WASPA appeals panel
Complaint 9817

REPORT OF THE APPEALS PANEL

Date:

Appellant: Viamedia

Complaint Numbers: 9817

Applicable versions: 9.0

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1 BACKGROUND TO THE APPEAL

1.1 This is an appeal against the finding and sanction imposed on the Appellant by the adjudicator in complaint 9817.

1.2 The Appellant is a full member of WASPA.

1.3 The complaint was made by a competitor of the Appellant, and resulted from receipt of an SMS from the Appellant on the 22nd of June 2010 in the following terms:

> U can win R33mil 2night! Reply P 2 get Powerball results and chance to win R100,000 in prizes plus 500 tickets per draw!Subs service.R3/day.Reply out 2 stop

1.4 The complainant alleged that the SMS constituted "bundling" of a service with a competition, and that it was misleading in that a consumer could be given the impression that responding to the SMS would result in an entry into the Powerball lottery game.

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2 THE APPLICATION OF THE CODE AND RULES

The Code, v9.0

2.1 The adjudicator correctly applied version 9.0 of the WASPA Code of Conduct to this complaint, the relevant clauses of which are reproduced here for convenience:

> 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.
>
> 5.1.3. For SMS and MMS communications, a recipient should be able to stop receiving messages from any service by replying with the word 'STOP'. If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate. The reply 'STOP' procedure should be made clear to the recipient at the start of any messaging service, for example by including "reply STOP to opt out" in the first message sent. If it is not technically feasible for the recipient to reply to a specific message then clear instructions for unsubscribing must be included in the body of that message.

> 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.
>
> 11.2.2. 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.

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3 THE DECISION OF THE ADJUDICATOR

3.1 The Appellant was held to have infringed clause 4.1.2. The Adjudicator agreed with the complainant in holding that that it was most likely that some consumers would think that they could enter the Powerball draw by replying to the Appellant's SMS. The wording of the SMS was not sufficiently clear that the subscriber would only get notified of draw results and not be entered in the draw as such.

3.2 The Adjudicator also found that the Appellant had infringed clause 5.1.3 on the basis that the opt-out instructions "Reply out 2 stop" did not comply with the provisions of that clause.

3.3 The Adjudicator found that the Appellant had infringed clause 11.1.1 of the Code of Conduct read with clause 1.4.1 of the Advertising Rules. The reason given for this was that clause 1.4.1 of the Advertising Rules specifically forbids abbreviation of the word "subscription" to "subs".

3.4 The Appellant was also found to have breached clause 11.2.2 as the terms used in the SMS were found to constitute "bundling" of services.

3.5 As to sanctions, the adjudicator found that the member's infringement of clause 11.2.2 of the Code of Conduct had already been dealt with in complaint numbers 9233, 9624 and 10245 and declined to impose a further penalty.

3.6 However, the adjudicator imposed the following sanction for the remaining breaches:

> For the breaches of sections 5.1.3 and 11.1.1 of the Code as well as section 4.1.2 of the Advertising Rules, a fine of R40 000 is imposed against the SP, R10 000 of which is to be suspended for a period of 12 months provided that no breach of 11.2.3 of version 11.0 of the Code (or a substantially equivalent provision of any later version) is upheld against the SP during the suspension period following the publication of this report.

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4 GROUNDS OF APPEAL

4.1 The Appellant lodged an appeal in this matter on the 4th of August 2011. It did not appeal the Adjudicator's findings in respect of clause 11.2.2, which is entirely understandable given the lack of sanction imposed. Its failure to appeal those in respect of clause 4.1.2 was more difficult to fathom.

4.2 The second numbered paragraph of the appeal reads in part as follows:

> More specifically the Adjudicator ruled that the Service did not comply with clauses 5.1.3 and 11.1.11 of the WASPA Code and 4.1.2 of the advertising rules…

4.3 It was apparent that the adjudicator had erred in referring to "section 4.1.2 of the Advertising Rules" in imposing sanction and that this had very likely led the appellant to overlook the finding in respect of 4.1.2 of the *Code of Conduct*. In the light of the panel's finding on the clause in question, it was not necessary to request that the WASPA Secretariat request a submission from the Appellant on this point.

4.4 The Appellant raised the grounds below in its appeal against the adjudicator's findings.

4.5 On the finding in respect of clause 5.1.3 the appellant contended:

> That the message clearly states "reply out to stop" and any reasonable consumer would be able to identify with the procedure to stop receipt of the promotional message. The use of the word "out" is recognized by the system and has the exact same effect as the word stop. It is our submission that the use of the word stop in this instance would not prejudice the consumer in any way and that the word stop may be noted once a consumer has already become a subscriber to the content. The word "stop" on the system would then potentially stop all subscriptions on behalf of the consumer.

4.6 On the finding in respect of clause 11.1.1:

> That there was an explicit display of the fact that the service is a subscription service and a reasonable consumer would recognize the wording of "Subs service.R3/day".

4.7 In appealing against the sanction imposed, the Appellant argued that the quantum of the fine was "more punitive than envisioned by the WASPA Code" in the light of the provisions of clause 14.4.1 (c) thereof which contemplates an "appropriate" fine. No grounds were raised in support of this contention, but the Appellant did advise by way of conclusion that it has "…an exemplary record with regards to complaint addressing and turnaround time and further submits that this should humbly be taken into account."

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5 FINDINGS OF APPEALS PANEL

5.1 The panel will deal with the adjudicator's findings as per the clause order in the Code.

Clause 4.1.2

5.2 While the Appellant has not formally submitted an appeal against the adjudicator's finding on clause 4.1.2, the panel is of the view that its failure to do so was most likely due to the error described above. There are however sufficient facts before the panel for it to make a determination on the matter without requesting a submission from the Appellant.

5.3 It is clear from the use of the word "knowingly" in clause 4.1.2 that intention to mislead is required in order for a member to infringe the clause. The adjudicator analysed the probability that the SMS complained of would have had the effect of misleading by inaccuracy or ambiguity. He does not deal with intention or otherwise on the part of the Appellant.

5.4 While the phrasing of the SMS complained of raises a critical eyebrow, the panel could not find a direct indication that the Appellant intended to mislead. Such intention does not appear from the original complaint files, and it is not implied by the circumstances of the matter. Accordingly the Appellant cannot be found to have infringed clause 4.1.2 and the appeal in respect thereof, succeeds.

Clause 11.1.1 read with Clause 1.4.1 of the Advertising Rules

5.5 The adjudicator's reasoning in finding as he did was rather sparse, in that he gave no grounds for the appellant having infringed clause 11.1.1, and merely dealt briefly with the provisions of clause 1.4.1 of the Advertising Rules.

5.6 On examination of the Advertising Rules, the panel found that section 1, of which clause 1.4.1 forms a part, applies only to television programs, infomercials and sundry related media. It does not extend to SMS advertisements, which are dealt with under section 11. The adjudicator erred in assuming that clause 1.4.1 applied to SMS/MMS advertisements without supporting this contention. The question that arises is whether the Advertising Rules forbid the abbreviation "subs" for "subscription".

5.7 The contents page of the Advertising rules contains the following:

> Note that each section above has a common section, the "GENERAL TERMS". This allows each section to be read independently.

5.8 The introduction states:

> Whilst each section can be used as standalone criteria for that media, there are however common criteria to all the media outlined in these guidelines, specifically the information required to be displayed to the consumer, and where the medium requires it, a voice-over explaining critical information.

5.9 Many sections have their own "General Terms", which all include a table setting out the "Correct Abbreviation" of certain terms and examples of the "Wrong Abbreviation". In all of these tables "subs" is listed as a "Wrong Abbreviation". The difficulty is that these "General Terms" are included in only six out of twelve sections. The sections in which they are included are set out below.

Section Title	**Contains "General Terms"?**
1. TV Programs and Infomercials	yes
2. TV & Cinema advertisements	yes
3. Radio	no
4. Newspaper & Newspaper Classifieds	yes

5. Magazines (excluding Contents booklets and Z-cards)	yes
6. Content booklets	yes
7. Outdoor Media/Billboards	no
8. Below-the-line marketing & promotional material	no
9. Web Sites	yes
10. email advertisements	no
11. SMS/MMS advertisements	no
12. Subscription Reminder Messages	no

5.10 The table raises two possibilities: either the drafters erred in omitting the "General Terms" from the relevant sections, or we are to assume that the "General Terms" were intended to apply only to those sections in which they were included.

5.11 The text quoted in paragraph 5.7 implies that each section should be read and interpreted separately. Paragraph 5.8 would be contradictory, unless one assumes that the drafter was referring to different forms of media dealt with within each section.

5.12 The omissions set out in the table make a certain amount of sense: certainly abbreviations would not be relevant to radio, and outdoor media and billboards invite abbreviation as they are designed to catch a sleeting glance. SMS/MMS advertisements and subscription reminder messages (per SMS) also lend themselves towards abbreviation. "Email advertisements" do not seem to fit this pattern however. Moreover, the fact that the "General terms" were omitted from half of the sections militates against the view that the drafter made a mistake.

5.13 Accordingly the panel is of the view that the Advertising Guidelines do not forbid the use of the abbreviation "subs" for "subscription" in the context of SMS/MMS advertisements.

5.14 This leaves us with a question not addressed by the adjudicator: Does clause 11.1.1 itself forbid such an abbreviation? The clause would not be intended to compel members to describe a single service in the plural as "subscription services", and certainly this is not done in practice. The intention is that such services should be clearly identified as subscription services, but the panel does not believe that this precludes abbreviations where the meaning is explicit. The panel is guided in this regard by the decision of the Appeals Panel in its report in complaint number 9624.

5.15 While use of the abbreviation "subs' for "subscription" was not misleading *per se*, the panel finds that the Appellant has nonetheless failed to identify the service as a subscription service prominently and explicitly. The "call to action" in the SMS complained of was for the recipient to obtain the Powerball results "2night". This is followed by notification that the recipient will be entered in a competition if the recipient replies to the SMS. Nowhere is the service explicitly described as providing Powerball results on an ongoing basis. The only

indication that the service is indeed a subscription service is located at the very end of the message.

5.16 In the context of the message as a whole, the service has not been prominently and explicitly identified as a subscription service because the service description itself is misleading.

5.17 The appeal in respect of clause 11.1.1 is dismissed.

Clause 5.1.3

5.18 The panel notes that the complainant did not raise this matter in the complaint; nor was it addressed elsewhere in the original complaint files. The Appellant was not given the opportunity to respond to the alleged infringement, but the adjudicator nonetheless found that the Appellant had infringed this clause. The panel is of the view that the principle of natural justice *audi alteram partem* is breached where a member is not given the opportunity to respond to an allegation before an adjudicator makes a finding against the member (version 11.0 of the Code of Conduct in fact codified this principle at clause 14.4.7). The exception to the rule is where the facts speak for themselves so eloquently that no submission by the member could have made a difference to the outcome.

5.19 In this case the adjudicator's finding turned entirely on the text of the SMS complained of, the contents of which were not in dispute. Consequently the panel does not believe that any submission on the facts by the appellant would have affected the adjudicator's decision. Hence the panel disapproves of the adjudicator's approach, but finds that it is not fatal to his finding.

5.20 Clause 5.1.3 relates to "opt-out" from further receipt of commercial communications, not to cancelling a subscription services. The clause states that "…a recipient *should* be able to stop receiving messages from any service by replying with the word `STOP'". Note the use of the subjunctive "should" rather the indicative "must".

5.21 The panel interprets this clause as stating that the member's systems must have the facility to respond to an opt-out request by a recipient. It does not compel the member to instruct the recipient to us the word "STOP". The clause goes on to name a "reply `STOP' procedure". In the context, this is a generic description for the procedure, and does not dictate that the word "STOP" must always be specified. A non-binding example of an opt-out instruction is also given.

5.22 Clause 5.1.6 states that:

> Where the words 'END', 'CANCEL', 'UNSUBSCRIBE' or 'QUIT' are used in place of 'STOP' in an opt-out request, the service provider must honour the opt-out request as if the word 'STOP' had been used.

5.23 By anticipating that words other than "STOP" could be used to opt-out of receiving messages, the drafters of the Code of Conduct did not contemplate compelling members to use the word "STOP" in unsubscribe instructions.

5.24 Accordingly the panel finds that clause 5.1.3 does not specify that the word "STOP" must be specified in opt-out instructions, and that consequently the appellant, which used the word "out" instead, has not infringed clause 5.1.3.

5.25 The appeal in respect of clause 5.1.3 is upheld.

Sanction

5.26 The adjudicator imposed a collective sanction in respect of infringements of clauses 4.1.2, 5.1.3 and 11.1.1. Only the finding in respect of clause 11.1.1 stands. Unfortunately the adjudicator did not indicate how he had calculated the quantum of the fine imposed, and the panel must consequently determine a proper sanction for the infringement of clause 11.1.1 alone.

5.27 In considering the sanction, the panel has taken into account prevailing levels of sanction for infringements of clause 11.1.1, as well as the Appellant's relatively good record of compliance with the WASPA Code at the time as a mitigating factor.

5.28 The adjudicator's sanction in respect of clauses 4.1.2, 5.1.3 and 11.1.1. is replaced with the following in respect of clause 11.1.1 alone:

> For its infringement of clause 11.1.1 of the Code of Conduct the member is fined the amount of R20 000, of which R10 000 is suspended for a period of twelve months from publication of the adjudicator's report on the condition that the member does not infringe clause 11.1.1 of the Code of Conduct during this time.

5.29 As the Appellant's appeal has been partially successful, half of its appeal fee is to be refunded.