.3.1.1 The SP must immediately stop its "IQ Challenge [/IQ Test]" promotion and remove and/or take down any banner advertising, web pages or other links or references to this promotion.

3.3.1.2 The SP must provide the WASPA Secretariat with written confirmation that it has complied with the sanction in paragraph 1 above.

**WASPA appeals panel
Complaint 6839 and 7070**

- 3.3.1.3 The SP must refund all subscribers who have used the SP's WGame service from the date that the service commenced for all subscription fees charged to their accounts.
 - 3.3.1.4 The SP must send an SMS notification to all such subscribers that they are entitled to claim the aforesaid refund.
 - 3.3.1.5 The SP is fined an amount of R150 000.00.
 - 3.3.1.6 These sanctions are not to be suspended pending the outcome of any appeal lodged by the SP.
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4 GROUNDS OF APPEAL

- 4.1 The SP's Legal Department in the Netherlands provided (i) the grounds for appeal for both 6839 and 7070, (ii) screenshots of the landing pages linked via the Facebook website and (iii) the SP's terms and conditions for channel owners. These are addressed in 4.1.1, 4.1.2 and 4.1.3 below.
- 4.1.1 SP's terms and conditions for channel owners (identical for 6839 and 7070)
 - 4.1.1.1 An extract from an agreement entered into between the SP and its 'channel owners' provides for the indemnification of the SP and, the jurisdiction of Dutch courts in the event of a dispute. Should the SP wish to rely on this agreement, it is a matter for the parties *inter se*, and of no relevance to WASPA. It has been excluded from this review.
- 4.1.2 Screenshots of the landing pages linked via the Facebook website (identical for 6839 and 7070).

WASPA appeals panel
Complaint 6839 and 7070

iq test Answer all questions and see if you can beat the top scores

subscription service - R60/Week

1. What is the capital of South Africa?
Answer this question to go to the next question

☐ Bloemfontein
☐ Pretoria
☐ Johannesburg
☐ All of the above

1/10

Get this and many more mobile games

Last players who played the IQ Test
Displaying 10 members

Marlene van Heerden John Paton Adrew Murray Rachel Gordimer Elisabeth Krog Peter James Joseph Sontonga Claire Schuster Janet Theron Alice Sher

Topscores

- Andrew Gunning (141)
- Rachel Gordimer (132)
- Lucy Smith (121)
- Robert McLeod (118)
- Basil Tobias (116)
- George Schonland (109)
- Marlene van Heerden (107)
- Clement Theiler (106)
- Calie Webster (104)
- Peter James (102)

subscription service - R45/Week.

This subscription service is available for all networks. You will receive 3 games per week which will be charged at R 20 per item. Download charges may apply. The shown item(s) form(s) part of the subscription service and is/(are) indicative of the content items that will be received. To cancel the service, send STOP WFACE to 31631. Bill payer's permission required. Min. age 18+ or with permission of parent or guardian. Celldorado operates according to the South African Wireless Application Service Providers' Association Code of Conduct. Celldorado offers innovative information and entertainment for your mobile, such as ringtones, Javagames and wallpapers. Celldorado offers original, unique services with the highest standards. IP: Blink. Helpdesk: 0800 980 963.

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iq test Answer all questions and see if you can beat the top scores

subscription service - R60/Week

Join now and get mobile games

Fill in your number to see how smart you are!

fill in your number
0 **continue**

Get this and many more mobile games

Last players who played the IQ Test
Displaying 10 members

Marlene van Heerden John Paton Adrew Murray Rachel Gordimer Elisabeth Krog Peter James Joseph Sontonga Claire Schuster Janet Theron Alice Sher

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**WASPA appeals panel
Complaint 6839 and 7070**

- 4.1.2.1 Under the heading “Subscription services – R45/Week ” in the lower portion of the screenshot, the following script appears:
- 4.1.2.1.1 *“This subscription service is available for all networks. You will receive three games per week which will be charged at R20 per item. Download charges may apply. The shown item(s) form(s) part of the subscription service and is (are) indicative of the content items that we will be received. To cancel the service, send STOP WFACE to 21621. Bill payer’s permission required. Min. age 18+ or with permission of parent or guardian. Celldorado operates according to the South African Wireless Application Service Providers Association Code of Conduct. Celldorado offers innovative information and entertainment for your mobile, such as ringtones, Javagames and wallpapers. Celldorado offers original, unique services with the highest standards. IP: blink. Helpdesk 0800 980 963”.*
- 4.1.2.2 Below this is a menu with links to the following:
- “More games, Celldorado, compatible handsets, general terms and conditions, specific terms and conditions, privacy policy, copyright policy, contact, mobile guardian”.*
- 4.1.3 The SP appeals against the adjudicator’s ruling on the grounds set out below. The grounds provided are identical for 6839 and 7070, apart from the inclusion of two additional points (mentioned above, see also clause 4.1.4.8), in the appeal document for 7070. The SP contends that :
- 4.1.3.1 the adjudicator erred in finding that complaint 6839 and complaint 7070 were to be treated as separate complaints;
- 4.1.3.2 the adjudicator erred in finding that the SP breached section 11.1.1, 11.1.2, 3.1 and 4.1 of the Code; and
- 4.1.3.3 it is ‘unjust and contrary to fair proceedings’ to determine that the sanctions imposed are not to be suspended pending appeal.
- 4.1.4 The SP quotes the adjudicator’s findings under the heading ‘decision’ in the adjudicator’s report and provides the following ‘background of the service’:
- 4.1.4.1 *“The IQ Test [IQ Challenge] is not a quiz that is being used as marketing tool in order to sell subscription services. The IQ Test is a game that is the first item of one of our subscription services, and is as such marketed by us. The questions a customer answers on our web pages before signing up are example questions of the IQ Test. Once the customer signs up,*

**WASPA appeals panel
Complaint 6839 and 7070**

the customer will get the full IQ Test on his phone, and other games that are part of this subscription service. The game “the IQ Test” is downloaded to a customer’s phone and can be played as much as one likes. So, by signing up for this subscription service the customer is not entered into a competition or quiz but will receive games, including but not limited to the IQ Test”.

4.1.4.2

The SP contends that the subject matter and the facts of the two complaints are “*very similar, if not exactly similar*”, and should not have been treated separately with the “*unjust*” result of, *inter alia*, duplicated appeal fees. The SP quotes from section 11.1.1 of the Code, provisions relating to promotional material for subscription services to “*prominently and explicitly*” identify the services as ‘subscription services’. The SP contends that it has met these requirements by, *inter alia*, clearly stating that:

- the service is a subscription in the upper right and lower left corners of all the web pages, including the sign-up and the confirmation page;
- charges are provided as “*subscription service – R60/week*”, and;
- each page states “*Get this and many more games*”, together with 2 examples of other games from the service the customer will receive after the IQ Test, once he signs up.

The following statements are included in the terms and conditions at the bottom of the page:

- “*You will receive 3 games per week which will be charged at R20 per item*”;
- “*The shown item(s) form(s) part of the subscription service and is (are) indicative of the content items that will be received*”;
- the subscription was explicitly confirmed by the complainant by entering the PIN Code he had received on the website, and;
- the welcome message sent to the complainant clearly mentioned that this service was a subscription service.

4.1.4.3

The SP directs the panel to the decision in complaint 6843, dated 19 June 2009, relating to the same campaign, where the

**WASPA appeals panel
Complaint 6839 and 7070**

adjudicator found that the same SP had complied with section 11.1.1 of the Code and had:

“clearly highlighted at various places in the relevant advert that the IQ Test is one of many content items that can be obtained if one joins this particular subscription service. The reasonable consumer would not be misled by this advert into believing that the IQ Test is being offered as a single item”.

4.1.4.4

In countering the adjudicator’s finding of a breach of section 11.1.2 of the Code, the SP contends, that as explained above:

“The marketing of a game that can be downloaded to a customer’s phone, like we do with regard to the IQ Test, is not a breach of this Section 11.1.2. As stated above, the questions we put on our Landing Pages are a preview of the first item of our subscription service and are not used to send the customer a result of any sort. Once the consumer subscribes, he or she gets the full product, and can play the IQ on his or her phone”.

The SP again supports its contention by reference to the decision in 6843, where the adjudicator dismissed the complaint.

4.1.4.5

The SP quotes sections 3.1 and 4.1 of the Code in full, in summary contending that as the adjudicator did not motivate why he was of the opinion that all paragraphs have been breached, it is impossible to respond in detail to the alleged breaches of the separate paragraphs. Stating:

“With respect to the alleged breaches of Section 4.1.3 up until and including Section 4.1.11 we can therefore only respond that as shown on our website www.celldorado.com/za and on the attached screenshot of the campaign, we fully comply with these paragraphs”, and;

“We assume that the alleged breaches of Section 3.1. and Section 4.1.1. and 4.1.2 refer to the Adjudicator’s statement that “the manner in which the SP has promoted its subscription services is a form of bait marketing which is not only misleading but is also dishonest.”

4.1.4.6

The SP records that it is:

“...very surprised that the Adjudicator ruled that the alleged manner of marketing was misleading and unjust, without having received a copy or screenshot of the marketing method in question in order to be able to

**WASPA appeals panel
Complaint 6839 and 7070**

decide on its alleged misleading nature. Secondly, we are surprised that the Adjudicator assumed that the party using the alleged misleading form of marketing was Blinck without any further investigation to check if this was really the case”.

4.1.4.7 Based on information provided for the complaint(s), the SP ‘assumes’ that the complainant was “referred to the Landing Page of our campaign through a banner on the website www.facebook.com which appeared as an invitation from a friend”.

4.1.4.8 The SP contends that no copy or screenshot of the banner was attached to the complaint and no further information was provided to it regarding the complaint. The panel notes the further contention in this regard made in 7070 as follows:

“According to the Adjudicator, the complainant attached a copy of the notification he received from a friend to do an IQ Test. On July 20, 2009 we indeed received a copy of the email from the complainant in which he states that he has attached the notification to that email. However, this email did not include a copy of that notification. It did include three other attachments. Assuming no other information was sent to the Adjudicator, we are very concerned about the level of accuracy and fairness of WASPA Adjudication Rulings. The Adjudicator ruled that the alleged manner of marketing was misleading and unjust, without having actually received a copy or screenshot of the marketing method in question and without even checking if he did receive a copy.

In case the Adjudicator did receive a copy of the notification and Blinck did not, Blinck should have been given a copy too in order to be able to defend itself and to find out whether or not Blinck was responsible for this manner of marketing. Since this was not the case, Blinck has been denied crucial information on this matter and we therefore are of the opinion that the Adjudicator’s ruling on this matter should be declared invalid”.

4.1.4.9 The SP continues, that it does not “use marketing methods like this” itself (the banner on www.facebook.com), “nor did we approve such a banner from one of our affiliate networks”. Apart from the fact that the panel sees no harm in advertising a service on a website such as Facebook, which service is delivered to a mobile device, as stated at clause 4.1.1.1 above, the panel has no interest in the SP’s affiliate relationships and

**WASPA appeals panel
Complaint 6839 and 7070**

will direct its attention only to matters relating to the member's compliance with the Code.

4.1.4.10

In consideration of the grounds of appeal submitted, the SP is of the opinion that:

- the adjudicator had insufficient evidence to find the SP responsible for the marketing method or that the marketing was “dishonest and misleading”;
- the adjudicator erred in finding the SP breached sections 3.1, 4.1.1. and 4.1.2 of the Code;
- the duplication of sanctions in 6839 and 7070 and double appeal fee is unfair, and;
- the non-suspension of sanctions pending appeal is unfair.

In conclusion, the SP confirms its obligations to comply with the Code, submits that the marketing campaign does not breach the Code and contends that the sanctions are ‘unjust’.

5 FINDINGS AND SANCTIONS OF APPEALS PANEL

5.1 *Objectives of WASPA and the Code of Conduct and this Appeal*

5.1.1 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. The Code aims to equip consumers with a mechanism for addressing any concerns or complaints relating to services provided by WASPA members and provide a framework for impartial, fair and consistent evaluation and response to any complaints made.

5.1.2 There is a good deal of confusion in these two complaints, with the unfortunate result of a lack of confidence evident on the part of at least one of the complainants and the SP itself. For example, (i) the adjudicator in 6839 commences the complaint section of this report by stating that “*The complainant logged an unsubscribe request via the WASPA unsubscribe system*”. The complainant, on the other hand, in an email to WASPA, dated 17 June 2009 states, “*I did not submit an unsubscribe request! I did submit a complaint alleging a breach of the WASPA Code...*”. The SP, as stated above, is “surprised” that a R300 000.00 fine can be imposed upon it by an adjudicator, apparently without reference to the facts relating to the service, or even to the earlier WASPA adjudication in complaint 6843 where the same set of facts relating to the same service resulted in

**WASPA appeals panel
Complaint 6839 and 7070**

the complaint relating to breach of similar sections of the Code being dismissed.

5.1.3 The panel has done its best to unravel the facts and come to an equitable solution, not an easy task, given that the service is no longer available for review.

5.1.4 We understand from the additional material provided by the SP in its grounds for appeal, that a banner advertisement was placed on www.facebook.com (possibly by an affiliate, but this is not material to the finding of compliance with the Code), inviting visitors to Facebook to respond to an IQ challenge from a friend. This was not a content download, merely an advertisement. It seems that when the challenge was taken up on the website by the complainant(s), initiated by the answering of the questions on the website, a PIN was sent to the mobile device of the complainant(s) as shown in the SP's logs, below. The logs also show the SP's requirement to fill in the PIN to initiate subscription and confirmation of the subscription, as required by the Code.

>	2	2009-03-24	3163	ZA_31631_GAME_W1_WGAME	Welcome to WGAME8! You will get your first game now! Info? za.celldorado.com/0800980963 (R20/sms) subscription service. Stop? WGAME8 stop. (max 3sms/week). ENJOY
>	6	19:48:11	1	8	
<	2	2009-03-24	3163		WGAME8 OK PIN=38631 1151146916 108719131 198.54.202.146 confirm
<	7	19:48:07	1		
>	2	2009-03-24	3163	ZA_31631_GAME_W1_WGAME	Fill in this game code 38631 to get ur IQ test! Or reply OK. You'll also get a BONUS GAME in the WGAME8 club! Info: za.celldorado.com/0800980963 (R20/sms 3sms/
>	8	19:47:03	1	8	
<	2	2009-03-24	3163		WGAME8 ON PIN=38631 1151146916 108719131 198.54.202.146 subscribe
<	9	19:47:01	1		

5.1.5 The panel has had reference to complaint 6843. Although the service was not available for review by the adjudicator at the time of the adjudication, he/she did have reference to a screenshot (not copied in the report). It is not certain whether this is the same screenshot provided to the panel for complaints 6839 and 7070. The panel notes however, that the adjudicator in 6843, refers to certain of the website terms and conditions, which are repeated by the SP in its appeal documents for 6839 and 7070, conditions which led to dismissal of the complaint in 6843.

5.2 Findings of the appeal panel

5.2.1 The panel elected to write one report for complaints 6839 and 7070 for the reasons set out in the introduction to this appeal report.

**WASPA appeals panel
Complaint 6839 and 7070**

- 5.2.2 The panel accepts the SP's contention that it had (sufficiently) complied with section 11.1 of the Code relating to subscription services.
- 5.2.3 The panel is somewhat confused by the two separate costs provided for the service shown in the screenshots: R60/Week and R45/Week. This confusion means that the screenshots do not exactly meet the "prominently and explicitly" requirement of section 11 of the Code and are technically a breach of sections 4.1.1. (pricing information must be accurately conveyed) and 4.1.2 (inaccuracy and ambiguity), but this is not sufficient in our view, to warrant so severe a sanction.
- 5.2.4 Regarding the suspension of sanctions, the panel is on record (see, *inter alia*, appeal 6219) as interpreting section 13.4.2 (a) and (b) of the Code to include only sanctions requiring a member to amend, suspend, or terminate a service being offered in breach of the Code, and the failure of a member to comply with previous sanctions, to be capable of non-suspension pending appeal. As such, the panel finds that no action was required of the SP and no negative inference is drawn with regard to the non-payment of the fines or other orders of the adjudicator in either complaint.
- 5.2.5 The panel finds that the two adjudicator reports for 6839 and 7070 do not contain, in our view, sufficient evidence for the finding that the SP was responsible for "dishonest and misleading" marketing. The finding in this regard is overturned.
- 5.3 *Sanctions of the appeal panel*
- 5.3.1 The SP has paid an appeal fee of R10 000.00 for each of the two appeals. Neither of the appeal fees will be refunded.
- 5.3.2 The SP need not refund the two complainants or any other subscribers for charges debited relating to the service.
- 5.3.3 The balance of the adjudicator's sanctions in both complaints, are overturned.
- 5.3.4 The SP is formally reprimanded for its failure to properly comply with sections 4.1.1. (pricing information must be accurately conveyed) and 4.1.2 (inaccuracy and ambiguity), resulting from the dual pricing and fined an amount of R10 000.00. This fine must be paid to WASPA within 5 working days of this report being published.
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6 COMMENTS BY THE APPEAL PANEL

- 6.1 The application of the Code to each unique set of facts, is not always going to yield identical outcomes.

**WASPA appeals panel
Complaint 6839 and 7070**

- 6.2 The panel is committed to the protection of consumers and to upholding the provisions and intentions of the Code. However, we urge users of the Internet, including users of www.facebook.com to read carefully, before agreeing to terms and conditions for use of the website itself and to associated, linked services, as in this case.
- 6.3 All WASPA stakeholders and role players, consumers, members, adjudicators and appeal panels alike should stay vigilant in all their actions and interactions relating to the Code. The coming to life of the spirit of the Code, confidence in the Code and the realisation of the purpose of the Code can only be achieved if all involved are committed to realising these goals. The panel is of the opinion that having proper regard for the increasing and already substantial body of precedent in the WASPA archives as well as what is by now properly established WASPA practice would go a long way in this regard and we would like to encourage all involved, especially adjudicators who are the true custodians of the Code, to do so.