



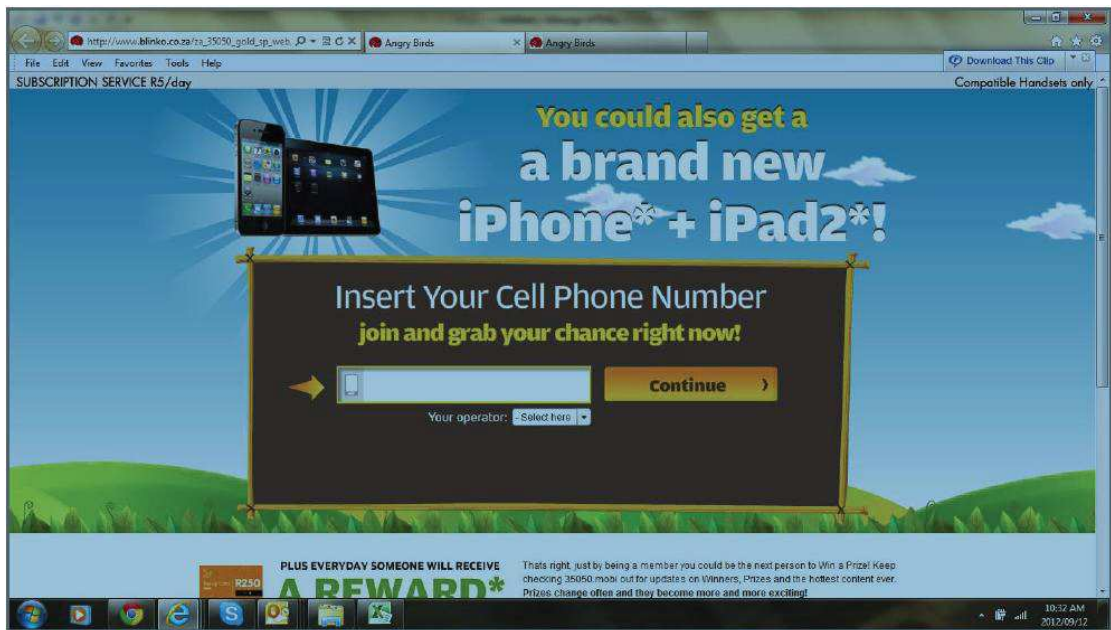
## REPORT OF THE APPEALS PANEL

<b>Complaint reference number:</b>	18432
<b>WASPA member(s):</b>	Buongiorno South Africa (Pty) Ltd
<b>Membership number(s):</b>	0002
<b>Complainant:</b>	Anonymous Employee of WASPA Member
<b>Type of complaint:</b>	Subscription service
<b>Date complaint was lodged:</b>	2 October 2012
<b>Date of the alleged offence:</b>	2 October 2012 or thereabout
<b>Relevant version of the Code:</b>	12.0
<b>Clauses considered:</b>	9.1.1, 11.2.2 and 11.2.3

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### Introduction

1. This complaint concerns the Appellant's subscription service which features an iPhone or iPad giveaway. The complainant is anonymous and is an employee of another WASPA Member and alleged to be a competitor of the Appellant. No details were given on the nature of the competitive relationship.
2. The grounds for the complaint were as follows:
  - 2.1 The advert mainly promotes a competition - the subscription services makes up a very small section of the advert.
  - 2.2 The competition is not charged at R1.50 either.
3. In its initial response to the original complaint, the Appellant merely asked for clarification of the campaign complained about as no details were provided in the complaint. In response the Complainant sent two screen shots depicted below:



4. The Appellant raised a preliminary concern about the complainant's anonymity and questioned whether the Secretariat had applied sections 14.1.3 and 14.1.4 of the Code appropriately. Whether the Secretariat had done so was not apparent from the information before the Adjudicator and he/she held that it was largely irrelevant to the complaint under consideration. This issue was not raised again on appeal.

5. Regarding the complaint itself, the Appellant pointed out that a similar set of campaigns was, at the time, being considered by an appeal panel hearing the Appeal.
6. The Adjudicator requested further submissions from the Appellant after the relevant cases had been decided on appeal, but no further submissions were made by the Appellant and the Adjudicator accordingly decided the matter on the materials provided. One appeal had not been finalised but the adjudicator held that that complaint did not deal with a related service and was therefore not relevant.
7. The Adjudicator considered the sections 9.1.1, 11.2.2 and 11.2.3 of the Code of Conduct of Version 12 which was applicable at the time and quoted below.
8. The Adjudicator then considered the Appeals Panel decision in complaints 11258, 11582, 11626, 13039, and 13038 which deals with similar concerns. Many of those concerns were addressed in the Appeal Decision and taken into account by the Adjudicator. The Appeal panel did not order sanctions against the Appellant in the Appeal Decision as the Appellant succeeded on procedural grounds, but it did attempt to provide guidance on the substantive issues which the Adjudicator considered.
9. This complaint was lodged roughly a year after the grounds for complaint which were the subject matter of the previous Appeals arose. It concerns a campaign which is similar to the campaign considered in complaints 13038 and 13039, which offered an iPhone in the campaign's marketing materials. The Adjudicator took the following paragraphs from the Appeal's Report in particular into account:

*5.7 Reference to concern of the concept of 'bundled' offers is explained in the notes to version 7.4 of the Code, which states: "WASPA has received a large number of complaints from consumers who claim to have been tricked into subscribing to services while entering competitions or quizzes. The modification to the above clause is intended to prohibit the practice of "bundling" competitions/quizzes and subscription services. Requiring a specific, separate request from a customer to be subscribed to a service prevents the automatic subscription to a service, when a customer intended only to participate in a quiz or competition."*

5.8 In WASPA's later amendment of the Code to clarify its intention behind the amendment to clause 11.1.2, it introduced clause 11.2.3 in version 10 of the Code, with notes stating: "This clause was introduced in version 10.0. The original intent of clause 11.2.2 was to prevent customers from being tricked into joining a subscription service when they thought they were entering a competition. However, it was not intended to prevent someone who has deliberately joined a subscription service from being included in a promotional draw. This clause is intended to clarify this."

5.9 The primary concern of WASPA in considering alleged breaches of clauses 11.2.2 and 11.2.3 is cited in the introduction to the Code, which states in clause 1.2. (Objectives of the Code of Conduct): "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." (Our emphasis).

5.10 This intention is given effect in clauses 4.1.1 and 4.1.2 of the Code: "4.1.1. Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers. 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."

10. The following paragraphs form the crux of the approach outlined by the Appeals Panel as considered by the Adjudicator:

5.11 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."

5.12 *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’.*

5.13 *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.*

5.15 *In other words, even if the potential customer has formally indicated consent by complying with an acceptable opt-in sign-up procedure, a breach of clauses 11.2.2 and 11.2.3 is possible where the presentation of the offer does not clearly indicate that the promotional draw is ancillary to the subscription service offering.*

...

5.17 *With regard to the cases under consideration in this appeal, and having regard to the application of the term ‘ancillary’ in accordance with the definitions cited above, a fair assessment of the SP’s promotional material will reveal that in none of the instances of the offers presented can the promotional draws be considered to be ancillary to the subscription service; if anything, the converse applies.*

11. The Adjudicator, applying these principles, held that in this complaint the only indication that the Appellant’s service is a content subscription service are the words “SUBSCRIPTION SERVICE R5/day” on the top left of the two Web pages submitted for review. The text below the large images displaying an iPhone and iPad on one screen and the two devices along with a VW Golf Polo on the second begins as follows:

*Thats right, just by being a member you could be the next person to Win a Prize! Keep checking 35050 mobi for updates on Winners. Prizes and the hottest content ever. Prizes change often and they become more and more exciting!*

12. The adjudicator upheld the complaint stating that there is certainly no indication that the opportunities to “get a brand new iPhone + iPad2” or “Win a Prize” are “in support of, rather than, the main thing” here and, instead, appear to be the primary focus of the campaign, if not the entire focus of the campaign. The Adjudicator accordingly therefore found the campaign in breach of sections 11.2.2 and 11.2.3 of the Code. The Adjudicator held that there was no breach of section 9.11 as the R5 per day related to the subscription service and not the entry into the competition.
  13. The adjudicator issued the following sanctions:
    - 13.1 *To the extent this particular iteration of the SP’s service remains active, the SP is directed to terminate this iteration of the service no later than 48 hours after receiving this report;*
    - 13.2 *The SP shall send a reminder message to subscribers which subscribed for the SP’s service on the basis of this particular iteration of the service which is compliant with the Code’s formatting and content requirements within 48 hours of receiving this report;*
    - 13.3 *The SP is fined R50 000 for its breach of sections 11.2.2 and 11.2.3 and this amount is payable within 5 business days of a demand for payment by the WASPA Secretariat.*
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## Grounds of Appeal

14. The Appellant has raised the following issues on Appeal:
  - 14.1 **Incorrect interpretation** - The adjudication applies a substantially flawed interpretation of the relevant clauses, namely 11.2.2 and 11.2.3 of the Code of Conduct. This erroneous application of interpretative criteria is unsupported by wording existing in version 12.0 of the Code of Conduct.
  - 14.2 **Deficient consideration of subscription service** - The adjudicator had applied himself / herself solely to the content of the landing page(s) supplied by the complainant and had not considered the

Appellant's service offering in its totality. In particular, the Appellant submits that the adjudicator should have had regard to the double opt-in process which positively brings to the attention of a potential subscriber the Appellant's subscription service, in a number of repetitive and conspicuous steps, that the service is a 'subscription service' and which cannot thus be a 'competition' which appears to have been alleged by the complainant.

- 14.3 **Punitive sanctions** -The sanctions imposed are unduly harsh, punitively in nature and are applied in peculiar circumstances where the interpretation of the relevant Code of Conduct provisions simply did not exist. The adjudicator should not be permitted to retrospectively enforce against the Appellant an interpretation of the Code which was not in existence at the time of the Complaint. This would necessarily entail a breach of the principles of due process and natural justice to the detriment of the Appellant. For the avoidance of doubt, subsequent Monitor notifications under the 'Heads Up' process under section 14.9.5 did not raise the subject matter under the Complaint nor alleged that it is not compliant.
15. The Appellant submits that section 11.2.3, as applicable to the Complaint does not apply to "all marketing and promotional material...". It simply provides that to the extent that the subscription service includes any competition, it must be reasonably clear that the competition is not the main subject matter of the service in question as "it must be reasonably clear to the customer that the promotional draw or competition is ancillary to the subscription service". Therefore section 11.2.3 is intended to also make allowance for SPs to include within their services, competitions which, as the guidance to this section explains: "it was not intended to prevent someone who has deliberately joined a subscription service from being included in a promotional draw"
16. In this respect it is submitted by the Appellant that "the process of joining" is not the same as the Appellant's "promotional material". There are material differences between the two, namely: The process of joining is understood to mean in its entirety rather than step by step. All promotional material must mean that which is viewed by the customer at every step, hence the inclusion of the word "all" in subsequent versions of the Code.

17. The Appellant submits that the adjudicator did not even contemplate an enquiry into the entire process including the double opt-in process applied by the Appellant. It is further submitted that the complainant did not complete the subscription process, nor does he/she allege to have done so. The Appellant submits that should the complainant have done so or should the adjudicator applied himself/ herself to section 11.2.3 correctly, the adjudicator would have necessarily concluded that the process has not been 'disguised' into something else. The Appellant then provided information about the entire subscription process, including the double opt-in process which necessarily requires a customer's specific intention prior to them subscribing to the subscription service.
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### **Sections of the Code considered**

18. The following sections of the Code were considered:

*9.1.1. The total cost for any entry into a promotional competition shall not exceed R1.50.*

*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.*

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### **Findings of the Appeal Panel**

*On the merits*



19. The Appellant submits that the Adjudicator failed to take into account the entire subscription process in the adjudication of the complaint. The Appellant has only itself to blame for this situation as it did not provide the Adjudicator with this information at the time of the adjudication. For purposes of the appeal we will take the new information provided by the Appellant into account.
20. In the interpretation of the provisions of Version 12 of the Code, which was applicable at the time of the alleged infringement, the Code as it existed at that time and its prior development may be taken into account. We do not agree that subsequent amendments to the Code in later versions are relevant in the interpretation of the Code as it existed at the time.
21. The Appellant also refers to the Adjudication in Complaint number 20401 where a similar campaign was under consideration. That case, however, is of no assistance as the infringement under consideration dealt with an entirely different issue, namely different pricing indications in different parts of the subscription process.
22. The true enquiry under section 11.2.2 in this case is whether the response of a potential customer reacting to this landing page would be a request to join a subscription service as an independent transaction or whether it would be an entry into a competition. Under section 11.2.3 the enquiry is whether the subscription service is the primary service on offer and the promotional draw or competition is ancillary to the subscription service, and whether the process of joining the subscription service is disguised as an entry into a competition.
23. We agree with the approach to these questions as set out in the Appeals Panel decision in complaints 11258, 11582, 11626, 13039, and 13038 and quoted above in paragraphs 9 and 10.
24. Considering the two pages provided by the Complainant, there is a reference to the subscription service in the banner at the top as well as in the fine-print below the main part of the page. The main part of the page is devoted to the competition and the offer to enter into the competition. The offer to subscribe to the subscription service is, without a doubt, ancillary to the offer to enter into the competition.

25. There is no indication on the first page as to how the process for entering into the competition or the subscription service will be completed. The prospective customer is simply requested to enter their cell phone number. There is very little or no information on what the subscription service offers, and certainly no emphasis on it as being the main part of the transaction.
26. Similarly, on the second page, there is simply a reference to being a member, no reference to a member of a subscription service, and once again the emphasis is on the competition and the prizes to be won.
27. The whole get-up of both of these pages is clearly aimed at eliciting a entry into the competition from the viewer. The request for an entry into a subscription service agreement is ancillary at best to the whole transaction. It must be remembered that an entry into a competition is also a contractual relationship governed by common law and now also by the Consumer Protection Act 68 of 2008.
28. The Appellant submits that in order to assess whether there has been an infringement of section 11.2.2 and 11.2.3 one must not only consider the marketing material, but rather the whole of the subscription process.
29. It then submits that there is a double opt-in process to become a subscribed member of the subscription service. However, no actual examples have been provided and there was also no indication by the Appellant on how the competition aspect of the transaction is handled or confirmed.
30. The request from the consumer in response to the first page is a request to enter a competition which is bundled with the request for entry into a subscription service. There is no indication on this page that the entry to the competition will not be complete by entering one's cell phone number.
31. We therefore find that there has been an infringement of section 11.2.2.
32. It is not clear from these pages that the competition being offered here is ancillary to the subscription service. On the contrary, the subscription service seems to be ancillary to the competition, with absolutely no emphasis on the actual content offered by the subscription service.

33. The initial step in the process of joining the subscription service is quite clearly disguised as an entry into a competition.
34. "Bait and hook" marketing has been highlighted in the Consumer Protection Act, 2008 as an unfair and/or irresponsible marketing practice.
35. The initial web pages used by the Appellant to promote its subscription service are, when viewed in conjunction with the rest of the campaign, misleading and serve to promote the Appellant's services in a dishonest manner.
36. We therefore find that there has been an infringement of section 11.2.3.
37. The appeal on the merits is therefore dismissed.

#### *Sanction*

38. In terms of section 14.6.10 of the Code, the appeal panel must review the sanctions recommended by the adjudicator if a breach of the provisions of the Code has been found.
39. In the present complaint, the adjudicator does not appear to have taken into consideration any previous successful complaints made against the Appellants, including any previous successful complaints of a similar nature, although there have been – see for instance Complaint 16313.
40. In terms of the prior adjudication record of the Appellant, numerous complaints have been upheld against the Appellant and several large fines have been imposed and paid.
41. Furthermore, the aims of the Code of Conduct to foster consumer trust so that they 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.
42. Where consumers are lured into subscribing for paid services using methods such as those used by the Appellant in the present appeal, which are deceptive or likely to mislead by inaccuracy, ambiguity or omission, as is the case here, the aims of the Code are seriously undermined.

43. The sanctions imposed by the adjudicator are, in our view, appropriate and the appeal against the sanctions recommended by the adjudicator is therefore also dismissed. The sanctions imposed are also in line with the sanctions for similar infringements by other Service Providers – see for instance Complaints 20980; 15268, 12527 and 10245 taking into account that some of these sanctions were imposed as far back as 2011 and were ostensibly for first infringements rather than repeat infringements .

*Appeal fee*

44. As the Appellant has not been successful in its appeal, it is not entitled to a refund of its appeal fee.