Wireless Application Service Providers' Association

Report of the Appeals Panel

Complaint number	30979
Cited WASPA members	*BMOBIL PTE LTD (1438)*
Notifiable WASPA members	Na
Appeal lodged by	*BMOBIL PTE LTD (1438)*
Type of appeal	*Written appeal*
Scope of appeal	Review of the sanctions imposed by the adjudicator
Applicable version of the Code	*14.3*
Clauses considered by the panel	*4.2, 5.4, 5.5, 15.4, 15.5*
Related complaints considered	
Amended sanctions	R 25 000 in respect of clause 15.4 Refund subscribers up until 12 July 2016.
Appeal fee	50% refund
Is this report notable?	***Not notable***
Summary of notability	*Na*

Background

This appeal involves a complaint from the media monitor around a campaign where a subscriber would be enticed with the promise of winning an iPhone, and only become aware later (if at all) that this was a subscription service.

It appears to be common cause that the advertising was not acceptable. In addition, this Panel has considered the original advertising and is in agreement that there was a *prima facie* breach of the Code.

The appeal centres on the sanction, and the findings in so far as they relate to the sanction.

Adjudicator's findings

The Adjudicator applied the following sanctions:
Fine;-

R 75 000.00 fine for breach of all clauses breached and such is payable within one week of receipt of the adjudication

- Clause 4.2 R 10 000.00
- Clause 5.4 R 10 000.00
- Clause 5.5 R 10 000.00
- Clause 15.4 R 25 000.00
- Clause 15.5 R 20 000.00

Further,

1. Database generated from the service in question is not to be marketed to from the date of receipt of this adjudication.

2. All consumers baited into this service are to be provided a full refund, from the 0807-2016 up to and until the publication date of this report.

Appeal submissions

The appellant outlined the timeline of what occurred, which we paraphrase below:
11 July 2016 – Received complaint
12 July 2016 - Took “immediate steps to adjust the advertisement to provide clarity”
19 July 2016 – Advised WASPA and asked for any feedback
21 July 2016 – Received acknowledgement of response.
Thought matter was resolved.

The appellant also submitted that:

- With regard to clauses 4.2 and 5.5, its customers are important to it. If a customer was unhappy, they would refund.
- Their subscription service is good value.
- Their immediate action indicates that they had no intention to deceive.
- They have refunded everyone that was successfully billed from 1 June to 12 July. They have terminated all these users.

The adjudicator has ordered a refund to all users subscribed from 8 July 2016 up to the date of the report. The Member submits that this is incorrect as the advertising changed after 12 July, and there is therefore no need to refund subscribers who joined after 12 July 2016.

The Member indicated that it does not market to subscriber data bases so this aspect of the sanction is complied with.

Sections of the Code considered

4.2. Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.

5.4. Members must have honest and fair dealings with their customers.

5.5. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

15.4. A member must not require that a customer join a subscription or notification service in order to claim an existing reward, to be able to redeem existing loyalty points or to claim a similar benefit. (Example of incorrect marketing: “to claim your prize, join this service”.)

15.5. A member may offer an incentive for joining a subscription or notification service, provided that it is clear that the benefit only applies once the customer has joined the service. (Example: “if you join this subscription service, you will be entered into a monthly draw for a prize”.)

Deliberations and findings

The scope of this Appeal is somewhat hard to fathom. The appeal document calls on the Panel to "review" the case. Some argument is submitted in relation to each clause. A detailed argument is then submitted regarding the sanction to refund all users from 8 July 2016.

Given the call to "review", given the argument on the clauses, and given the fact that the Member has not paid the fines, we are regarding the fines and the refund sanctions as being under appeal.

We will first consider the refund sanction. The adjudicator ordered a refund on all subscribers from 8 July to date of decision. However, it appears *ex facie* that the offending advertising stopped running on 12 July 2016, and the Member has now refunded all subscribers up to that date.

We agree with the Member that there is no logical correlation between the offending behaviour and those subscribers who joined after 12 July 2016. We therefore amend the sanction in that regard to read:

> All consumers baited into this service from inception of this campaign up until 12 July 2016 are to be provided a full refund.

The next issue is whether the combined fine of R 75 000 is reasonable in the situation.

There are a number of issues at play here.

We note that the adjudicator appears to have erred in a few respects:

- They have presumed that the user is added to a data base for marketing, which is not supported by any evidence in this matter;
- Undue weight has been given to the submissions of the SP, who claim to have advised the Member during the Heads Up process. There is no evidence of this before the adjudicator, although it would appear that the Member may have had prior knowledge of the potential breach.

There is essentially one "wrong" in this matter – the use of a competition incentive to bait the subscriber, without making it clear upfront that the transaction is primarily one of subscription. We agree with the adjudicator that this is a serious breach and a problem within the industry. However, we are not convinced that a finding in terms of all the clauses is warranted.

We are, in the first place, of the opinion that clauses 15.4 and 15.5 are mutually exclusive:

15.4. A member must not require that a customer join a subscription or notification service in order to claim an existing reward, to be able to redeem existing loyalty points or to claim a similar benefit. (Example of incorrect marketing: “to claim your prize, join this service”.)

15.5. A member may offer an incentive for joining a subscription or notification service, provided that it is clear that the benefit only applies once the customer has joined the service. (Example: “if you join this subscription service, you will be entered into a monthly draw for a prize”.)

Clause 15.4 deals with a situation where the consumer understands that they are subscribing, but they are doing so because they are under the impression that there is a guaranteed reward once they have done so. They are subscribing to get the reward.

Clause 15.5 deals with a situation where you join the service and as an added benefit, you are entered into a competition. The wrong that this clause seeks to address is where you do not realise that entering the competition requires subscription, and are ambushed by the subscription.

In the matter at hand, the advertising stated “Stand a chance to win. . .”. Clause 15.4 is therefore not applicable, as it is clearly a competition, and not a case of claiming a guaranteed reward.

The problem falls within Clause 15.5 – that it is not clear upfront that you need to subscribe to enter the competition. The subscription only becomes apparent once the process has started – the subscription is ancillary to the competition, when it should rightfully be the other way around.

We therefore find a breach of Clause 15.5 but not of Clause 15.4.

Clause 4.2, 5.4 and 5.5 all go to the professionalism of the Member, in one respect or another. We agree with the adjudicator that the breach referred to above was blatant, and that it was a knowing and unprofessional dissemination of misleading information. We are therefore in agreement that all three clauses were indeed breached.

However, this breach was all part and parcel of the original wrong – the breach of Clause 15.5. We are therefore not convinced that as separate fine should have been imposed for each clause as they all arose from one wrong. (To be clear, this thinking would not apply if each breach had arisen from a slightly different aspect of the Member’s behaviour – in that case, separate sanctions are warranted. In this matter, all the breaches arise from the same behaviour.)

What has happened, in essence, is that the Member has been fined R 75 000 for one breach.

We also note the Member is *ex facie* a new player on the South African market, and there are no other recorded complaints against this member. In addition, the advertising was corrected immediately on receipt of the formal response and it is true that the Member invited further WASPA feedback.

Given the above, we consider the fine of R75 000 to be excessive in the circumstances. We reduce the fine to only the fine imposed for the breach of Clause 15.5, which was R25 000, and which we consider an appropriate fine for a first time breach of this nature.

Amendment of sanctions

The sanction is amended to read:

> Fine for breach of Clause 15.4 – R 25 000
>
> All consumers baited into this service from inception of this campaign up until 12 July 2016 are to be provided a full refund.

Appeal fee

The Appeal has been partially successful and the Member must be refunded 50% of the Appeal fee.
