



## REPORT OF THE ADJUDICATOR

<b>Complaint reference number:</b>	17831
<b>WASPA member(s):</b>	Buongiorno ZA
<b>Membership number(s):</b>	002
<b>Complainant:</b>	WASPA Media Monitor
<b>Type of complaint:</b>	Subscription service
<b>Date complaint was lodged:</b>	16 July 2012
<b>Date of the alleged offence:</b>	12 July 2012
<b>Relevant version of the Code:</b>	12.0
<b>Clauses considered:</b>	4.1.2; 11.1.1; 11.1.2; 11.2.2
<b>Relevant version of the Ad. Rules:</b>	2.3
<b>Clauses considered:</b>	9
<b>Related cases considered:</b>	11863, 15183, 15477, 15664, 16313, 16479, 16559, 16659, and 16832

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### Complaint

1. This complaint has been lodged against the member by the WASPA Media Monitor regarding a promotional campaign run by the SP in respect of its 35050 GOLD subscription service.
2. The Monitor alleges that the member has breached clauses 4.1.2; 11.1.1; 11.1.2; and 11.2.2 of the WASPA Code of Conduct ("the Code") on the following grounds:

- 2.1 The member is using an advertising/promotional campaign to exclusively promote a competition instead of the underlying content subscription service offered by it;
  - 2.2 The promotional material used does not prominently and explicitly identify the services as “subscription services”;
  - 2.3 The promotional material used for the advertised content subscription service does not clearly display at least two (2) examples of the content available;
3. The Monitor tested the campaign using both a Vodacom and MTN number.
  4. Details of the Monitor’s test results, relevant screenshots, and grounds of complaint are annexed marked “A”.
  5. It is not clear from the Monitor’s reference to “advert” in the complaint whether they are referring only to the banner advert, or to the promotional web pages, or to both. I have therefore viewed the campaign in its entirety in the context of the Monitor’s allegation that the advert is not compliant with the Code.
  6. The Monitor has also raised an issue with the wording of the confirmation message that is sent to Vodacom subscribers once they have entered their cellphone number on the landing page of the campaign.
  7. There appears to be a dispute around who is responsible for the wording of this message, i.e. Vodacom or the member, and whether the wording required by Vodacom in terms of its business rules overrides the prescribed wording set out in the Code for such messages.
  8. The Monitor suggested that the campaign should be amended as follows:
    - 8.1 A content subscription service is being sold – therefore examples of content must be supplied;
    - 8.2 The subscription component of the advert must be explicit and prominent, not the competition;

- 8.3 The confirmation page for Vodacom subscribers must be edited as per the Monitor's suggestions;
  - 8.4 The confirmation message sent to Vodacom subscribers must be reworded as suggested by the Monitor.
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### **SP's response**

9. A copy of the member's detailed response to the complaint, together with supporting documents, is annexed marked "B".
10. The member dealt with each aspect of its campaign and asserts that the campaign is compliant with the Code.
11. In particular, the member alleges that the banner advert used does not actually form part of the underlying advertising campaign and is only used to attract the interest of potential subscribers.
12. The member goes on to suggest that it is only the underlying advertising campaign that should contain the prescribed information pertaining to subscription services as required by the Code.
13. The member also referred to the inherent size limitations of banner adverts as a basis for asserting that not all prescribed information can be included in the advert.
14. The member does, however, concede that the wording of a banner advert cannot be deliberately and blatantly deceitful.
15. The member states that the wording of this particular banner is not misleading as it clearly states that potential subscribers "*stand a chance*" of winning something, but that this involves being subscribed to a subscription service which is charged at R5/day.
16. An asterisk and the text "terms and conditions" also alerts visitors to the fact that their chance of winning is subject to certain further terms and conditions,

which are made available when the visitor clicks through to the landing page for the underlying campaign.

17. The member alleges that it is clearly stated on the landing page ("the splash page") that the service is a subscription service.
  18. The member states further that the terms and conditions found on the splash page specifically refer to the subscriptive nature of the service.
  19. The member argues that it is entitled to promote its subscription service alongside the rewards program it offers to its subscribers. The member relies on the adjudicator's comments in the adjudication of complaint 11863.
  20. The member believes that a potential subscriber who follows the steps set out in the campaign, consciously and actively agrees to become subscribed to the service.
  21. The member refers to three (3) examples of previous deals offered by the One Day Only service which are clearly displayed on the splash and confirmation web pages of the campaign.
  22. The member denies that it has breached any provisions of the Code and that potential subscribers are clearly informed of the difference between entering the promotion/competition and subscribing to the service itself.
  23. The member believes that its advertising campaign makes it clear that the chance to win prizes pursuant to its rewards program is only available to subscribers and that the double opt-in subscription process that has to be followed by potential subscribers ensures that customers are not misled and that they have a clear appreciation of the fact that they are joining a subscription service when they take active steps to opt-in.
  24. The member also states that this campaign is no different to other campaigns which have been tested and found to be compliant with the Code.
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## **Clauses of the Code considered**

25. The following clauses of version 12.1 of the Code were considered:

*Clause 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.*

*Clause 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.*

*Clause 11.1.2:*

*An advert for a content subscription service which includes examples of the content provided as part of that service must include at least two examples of that content clearly displayed, except as provided for in 11.1.3.*

*Clause 11.2.1:*

*Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.*

*Clause 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.*

*Clause 11.2.6:*

*The confirmation message sent in response to a subscription request (such as that described in 11.2.5, or triggered by entering a mobile number on a web site) must include the subscription service information in the following format, flow and wording:*

***[service activation instructions and/or activation code]. You'll be subscribed to [XYZ service] from [name of service provider] at [cost of service and frequency of billing].***

*Clause 11.2.7:*

*If the network is already undertaking any of the verification steps required in this chapter of the Code, then it is not necessary for members to repeat those particular steps again.*

*Clause 11.3.1:*

*If a subscription service is initiated by entering a customer's mobile number on a web page or WAP site, then a separate confirmation message must be sent to the customer's mobile handset in order to prove that the number entered matches the customer's mobile handset number. This message may either:*

- (a) contain a PIN which is then confirmed or validated on the web page, or*
- (b) contain the name of the service, an explanation of the confirmation process, and a URL with a unique identifier, which, when clicked, validates the handset number.*

*Clause 11.3.2:*

*For any subscription services that are initiated via WAP, it is a requirement for the service provider who has a direct contract with the network operator to display a WAP confirmation page to the potential subscriber. This confirmation page must be displayed after the subscriber has first indicated an interest in the subscription service by clicking on a "join" or similar link.*

*Clause 11.3.3:*

*The WAP confirmation page must display the following information in a clear and easy to read manner:*

- (a) The name of the service and an indication that it is a subscription service*
- (b) The price and frequency of billing*

(c) *A phone number for customer support*

*Clause 11.3.6:*

*The WAP confirmation page described above must also present a confirmation button. It must be clearly communicated to the customer on the confirmation page that clicking the confirmation button will initiate a subscription service.*

*Clause 11.3.7:*

*The WAP confirmation page may not contain any marketing messages or other content that is likely to distract the customer from the required confirmation information and process.*

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## **Clauses of Advertising Rules**

26. The following clauses of version 2.3 of the Advertising Rules were considered:

*Clause 9.1*

*This section applies to all advertising placed on internet-based web sites visible to the general public where Access Channels are displayed. This also includes advertisements placed on third-party web sites.*

*Clause 9.2.1.1*

*Formatting Of Access Cost Text:*

- *Access cost text must be of a size that is at least **80%** of the largest access number on the page, or 15 point font size, whichever is the greater. The access cost text must be in a nonserif font.*
- *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.*
- *The cost text must not be part of a colour scheme or design that could obscure (objective) easy reading of complete details of the price.*

- *All access cost information must be placed horizontally.*

#### *Clause 9.2.1.2*

##### *Position of Access Cost Text*

- *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.*
- *If the ad and/or offer is on a third party web site as a graphic or display text, then the display text with pricing and contact info must be displayed on immediately below, above or to the side of the access number to show the FULL cost to consumer. This includes for example, text-based ads placed on Google-based (or similar) advertisements.*
- *The T&C text must be placed close as possible to the unique access number.*
- *T&C information must be placed horizontally.*
- *If multiple offers are made on the same advertisement and the cost and T&C differ with each offering, each offering must show the cost & T&C separately and clearly.*
- *While cost information associated with an access number may be displayed elsewhere on a web site (for example cost information also placed in the T&C page of a web site), this must be done as part of a duplication of the pricing. Hence, cost information cannot solely be placed on, for example only the T&C page where accessing the T&C page requires that the user click away from the initial page that displayed the access number.*
- *The consumer should thus not have to scroll down significantly on that same page or follow any links to other pages to be made aware of the full pricing and T&C associated with a unique access number.*
- *No cost and/or T&C information may be placed on in-view type pages.*



- *No cost and T&C information may be placed on any Internet web page requiring a particular add-on component or facility that is not generally available to all users on the Internet. This prohibition extends to placement on pop-up and in-view pages.*

#### *Clause 9.2.2.1*

##### *Formatting & Font Criteria For T&C Text*

- *The T&C text must be in 12 point font size, or 50% of the largest access number on a Web page, whichever is the greater. The T&C must be in a non-serif font*
- *All T&C information must be placed horizontally*

#### *Clause 9.2.2.2*

##### *Position of T&C display text*

- *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 in a non-serif font.*
- *This T&C text must be placed close as possible to the unique access number. If multiple offers are made on the same advertisement and the cost and T&C differ with each offering, each offering must show the cost & T&C separately and clearly*

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## **Decision**

27. It is noted that the issues raised in this complaint have been adjudicated upon previously in a number of similar complaints involving the member's promotional campaigns involving its rewards program. A number of these complaints were also lodged by the Monitor.

28. As it has done on numerous previous occasions, the member again argues that the promotion of its rewards program is ancillary to the promotion of its 35050 GOLD subscription service.
29. The member appears to have again placed a great deal of stock in the findings of the adjudicator in complaint 11863, which involved a similar promotional campaign, albeit for a different service.
30. The adjudicator, in their report for complaint 11863, found that the Code does not set out a blanket prohibition of any association of a competition or promotional draw with a subscription service. However where a competition or promotional draw is associated with an advertisement for a subscription service, the central principle remains that a request from a customer to join that subscription service must be an independent transaction made with the specific intention of subscribing to that service.
31. The adjudicator went on to state in their report that 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:
  - 31.1 it would be clear to that customer that the promotion draw or competition is "ancillary" to the subscription service, and
  - 31.2 the subscription process has or has not been disguised as an entry into a competition;
  - 31.3 the advertising campaign complies with all other requirements of the Code and Advertising Rules, after reviewing the design elements employed and the balance of the subscription sign-up process.
32. I have followed the approach suggested by my learned colleague in evaluating the current campaign.
33. Regarding the initial banner advert, it appears that the member has taken heed of the ruling made in complaint 11863 and has included the words

“Subscription service”, together with the applicable pricing of the service and a link to the relevant terms and conditions for the service (elements which were absent in the banner advert in complaint 11863).

34. However, despite this, I find the use of the word “Congratulations” in the advert to be very misleading as someone accessing the banner advert has not yet won anything. On this basis alone, I find that the banner advert contravenes section 4.1.2 of the Code.

35. Regarding the landing (splash) page and confirmation web pages used by the member:

35.1 The words “Subscription service R5/day” is stated in the top right hand corner of the page and appears to be in line with the requirements of clause 9 of the advertising rules.

35.2 The member has made the promotion of the “Hot Deals” content reasonably prominent on the splash and confirmation web pages.

35.3 See the headline text on the page which reads:

***“Get Hot Deals on ur Fone plus a chance to WIN a Polo\* & daily Prizes\*”.***

35.4 Different colour font has also been used to distinguish between the two aspects of the promotion, i.e. black font for “***get Hot Deals on ur Fone***” and red font for “***plus a chance to WIN a Polo\* & daily Prizes\****”.

35.5 Three (3) examples of previous “hot deals” are clearly displayed on the splash and confirmation pages.

35.6 The terms and conditions at the bottom of the page also expressly state that this is a mobile subscription service and the terms relating to pricing are set out.

35.7 However, the “opt-in” box on the page which invites potential subscribers to enter their cell phone number is again misleading as

there is no mention in and around this box that by doing so a person could be subscribed to a subscription service.

- 35.8 Once a customer enters their cellphone number, they are directed to a new web page with another box which is headed: **“You are about to receive an SMS on >>>> Reply YES for a chance to get a brand new Polo.”**
- 35.9 The confirmation button now reads: **“tell me what I can win”**.
- 35.10 Below this box, is the following wording in smaller font:  
**“By replying Yes”, I agree to subscribe to 35050 Gold subscription service R5/day. I accept the terms and conditions and confirm I am > 18. For help dial >>>>. Terms and conditions (please read).**
36. On reviewing the wording and design elements of these pages as a whole, I can see that the member has attempted in some respects to distinguish between the subscription service and the rewards program.
37. However am not satisfied that the member has done enough to make it clear to customers that the promotion draw or competition is “ancillary” to the subscription service.
38. The opt-in boxes on both the splash page and the confirmation page for Vodacom subscribers either makes no mention of the subscription nature of the service, or disguises this in smaller font after emphasising the opportunity to win the Polo and other advertised prizes. This is very misleading to consumers who are not being overly vigilant.
39. I have also considered the statements made by both parties regarding the wording of the opt-in message used for Vodacom subscribers.
40. Without deciding the issue of who is responsible for sending this message, and/or to what extent Vodacom's business rules depart from the provisions of the Code, it is clear to me that the wording of the message sent again emphasises the prize winning aspects of the promotion and relegates the subscription nature of the services.

41. Based on the foregoing, I find that:
- 41.1 The member has not contravened clause 11.1.1 or 11.1.2 of the Code.
  - 41.2 The member has contravened clause 4.1.2 of the Code in that it has used promotional material in this campaign which is false or deceptive, or is likely to mislead by inaccuracy, ambiguity, exaggeration or omission and; taking into account the numerous other complaints that have been lodged and upheld against the member, its sophistication as a long standing member of WASPA, and the relative ease with which it could achieve its marketing goals while still complying with the requirements of the Code, I unfortunately must reach the conclusion that the member has done so knowingly.
  - 41.3 The member has contravened clause 11.2.2 in that the promotional campaign and opt-in process used by the member, particularly when directed at Vodacom subscribers, does not ensure that any request from a customer to join a subscription service will be an independent transaction, with the specific intention of subscribing to the service.
  - 41.4 Furthermore, I am not satisfied that a request from a subscriber to join the advertised subscription service would not be a request to enter the competition or draw also advertised as part of the campaign.
  - 41.5 The member has contravened clause 11.2.6 in that the confirmation message sent in response to a subscription request from a Vodacom subscriber does not comply with the requirements of the Code in relation to the subscription service information to be included, and the format, flow and wording prescribed for such information.
42. The complaint is accordingly upheld in the aforementioned respects.

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## Sanctions

43. In determining an appropriate sanction, the sanctions imposed by the adjudicator in complaint 16559 have been taken into account. The matter is currently before the appeal panel and I will therefore refrain from imposing any further sanction of suspension, which I believe to be appropriate in the circumstances, and I will defer to the eventual findings of the appeal panel in regard to complaint 16559.
  
44. Taking into account the fines previously imposed on the SP for the same or similar contraventions of the Code, a fine of R50 000.00 is imposed on the member, which is payable within 7 days of the date of publication of this report.

## Buongiorno WEB Advert Test

10 July 2012

Shortcode: 35050

Service Provider: Buongiorno

Cellphone Number: 0793829070

Starting Airtime: R13.83

WEB URL: <http://lockerz.com/s/219917713>

Landing Page URL:

[http://www.35050.co.za/za\\_35050\\_gold\\_sp\\_web/site/pages/Groupromo.bsp?service=gold&mk=18621&subparam\\_mk=adfPubA&afuserID=4F9938D16E651A6B96996CA9F010C461&PubID=10761341909451175](http://www.35050.co.za/za_35050_gold_sp_web/site/pages/Groupromo.bsp?service=gold&mk=18621&subparam_mk=adfPubA&afuserID=4F9938D16E651A6B96996CA9F010C461&PubID=10761341909451175)

### **Background:**

Buongiorno make use of Competition campaigns, that are misleading consumers, in an effort to market and sell subscription services.

- The media has referred to these campaigns, see link <http://www.moneyweb.co.za/mw/view/mw/en/page295046?oid=575434&sn=2009+Detail&pid=287226> ,
- competitors are consistently informing WASPA of these non-compliant campaigns and believe it to be damaging to our industry
- and the monitoring team have on several occasions tried to put a stop to these campaigns.

The screenshots below will demonstrate yet again another example of a non-compliant campaign that exclusively promotes the winning of a car and other prizes; and not sell the content subscription service for its content.

**Test result:**

I clicked on the following banner advert.



I clicked on the banner.



I was taken to the following page:

Firefox - Groupromo

www.35050.co.za/za\_35050\_gold\_sp\_web/site/pages/Groupromo.bsp?service=gold&mk=18621&subparam\_mk=adIPubA&afusertID=4F9938D16E651A6B96996C

Wikipedia (en)

Most Visited Google Facebook deviantART ThePirateBay KickassTorrents Gmail sms.c.o.d.e.s WASPA Website Webmail DARK FORCES Gantz 368 Naruto 593 Ao No Exorcist 37 Bookmarks

Subscription Service R5/day Compatible handsets only

# Be a Celeb, Like Angelina

With these trendy Roberto Cavalli or Tom Ford Sunglasses

get Hot Deals on ur Fone plus a chance to WIN a Polo\* & daily Prizes\*

UP TO 70% OFF\*

Enter your cell phone number:

Your operator: - Select here -

CONTINUE

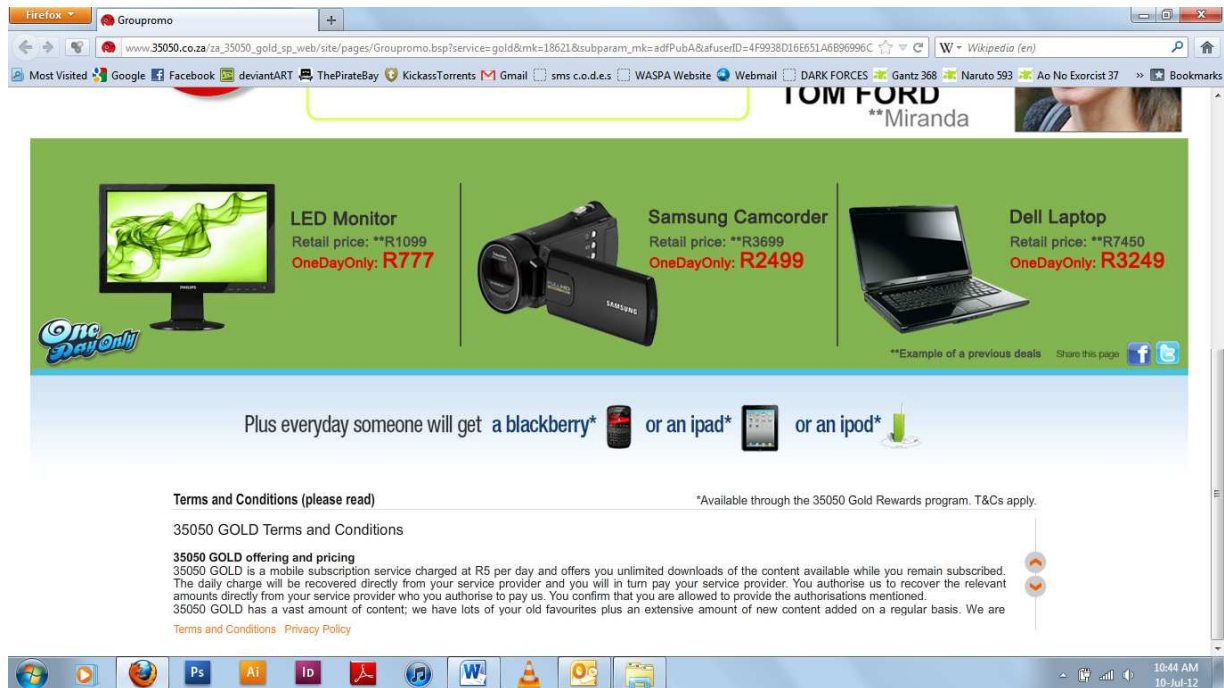
TOM FORD  
\*\*Miranda

LED Monitor Samsung Camcorder Dell Laptop

10:44 AM 10-Jul-12

Only when I scroll down do I see the terms and conditions.

What is 70% off? How does the One Day Only deals (seen in the screen below) work?  
There are no forms of examples of content supplied on these pages.



The above screenshots show that the SP is guilty of the following code breaches:

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**.

*The above advert insinuates that the customer is only joining/entering the competition. No content is provided nor does anything explicitly state that this is a subscription service.*

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.

*There is nothing here stating explicitly that this is a subscription service.*

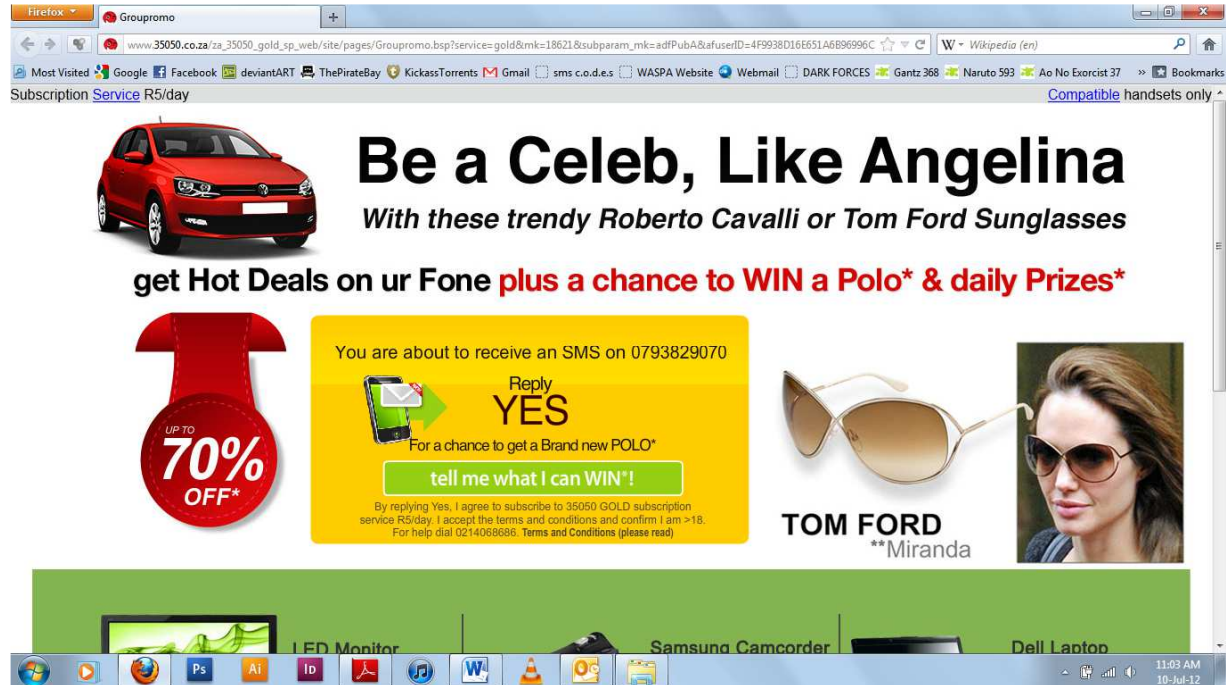
11.1.2. **An advert for a content subscription service** which includes examples of the content provided as part of that service **must include at least two examples of that content clearly displayed**, except as provided for in 11.1.3.

*Not one type of content is advertised.*

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.

*The above advert only advertises the competition aspect of the subscription service. No average consumer's intent it to download content, the intent is purely to enter a competition.*

I entered my number and selected my network provider and was taken to the following page:



Once again the above screenshot is all about “what I can WIN!” and not about the subscription service.

Competition vs. Subscription:



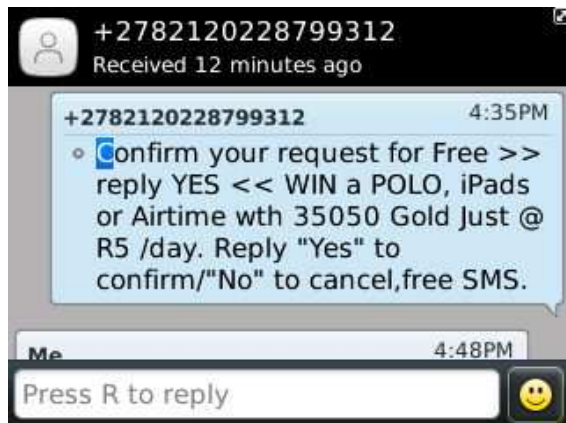
The **RED BLOCK** shows the competition aspect and the **BLUE BLOCK** shows the subscription aspect. There is however no mention of what that subscription is for.



The above must be modified to the following, to be considered compliant. (assuming of course they have done a content promotion on previous pages)



I received the following double opt-in message:



The above message states :

1. That you can win a polo, ipad or airtime

**The above is not promoting a subscription service.**

Text in RED is the copy supplied by the SP.

“Confirm your request for FREE >> reply YES << WIN a POLO, iPads or Airtime wth 35050 Gold Just @ R5/day...”

It must be changed to: “Confirm your request for 35050Gold from Buongiorno @ just R5/day. Plus WIN a POLO, iPads or Airtime...”

**Vodacom has confirmed that the copy supplied is the responsibility of the SP.**

I replied YES and received a welcome message.

I unsubscribed successfully.

**MTN:**

12 July 2012

Cellphone Number: 0783622203

Starting Airtime: R30

I followed the process to the confirmation page:

Firefox - Groupromo

www.35050.co.za/za\_35050\_gold\_sp\_web/site/pages/Groupromo.bsp?service=gold&mk=18621&subparam\_mk=adfPubA&afuserID=4f9938d16651a6896996c

Subscription Service R5/day

Be a Celeb, Like Angelina

With these trendy Roberto Cavalli or Tom Ford Sunglasses

get Hot Deals on ur Fone plus a chance to WIN a Polo\* & daily Prizes\*

UP TO 70% OFF\*

You are about to receive a message on your mobile

Enter your CODE:

CONFIRM

By clicking confirm, I agree to subscribe to 35050 GOLD subscription service R5/day. I accept the terms and conditions and confirm I am >18. For help dial 0214068686. Terms and Conditions below (please read)

TOM FORD \*\*Miranda

LED Monitor Samsung Camcorder Dell Laptop

12:24 PM 12-Jul-12

The message read:

“:>> ur CODE is 1100 << enter it in the web confirmation page. U’ll b subscribed to 35050 from Buongiorno @ R5/day. WIN A POLO, iPads, iPhones+Unlimited Downloads”

The above is compliant. The double opt-in message on Vodacom should carry the same format: [how to subscribe] [subscription information] [billing information] [extras]

I entered my code and clicked on Confirm.

I was successfully subscribed.

I SMSed CANCEL GOLD to 35050 and was successfully unsubscribed.

### **Conclusion:**

WEB pages must be edited in the following ways:

1. A content subscription service is being sold – therefore examples of content must be supplied.
2. The subscription component of the advert must be explicit and prominent, not the competition.
3. Confirmation page (when subscribing through Vodacom) must be edited (see guide in test).

Double Opt-In message (the part supplied to Vodacom) must be reworded. (as previously suggested by Vodacom)

### **Breaches in the Code:**

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.

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.

11.1.2. **An advert for a content subscription service** which includes examples of the content provided as part of that service **must include at least two examples of that content clearly displayed**, except as provided for in 11.1.3.

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.



11.2.6. The confirmation message sent in response to a subscription request (such as that described in 11.2.5, or triggered by entering a mobile number on a web site) must include the subscription service information in the following format, flow and wording:

[service activation instructions and/or activation code]. **You'll be subscribed to [XYZ service] from [name of service provider] at [cost of service and frequency of billing].**

11.2.7. If the network is already undertaking any of the verification steps required in this chapter of the Code, then it is not necessary for members to repeat those particular steps again.

**REQUIREMENTS:**

I recommend this Web campaign be de-activated and removed, appropriate changes to be made and sent to the Media Monitor prior to making live again.



**Formal response #17831**

Dear Waspa,

1. We confirm that on 16 July 2012 WAPSA informed us that a formal complaint had been lodged against us by the WASPA Media Monitor (the “Monitor”), under complaint number 17831 (the “Complaint”).
2. The version of the WASPA Code of Conduct (the “Code”) applicable to this Complaint is the latest version, being version 12.
3. Apart from the general allegations made by the Monitor we confirm that we are being accused of specifically breaching sections 4.1.2, 11.1.1, 11.1.2, and 11.2.2 of the Code respectively.
4. It will be appreciated that there are a number of underlying/related issues which could be addressed by ourselves, which are not specifically raised by the Monitor. To attempt to deal with all these possible issues would be highly impractical, if not impossible. In the interests of brevity, we confirm that we are only going to deal with those allegations specifically made by the Monitor.
5. We are going to deal with the allegations in the following order:
  - 5.1. Breaches of sections 4.1.2, 11.1.1, 11.1.2, and 11.2.2 respectively; and
  - 5.2. General allegations.

**The campaign:**

The banner:

6. The campaign starts with the banner. The Monitor appears not to have any specific issues with the banner, other than the broad allegation that the campaign is “*exclusively promotes the winning of*” prizes.
7. In general:



- 7.1. Banners are, in context to the campaigns into which they link, are generally regarded in the industry as a marketing tool used to catch the eye of potential customers, inviting them to link into the underlying advertising campaign. It is the underlying advertising campaign which should contain all the substantive information pertaining to subscription services and as required by WASPA;
- 7.2. Due to their size they can only contain a limited amount of information on them;
- 7.3. We agree that the banners cannot be deliberately and blatantly deceitful, but due to their purpose and the nature thereof, there is a limit to the amount of information they can contain, whilst still being catchy enough to generate interest in viewing the underlying advertising campaign;
- 7.4. They do not form the backbone of the advertising campaign and are only the very first point of interaction with the potential customer, whereafter the potential customer may link to an underlying campaign;
- 7.5. Interacting with the banner does not lead directly and immediately to subscription by potential customers. Once the potential customer has interacted with the banner, and been linked into the underlying campaign, the potential customer has to then follow the double-opt in process – prescribed by WASPA and/or the networks - before he/she can become subscribed to the particular WASP's service (this will be discussed in more detail below). Only once they have interacted with the underlying campaign, and consciously and actively agreed to become subscribed, will the potential customer be subscribed to the service.
8. In this instance the banner does not assure the potential customer that they have won anything – “*Congratulations. You could be the next POLO VIVO\* winner!*” (underlining added), and the asterix referring to applicable terms and conditions. The banner informs potential customers that they “stand a chance” of winning something, but that:
  - 8.1. it involves being subscribed to a subscription service, charged at R5/day; and



- 8.2. there are underlying terms and conditions. These terms and conditions confirm, on the landing page of the linked campaign, a) the subscriptive nature of the service; b) the cost thereof; and c) the ancillary nature of the promotional draw (members of the public have to at least be members of our client's service).
9. The banner is intended to attract potential customers, but is not deceptive. It advertises not only our subscription service, but also our rewards program, which is ancillary to being subscribed to that service.
10. Any reasonable person interacting with the banner would be aware that, when considering the banner in its entirety:
  - 10.1. they have won nothing;
  - 10.2. although there is the potential to win, that potential encompasses certain terms and conditions - a reasonable person would realise this, even if reference to the terms and conditions was not contained on the banner, as no reasonable person would believe they were winning something merely because they clicked on the banner. This would be an absurd conclusion.

The landing page:

11. For ease of reference we are going to refer to the landing page in two separate categories:
  - 11.1. The splash page (attachment "B1");
12. The confirmation page (attachment "B2" and "B3"). B2 is the confirmation page in relation to potential Vodacom subscribers, and "B3" is the confirmation page developed by our client in order to be in compliance with the Code's prescribed double opt-in mechanism.
13. The Monitor appears to have misread the landing page and what is being advertised thereon.



14. We confirm that part of the content which our 35050 Gold service (the “Service”) offers is access, via WAP, to deals offered by One Day Only.
  
15. All relevant pages (whether Vodacom and/or non-Vodacom) contain the following information:
  - 15.1. At the top left hand corner of the pages (black print on grey), clearly and explicitly, states the following:

*“Subscription Service R5/day”*;
  
  - 15.2. *“Hot deals”* are available, with three references to the deals below – advertising available content on the Service;
  
  - 15.3. Reference to the reward advertised on the banner page (the Polo), as well as other rewards available to loyal subscribers of the Service (daily prizes), with the accompanying asterix referring potential subscribers to the fact that these rewards are an ancillary benefit only for subscribers of the Service. This method of using asterixes to refer to terms and conditions is acceptable and widespread practice in the industry;
  
  - 15.4. The full terms and conditions of the Service are available at the bottom of the page. These terms and conditions confirm *inter alia* a) that the Service is a subscription service; b) the cost thereof; c) the fact that the rewards are ancillary to subscription to the Service; d) the unsubscribe procedure; and e) our helpline number.
  
16. The confirmation pages (Vodacom and non-Vodacom), in addition, contain – in the confirmation box – the fact that by “confirming” or replying “yes” the potential subscriber will a) be subscribed to our Service, at R5/day; b) be agreeing to the terms and conditions (which are illustrated prominently and/or referred to on each page, including the banner). Our helpline is also clearly displayed.

Double opt-in:



17. As already stated, all the pages within the campaign contain the required subscription service references, including costings. Our terms and conditions are referred to on every page, and, although not required by the Code, are provided in full on each of the pages constituting the campaign to which the banner links.
18. By way of amplification with respect opt-in mechanism for non-Vodacom customers:
  - 18.1. On the splash page (“B1”) the potential subscribers may, if they choose to do so, enter their phone number (MSISDN), whereafter they will be sent a pin number to their phone. At this point the potential subscriber has still not been subscribed to the service;
  - 18.2. Once the pin number is received, potential subscribers may then choose to enter the pin number on the confirmation page (“B3”);
  - 18.3. The text message containing the pin number again confirms that the potential subscriber is dealing with a subscription service, and the cost thereof, and that if they enter the pin number on the confirmation page they will be subscribed to a service. At this point they are still not subscribed to the service;
  - 18.4. The potential subscriber then has to enter that unique pin number on the confirmation page and click on the CONFIRM button before they be subscribed to the Service;
  - 18.5. In addition, as already stated:
    - 18.5.1. The landing page includes our Terms and Conditions - the contents of which again highlight that the Service being advertised is a subscription service and the costings thereof;
    - 18.5.2. Immediately below the CONFIRM button, on the confirmation page, the potential subscriber is again informed of the subscription element of the Service, the cost thereof and referred to our terms and conditions:



*“By clicking confirm, I agree to subscribe to 35050 Gold subscription service R5/day. I accept the terms and conditions... For help dial 0214178001. **Terms and Conditions below (please read)**”.*

18.5.3. Only after taking the positive steps of a) entering a pin number; and b) clicking the CONFIRM button, is the potential subscriber then subscribed to the Service.

19. With respect to the opt-in mechanism for Vodacom customers:

19.1. As per Vodacom’s business rules a different double opt-in process than that required by the Code is prescribed.

19.2. In order to do business with Vodacom SPs are obliged to follow the process as defined in Vodacom’s business rules. This process still requires a potential subscriber to follow a double opt-in mechanism. The Code also stipulates that WASPs are required to comply with contracts and agreements that may exist with operators (e.g. Vodacom) (section 1.5 of the Code).

19.3. The Code does not cater for a situation where the Code and operator provisions may differ – which applies above the other, but without following operator requirements WASPs cannot conduct business through those operators. Nevertheless, despite the different configurations we confirm that the spirit of the purpose of the double opt-in process applies by both the Code as well as Vodacom’s requirements.

19.3.1. The double opt-in process is substantively the same. The only difference is that, instead of us sending a text message with a PIN to MSISDN which has to be entered on the relevant webpage, the customer is now sent a message by Vodacom to the MSISDN whereto, should they wish to subscribed, the must respond by replying “YES” to the text message from their MSISDN to Vodacom.

19.3.2. We confirm that the message sent by Vodacom also contains confirmation that our Service is a subscription service charged at R5/day (“with 35050 Gold just @ R5 /day”). In addition, after the page in which the customer inserts his/her MSISDN, they are then referred to a webpage (“B2”) which confirms that they will be receiving a message from Vodacom (this replaces our usual confirmation page).



The insertion of this latter webpage is not a requirement by Vodacom, but our client has inserted to ensure that the principles of double opt-in are incorporated in all its campaigns, irrespective of to which network the subscriber belongs.

19.3.3. The double opt-in process for Vodacom users is therefore partially controlled by our client and partially controlled by ourselves. Once the MSISDN is inserted on the splash page the process is thereafter controlled by Vodacom. Without confirmation from Vodacom that the customer has replied “yes” to the text message referred to in 19.3.1 we are not permitted to subscribe the customer.

19.3.4. We confirm that Vodacom provides us with some latitude as to what is contained in this text message, but ultimately Vodacom is in control of the process and can dictate to WASPs what the message can and cannot contain. In any event our message complies with the spirit of the Code.

**Breach of section 4.1.2:**

20. The Monitor alleges that we are not compliant because our advertising campaign *“insinuates that the customer is only joining/entering the competition. No content is provided nor does anything explicitly state that this is a subscription service”*.

21. As specifically stated in complaint numbered 11863 (“#11863”), confirmed by numerous subsequent adjudications – complaint numbered 16382 (“#16382”) being the latest – there is nothing which prohibits any association of a competition or promotional draw with a subscription service, *“nor would it be desirable for it to do so as this would constitute a significant restriction on the ability of members to promote their services”* (emphasis added)...11.2.2 was not *“intended to prevent someone who has deliberately joined a subscription service from being included in a promotional draw...”* (paragraph 14.1 of Report of #11863);

21.1. *“The WASPA Code does not explicitly prohibit the use of promotional draws / competitions to promote subscription services, provided that potential subscribers are clearly informed of the difference between entering the promotion/competition and subscribing to the service itself.*





*The SP's double opt-in subscription process ensures that customers are not misled and that they have a clear appreciation of the fact that they are joining a subscription service. (See also the adjudicator's report of complaint #11863)" (page 18 – 19 of Adjudicator's Report for #16382).*

22. We confirm that our rewards program is advertised in this campaign, but so is our subscription service as well as content which can be found thereon.
23. As described above:
  - 23.1. The banner refers to the subscription nature of service;
  - 23.2. The landing page clearly and explicitly refers to subscription service and cost thereof in top left hand corner of each page;
  - 23.3. The terms and conditions confirm that 35050 Gold is a subscription service and the cost thereof;
  - 23.4. The PIN code message and the Vodacom message both contain references to charge of subscription service;
  - 23.5. The confirmation page has direct reference to subscription service, cost and terms and conditions of the service (on both "B2" and "B3");
  - 23.6. There are three items of content illustrated on the splash pages and the confirmation pages; and
  - 23.7. Items of content available in the Service are explicitly referred to in the campaign – "get Hot Deals".
24. It is difficult to understand how the Monitor reached her conclusion with regard to her claim that we are in breach of section 4.1.2. for the above stated reasons.

**Breach of section 11.1.1:**

25. The allegation is that, "[t]here is nothing here stating explicitly that this is a subscription service".



26. In response to the above allegation we repeat paragraphs 23.1 – 23.5.
27. With specific reference to the advertising of the subscription nature of the Service, this campaign is materially no different from our other campaigns, which campaigns have been tested and found to be compliant – see paragraph 5 on page 18 of #16382 wherein it states that, “*the SP has prominently and explicitly identified the services being promoted as “subscription services”*”.

**Breach of section 11.1.2:**

28. The allegation in this regard is that there is “[n]ot one type of content is advertised”.
29. As already stated above, it appears that the Monitor has misunderstood the campaign as a whole and that the deals referred to in the advertisement are part of the content available within the service. The Monitor’s allegation therefore has no foundation.

**Breach of section 11.2.2:**

30. It is alleged that the “*advert only advertises the competition aspect of the subscription service. No average consumer’s intent (sic) it to download content, the intent is purely to enter a competition.*”
31. We have already dealt with this allegation above, in response to the other alleged breaches of the code, more specifically sections 4.1.2 and 11.1.1.
32. We are not merely advertising our promotional draws/reward program, but also the Service and that it is a subscription service through which content – such as special deals available from One Day Only - is available on subscribers phones through this Service.
33. The Code does not prohibit the advertising of promotional draws alongside subscription service advertising. We have dealt with this allegation repeatedly in the past – on substantively similar campaigns - and the Monitor merely refuses to accept that our method of advertising is legitimate. We will refer to the inferences of this conduct in more detail below.
34. This allegation is therefore unfounded and without merit.



**General allegations:**

35. There are many broad-brush allegations made by the Monitor, which are without foundation.
36. The Monitor claims that, in her opinion, the public is losing faith in the industry – she however provides no factual foundation for this allegation:
  - 36.1. An article which was published on Moneyweb by Julius Cobbett (“Cobbett”) – a scrutiny of this article and the response thereto shows that Mr Cobbett is merely expressing an opinion – our response cogently refutes his complaints;
  - 36.2. Apparent claims by our competitors - once more unsupported by any evidence - that we are damaging the industry; and
  - 36.3. Previous attempts by the monitoring team, on several occasions, to stop these campaigns.
37. In response to the Cobbett article:
  - 37.1. Cobbett is an investigative journalist for Moneyweb;
  - 37.2. We confirm that we are currently dealing with numerous complaints lodged by Cobbett, largely in relation to banners which were apparently flighted on our behalf – in some instances these banners were Buongiorno approved banners and in others they were actually competitor banners or non-approved banners;
  - 37.3. We confirm that Cobbett has never actually completed the subscription process and has therefore never verified this process;
  - 37.4. It also appears that we are the sole target of Cobbett’s investigation, even though we have confirmed that some of the banners he finds offensive are actually competitor banners – attached, marked as “B6” is a competitor banner which started Cobbett’s campaign against us. We have no reason to believe that any of our competitors have been questioned by Cobbett regarding this or any other offending banner;



- 37.5. Cobbett has, on numerous occasions, been invited to our offices in order that we may explain to him our advertising strategy relating to our subscription services and its ancillary rewards program, as well as our process regarding the double opt-in mechanism. He has declined these invitations;
- 37.6. We also find it suspicious that the Monitor has seen fit to refer to Cobbett's article but not our response therefore, which we believe sufficiently answers all his allegations. A copy of the article and the response is attached hereto for completeness, marked "B4" and "B5";
- 37.7. Furthermore, Cobbett's WASPA based complaints are currently being adjudicated and/or have been referred to the Appeal Panel. The basis for Cobbett's complaints are very limited compared to those of the Monitor in this complaint. It appears that the only reason the article has been referred to is to create the impression that we are causing some discontent in the public eye. We confirm that neither prior to nor since the publishing of this article by Cobbett have we received any public complaints which refer to it, and we therefore are justified in believing that the general public who uses our services does not share Cobbett's views;
- 37.8. No other reference in her Complaint is made by the Monitor to this article and we are of the view that this was merely a ruse to create a bad impression against us from the onset.
38. As regards the allegation that competitors are discontented with our campaigns due to the fact that they are damaging the industry:
- 38.1. We are not aware of any competitor complaints which back this statement. If our competitors find issue with our campaigns they can, as they have done in the past, lay formal complaints against us – this year we have received not even a handful of competitor complaints. Based on our competitors' conduct we have grave concerns about the correctness of the Monitor's statement, and must question her motive in making it to justify the steps she has taken;
- 38.2. In fact, from our monitoring of the industry it appears that we are in fact setting the standard for the industry;



38.3. Our monitoring of the industry has brought to our attention that there are competitor campaigns that are, in our opinion, much more borderline than ours in terms of compliance – the Monitor has found no issue with these campaigns and/or has not seen fit to question these campaigns. Examples are attached hereto, marked “B6” and “B7”.

39. We confirm that the Monitor has found issue with numerous of our campaigns. When we have felt that these issues are justified we have amended and/or removed our campaigns – these occasions are in the minority. Due to the fact that on the majority of occasions we have disagreed with the Monitor we have now been labeled by her as a repeat offender.

40. We respond as follows:

40.1. The Monitor concedes that her team has “*on several occasions tried to put a stop to these campaigns*” (emphasis added);

40.2. We submit that she has been largely unsuccessful due to the fact the campaigns which the monitoring team is finding issue with are compliant with the Code. Repeatedly the WASPA Adjudicators are finding that the advertising of our subscription services alongside our rewards program – ancillary to subscription to the services – is in line with the Code. See, for example, complaints numbered 11863, 13744, 15183, 15664 and 16832;

40.3. In repeatedly laying formal complaints against campaigns which materially the same as those already adjudicated upon, it would appear that the Monitor is intentionally defying the decisions made by the respective adjudicators, by challenging these decisions. The Monitor has gone so far as to state that adjudicators do not set precedents, especially when their decisions are not in line with the Code (see correspondence leading up to the lodging of complaints numbered 16559 and 16659). It seems that the Monitor has the view that her opinion on the interpretation of the Code trumps that of an adjudicator. This approach is plainly incorrect. The monitor is bound by adjudicator's decisions as much as our client is bound thereby. The Code makes no provision for the Monitor to appeal an adjudication. Her continuous challenging of our campaigns, when materially similar to other campaigns already adjudicated on and found to be compliant calls into question whether or not she



correctly understands her role, and the fact that the Monitor has no right of appeal. If there is dissatisfaction with the Code it is up to WASPA, in consultation with its members to change it. If the Monitor is dissatisfied with the way in which adjudicators are interpreting the Code, it is wholly inappropriate and, with respect, an abuse of process, for her to continue to lay complaints against us when rulings in our favour have been made by adjudicators on materially similar issues. The heart of the matter is that the Monitor seems to be unable to accept the correctness of these decisions, and is in effect repeatedly challenging – at the cost of WASPA and our client – these rulings.

41. The Monitor has an issue with the fact that our terms and conditions are only viewed with the use of the scroll-down button.
  - 41.1. Different screens allow for viewing of more or less content without scrolling down. Those that require users to scroll down to view the terms and conditions do not require substantial use of the scroll down button;
  - 41.2. The asterix on the rewards offered also refers users to terms and conditions, which are available in full either lower down on the page and/or on our service portals;
  - 41.3. A reasonable user would be fully aware of scroll down facilities, depending on their screen settings for either a desktop or mobile device, and that an asterix refers to “terms and conditions below”. This is not unusual and we are not quite sure why the Monitor is complaining about this method of presentation since it is Code compliant according to numerous adjudications.
42. The Monitor finds issue with the format of the Vodacom confirmation page (“B2”), stating that there is no mention what the subscription is for:
  - 42.1. We confirm that “B2” is not a requirement in terms of the Vodacom business rules, and therefore is not required to even exist. Furthermore, section 11.2.7 states that if a network is undertaking any of the verification steps required by section 11.2 as a whole, then it is not necessary for members to repeat those particular steps.
  - 42.2. We have however added this page – not required by Vodacom or the Code - in order to ensure that customers are informed as to the reason they are replying “yes” to the



message they are receiving from Vodacom. It has additional advertising thereon, but the crux of the message is there – by replying “yes” you are subscribing to 35050 Gold at R5/day, allowing access to content and making yourself eligible to qualify for our rewards;

- 42.3. On the top left hand corner of this page, as already stated above, it confirms that this is related to a subscription service, charged at R5/day;
- 42.4. In the yellow box it clearly states that by replying “yes” the customer is agreeing to subscribe to 35050 Gold subscription service at R5/day, and that our terms and conditions are accepted;
- 42.5. “B2” also contains our full terms and conditions, which also confirm that our service is subscription based at R5/day and that rewards advertised are subject to subscription;
- 42.6. Content available on 35050 Gold is also clearly illustrated (see three examples of deals available through subscription to the Service) immediately below the yellow box;
- 42.7. Based on the above we again state that the Monitor is misguided in her allegations and that numerous references are made to subscription and “*what that subscription is for*”.
43. The Monitor attempts to modify “B2”:
  - 43.1. In doing so she is again attempting to interfere with the marketing of our product. She has no authority to prescribe specific marketing tools and has gone beyond her jurisdiction, especially as the page in question is not a requirement of the Code and/or Vodacom.
44. She also attempts to modify the text message sent by Vodacom to potential subscribers, confirming they would like to confirm request to subscribe.
  - 44.1. With all due respect to the Monitor, this is an issue to be taken up by WASPA with Vodacom. Although we have some room to provide content of the text Vodacom sends to its customers, Vodacom is in ultimate control of the message, not ourselves.



The message does contain some marketing elements, but it does also confirm that by replying “yes” you will be joined to 35050 Gold at R5/day and we believe that even if it were in our control it would be compliant.

45. Based on the above we submit that a) this matter does not require the resources of an emergency panel (in fact this could have been resolved through a mere heads-up); and b) in any event the Complaint should be dismissed and, for reasons stated above, should not have been made in the first place.

Your Faithfully

Buongiorno SA