WASPA appeals panel
Complaint 16313 / 17007

REPORT OF THE APPEALS PANEL

Date:	**18 August 2014**
WASPA Member (SP):	Buongiorno SA
Information Provider (IP):	iTouch
Service Type:	Subscription
Complainant:	WASPA Monitor
Complaint Number:	16313 / 17007
Code Version:	11.6
Advertising Rules Version:	2.3

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1. BACKGROUND TO THE APPEAL

1.1 This appeal concerns two complaints lodged by the WASPA Monitor against Buongiorno. The appeal and others has been on hold pending the resolution of certain other matters but is now active again, and this Panel is charged with the resolution of the appeals in matter 16313 and 17007.

1.2 The complaints relate to subscription services, more particularly, alleged breaches of clause 11.1.1, 11.2.2 and 11.2.3 of the WASPA Code of Conduct (Code).

1.3 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

The following clauses are relevant to the appeal:

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.

11.2.3 Notwithstanding the above clause, it is permissible for a customer to be included as a participant in a promotional draw or competition as an additional benefit to being a subscription service customer. In such a case, it must be reasonably clear to the customer that the promotional draw or competition is ancillary to the subscription service, and the process of joining the subscription service may not be disguised as an entry into a competition

3. FINDINGS AND DECISIONS OF THE ADJUDICATOR

3.1 Finding of the Adjudicator

In matter 16313, the Adjudicator found, in essence, that:

- Clause 11.1.1 was breached in that the words "subscription service" were of insufficient prominence'

- Clause 11.2.2 was breached in that the insufficiency of the communication around “subscription service” rendered it unclear that it was an independent transaction;

In matter 17007, the Adjudicator found that the advertising targeted at Vodacom customers was in breach of Clause 11.2.3 in that it is not clear that the competition is ancillary to the subscription AND the subscription process has been disguised as a competition.

3.2 Sanctions

The following sanctions were given in matter 16313:

- R50 000 in respect of Clause 11.1.1;
- R20 000 in respect of Clause 11.2.2;
- A suspension of all promotional activity for subscription services with a competition or reward element pending an assessment by the Monitor for 6 months;
- A referral to the National Consumer Tribunal.

The sanctions in matter 17007 were:

- R5000 in respect of Clause 11.2.3.

4. GROUNDS OF APPEAL

4.1 The grounds of appeal, and therefore my discussion above, were limited to the following overarching issues:

4.1.1 That there are no breaches of Clauses 11.1.1 and 11.2.2;

4.1.2 That there is no breach of Clause 11.2.3 in respect of Vodacom customers;

4.1.3 That the sanctions are unduly harsh.

4.1.4 I will canvas the specifics of each ground as far as is necessary below.

5. FINDINGS OF APPEAL PANEL

5.1 Version of the Code

5.1.1 The complaints were made in March and April 2012. Version 11.6 of the Code, in use from 17 November 2011 to 8 June 2012, applies.

5.2 Merits

5.2.1 The relevant initial landing page for this matter is:

5.2.2 The follow up pages to the campaign are similar in layout.

5.2.3 Cause 11.1.1 reads:

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.

5.2.4 The appeal in relation to Clause 11.1.1, in essence, submits that the Adjudicator's finding was based on Advertising Rule 9.2.1.1. which requires that the access cost be either 80% of the largest access number or 15 point font size. The Appellant submits that the font size is 15 points and that they therefore comply with the Code.

5.2.5 This panel has two issues with this submission. In the first place, it is not convinced that the font size *displays* as 15 point, unless an extremely small font has deliberately been chosen. For example, in the font currently used in this report, this is 15 point.

5.2.6 In the second place, and more pertinently, the size of the font cannot be the *only* measure of "prominence" (and we are in agreement with the appeal papers that it is "prominently" rather than "explicitly" that is in question. We are of the opinion that explicitly goes to the wording, and prominently goes to the design.)

5.2.7 The adjudicator referred to a quote from decision 16559, but both the adjudicator and Appellant appear to have missed that this quote is in fact from the Advertising Rules introduction. It states, *inter alia*, that ". . .WASPs may not seek to circumvent these criteria in any way by attempting to exploit any potential loopholes in the rules where by doing so they may deprive the consumer of the minimum information required. . .". The Appellant has quite correctly pointed out that a loophole can occur when there is no rule. The fact that there is only a rule about the size of the font and not the placement cannot be interpreted to allow the WASP to place information in a manner that compromises its prominence.

5.2.8 The relevant definition of prominent, as found on www.oxforddictionaries.com, is "Situated so as to catch the attention; noticeable". In this respect, we are in agreement that the adjudicator erred.

However, that error lay in his reference to Clause 9.2.1.1 of the Advertising Rules as the only measure of prominence for Clause 11.1.1 of the Code.

5.2.9 The question before this panel is therefore whether the communication around the subscription service is situated so as to catch the attention, and noticeable.

5.2.10 We find that it is not. Whether this situation should be remedied by an increase in font size or a change in the placement of the information is not within the mandate of this Panel to recommend. The information must, however, be communicated with sufficient prominence that a reasonable consumer would inevitably notice same. This is not the case on the landing page in question.

5.2.11 **The adjudicators finding in respect of Clause 11.1.1 is therefore upheld, but for the reasons given above.**

5.2.12 We note at this point that the Adjudicator found that in matter 16313 there was no breach of Clause 11.2.3 because the only competition on the page was below the communication about BMI, and therefore ancillary. It raises an interesting and perhaps unintended anomaly that while Clause 11.2.2 refers to “a specific content item”, Clause 11.2.3 only refers to competitions. In any event, this finding is not appealed and we are therefore limited to Clause 11.2.2.

5.2.13 Clause 11.2.2 states “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.”

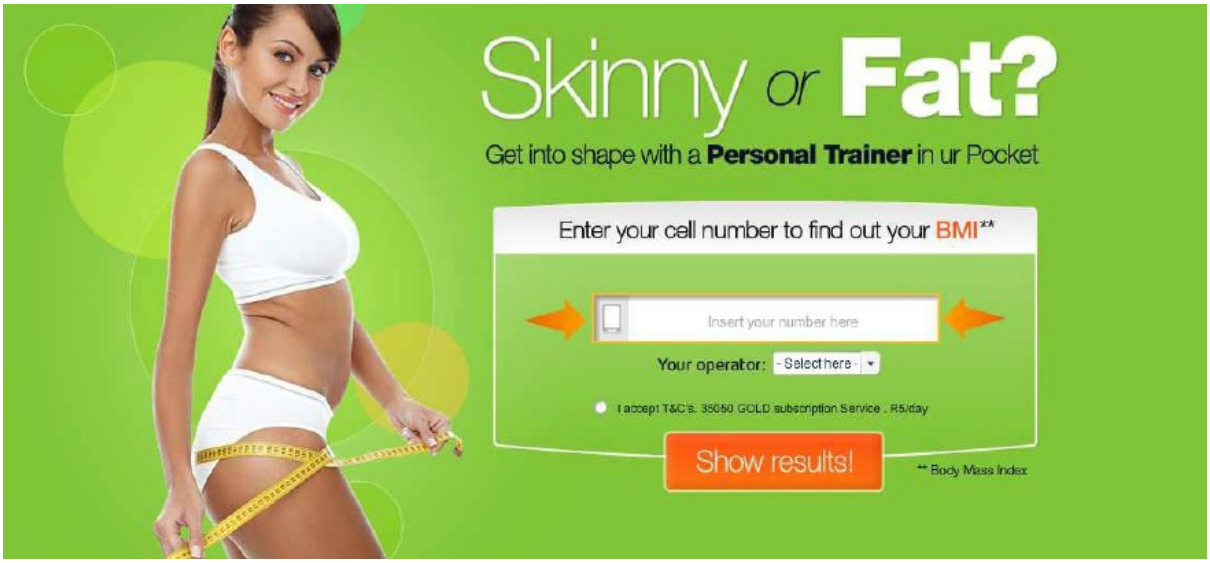
5.2.14 The Appellant submits that the subjective specific intent of the consumer, as brought about by the advertising material, is one of the key considerations for this clause.

5.2.15 Clause 11.2.2 says, “Any request from a customer to join a subscription service must be an independent transaction, **with** the specific intention of subscribing to a service” (our emphasis).

5.2.16 The Appellant seeks to make a case that once the consumer can be shown to know that they were subscribing, the requirements of Clause 11.2.2 are met. The appeal outlines the double opt-in process as evidence of the consumer’s intention to join a subscription service.

5.2.17 While the double opt-in process is important, it is only evidence of the consumer’s intention to join a subscription service if it makes it clear – at the very least at some point - that the process is leading to a subscription.

5.2.18 The relevant part of the first opt-in looks like this:



5.2.19 We are in agreement that, given the specific consent needed at the line that lists the subscription service, the consumer knew by the end of the process that they were subscribing.

5.2.20 However, Clause 11.2.2 says, “Any request from a customer to join a subscription service must be an independent transaction, **with** the specific intention of subscribing to a service”.

5.2.21 The first part of the requirement is clear: A request to join a subscription service MUST be an INDEPENDENT transaction.

5.2.22 The WASP has argued that the request for the BMI is made before the request to subscribe and that these are therefore independent. The relevant page looks like this:

5.2.23 However, it is impossible to join the subscription without getting your BMI. While you get your BMI before the final step of the subscription process, the majority of the Panel do not believe that this renders the transaction independent. The request to join a subscription is therefore not

independent of the request for one's BMI as the BMI is only received after the subscription process is initiated.

5.2.24 The majority of the Panel therefore again disagree with the adjudicator's reasoning and in particular the focus on the intention of the consumer rather than the clause as a whole. **However, we again find that the ultimate finding of a breach of Clause 11.2.2. was correct.**

5.2.25 The final clause before this Panel is Clause 11.2.3 of the Code in relation to matter 17007 only. Clause 11.2.3 reads:

> Notwithstanding the above clause, it is permissible for a customer to be included as a participant in a promotional draw or competition as an additional benefit to being a subscription service customer. In such a case, it must be reasonably clear to the customer that the promotional draw or competition is ancillary to the subscription service, and the process of joining the subscription service may not be disguised as an entry into a competition.

5.2.26 In respect of this Clause, in matter 17007, the adjudicator found that Vodacom customers are more aggressively targeted for the competition that others and that for this reason the material in respect of Vodacom customers is in breach of Clause 11.2.3.

5.2.27 The relevant page looks like this:

5.2.28 The Appellant argues, in essence, that only from the inclusion of the words "all marketing and promotional material" in version 12.1 of the Code has the interpretation that a customer must not be enticed to subscribe by the competition been supported.

5.2.29 In the matter of 16559/ 16659/ 17910 this Panel considered this issue, and we quote extensively from that finding as it remains on point:

Having considered the arguments put forward on Clause 11.2.3, the Panel is strongly of the view that the Clause sets out a two pronged test. The first question is whether it is reasonably clear to the customer that the promotional draw or competition is ancillary to the subscription service; the second and separate question is whether the process of joining the subscription service may not be disguised as an entry into a completion.

There are several factors that lend support to our approach.

The Appellant was at pains to remind the Panel that the Code is a legal instrument and must be interpreted according to the normal "interpretive mechanisms" applied to legal instruments. We agree with this submission, and have applied such principles to our interpretation of the clause.

In the first place, the two legs of the test are separated by the word "and". Mr Farlam himself, in fact, pointed out that the word "and" is preceded by a comma. The word "and" by its ordinary meaning means "as well as" or "and also this". This is underlined by the use of a comma, which is an unusual construction of punctuation in conjunction with the word "and" and must therefore denote a particular intention of the drafters.

In the second place, a reading of the test as being a one pronged test renders the first part – "whether it is reasonably clear to the customer that the promotional draw or competition is ancillary to the subscription service" – superfluous. A court will not easily decide that words contained in legislation are superfluous (see for example Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd 1993 4 SA 110 (A)). We consider that the same principle applies to the Panel, and there is nothing before us to indicate that the intention of the drafters was that the words in this clause should be regarded as superfluous, or that the test that they create is inconsistent with the purpose of the Code. On the contrary, we believe that the two pronged interpretation is more consistent with the purpose of the Code which is stated in Clause 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.

Finally, we are also reminded by the Appellant of the need for WASPA decisions to be consistent. In matter 11258; 11582; 11626; 13038 and 13039, the Appeal Panel said the following:

> *A useful two-step enquiry to determine the so-called 'bundling' complaint was suggested by the Adjudicator in his or her Report to complaint 11862, the conclusion of which is cited with approval by the SP in this matter, to*

determine whether a breach of clause 11.2.2 has occurred. The Adjudicator says, in paragraph 14.4 of that Report: "In considering whether subscription would be an independent transaction made with the requisite intention in a case where a competition or promotional draw is offered as an additional benefit to being a subscriber to the service, an adjudicator is required to decide whether: 14.4.1. it would be clear to that customer that the promotion draw or competition is "ancillary" to the subscription service, and 14.4.2. (whether) the subscription process has or has not been disguised as an entry into a competition."

We therefore regard the test set out in Clause 11.2.3 as two pronged.

We accept that the second prong is met – by the time the consumer actually subscribes to the service, they are aware that this is a subscription service.

The question before us is whether the first prong is met: is it reasonably clear to the customer that the promotional draw or competition is ancillary to the subscription service?

The Appellant presented argument around the word "ancillary". The gist of the argument seems to be that the word "ancillary" does not import "the means by which something is or becomes supportive of the 'main thing'" (ref paragraph 2.1.12 of the original Appeal document). In matter 11258; 11582; 11626; 13038 and 13039, the Panel conducted research on the meaning of the word 'ancillary" and concluded:

On the first enquiry, regarding whether a promotional draw is 'ancillary', it is useful to consider the meaning of this term. We annex to this report the leading information from the top five results to a Google search for the query 'Dictionary ancillary'. In our understanding, the word 'ancillary' clearly means something that is 'in support of, rather than, the main thing'.

In the context of a promotional draw which forms a part of a subscription service extended by a Service Provider and which is subject to clauses 11.2.2 and 11.2.3 of the Code, it must be accepted that the term 'ancillary' implies that a potential customer must be enticed firstly with the contents of the subscription service, sweetened secondly by the promotional draw. 5.14 This is necessarily an objective enquiry considering the presentation of the offer, and which precedes the question of the potential customer's subjective 'intent' to sign up for the subscription service.

There is nothing before us that justifies a deviation from this interpretation and approach. At the absolute least, the promotion of the competition and the subscription service must be on equal footing in all the material.

5.2.30 We again believe that there is nothing before us to warrant a deviation from this approach.

5.2.31 In the material before us it says boldly “Reply YES and you could have a chance to get a Brand new Car” and “Tell me what I could WIN!”. In much smaller print it says, “By replying YES I agree to subscribe. . .”.

5.2.32 There is no doubt in our minds that the primary communication is that you can win a car. It does not say, boldly, “Reply YES to subscribe AND stand a chance to win a car”. The subscription is the ancillary communication and not vice versa.

5.2.33 **We therefore agree with the Adjudicator’s findings in respect of Clause 11.2.3.**

5.2.34 Finally, the Appellant has submitted that the sanctions are too harsh.

5.2.35 The bulk of the Appellant’s argument in this respect is directed at the role of the Monitor and the sanction of withdrawal of all similar competitions and promotions pending an “audit” by the Monitor.

5.2.36 We are in agreement with the Monitor’s role is limited to monitoring and submitting complaints to independent adjudicators. It is not her mandate to become both the prosecutor and judge, as this sanction would imply.

5.2.37 We are also aware of the fact that this campaign is now somewhat a historic fact, and that in the interim the Monitor has indeed lodged many complaints against the WASP’s material and the WASP has obtained

ample guidance, in the form of adjudications and appeals, as to how it should proceed.

5.2.38 **We therefore overturn the sanction of suspending all competition related promotions pending an assessment by the Monitor.**

5.2.39 **We are similarly unconvinced that a referral to the National Consumer Tribunal is warranted or indeed relevant at this point.**

5.2.40 **On the issue of the financial sanctions, amounting to R75 000, the Appeal puts no compelling reasons before us that these should be reconsidered. In the circumstances, they stand.**