



**Wireless Application Service Providers' Association**

Report of the Appeals Panel

Complaint number	<b>#31747 and #31757</b>
Cited WASPA members	Viamedia (Proprietary) Limited (0043)
Notifiable WASPA members	Not applicable
Appeal lodged by	WASPA
Type of appeal	Written appeal
Scope of appeal	Review of the adjudicator's decision
Applicable version of the Code	14.5
Clauses considered by the panel	<ul style="list-style-type: none"> <li>• The complaints: 4.2, 5.5, 8.9, 9.1, 9.2</li> <li>• This appeal: 24.38 and 24.69</li> </ul>
Related complaints considered	<ul style="list-style-type: none"> <li>• Appeal panel report regarding complaints 15477, 15722, 16851, 16977, 17184 and 17236 ("the 15477 appeal")</li> <li>• Appeal panel report regarding complaints 16313 and 17007 ("the 16313 appeal")</li> <li>• Appeal panel report regarding complaint 20857 ("the 20857 appeal")</li> <li>• Appeal panel report regarding complaint 27729</li> </ul>
Amended sanctions	The respondent is to be issued a formal reprimand for its breach of the provisions of the Code.
Appeal fee	Not applicable

Is this report notable?	<b>Notable</b>
Summary of notability	This report deals with an unusual situation where WASPA appealed against an adjudicator's decision. It also deals with the matter of consistency in the context of an incorrect interpretation of the Code and apparent determination of the acceptability of partial compliance with the Code.

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### Initial complaint

1. This report pertains to the appeals of two complaints: 31747 and 31757 ("the complaints") which concern substantially the same subject matter.
2. The complaints concern a series of television ads ("the ads") that the respondent ran that promoted a subscription service through which subscribers would receive suggested lottery numbers and be entered into a draw to win cash prizes.
3. The focus of the complaints is the advertising text ("ad text" for ease of reference) that appears in the bottom half of the ads. The ad text reads as follows:

*R3/day subscription. Call Centre 0861 11 11 06 (VAS). T&C at xcitemobile.co.za.  
Competition ends 31 December 2016*

4. The basis of the complaints is well represented by the description of the complaint in 31747:

*The Via media television commercials (3 attached) are potentially in breach of the WASPA COC.*

*Via media television commercials are animated and busy. Fast moving images run across the screen throughout the commercial.*

*Pricing being "prominent and clear" as required by the COC, means that pricing should be particularly noticeable, stand out, and not blend into what appears as*

*a footnote at the bottom of the screen. (Where T&C's are placed). Pricing therefore needs to "fight" with all other images onscreen.*

*Their pricing is obscured by other information. The pricing is not immediately adjacent to the CTA button. Pricing is not independent of other text. It is almost impossible for an average viewer to take in all that information, and still notice pricing. It is quite possible an average viewer will overlook the pricing completely.*

*The Code requires:*

*“Pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action.”*

*And*

*“Pricing information must not be obscured by any other information.”*

*We would also like to suggest that ALL future Via media television commercials, which have adopted the pricing format, be relooked and revised.*

*3 low res commercials are being sent via email.*

5. There was some discussion about the low quality of the versions of the ads that were initially sent to the adjudicator relative to higher quality versions that the respondent subsequently supplied. We do not believe that this is a material consideration. The adjudicator considered the higher quality versions of the ads.
6. The respondent filed fairly comprehensive submissions which provide helpful background to the complaints in addition to setting out its responses to the complaints. We have annexed the respondent's submissions as Annexure “**C**”.

### **Adjudicator's findings**

7. The complaints were lodged by the WASPA Monitor on 4 October 2016 and were adjudicated upon by an adjudicator. The adjudicator's report is annexed to this report as Annexure “**B**” for ease of reference.

8. The adjudicator disagreed with the Monitor’s contentions that the ad text was not compliant with the Code’s requirements. The crux of the adjudicator’s report was the following:

*Turning back to the question of whether the commercials breach the clauses before me, I also note that one cannot confuse a perfectly executed commercial with the only acceptable commercial. The commercials before me could be clearer, they could comply with the Code better, and they are not examples of the pinnacle of clarity. However, that does not automatically mean that they are non-compliant. It is my opinion that they meet the requirements set down by the Code.*

*Working on the assumption that the price of R3/day is correct, which was the case ex facie the facts presented to me, the commercials are not in breach of Clauses 9.1 and 9.2 for the reasons given above. They are therefore also not in breach of Clauses 4.4 and 5.5, and clause 8.9 is a definition and cannot be breached.*

9. In the process of arriving at the decision, the adjudicator also determined that a “television commercial does not have a call to action, as defined and as typically used within the industry”<sup>1</sup>. This is relevant to aspects of the appeal which we deal with below.

## **Appeal submissions**

10. WASPA appealed against the adjudicator’s decision. The appeal submissions are annexed to this report, marked Annexure “**D**”. We will refer to WASPA as the “appellant” in this report.
11. The respondent’s reply to the appellant’s appeal submissions are annexed to this report, marked Annexure “**E**”.
12. *Procedural aspects of the appeal*

- 12.1. The appellant invoked sections 24.38 and 24.69 which state the following:

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<sup>1</sup> At the bottom of page 3

*24.38. In exceptional circumstances, where WASPA believes that the decision of the independent adjudicator is patently wrong, unfairly prejudices the industry, unfairly prejudices the consumer or brings the good name of WASPA into disrepute, WASPA itself may, at its discretion, institute an appeal against the decision of an adjudicator. In such a case, the respondent involved in the complaint must be notified of the appeal and given the opportunity to provide an appeal submission as if that respondent had lodged an appeal.*

*24.69. WASPA itself may lodge an appeal against a decision of the adjudicator, in such case the procedure set out above will be followed, mutatis mutandis.*

- 12.2. The respondent, in its response to the appeal, made the following comments regarding its right to a fair hearing<sup>2</sup>:

*17. Notwithstanding the above submissions in respect of mitigation of any potential sanction, ViaMedia is concerned that – in the event that the Panel were to impose a sanction – the WASPA Code of Conduct does not allow ViaMedia a chance to appeal such sanction. This is notwithstanding that this will be the first sanction imposed in this matter. The civil procedure in the courts where a matter such as this is referred back to the court a quo does not find application.*

*18. This on the face of it constitutes a further procedural violation of ViaMedia's right to fair, administrative action, and ViaMedia's rights in this regard remain reserved.*

*19. Should such a scenario arise, ViaMedia requests that the panel specifically address this difficulty in its ruling.*

- 12.3. This is concern, given the appeal procedure prescribed by the Code, is addressed below.

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<sup>2</sup> At paragraphs 17 to 19

### 13. *Substantive appeal submissions*

- 13.1. The appellant has appealed the adjudicator’s findings on the following grounds<sup>3</sup>:
- 13.1.1. “The adjudicator’s interpretation of a CTA as set out in Clause 8.9 read with Clause 9.1 and 9.2, or the lack thereof, within television adverts is patently incorrect;
  - 13.1.2. “The adjudicator’s statement that television adverts do not contain a CTA, is patently incorrect and sets dangerous precedent;
  - 13.1.3. “The adjudicator’s interpretation of the requirements of Clause 9.1 and 9.2 is patently incorrect;
  - 13.1.4. “This ruling sets precedent that provides for an incorrect interpretation and application of the COC with regards to the placement of pricing information and associated requirements;
  - 13.1.5. “This ruling sets precedent that partial compliance is allowed.”
- 13.2. The appellant went into a fair amount of detail, examining each aspect of the ad text in order to substantiate its appeal submissions. In particular, the appellant addressed each of the points the adjudicator made on page 4 when s/he summarised her/his findings. The respondent also quoted this section at 8.3 of the respondent’s appeal submissions.
- 13.3. Both the appellant and the respondent made detailed and considered submissions which we found most helpful. It is important to remain focused on the Code’s requirements and not become lost in that detail, however. These are the provisions of the Code which are pertinent to the subject matter of this appeal:

#### ***Definition of call-to-action***

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<sup>3</sup> On page 11

8.9. A “call-to-action” is any link, input box, short-code, or any other component of an advert which triggers the confirmation step for a transaction or a service.

**Display of pricing information**

9.1. For any television or cinema advert, pricing information does not need to be displayed for services which are free, or which are billed at standard rates. For all other services, pricing information for the service must be shown on the screen for the entire duration of the advert. Pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action.

9.2. There must not be any intervening text or images between the call-to-action and the pricing information. Pricing information must be legible, horizontal and presented in a way that does not require close examination. Pricing information must not be obscured by any other information. Pricing information must not be animated.

13.4. The adjudicator and the parties referenced section 8.9 for the purpose of giving meaning to the reference to “call-to-action” in section 9.1.

13.5. The central questions before us are the following:

13.5.1. Did the adjudicator err in her/his interpretation of, and determination that the respondent did not breach sections 9.1 and/or 9.2 of the Code?

13.5.2. Ancillary to this, does the adjudicator’s ruling establish a -

13.5.2.1. “precedent that provides for an incorrect interpretation and application of the COC with regards to the placement of pricing information and associated requirements”?

13.5.2.2. “precedent that partial compliance is allowed”?

13.5.3. In the event that we conclude that the respondent breached the provisions of the Code, the respondent asked that we address the

consequences for its right to a fair hearing in the context of any sanctions we may order as a consequence of our decision.

## **Deliberations and findings**

### *14. What is a call-to-action?*

- 14.1. The adjudicator was not convinced that a call-to-action was presented in the ads. Neither the appellant or respondent agree with the adjudicator's conclusion.
- 14.2. As the appellant pointed out, the question is whether, in the context of the ads, "the instruction/request to SMS a keyword to a short-code, would be regarded as the call-to-action"?
- 14.3. Section 8.9 contemplates a causal relationship between "any link, input box, short-code, or any other component of an advert" and the activation of a transaction or service.
- 14.4. The definition specifically uses the verb "triggers" which, according to an Oxford Dictionaries definition, means the following<sup>4</sup>:

*(of an event or situation) cause (someone) to do something.*
- 14.5. In the case of the ads, the "instruction/request to SMS a keyword to a short-code" would be the trigger that causes the consumer to activate the service. It is therefore a call-to-action as defined by section 8.9 of the Code.

### *15. The question of prominence*

- 15.1. The question of prominence has periodically arisen in WASPA adjudications and appeals. It has been the subject of considerable debate.
- 15.2. The 15477 appeal address this question in the context of section 11.1.1 of versions 11.0 and 11.6 of the Code. That particular provision dealt with the

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<sup>4</sup> <https://en.oxforddictionaries.com/definition/trigger>



requirement that the subscription nature of a service be “prominently” identified as such.

15.3. Although section 11.1.1 of versions 11.0 and 11.6 of the Code are not relevant to this appeal, the discussion about prominence is.

15.4. The appeal panel in the 15477 appeal provided guidance for the interpretation of the prominence requirement as it pertains to both the subscription nature of a service and the pricing of that service that is instructive:

*The purpose of the prominence of the subscription services is to alert the consumer to the potential cost in a manner that would not be easily overlooked. As a result the caveat subscriptor rule is not an appropriate test. Rather, adjudicators should prefer the more recent approach of the Consumer Protection Act in ensuring that important or unusual terms are highlighted and drawn to a consumer’s attention.*

*We consider the cost of the subscription to be a very important aspect of the service and this aspect must always be highlighted.*

...

*5.2.8 The relevant definition of prominent, as found on [www.oxforddictionaries.com](http://www.oxforddictionaries.com), is “Situated so as to catch the attention; noticeable”.*

*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.*

15.5. This extract was cited with approval by the appeal panel in the 20857 appeal. Although the 16313 and the 20857 appeals were decided under a previous generation of the Code, the underlying prominence requirements have been consistent themes in the Code going back several years. The above guidance is applied in context with specific consideration of the ads in question.

## 16. *Considering the ads*

- 16.1. There are three ads under consideration. We have identified them as “Ad 1”, “Ad 2” and “Ad 3” in Annexure “**A**” for easy reference. It is important to bear in mind that the screengrabs in Annexure “**A**” are not meant to be representations of the actual size and quality of the ads as they were likely displayed on TV.
- 16.2. These screengrabs offer a relative perspective on the elements in each of the ads and a frame of reference for our discussion.
- 16.3. There was some discussion in the lead-up to the adjudication and subsequently about the quality of the video files sent to the adjudicator for consideration. The adjudicator was ultimately furnished with high quality versions of the ads so we do not believe that the earlier delivery of lower quality video files had a material bearing on the adjudicator’s decision or our deliberations.
- 16.4. Still, this issue of variation of the quality of video files raises a consideration that is increasingly a factor in a cross-device consumer market. While we accept that the ads we are considering were clearly produced for TV audiences, consumers are able to view such content on a variety of devices with different size screens. In an appropriate context, the extent to which the ad provisions for the variation in screen sizes may well be relevant to the determination of a WASPA complaint.
- 16.5. In this particular matter, our view is that the ads should be assessed based on their intended display medium, namely TVs. This speaks directly to the question of whether the pricing information in the ads comply with the requirements of sections 9.1 and 9.2 of the Code which are the following:
  - 16.5.1. the pricing information for the service must be shown on the screen for the entire duration of the advert;
  - 16.5.2. the pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action;

- 16.5.3. there must not be any intervening text or images between the call-to-action and the pricing information;
  - 16.5.4. the pricing information must be legible, horizontal and presented in a way that does not require close examination;
  - 16.5.5. the pricing information must not be obscured by any other information;
  - 16.5.6. the pricing information must not be animated.
- 16.6. Following consideration of the appellant's and respondent's submissions respectively,
- 16.6.1. we affirm that the following requirements are not in contention: 16.5.1, 16.5.3, 16.5.5 and 16.5.6;
  - 16.6.2. regarding 16.5.2 and 16.5.4,
    - 16.6.2.1. our examination of the ads concludes that the ad is legible and horizontal, and
    - 16.6.2.2. we are persuaded by the respondent's submission that the ad is "immediately adjacent to the call-to-action";
  - 16.6.3. we deal in more detail with the remaining issues concerning "clearly and prominently displayed" and "presented in a way that does not require close examination" below.
- 16.7. Section 1 of the Consumer Protection Act, 2008 defines the word "clearly" as follows:

*"clearly", in relation to the quality of any text, notice or visual representation to be produced, published or displayed to a consumer, means in a form that satisfies the requirements of section 22;*

- 16.8. Section 22, in turn, reads as follows:

***Right to information in plain and understandable language***

22. (1) *The producer of a notice, document or visual representation that is required, in terms of this Act or any other law, to be produced, provided or displayed to a consumer must produce, provide or display that notice, document or visual representation— (a) in the form prescribed in terms of this Act or any other legislation, if any, for that notice, document or visual representation; or (b) in plain language, if no form has been prescribed for that notice, document or visual representation. (2) For the purposes of this Act, a notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort<sup>5</sup>, having regard to— (a) the context, comprehensiveness and consistency of the notice, document or visual representation; (b) the organisation, form and style of the notice, document or visual representation<sup>6</sup>; (c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and (d) the use of any illustrations, examples, headings or other aids to reading and understanding.*

- 16.9. To paraphrase the appeal panel in the 20857 appeal, the question before us is whether the pricing information in each ad is situated so as to catch the attention and is noticeable.
- 16.10. The test of whether the pricing information is “clearly and prominently displayed” is both subjective and objective. It is both apparent when you subjectively observe it and an objective question of whether, to quote section 22 of the Consumer Protection Act, it would be apparent to -

*an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills*

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<sup>5</sup> Our emphasis

<sup>6</sup> Our emphasis

*and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort.*

- 16.11. Having reviewed the ads, there is a noticeable difference between the manner in which the pricing information is displayed.
- 16.12. In Ad 1, the combination of the size of the ad text, coupled with the design of the ad itself result in the ad text being “clearly and prominently displayed” and “does not require close examination”.
- 16.13. The same cannot be said of the pricing information in Ad 2 and Ad 3 where the ad text is not “clearly and prominently” displayed. It does not, in our opinion, sufficiently “alert the consumer to the potential cost in a manner that would not be easily overlooked”.
- 16.14. This may be as a result of the relative size of the text, the colours used or some other combination of design elements but the cumulative effect is to understate the pricing information and make it all but prominent. Indeed given the cumulative effect of the design elements there is the potential that the pricing information may be overlooked by the consumer without close examination.
- 16.15. We therefore find that Ad 2 and Ad 3 breached the provisions of sections 9.1 and 9.2 of the Code.

## 17. *Remaining questions*

- 17.1. Does the adjudicator’s ruling establish a “precedent that provides for an incorrect interpretation and application of the COC with regards to the placement of pricing information and associated requirements”?
  - 17.1.1. This question suggests that adjudication decisions are capable of establishing precedents for future adjudications.
  - 17.1.2. Certainly adjudicators consider previous adjudication decisions when considering complaints. It is also important that there be a degree of

consistency in the findings of adjudicators considering substantively similar complaints.

- 17.1.3. That said, the appeal process exists to address substantive inconsistencies and offer guidance for adjudicators in an effort to reduce the likelihood of a “precedent that provides for an incorrect interpretation and application” of the Code.
  - 17.1.4. Determining whether factors such as the manner in which pricing information is conveyed complies with provisions of the Code depends on a combination of facts particular to a complaint, the adjudicator’s considered interpretation of the Code in the context of those facts and the weight the adjudicator places on previous adjudication reports and appeal panel findings.
- 17.2. Does the adjudicator’s ruling establish a “precedent that partial compliance is allowed”?
- 17.2.1. Following on from our response to the previous question, we do not believe that the adjudicator’s report establishes such a precedent.
  - 17.2.2. The Code does not allow for partial compliance. A determination of compliance is binary. Either the object of a complaint complies with the Code or it does not.
- 17.3. In the event that we conclude that the respondent breached the provisions of the Code, the respondent asked that we address the consequences for its right to a fair hearing in the context of any sanctions we may order as a consequence of our decision.
- 17.3.1. The respondent raised a valid concern here.
  - 17.3.2. Given that we have determined that Ad 2 and Ad 3 breached the Code, it remains for us to decide on the appropriate sanction bearing in mind that there is no scope for appeal from our decision in terms of the WASPA Code.

- 17.3.3. This creates a dilemma because it detracts from the respondent's broader rights to a fair hearing.
- 17.3.4. Circumventing this dilemma either requires us to simply not impose a sanction for non-compliance with the Code or to find another way to do so and still protect the respondent's rights.
- 17.3.5. Avoiding a sanction for non-compliance with the Code is not a satisfactory solution and would establish a problematic precedent.
- 17.3.6. Section 24.63 of the Code provides as follows:

*24.63. On the basis of the evidence presented, the panel will decide whether there has, in fact, been a breach of the Code. If the panel determines that there has, in fact, been a breach of the Code, then the panel must review the sanctions recommended by the adjudicator. The panel may maintain the same sanctions recommended by the adjudicator, or may determine such other sanctions, as it deems appropriate given the nature of the breach and the evidence presented.*

- 17.3.7. Section 24.63 empowers us to review the sanctions imposed by the adjudicator and to vary those sanctions as we deem "appropriate given the nature of the breach and the evidence presented."
- 17.3.8. This appeal is unusual in that it follows a result vindicating the respondent. There are no sanctions to vary.

### **Amendment of sanctions**

- 18. We find the respondent to have breached sections 9.1 and 9.2 of the Code.
- 19. We are also mindful of the following considerations:
  - 19.1. There do not appear to have been any consumer complaints concerning the ads;

- 19.2. The respondent took steps to respond substantively to the Media Monitor's complaint and participated fully in both the complaint and appeal processes;  
and
  - 19.3. The respondent is in good standing with WASPA.
20. We therefore believe that an appropriate sanction for the respondent's breach of the Code is a formal reprimand to be issued by the Secretariat in the format it deems appropriate.



## Annexures

Annexure "A"	Screengrabs of each of the ads
Annexure "B"	Adjudicator's report on complaints 31747 and 31757
Annexure "C"	Respondent's submissions in response to the complaints
Annexure "D"	Appellant's (WASPA's) appeal submissions
Annexure "E"	Respondent's appeal submissions

# Annexure "A"

## Ad 1

6 12 18 33 GET LOTTO AND LOTTO PLUS RESULTS AFTER EVERY DRAW 24 38 3 12

sms LOTTO to 3 13 14

R3/day subscription. Call Centre 0861 11 11 06 (VAS). T&C at xcitemobile.co.za. Competition ends 31 December 2016

## Ad 2

sms

Get Lotto & Lotto Plus results.

LOTTO to

3 13 14

R3/day subscription. Call Centre 0861 11 11 06 (VAS). T&C at xcitemobile.co.za. Competition closing 31 December 2016

Ad 3

**WINNING  
POWERBALL  
NUMBERS**

**MASSIVE JACKPOT  
THIS WEEK**

**MILLIONS TO  
BE WON**

R3/day subscription. Call Centre 0861 11 11 06 (VAS). T&C at [xcitemobile.co.za](http://xcitemobile.co.za). Competition ends 31 December 2016



**Wireless Application Service Providers' Association**

## Adjudicator's Report

Complaint number	31747 and 31757
Cited WASPA members	Viamedia (Pty) Ltd (0043)
Notifiable WASPA members	
Source of the complaint	Media monitor
Complaint short description	Pricing on television advertising
Date complaint lodged	4 October 2016
Date of alleged breach	
Applicable version of the Code	14.5
Clauses of the Code cited	4.2, 5.5, 8.9, 9.1, 9.2
Related complaints considered	
Fines imposed	

Is this report notable?	<i>Not notable</i>
Summary of notability	

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## Initial complaint

In matter 31747, the Media Monitor submitted:

The Via media television commercials (3 attached) are potentially in breach of the WASPA COC.

Via media television commercials are animated and busy. Fast moving images run across the screen throughout the commercial. Pricing being “prominent and clear” as required by the COC, means that pricing should be particularly noticeable, stand out, and not blend into what appears as a footnote at the bottom of the screen. (Where T&C's are placed). Pricing therefore needs to "fight" with all other images onscreen. Their pricing is obscured by other information. The pricing is not immediately adjacent to the CTA button. Pricing is not independent of other text. It is almost impossible for an average viewer to take in all that information, and still notice pricing. It is quite possible an average viewer will overlook the pricing completely.

There were 3 commercials attached to the complaint in 31747.

Complaint 31757 essentially introduced a further 3 commercials to the same complaint (3 were repeats).

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## Member’s response

The Member submitted a detailed response, addressing each clause and explaining that there is a double opt in subscription service.

The Member also attached high resolution copies of some of the material.

## Clauses

*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.*

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

*8.9. A “call-to-action” is any link, input box, short-code, or any other component of an advert which triggers the confirmation step for a transaction or a service.*

*9.1. For any television or cinema advert, pricing information does not need to be displayed for services which are free, or which are billed at standard rates. For all other services, pricing information for the service must be shown on the screen for the entire duration of the advert. Pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action.*

*9.2. There must not be any intervening text or images between the call-to-action and the pricing information. Pricing information must be legible, horizontal and presented in a way that does not require close examination. Pricing information must not be obscured by any other information. Pricing information must not be animated.*

## **Decision**

The first issue that I wish to comment on is the quality of the commercials. The commercials supplied by the Monitor were certainly completely illegible in terms of the pricing information, and if it is this version that the Monitor saw, I can understand their immediate concern about the pricing information.

I was, however, provided with three high resolution copies of the commercials. I am making the assumption that the other three were of the same or similar quality.

I accept that it is the high resolution version of the commercial that would appear on screen and be seen by consumers, and it is these that I consider below.

My next observation is that the clauses which go to the heart of this complaint – clauses 9.1 and 9.2 – are confusingly drafted in that they reference a “call to action”. A “call to action” is defined in clause 8.9 as “*any link, input box, short-code, or any other component of an advert which triggers the confirmation step for a transaction or a service*”. In other words, the call to action is an interactive step that begins the subscription process. A television commercial does not have a call to action, as defined and as typically used within the

industry. The closest to a call-to-action is the instruction to “SMS Lotto to . . .” and “SMS Power to. . .”, although this is a generous interpretation of the narrowly defined words.

It is my opinion that Clause 9.1 and 9.2 must be considered in terms of the specific requirements set out, given that the drafting of the Code does set out specific requirements for this medium. I also consider that these requirements must be seen through the lenses of equity – the core question of whether the consumer should reasonably have seen the pricing.

In the commercials before me, following the requirements of the clauses, I note:

- The pricing information is on-screen the entire duration;
- The font is clear;
- The display is prominent in that it is legible and is the first piece of information in the terms that remain on-screen for the entire duration;
- In so far as there is a call to action, which I dispute, the price is always the next readable piece of information after the SMS number;
- There is similarly no intervening visual between the so-called call to action and the price;
- The price is legible;
- The price is horizontal;
- The price does not require closer inspection;
- The price is not obscured;
- The price is not animated.

While the commercials are “busy” they are not excessively so, and they are conveying one simple piece of information, not multiple pieces of information. I also note that the voice overs state “To get winning power ball numbers / lotto and lotto plus numbers”. This indicates that you will repeatedly get numbers, rather than just “the” winning number “this week”, and that the service must therefore be of a subscription nature. In some of the commercials (including the “first” one in matter 31747, which I note is also the clearest visually and the most overtly compliant), it also states, “Get Lotto and Lotto Plus results after every draw” on the top of the screen for the entire duration.

The commercials are also sufficiently long that the reasonably literate consumer has time to take in the main message, and consider the pricing at the bottom.

While not a defence in itself, and certainly not a defence in the face of a breach of specific requirements, it is nonetheless relevant that the commercial triggers a double opt in process. I myself tested this process and received a message stating. "Confirm your request for Xcite Mobile Lottopusha @R3,00 per charge, max 5 charges per day. Reply "Yes" to confirm/ "No" to cancel. Free SMS".

This raises a major concern as it would appear that the pricing on the television commercial is therefore incorrect – my message (dated 29 November 2016) indicates that I may be charged up to R 15 a day. While I am most disturbed by this development, it is not the question before me. **I request that the Monitor conduct an immediate and urgent investigation into the whole subscription process based on this concern.**

However, it is true that there is a further opt in step, and that the pricing is communicated with that step.

Turning back to the question of whether the commercials breach the clauses before me, I also note that one cannot confuse a perfectly executed commercial with the only acceptable commercial. The commercials before me could be clearer, they could comply with the Code better, and they are not examples of the pinnacle of clarity. However, that does not automatically mean that they are non-compliant. It is my opinion that they meet the requirements set down by the Code.

**Working on the assumption that the price of R3/day is correct, which was the case ex facie the facts presented to me, the commercials are not in breach of Clauses 9.1 and 9.2 for the reasons given above. They are therefore also not in breach of Clauses 4.4 and 5.5, and clause 8.9 is a definition and cannot be breached.**





**(Proprietary) Limited**

601, 6<sup>th</sup> Floor  
The Studios  
4 Loop Street  
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19 October 2016

WASPA

Per email: [complaints@waspa.org.za](mailto:complaints@waspa.org.za)

**Formal response: Complaints #31747 and #31757**

### **Introduction**

1. WASPA Code of Conduct Complaint #31747 was lodged by the WASPA Media Monitor and notified to ViaMedia on 5 October 2016.
2. The Media Monitor raised possible breaches of the following clauses of the Code:
  - 2.1. Clause 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.
  - 2.2. Clause 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.
  - 2.3. Clause 8.9. A “call-to-action” is any link, input box, short-code, or any other component of an advert which triggers the confirmation step for a transaction or a service.
  - 2.4. Clause 9.1: For any television or cinema advert, pricing information does not need to be displayed for services which are free, or which are billed at standard rates. For all other services, pricing information for the service must be shown on the screen for the entire duration of the advert. Pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action.
  - 2.5. Clause 9.2: There must not be any intervening text or images between the call-to-action and the pricing information. Pricing information must be legible, horizontal and presented in a way that does not require close examination. Pricing information must not be obscured by any other information. Pricing information must not be animated.
3. The Media Monitor provided the following detail in the complaint:
  - 3.1. Three “low-res” ViaMedia television commercials were attached and identified as potentially in breach of the Code.
  - 3.2. The commercials were characterised as “animated and busy”:

*Via media television commercials are animated and busy. Fast moving images run across the screen throughout the commercial. Pricing being “prominent and clear” as required by the COC, means that pricing should be particularly noticeable, stand out, and not blend into what appears as a footnote at the bottom of the screen. (Where T&C's are placed). Pricing therefore needs to "fight" with all other images onscreen.*

- 3.3. The pricing displayed in the commercials is obscured by other information and is not “immediately adjacent” to the call-to-action button:

*Their pricing is obscured by other information. The pricing is not immediately adjacent to the CTA button. Pricing is not independent of other text. It is almost impossible for an average viewer to take in all that information, and still notice pricing. It is quite possible an average viewer will overlook the pricing completely.*

4. The Media Monitor suggested that all “future Via media television commercials, which have adopted the pricing format, be relooked and revised.”
5. WASPA Code of Conduct Complaint #31757 was lodged by the WASPA Media Monitor and notified to ViaMedia on 6 October 2016.
6. The Media Monitor raised possible breaches of the following clauses of the Code:
- 6.1. Clause 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.
- 6.2. Clause 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.
- 6.3. Clause 8.9: A “call-to-action” is any link, input box, short-code, or any other component of an advert which triggers the confirmation step for a transaction or a service.
- 6.4. Clause 9.1: For any television or cinema advert, pricing information does not need to be displayed for services which are free, or which are billed at standard rates. For all other services, pricing information for the service must be shown on the screen for the entire duration of the advert. Pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action.
- 6.5. Clause 9.2: There must not be any intervening text or images between the call-to-action and the pricing information. Pricing information must be legible, horizontal and presented in a way that does not require close examination. Pricing information must not be obscured by any other information. Pricing information must not be animated.
7. The Media Monitor provided the following detail in the complaint:

7.1. Six further ViaMedia television commercials were attached and identified as potentially in breach of the Code.

7.2. Issues raised under Complaint #31747 were restated:

*As mentioned in complaint 31747: Via media television commercials are animated and busy. Fast moving images run across the screen throughout the commercial. Pricing being "prominent and clear" as required by the COC, means that pricing should be particularly noticeable, stand out, project, and not blend into what appears as a footnote at the bottom of the screen. (Where T&C's are placed). The pricing display therefore needs to "fight" with all other images onscreen.*

*Their pricing is potentially obscured by other information.*

*The pricing placement is not immediately adjacent to the CTA button. "Immediately adjacent" does not mean in the vicinity of, it means "immediately next to or adjoining with something else". Their pricing format is not independent of other text. The pricing format used in the Via media television commercials does not adequately meet this expectation.*

*It is almost impossible for an average viewer to take in all the advertised/promoted information, and still notice pricing. It is quite possible an average viewer will overlook the pricing completely. It is our view that the Via media pricing requires a consumer to look for the pricing.*

*The Code requires:*

*"Pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action."*

*And*

*"Pricing information must not be obscured by any other information."*

*In some of the television commercials attached, pricing has been placed in the top righthand corner of the screen. This format is not a requirement of the WASPA COC.*

8. The Media Monitor requested that both complaints be assigned to the same adjudicator.

9. In the light of such request – with which ViaMedia agrees – a consolidated response to the two complaints is set out below.

### **History of the complaints**

10. On 8 September 2016, ViaMedia received email from the WASPA Media Monitor regarding an urgent Heads Up under reference HU626 in the following terms:

*The attached television commercials displays your pricing in the incorrect format: Pricing is not explicit and clear as required by the Code. Explicit and clear means that pricing should be particularly noticeable and stand out. Pricing needs to be independent from all other text.*

*Pricing needs to be enlarged to be noticeable.  
Please can you have these commercials removed off air with immediate effect to avoid a formal complaint being lodged.  
Please advise and confirm by when this can be done.  
Please forward revised artwork to the media monitoring team before flighting again.  
Please also note that we suggest ALL your television commercials, which have adopted the pricing format, be relooked and revised.*

11. ViaMedia acknowledged receipt within the given two days allowed, noting the following:

In the current version of the WASPA Code of Conduct, sections 9.1 and 9.2 states the following:

*“9.1. For any television or cinema advert, pricing information does not need to be displayed for services which are free, or which are billed at standard rates. For all other services, pricing information for the service must be shown on the screen for the entire duration of the advert. Pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action.”*

*Our pricing information is clearly visible for the entire duration of the advert (I have attached HD files for your perusal, as the files copied in the mail were of extreme bad quality and very distorted). The pricing is clear and prominent, directly below and adjacent to the call to action and there is nothing that is obscuring this information from the user. As such, we are not in breach of section 9.1 of the code.*

*“9.2. There must not be any intervening text or images between the call-to-action and the pricing information. Pricing information must be legible, horizontal and presented in a way that does not require close examination. Pricing information must not be obscured by any other information. Pricing information must not be animated.”*

*The pricing information is not animated, it is static. The Oxford English Dictionary ascribes the following meaning to the word /intervene inter alia: “occur as a delay or obstacle to something being done”. The text follows the pricing information, and there is no intervening text or images between the call-to-action and the pricing information. The Pricing information is legible, horizontal and does not require a user to “examine” the advert. We are therefore not in breach of section 9.2 of the code.*

*As the television ads are fully in line with the Code, we therefore request HU626 be closed.”*

12. On 12 September 2016, the Media Monitor sent a further email to ViaMedia stating that a formal complaint would be opened given that no communication had been received from ViaMedia. ViaMedia responded to the effect that this was incorrect and attached the emails of the acknowledgement and the response referred to in the previous paragraph.

13. Further correspondence evidences the Media Monitor's disagreement with the response provided to the Heads-Up and her demand that ViaMedia terminate the display of the adverts within two days, failing which the matter would go to a formal complaint.

14. At this stage ViaMedia sent the following further correspondence to the Media Monitor:

*"ViaMedia has already booked television in inventory over a month in advance. For any ads that we pull, there is a 100% penalty i.e. we lose the full value of the advertising slot. These advance booked advertising slots value currently stands at around +- R500 000.00.*

*We also feel that our adverts are compliant with the code of conduct. We are looking to withdraw them out of respect to you and your concerns, although immediately withdrawing them would result in a massive financial penalty, which in our opinion would be both unfair and extremely onerous."*

15. Despite ViaMedia's view that the Media Monitor was incorrect in her submissions and taking into account the premium which ViaMedia places on compliance with the WASPA Code, ViaMedia did take steps to meet the concerns raised in the Heads-Up by amending the commercials so as to feature pricing information in a different coloured block in the top right-hand corner of the screen for the duration of each commercial. This was done to align the commercials with the more objective requirements set out in the old (and now non-binding) WASPA Advertising Guidelines. ViaMedia took this step taking into consideration the fact that it had not received any complaints regarding this format under the more objective requirements of the Guidelines.

16. In order to effect these changes, ViaMedia used three internal resources for a two week period and incurred upload fees of R15 500 ex VAT.

17. Notwithstanding the above and the Media Monitor's original request for ViaMedia to revise **future** advertising, and without any further substantive engagement with ViaMedia, the Media Monitor proceeded to lodge the formal complaints in respect of which this response is filed.

### **Quality of recordings of commercials**

18. ViaMedia is concerned that the quality of the files viewed and provided by the Media Monitor does not lend itself to fair adjudication of the whether the commercials complained about are compliant with the provisions of the Code cited.

19. To this end the adjudicator is requested to view the files provided contemporaneously with this response.

20. The adjudicator is further requested to apply her or his mind to how the commercials would have been viewed on a television screen rather than on a computer screen.

### **Compliance with the balance of the requirements of the Code of Conduct**

21. ViaMedia notes that it is compliant with the balance of the requirements of the Code of Conduct regarding the subscription service process. This includes the double opt-in procedure and the welcoming and reminder messaging mandated by the Code.
22. To the extent that any of the commercials complained about did cause confusion to consumers – which is denied and of which there is no evidence – this would have been mitigated by such compliance so that any consumer prejudice would have been minimised and any decision to subscribe to the service would have been confirmed independently of the advertising through the double opt-in and welcome message.

### **Response to allegation of breach of clause 4.2**

23. The Media Monitor advances no grounds or evidence for citing this clause (other than as a general catch-all should an adjudicator find ViaMedia to have breached other clauses cited).
24. ViaMedia submits that:
  - 24.1. It responded timeously to the Heads Up negotiation.
  - 24.2. It engaged with the Media Monitor regarding her complaint in good faith.
  - 24.3. The essence of the complaint is a matter which is subjectively-assessed (as may be informed by objective evidence). ViaMedia in good faith holds a different view to that of the Media Monitor.
  - 24.4. The steps taken by ViaMedia to amend the commercials to meet the concerns of the Media Monitor, even while disagreeing with them.
  - 24.5. ViaMedia has explained to the Media Monitor the consequences of immediate termination of the advertising schedule booked for the commercials. While commercial considerations are subordinate to compliance with the Code, in the real world the substantial cost of pulling the commercials has to be weighed against what are allegations made by the Media Monitor of potential breaches of the Code, taking into account ViaMedia's differing view on the merits of the allegations.
25. ViaMedia confirms that the commercials cited were reviewed prior to being submitted for airing to ensure compliance with the requirements of the Code.
26. ViaMedia has behaved professionally in its interactions with the Media Monitor and as regards the design and flighting of the commercials cited and there is no evidence to the contrary presented.

### **Response to allegation of breach of clause 5.5**

27. The Media Monitor advances no grounds or evidence for citing this clause (other than as a general catch-all should an adjudicator find ViaMedia to have breached other clauses cited).

27.1. ViaMedia denies that it has “knowingly disseminated information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission”.

27.2. This remains the case even should an adjudicator find that ViaMedia has breached other clauses of the Code cited (which is denied). This flows from ViaMedia at all times acting in good faith in the design and lighting of the commercials.

### **Response to allegation of breach of clauses 9.1 and 9.2**

*9.1: For any television or cinema advert, pricing information does not need to be displayed for services which are free, or which are billed at standard rates. For all other services, pricing information for the service must be shown on the screen for the entire duration of the advert. Pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action.*

*9.2: There must not be any intervening text or images between the call-to-action and the pricing information. Pricing information must be legible, horizontal and presented in a way that does not require close examination. Pricing information must not be obscured by any other information. Pricing information must not be animated.*

28. The Media Monitor characterises the commercials as “animated and busy” noting that “fast-moving images run across the screen throughout the commercial”. This characterisation is used as the context for alleging that pricing information is not “prominent and clear”.

29. This is a subjective assessment with which ViaMedia disagrees.

29.1. It should be noted that the different commercials reflect different levels of animation and it is not possible to characterise them all with a single descriptor.

29.2. The commercial supplied under reference number LTY-015-340-E, for example, can in no manner said to be “animated or busy”: this commercial provides core information necessary to market the service in a straightforward manner.

29.3. This assessment is a matter of degree. ViaMedia does not believe that any of the commercials, when viewed clearly on a television screen as intended, are “busy” and it is patently incorrect that fast-moving images run across the screen throughout any of the commercials.

- 29.4. While animated elements are used, the terms and conditions and pricing information are static and clearly visible on screen for the entire duration of the advert.
30. The Media Monitor interprets “prominent and clear” as requiring that pricing information should be “particularly noticeable, stand out, project, and not blend into what appears as a footnote at the bottom of the screen. (Where T&C’s are placed). The pricing display therefore needs to “fight” with all other images onscreen”.
31. This is a subjective assessment with which ViaMedia disagrees.
- 31.1. Pricing information is static/not animated.
- 31.2. Pricing information is clearly visible for the entire duration of the advert.
- 31.3. Pricing information is legible, horizontal and presented in a way that does not require close examination as it is featured in a footer and uses contrasting colours.
- 31.4. Pricing information is clear and prominent, directly below and adjacent to the call to action.
- 31.5. Pricing information is not obscured nor is there intervening text or images between the call-to-action and the pricing information.
- 31.6. The Media Monitor’s assertion that “pricing is potentially obscured by other information” or not “independent of other text” is denied. There is no such requirement in the WASPA Code of Conduct and it is further not clear what “potentially obscured” means: surely the pricing information is either obscured or not obscured (it is not).
- 31.7. The Media Monitor’s assertion that pricing information should “not blend into what appears as a footnote at the bottom of the screen” employs language which appears at best indicative of over-dramatisation and at worst of some form of bias, as this is clearly not the case.
32. The Media Monitor asserts that it is “almost impossible” for a consumer to notice pricing amongst all the other information provided and that it is “quite possible” that a consumer will overlook the pricing completely. In the view of the Media Monitor a consumer would be required to “look for the pricing”.
33. As regards these assertions, ViaMedia begs to differ and notes that the consumer response to the commercials does not in any manner support the Media Monitor’s position:



- 33.1. ViaMedia has not received any complaints directly or through WASPA regarding any of the commercials cited in the two complaints initiated by the Media Monitor.
  - 33.2. ViaMedia has not received any complaints directly or through WASPA regarding any of the services advertised in the commercials cited in the two complaints initiated by the Media Monitor.
34. It therefore appears that it is only the Media Monitor – and not consumers targeted by the commercials – who is apparently confused by the commercials.

**Submissions regarding any potential sanction to be applied**

35. In the event that an adjudicator, notwithstanding the above submissions, finds that ViaMedia has indeed breached the clauses cited by the Media Monitor in the two complaints under response, then the adjudicator is requested to consider the following in mitigation of such sanction:
- 35.1. ViaMedia’s recent disciplinary record under the WASPA Code has improved significantly and it has not faced a complaint relating to television advertising of its services. This is despite ViaMedia being one of the largest television advertisers of WASP services in South Africa.
  - 35.2. The lack of any demonstrable consumer harm as set out in paragraph 33 above.
  - 35.3. ViaMedia’s compliance with other requirements of the Code, notably clauses 8.2, 15.12, 15.19 and 15.20, all of which serve to mitigate any consumer harm which may have been experienced.
  - 35.4. The subjective nature of the assessment at issue in both complaints and ViaMedia’s good faith view that the commercials are compliant with the Code.
  - 35.5. The steps in mitigation taken as set out above with particular reference to amendments undertaken at ViaMedia’s cost to meet the concerns of the Adjudicator.
36. Should the adjudicator require further information, we would be happy to supply this.

Regards



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**WASPA**

**ATTENTION: COMPLAINTS DEPARTMENT**

**PER EMAIL: [complaints@waspa.org.za](mailto:complaints@waspa.org.za)**

23 January 2017

**RE: APPEAL SUBMISSION: FORMAL COMPLAINT #31747 AND #31757**

Dear Sir/Madam,

The abovementioned matter has reference.

WASPA hereby formally lodges an appeal against the ruling set out in WASPA formal complaint #31747 and #31757, in accordance with Clause 24.38 and Clause 24.69 of the WASPA Code of Conduct.

**1. BACKGROUND – SUMMARY OF ORIGINAL COMPLAINT:**

- a. The complaint revolved around the placement of pricing information on television adverts that promote a subscription service.
- b. The pricing information was placed at the bottom of the screen, as part of various other terms and conditions.
- c. Pricing being “prominent and clear” as required by the WASPA Code of Conduct (hereinafter referred to as “**COC**”), means that pricing should be particularly noticeable, stand out, and not blend into what appears as a footnote at the bottom of the screen.
- d. The pricing information is obscured by other information.
- e. The pricing information is not immediately adjacent to the call-to-action (hereinafter referred to as “**CTA**”) button.
- f. The pricing information is not independent of other text.

## 2. DECISION – GENERAL COMMENTS:

### 2.1 QUALITY OF COMMERCIALS:

- a. Commercials are provided by a third party supplier.
- b. Irrespective of the quality of the commercial reviewed, the content of the commercial still needs to adhere to the provisions of the COC.
- c. The placement of the pricing information did not comply with the requirements as set out in the COC.
- d. Upon reviewing the higher resolution quality advertisements, the core issues set out in the original complaint remain present. The quality of the advertisement does not negate the requirement to adhere to the provisions of the COC, with specific reference to the placement of pricing information.

### 2.2 INTERPRETATION OF CLAUSE 9.1, 9.2 READ WITH CLAUSE 8.9:

#### Clause 8.9:

- a. Clause 8.9 states:  
*“Definition of call-to-action  
8.9. A “call-to-action” is any link, input box, short-code, or any other component of an advert which triggers the confirmation step for a transaction or a service.”*
- b. Two points worth noting:  
The following section(s) has relevance to television adverts and the mobile originated method to activate the subscription service double opt-in flow which triggers the network hosted confirmation step:
  - *“...A “call-to-action” is any... short-code... which triggers the confirmation step...”*
  - *“...A “call-to-action” is any... other component of an advert which triggers the confirmation step...”*

- c. *In casu*: the instruction/request to SMS a keyword to a short-code, would be regarded as the call-to-action:
- o complies with the short-code method; or alternatively
  - o complies with the component of the advert method, which will trigger the network hosted confirmation step.

### Clause 9.1:

- d. Clause 9.1 states:
- “9. Television and cinema advertising  
Display of pricing information  
9.1. For any television or cinema advert, pricing information does not need to be displayed for services which are free, or which are billed at standard rates. For all other services, pricing information for the service must be shown on the screen for the entire duration of the advert. Pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action.”*
- e. The following section is not complied with: *“...pricing information for the service must be shown on the screen for the entire duration of the advert...”*
- o Although the pricing information is displayed at the bottom of the screen (along with various other terms and conditions), for the duration of the advert, the placement of the pricing information is not compliant.
  - o Therefore, incorrect placement of pricing, although displayed for the duration of the advert, results in non-compliance with this requirement of the COC.
- f. The following section is not complied with: *“...Pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action...”*
- o The pricing information is in a small font, contained at the bottom of the screen, along with various other terms and conditions.
  - o The pricing information blends into the terms and conditions paragraph, does not stand out, and is in no manner highlighted or differentiated from the other text contained in the paragraph.
  - o The pricing information is therefore neither clear, nor prominent, as it blends into the other terms and conditions which could easily be overlooked by a reasonable end-user.
  - o Most importantly, the pricing information is not immediately adjacent to the CTA.

- o One of the reasoning's behind placing the pricing information immediately adjacent to the CTA, is to provide the consumer with an opportunity to clearly and prominently view the cost associated with joining the subscription service, at the point where instructions are provided on how to join.
  - o This affords the consumer the opportunity to make an informed decision on whether or not to join the service at the set cost and frequency of charge.
  - o Therefore, incorrect placement of pricing, as it is not displayed immediately adjacent to the CTA, results in non-compliance with this requirement of the COC.
- g. The instruction to SMS a keyword to a short-code, is the call-to-action, as this is the action that the consumer is required to execute in order to trigger the network hosted confirmation step.
- h. As such, the pricing information needs to be placed immediately adjacent to this instruction (the CTA), in a clear and prominent way.
- i. Placing the pricing information at the bottom of the screen, in a paragraph that blends into various other terms and conditions, is neither immediately adjacent to the call-to-action, nor clear and prominent, as required by the COC.

**Clause 9.2:**

- j. Clause 9.2 states:  
*"9.2. There must not be any intervening text or images between the call-to-action and the pricing information. Pricing information must be legible, horizontal and presented in a way that does not require close examination. Pricing information must not be obscured by any other information. Pricing information must not be animated."*
- k. The pricing information is placed at the bottom of the screen, with substantial open space between the CTA and the pricing information.
- l. As the pricing information is contained in a paragraph format, along with various other terms and conditions, it is displayed in a way that requires closer examination by the consumer in order to be informed of the cost of the service.

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- m. The pricing information is obscured by other terms and conditions, as all the information is contained in a paragraph format at the bottom of the page, and not in a clear and prominent position immediately adjacent to the CTA.

### 3. **ADJUDICATOR'S INTERPRETATION:**

- a. The adjudicator challenges the content and interpretation of Clause 9.1 and 9.2, as the adjudicator states that it confusingly refers to a call-to-action, which television adverts apparently do not contain as defined in Clause 8.9.
- We strongly disagree with this viewpoint.
  - The instruction to SMS a keyword to a short-code clearly falls within the definition of a call-to-action.

- b. The adjudicator then reviews the requirements of Clause 9.1 and 9.2 (in italics for ease of reference):

*"In the commercials before me, following the requirements of the clauses, I note:*

*The pricing information is on-screen the entire duration;*

- Although the pricing information is displayed for the duration of the advert, the pricing information is not placed in the correct position, and therefore does not comply with the requirements of the COC.
- Purely having pricing information displayed for the duration of the advert, irrespective of whether the information is correct and/or correctly placed, is not sufficient to comply with the COC.
- The content of the information as well as the placement of the information is crucial. Thereafter, correct information that is placed in the correct position, needs to be displayed for the duration of the advert.

- c. *The font is clear;*

- The pricing information is displayed in a small font, at the bottom of the screen, along with various other terms and conditions.
- It blends into the paragraph of information and is by no means clear or prominent.
- Furthermore, majority of the adverts use a font, font colour and background colour that does not facilitate easy viewing of the terms and conditions (even with the incorrect placement of the pricing information).

- d. *The display is prominent in that it is legible and is the first piece of information in the terms that remain on-screen for the entire duration;*
- The COC requires clear and prominent display of pricing information. Only placing this information at the bottom of a screen in a paragraph that contains various other terms and conditions, does not comply with this requirement.
  - The pricing information blends into a paragraph and is not prominent as it is obscured by other terms and conditions.
  - More importantly, the pricing information is not immediately adjacent to the call-to-action.
  - It is placed in a paragraph at the bottom of the screen, not remotely close to, let alone immediately adjacent to, the instruction to SMS a keyword to a short-code.
- e. *In so far as there is a call to action, which I dispute, the price is always the next readable piece of information after the SMS number;*
- We strongly disagree with the Adjudicator's interpretation that no CTA is present. Refer to the comments above.
  - Example: With web based subscriptions, we require the pricing information to be immediately adjacent to the call-to-action, which is usually a clickable button (component of the advert that triggers the network hosted confirmation step).
  - When reviewing web based subscriptions, we do not allow numerous line spaces between this button and the pricing information. If there are line spaces – and even if this space is just blank, with no other information or images - the pricing information is not immediately adjacent to the CTA, and a complaint is lodged in order for the member to rectify the breach.
  - Also, the pricing information – subscription service reference, price and frequency of the billing – needs to be displayed immediately adjacent to the CTA, and separate from any other information, specifically separate from any terms and conditions contained on the page, in order for the pricing information to be clear, prominent, not to require closer examination or be obscured in any way.
  - Similarly, the pricing information for television adverts needs to be placed immediately adjacent to the CTA. If the CTA is placed in the middle of the screen, and the pricing information at the bottom of the screen in a paragraph with other terms and conditions, the space in between the CTA and terms and conditions paragraph would be seen as 'line spaces' for interpretation purposes,

and consequently in breach of the clear, prominent and immediately adjacent requirement as set out in the COC.

f. *There is similarly no intervening visual between the so-called call to action and the price;*

- Although there are not visuals/images/text in between the CTA and the terms and conditions paragraph, which contains the pricing information, the placement is still not immediately adjacent and therefore not compliant.
- As explained above, in order to be clear and prominent, the pricing information must be displayed in such a way that it is highlighted and does not compete with other text, images, visuals etc. Placing the pricing information in the terms and conditions paragraph, does not
- We need to respectfully submit that the adjudicators incorrect interpretation of the CTA, affects several of the interpretations of the requirements.

g. *The price is legible;*

- The price is not clear, nor prominent. As stated above, it blends into a paragraph containing various terms and conditions, and is by no means highlighted or clearly brought to the attention of a reasonable consumer, as required by the COC.

h. *The price is horizontal;*

- Agreed.

i. *The price does not require closer inspection;*

- We respectfully disagree with the statement. The average, reasonable consumer will have to take their attention away from the busy graphics, animations, images, colours and sounds etc. to inspect the pricing information at the bottom of the screen, where it blends into other text.
- If the pricing information was placed in the correct position – immediately adjacent to the call-to-action, then the consumer would clearly and prominently be informed of the cost whilst they are informed of the actions necessary to subscribe to the service – SMS a keyword to short-code, the CTA.
- Placing the pricing information at the bottom of the screen, blending into a paragraph of terms and conditions, requires the consumer to closer inspect this paragraph in order to be properly informed of the potential cost and frequency of the billing.





Wireless Application Service Providers' Association

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- j. *The price is not obscured;*
- We respectfully disagree with the statement. The average, reasonable consumer will have to take their attention away from the busy graphics, animations, images, colours and sounds etc. to inspect the pricing information at the bottom of the screen, where it blends into other text.
  - The pricing information is not clear.
  - The pricing information is not prominent.
  - The pricing information is not immediately adjacent to the CTA.
  - The pricing information requires closer inspection.
  - We specifically state that the pricing information blends into a paragraph of text that contains numerous terms and conditions, and is obscured due the incorrect placement of this information.
- k. *The price is not animated.”*
- Agreed.

#### **4. SUBSCRIPTION INFORMATION:**

- a. Although the content of the voice over may allude to the fact that it is a subscription service, the COC still requires that this fact – the word “subscription” - be displayed as part of the pricing information, in a clear and prominent manner, immediately adjacent to where the CTA is displayed on the screen.
- b. Alluding to the fact, via the content of the voice over, does not negate the requirement to place this information immediately adjacent to the CTA.
- c. The requirement to place the pricing information immediately adjacent to the CTA, enables the consumer to make an educated and informed decision when responding to the advert to join the service. Placing the pricing information at the bottom of the screen, requires further inspection, and ultimately defies the purpose of the pricing placement requirements of the COC.
- d. The length of the advert should have no impact on adhering to the strict and clear requirements on how to communicate the cost to the consumer.

**5. NETWORK HOSTED CONFIRMATION PROCEDURE:**

- a. The question whether the required procedure was present, which includes the network hosted confirmation step (in practice often referred to as the Double Opt-In procedure), was not placed in dispute by the Media Monitor.
- b. It is possible to have two distinct opt-in steps – one contained as part of the advertising, and the other controlled by the MNO - but have elements of those steps that are not compliant, as was the case in this complaint.
- c. The focus of this complaint was not whether the service contained the required process flow, but whether or not the pricing information contained in the commercial was displayed in a way that complied with the requirements of the COC.
- d. We expressly state that the presence of the required process flow does not negate the requirements to communicate the pricing information on all advertising in a manner which is consistent with the provisions of the COC, which we specifically state was not the case in this matter.

**6. PERFECTLY EXECUTED COMMERCIAL VERSUS ACCEPTABLE COMMERCIAL:**

- a. The argument made by the adjudicator is confusing, to say the least, and extremely conflicting.
- b. The adjudicator states: *“The commercials before me could be clearer, they could comply with the Code better, and they are not examples of the pinnacle of clarity. However, that does not automatically mean that they are non-compliant.”*
- c. This sets an extremely dangerous precedent. What level of compliance is then required – objective or subjective?
- d. What would then be considered totally compliant, versus a grey area in the middle of partial/acceptable compliance – which this commercial falls within according to the adjudicator – and non-compliance?

- 
- e. We respectfully submit that this ruling will create precedent which other members will follow to allow for partial compliance, in cases where members could have provided more compliant services, but are now allowed to operate in the grey area, as long as it is not blatantly non-compliant. This ruling will authorise them to bend the rules as far as they can, and provide authority to do so.

## 7. **RULING:**

- a. The adjudicator states: *“Working on the assumption that the price of R3/day is correct, which was the case ex facie the facts presented to me, the commercials are not in breach of Clauses 9.1 and 9.2 for the reasons given above.”*
- We strongly disagree with this ruling.
  - Furthermore, we strongly contest various interpretations and assumptions made by the adjudicator, as set out above.
  - The pricing information did not comply with the requirements as set out in the COC.
- b. The adjudicator states: *“They are therefore also not in breach of Clauses 4.4 and 5.5, and clause 8.9 is a definition and cannot be breached.”*
- Clause 4.4 was never cited by the Media Monitor. We can only assume that the adjudicator meant Clause 4.2.
  - We strongly disagree with the ruling regarding Clause 4.2\* and 5.5.
  - The pricing was placed in such a way, and in our opinion in breach of the requirements as set out in the COC, where consumers were not informed about the cost in such a way which would have enabled them to make an informed decision.
  - The incorrect placement of the pricing information misled the consumer, as the commercial at no point clearly and prominently displayed the pricing information.

## 8. **CONCLUSION:**

In accordance with Clause 24.38: *“In exceptional circumstances, where WASPA believes that the decision of the independent adjudicator is patently wrong, unfairly prejudices the industry, unfairly prejudices the consumer or brings the good name of WASPA into disrepute, WASPA itself may, at its discretion, institute an appeal against*

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*the decision of an adjudicator. In such a case, the respondent involved in the complaint must be notified of the appeal and given the opportunity to provide an appeal submission as if that respondent had lodged an appeal.”; and*

*Clause 24.69: “WASPA itself may lodge an appeal against a decision of the adjudicator, in such case the procedure set out above will be followed, mutatis mutandis.” –*

WASPA would like to request that the decision of the adjudicator in Formal Complaint #31747 and #31757, be appealed, on the following grounds:

- a. The adjudicator’s interpretation of a CTA as set out in Clause 8.9 read with Clause 9.1 and 9.2, or the lack thereof, within television adverts is patently incorrect;
- b. The adjudicator’s statement that television adverts do not contain a CTA, is patently incorrect and sets dangerous precedent;
- c. The adjudicator’s interpretation of the requirements of Clause 9.1 and 9.2 is patently incorrect;
- d. This ruling sets precedent that provides for an incorrect interpretation and application of the COC with regards to the placement of pricing information and associated requirements;
- e. This ruling sets precedent that partial compliance is allowed.

We respectfully submit that the ruling in formal complaint #31747 and #31757 is patently incorrect and sets dangerous precedent and request the appeals panel to review and overturn this ruling.

We trust that you find the above in order and look forward to your response herein.

Kind Regards,

**WASPA**



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15 February 2017

## **WASPA**

Per email: [complaints@waspa.org.za](mailto:complaints@waspa.org.za)

## **Formal response: WASPA's Appeal in respect of the adjudications in complaints #31747 and #31757**

### **Introduction**

1. WASPA Code of Conduct Complaint #31747 was lodged by the WASPA Media Monitor and notified to ViaMedia on 5 October 2016.
2. ViaMedia duly provided its response under the formal process and, in due course, the independent adjudicator assigned to the complaints delivered a consolidated report on 2 December 2016. ViaMedia requests that the submissions made in such original response be incorporated herein.
3. On 3 January 2017, ViaMedia was informed that WASPA had taken a decision under clause 24.38 of the WASPA Code to appeal against the findings of the adjudicator.
4. On 17 January 2017 ViaMedia instructed us to address correspondence to WASPA regarding its decision to appeal the adjudication.
5. No response was received from WASPA to this correspondence.
6. ViaMedia's rights in respect of the process undertaken by WASPA in this matter – aggravated by the failure to respond to the requests for information set out in the correspondence of 17 January 2017 – remain reserved and the omission in these submissions of any procedural points should not be in any manner construed as acceptance of the manner in which WASPA has acted, which we regard as unlawful and contrary to its own Code of Conduct.
7. On 24 January 2017, ViaMedia received a document setting out WASPA's appeal submissions, to which it has instructed us to respond as set out below.

### **The findings of the adjudicator**

8. The findings contained in the consolidated report issued by the independent adjudicator can be summarised as follows:

Branches:  
Sandton: Upperground, Unit 2, 114 West Street, Sandton - c/o Workonline  
Cape Town: Unit C14, Westlake Square, Westlake Drive, Westlake, Cape Town  
Directors:  
Dominic Cull B.Bus.Sc. LL.B LL.M (ICT Law)  
Anton Kotzé LL.B

- 8.1. The copies of the commercials forming the subject of the complaint submitted by the Media Monitor were low-resolution and therefore “completely illegible”. This was in stark contrast to the higher-resolution copies provided by ViaMedia, which the adjudicator accepted as being the versions broadcast and therefore the versions on which he or she should base further consideration of the complaints. This finding was made in respect of all six advertisements forming part of the complaint.
- 8.2. The adjudicator found the reference to a “call to action” contained in clauses 9.1. and 9.2 of the Code to be “confusingly drafted”. A “call to action” is defined in clause 8.9 of the Code as “any link, input box, short-code, or any other component of an advert which triggers the confirmation step for a transaction or a service”. The adjudicator characterised a call to action as “an interactive step that begins the subscription process” and found that a television commercial does not *per se* have a call to action, as defined and as that term is typically used within the industry.
- 8.3. The adjudicator continued:

*It is my opinion that Clause 9.1 and 9.2 must be considered in terms of the specific requirements set out, given that the drafting of the Code does set out specific requirements for this medium. I also consider that these requirements must be seen through the lenses of equity – the core question of whether the consumer should reasonably have seen the pricing.*

*In the commercials before me, following the requirements of the clauses, I note:*

- *The pricing information is on-screen the entire duration;*
- *The font is clear;*
- *The display is prominent in that it is legible and is the first piece of information in the terms that remain on-screen for the entire duration;*
- *In so far as there is a call to action, which I dispute, the price is always the next readable piece of information after the SMS number;*
- *There is similarly no intervening visual between the so-called call to action and the price;*
- *The price is legible;*
- *The price is horizontal;*
- *The price does not require closer inspection;*
- *The price is not obscured;*
- *The price is not animated.*

*While the commercials are “busy” they are not excessively so, and they are conveying one simple piece of information, not multiple pieces of information. I also note that the voice overs state “To get winning power ball numbers / lotto and lotto plus numbers”. This indicates that you will repeatedly get numbers, rather than just “the” winning number “this week”, and that the service*

*must therefore be of a subscription nature. In some of the commercials (including the “first” one in matter 31747, which I note is also the clearest visually and the most overtly compliant), it also states, “Get Lotto and Lotto Plus results after every draw” on the top of the screen for the entire duration.*

*The commercials are also sufficiently long that the reasonably literate consumer has time to take in the main message, and consider the pricing at the bottom. While not a defence in itself, and certainly not a defence in the face of a breach of specific requirements, it is nonetheless relevant that the commercial triggers a double opt in process.*

.....

*Turning back to the question of whether the commercials breach the clauses before me, I also note that one cannot confuse a perfectly executed commercial with the only acceptable commercial. The commercials before me could be clearer, they could comply with the Code better, and they are not examples of the pinnacle of clarity. However, that does not automatically mean that they are non-compliant. It is my opinion that they meet the requirements set down by the Code.*

*Working on the assumption that the price of R3/day is correct, which was the case ex facie the facts presented to me, the commercials are not in breach of Clauses 9.1 and 9.2 for the reasons given above. They are therefore also not in breach of Clauses 4.4 and 5.5, and clause 8.9 is a definition and cannot be breached.”*

## **WASPA’s appeal submissions and responses thereto**

9. ViaMedia at the outset notes the general and repetitive nature of the appeal submissions. The assertions set out in the appeal document are not strengthened by this repetition.

### **10. Quality of the Commercials**

10.1. WASPA submits that copies of commercials are provided by a third-party supplier and that the quality of the commercial reviewed by the adjudicator is irrelevant given the need for compliance with the applicable provisions of the Code. WASPA’s view is that the non-compliance alleged continues to exist when viewing the higher-resolution versions, with specific reference to the pricing information.

10.2. ViaMedia strongly disagrees that the quality of the commercials viewed is not relevant to an investigation into compliance with the Code. It seems obvious that both the impression created by sub-standard versions in the mind of a viewer and the inability of the viewer to note clearly the different elements of the advertisement are directly relevant to investigating compliance.

- 10.3. ViaMedia regards the assessment set out in paragraph 2(1)(c) of the WASPA appeal submissions to be subjective and retains its view that the pricing is clear, legible and static and that it is in no manner obscured.
- 10.4. ViaMedia regards the assessment set out in paragraph 2(1)(d) of the WASPA appeal submissions to be subjective and retains its view that the pricing is directly below – and therefore adjacent to – the call to action.
- 10.5. The source of the copies is irrelevant.

*11. Interpretation of clauses 9.1 and 9.2 of the Code read with clause 8.9*

- 11.1. WASPA submits in paragraph 2.2 (e) that:

*e. The following section is not complied with: "...pricing information for the service must be shown on the screen for the entire duration of the advert..."*

*o Although the pricing information is displayed at the bottom of the screen (along with various other terms and conditions), for the duration of the advert, the placement of the pricing information is not compliant.*

*o Therefore, incorrect placement of pricing, although displayed for the duration of the advert, results in non-compliance with this requirement of the COC.*

- 11.2. This statement is, with respect, illogical: WASPA is alleging that the advertisements do not comply with the requirement that pricing information be shown on the screen for the entire duration of the advert, but in the very next line notes that the pricing information is displayed for the duration of the advert.

- 11.3. To the extent that the submission relates to the placing of the pricing information, this is dealt with above and below.

- 11.4. WASPA submits in paragraph 2.2 (f) that:

*f. The following section is not complied with: "...Pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action..."*

*o The pricing information is in a small font, contained at the bottom of the screen, along with various other terms and conditions.*

*o The pricing information blends into the terms and conditions paragraph, does not stand out, and is in no manner highlighted or differentiated from the other text contained in the paragraph.*



*o The pricing information is therefore neither clear, nor prominent, as it blends into the other terms and conditions which could easily be overlooked by a reasonable end-user.*

*o Most importantly, the pricing information is not immediately adjacent to the CTA.*

*o One of the reasoning's behind placing the pricing information immediately adjacent to the CTA, is to provide the consumer with an opportunity to clearly and prominently view the cost associated with joining the subscription service, at the point where instructions are provided on how to join.*

*o This affords the consumer the opportunity to make an informed decision on whether or not to join the service at the set cost and frequency of charge.*

*o Therefore, incorrect placement of pricing, as it is not displayed immediately adjacent to the CTA, results in non-compliance with this requirement of the COC.*

11.5. ViaMedia submits the following in response:

11.5.1. There is no "terms and conditions paragraph" and it is not clear why WASPA seeks to characterise a single sentence written in layman's terms in this manner.

11.5.2. Pricing information is placed first in this sentence and is highlighted by being in a different colour band, i.e. it is highlighted and afforded a position of prominence to bring it to the attention of consumers and in no manner obscured or hidden from consumers.

11.5.3. The dictionary definition of "adjacent" – a fair basis for the interpretation of the meaning of this term – is presented as "close to or near something" or "not distant".

11.5.4. ViaMedia submits that the adverts comply with these definitions.

11.6. The WASPA submissions continues to the effect that:

*h. As such, the pricing information needs to be placed immediately adjacent to this instruction (the CTA), in a clear and prominent way.*

*i. Placing the pricing information at the bottom of the screen, in a paragraph that blends into various other terms and conditions, is neither immediately adjacent to the call-to-action, nor clear and prominent, as required by the COC.*

11.7. ViaMedia refers to its responses above regarding the positioning of the pricing information.

- 11.8. ViaMedia takes issue with the subjective characterisation employed by WASPA to the effect that the pricing information “blends into various other terms and conditions”: this is self-evidently and, as set out above, not the case.
- 11.9. As set out above ViaMedia disputes that the pricing information is not clear and prominent or that it is not immediately adjacent to the call to action.
- 11.10. As regards the interpretation of clause 9.2., WASPA submits that:
- k. The pricing information is placed at the bottom of the screen, with substantial open space between the CTA and the pricing information.*
- l. As the pricing information is contained in a paragraph format, along with various other terms and conditions, it is displayed in a way that requires closer examination by the consumer in order to be informed of the cost of the service.*
- m. The pricing information is obscured by other terms and conditions, as all the information is contained in a paragraph format at the bottom of the page, and not in a clear and prominent position immediately adjacent to the CTA.*
- 11.11. ViaMedia submits in response that:
- 11.11.1. The spacing between the call to action and terms and conditions is irrelevant. This is because – unlike web/wap services where the user is able to scroll – television advertising presents on all information on a single screen and one is not able to hide information by relying on the fact that the user would need to interact (by scrolling) to access this information.
- 11.11.2. Placing the terms and conditions lower down and on a different colour band removes them from the “noise” of the advert and thus makes them more noticeable than if they were to be placed in the middle of the advert.
- 11.11.3. The balance of the WASPA submission in this regard repeats the core (subjective) assertion that the pricing information is obscured and incorrectly placed, dealt with above. The terms and conditions comprise a single line of text, not a paragraph. The pricing is placed first and highlighted and is not hidden amongst the terms and conditions in an attempt to obscure as WASPA insinuates. This sentence is written in laymen’s terms and is easily understood.

11.11.4. ViaMedia submits that there is quite clearly no intent on its part to deceive consumers viewing the advertisement.

11.11.5. No evidence of consumer harm has been submitted by the Media Monitor as part of the original complaint or by WASPA as part of its appeal submissions.

## 12. WASPA's challenges to the adjudication

12.1. ViaMedia does not dispute WASPA's interpretation of what constitutes a call-to-action and that there is a call-to-action present in the advertisements. Notwithstanding which ViaMedia does not believe that this is a pertinent consideration and notes that this was raised by the adjudicator and not by ViaMedia in its original response to the formal complaints. ViaMedia regards this aspect of the appeal as being irrelevant to a determination of compliance in respect of the current complaints.

12.2. WASPA continues to conflate the requirement that pricing information must be shown for the entire duration of the advert with the requirement regarding the positioning of the pricing information. These are two different requirements: as accepted by WASPA in its appeal submission the pricing information is displayed for the entire duration of the advert. This conflation is a continuous refrain throughout the WASPA appeal submission.

12.3. WASPA adopts a different view to that of the adjudicator, who found and made explicit statements regarding the individual requirements set out in clauses 9.1 and 9.2 of the Code:

### 12.3.1. The pricing information is on-screen the entire duration.

12.3.1.1. WASPA again misses the point by making a submission that, although this is true, WASPA's view that the pricing information is in the incorrect place means that display for the entire duration does not constitute compliance with the requirement relating to placing of pricing information. With respect, this is a statement of the obvious.

12.3.1.2. Nothing raised by WASPA changes the factual statement made by the adjudicator that the pricing information is on-screen the entire duration, as required by the Code.

12.3.2. The font is clear.

12.3.2.1. WASPA submits that this is not the case, but that the font is “small” and “at the bottom of the screen, along with various other terms and conditions”. WASPA repeats its assertion that the pricing information “blends into the paragraph of information and is by no means clear or prominent”.

12.3.2.2. Once again, WASPA is conflating separate requirements in an attempt to attack the adjudicator’s statement that the font is clear. The only relevant assertion from WASPA is that the font is “small”. ViaMedia notes that there is no requirement in the Code regarding the appropriate size of the font, and that this is again therefore a subjective assessment without an objective reference point.

12.3.2.3. This subjectivity is demonstrable: the Media Monitor is of the view that the font is small, implying that this is a factor in determining that the pricing information is not prominent. The adjudicator – and ViaMedia – are of a different view, with the adjudicator clearly regarding the font as “clear” which in turn implies that the pricing information text was not obscured through the size of the font.

12.3.2.4. The balance of the assertions relating to placing and prominence are dealt with elsewhere.

12.3.2.5. Nothing raised by WASPA changes the factual statement made by the adjudicator that the font is clear as required by the Code.

12.3.3. The display is prominent in that it is legible and is the first piece of information in the terms that remain on-screen for the entire duration.

12.3.3.1. WASPA takes issue with this finding, asserting that placing pricing information “at the bottom of a screen in a paragraph” does not comply with the requirement relating to prominence.

12.3.3.2. Aside from noting that the independent adjudicator was clearly of a different view, there is nothing new raised in WASPA’s assertions in this regard.

12.3.3.3. Nothing raised by WASPA changes the factual statement made by the adjudicator that the display is prominent in that it is legible and is the first piece of information in the terms that remain on-screen for the entire duration.

12.3.4. Insofar as there is a call to action, which I dispute, the price is always the next readable piece of information after the SMS number.

12.3.4.1. As noted above, ViaMedia is happy to proceed on the basis that there is a call-to-action present in the advertisements.

12.3.4.2. WASPA provides the following example:

*o Example: With web based subscriptions, we require the pricing information to be immediately adjacent to the call-to-action, which is usually a clickable button (component of the advert that triggers the network hosted confirmation step).*

*o When reviewing web based subscriptions, we do not allow numerous line spaces between this button and the pricing information. If there are line spaces – and even if this space is just blank, with no other information or images - the pricing information is not immediately adjacent to the CTA, and a complaint is lodged in order for the member to rectify the breach.*

*o Also, the pricing information – subscription service reference, price and frequency of the billing – needs to be displayed immediately adjacent to the CTA, and separate from any other information, specifically separate from any terms and conditions contained on the page, in order for the pricing information to be clear, prominent, not to require closer examination or be obscured in any way.*

*o Similarly, the pricing information for television adverts needs to be placed immediately adjacent to the CTA. If the CTA is placed in the middle of the screen, and the pricing information at the bottom of the screen in a paragraph with other terms and conditions, the space in between the CTA and terms and conditions paragraph would be seen as 'line spaces' for interpretation purposes, and consequently in breach of the clear, prominent and immediately adjacent requirement as set out in the COC.*

12.3.4.3. ViaMedia submits that one cannot compare apples to pears. The reasoning behind positioning of web-based services, was the fact that

users would need to scroll down if too many line spaces were inserted between the CTA and the terms and conditions/pricing – thus obscuring the information from the users. This is not possible on a television commercial.

12.3.4.4. Furthermore, “specifically separate from any terms and conditions contained on the page” is not a requirement of the Code.

12.3.4.5. WASPA is offering comments on web-based marketing which are not relevant to this matter.

12.3.4.6. Nothing raised by WASPA changes the factual statement made by the adjudicator that the price is always the next readable piece of information after the SMS number.

12.3.5. There is similarly no intervening visual between the so-called call to action and the price.

12.3.5.1. WASPA admits that “there are not visuals/images/text in between the CTA and the terms and conditions paragraph, which contains the pricing information, the placement is still not immediately adjacent and therefore not compliant”.

12.3.5.2. WASPA again seeks to obscure this admission by referring to other requirements of the Code.

12.3.5.3. WASPA submits that the adjudicator’s “incorrect interpretation of the CTA” affects several of the interpretations of the requirements.

12.3.5.4. ViaMedia disputes that this is the case, noting that no concrete examples are provided as to how interpretations of the requirements are affected. As noted above ViaMedia did not raise this aspect and has no objection to this particular finding being overturned.

12.3.5.5. Nothing raised by WASPA changes the factual statement made by the adjudicator and acknowledged by WASPA that there is no intervening visual between the CTA and the price.

12.3.6. The price is legible.

12.3.6.1. WASPA asserts that “the price is not clear, nor prominent. As stated above, it blends into a paragraph containing various terms and conditions, and is by no means highlighted or clearly brought to the attention of a reasonable consumer, as required by the COC”.

12.3.6.2. As set out above, the pricing information is placed at the beginning of the text in the footer and highlighted with a different colour band: it is at best disingenuous to state that this information “blends” into the other terms and conditions.

12.3.6.3. The requirement of the Code relates to legibility. Nothing raised by WASPA changes the factual statement made by the adjudicator that the pricing information is legible.

12.3.7. The price is horizontal;

12.3.7.1. WASPA does not dispute this finding.

12.3.8. The price does not require closer inspection;

12.3.8.1. WASPA disputes this finding, asserting that the average, reasonable consumer will have to take their attention away from the busy graphics, animations, images, colours and sounds etc. to inspect the pricing information at the bottom of the screen, where it blends into other text.

12.3.8.2. This is subjective: WASPA refers to the adverts being “busy”, but by who’s definition? Certainly not the version of the reasonable consumer posited by the adjudicator, who explicitly deals with this point:

*“While the commercials are “busy” they are not excessively so, and they are conveying one simple piece of information, not multiple pieces of information.”*

12.3.8.3. No evidence of consumer harm is presented to back up this claim or the general claim of non-compliance. On the contrary, ViaMedia have received no complaints from any regulating body including the Advertising Standards Authority of South Africa (ASASA) nor from any consumer,

notwithstanding that these advertisements have been running for nearly a year (they are no longer live).

12.3.9. The price is not obscured.

12.3.9.1. Again WASPA presents its understanding of the “average, reasonable consumer”, who would “have to take their attention away from the busy graphics, animations, images, colours and sounds etc. to inspect the pricing information at the bottom of the screen, where it blends into other text”.

12.3.9.2. Repeating the same assertions, subjectively and at times pejoratively formulated, does not make them any less subjective. ViaMedia has set out its response to these assertions elsewhere.

12.3.9.3. WASPA’s assertion appears to wilfully ignore the voice-over and we reiterate the finding of the adjudicator to the effect that, while the commercials are “busy”, they are not excessively so, and they are conveying one simple piece of information, not multiple pieces of information.

12.3.10. The price is not animated.

12.3.10.1. WASPA does not dispute this finding.

### **13. WASPA’s appeal in respect of subscription information**

13.1. ViaMedia notes at the outset that allegations of non-compliance with requirements to display subscription information as set out in the Code were not part of the original complaint and therefore cannot be part of any appeal relating to the original complaint. The original complaint cites clauses 9.1. and 9.2., both of which relate only to pricing information. The complaint raised does not reference clause 8.2. and it clearly and very specifically relates to the situation of the pricing information.

13.2. The general clauses cited – 4.2. and 5.5. – cannot be used as a standalone to bring in allegations of non-compliance not contained in the original complaint or put to ViaMedia for response. ViaMedia cannot identify any evidence provided justifying a finding under either of these clauses.



#### **14. WASPA's submissions on the network hosted confirmation**

- 14.1. WASPA's appeal submissions in this regard misconstrue the nature of the submission made by ViaMedia in its response to the formal complaint. ViaMedia's compliance with the requirements of the Code in this regard was raised as a mitigating factor and not as an argument relating to the allegation of non-compliance in respect of pricing information. The relevance of this submission in mitigation was to show that any potential harm to consumers caused by the advertising – should it be found to be non-compliant – would be immediately mitigated through the double opt-in procedure provided by ViaMedia.

#### **15. WASPA's submission relating to "perfectly executed commercials versus acceptable commercial"**

- 15.1. The adjudicator made the following finding:

*"I also note that one cannot confuse a perfectly executed commercial with the only acceptable commercial. The commercials before me could be clearer, they could comply with the Code better, and they are not examples of the pinnacle of clarity. However, that does not automatically mean that they are non-compliant. It is my opinion that they meet the requirements set down by the Code."*

- 15.2. WASPA regards this statement as "confusing" and "extremely conflicting" and as setting an "extremely dangerous precedent". WASPA asks what level of compliance is then required – objective or subjective?

- 15.3. With respect, WASPA is confusing "substantial compliance" with "partial compliance". WASPA's argument is premised on its own view that the pricing information is incorrectly situated and that the adjudicator is finding that there is no breach notwithstanding this non-compliance: hence "partial compliance".

- 15.4. But this ignores the fact that the adjudicator has come to a different conclusion and does not regard the pricing information as being in the wrong place. This is explicitly stated in the adjudication, and this same statement makes it clear that the adjudicator is assuming that there is a CTA for the purpose of assessing whether the pricing information is in the same place relevant to that CTA:

*"In so far as there is a call to action, which I dispute, the price is always the next readable piece of information after the SMS number;"*

- 15.5. The adjudicator has not found that ViaMedia’s advertising has breached any provision of the Code: it is not partially compliant and partially non-compliant (and such an approach would be nonsensical). Rather the adjudicator is of the view that – while the advert is compliant – more could have been done to make pricing information more prominent and clear. This does not constitute a statement that such pricing information is not prominent and clear.
- 15.6. WASPA’s concerns about the adjudication creating precedent for somehow sanctioning non-compliance as being “partial compliance” is unfounded and misplaced.
- 15.7. WASPA raises the query as to what level of compliance is then required – objective or subjective? A great deal of objectivity in the assessment of compliance with the Code of advertising was removed with the repeal of the Advertising Guidelines and there will always therefore be a subjective element in such assessment. This subjectivity should be informed by the objective elements available: in this case the eleven clear requirements of sections 9.1 and 9.2 as traversed by the adjudicator and found to have been complied with.
- 15.8. On the contrary, the assertions raised by the Media Monitor and then by WASPA are laced with subjectivity and the use of loaded terms to try and convey an impression of consumer harm and non-compliance.
- 15.9. This is evident in particular from paragraph 7(b) of the WASPA appeal submissions (our emphasis):
- The pricing was placed in such a way, **and in our opinion** in breach of the requirements as set out in the COC, where consumers were not informed about the cost in such a way which would have enabled them to make an informed decision.
  - **The incorrect placement of the pricing information mislead the consumer**, as the commercial at no point clearly and prominently displayed the pricing information.
- 15.10. Where is evidence of this consumer harm and misleading of consumers which is stated as a fact? Nothing has been presented other than the opinion of the Media Monitor.

#### **Submissions regarding any potential sanction to be applied**

16. In the event that an appeals panel, notwithstanding the above submissions, finds that ViaMedia has indeed breached the clauses cited by the Media Monitor in the two complaints under response, then the appeals panel is requested to consider the following in mitigation of such sanction:

- 16.1. ViaMedia's recent disciplinary record under the WASPA Code has improved significantly and it has not faced a complaint relating to television advertising of its services. This is despite ViaMedia being one of the largest television advertisers of WASP services in South Africa.
  - 16.2. The lack of any demonstrable consumer harm as set out above.
  - 16.3. ViaMedia's compliance with other requirements of the Code, notably clauses 15.12, 15.19 and 15.20, all of which serve to mitigate any consumer harm which may have been experienced.
  - 16.4. The subjective nature of the assessment at issue in both complaints and ViaMedia's good faith view that the commercials are compliant with the Code. That this is a good faith view is emphasised by the fact that the independent adjudicator reached the same conclusions.
  - 16.5. The steps in mitigation taken as set out in ViaMedia's response to the formal complaint, with particular reference to amendments undertaken at ViaMedia's cost to meet the concerns of the Media Monitor.
17. Notwithstanding the above submissions in respect of mitigation of any potential sanction, ViaMedia is concerned that – in the event that the Panel were to impose a sanction – the WASPA Code of Conduct does not allow ViaMedia a chance to appeal such sanction. This is notwithstanding that this will be the first sanction imposed in this matter. The civil procedure in the courts where a matter such as this is referred back to the *court a quo* does not find application.
  18. This on the face of it constitutes a further procedural violation of ViaMedia's right to fair, administrative action, and ViaMedia's rights in this regard remain reserved.
  19. Should such a scenario arise, ViaMedia requests that the panel specifically address this difficulty in its ruling.

## **Conclusion**

20. Assessing whether there is compliance with clauses 9.1. and 9.2 of the Code is a subjective assessment which is made with reference to the various requirements set out in those clauses.
21. The adjudicator has traversed these requirements and set out his or her assessment in respect of all them as a means to objectify the compliance assessment exercise. The adjudicator's findings are explicit insofar as these requirements are concerned:
  - 21.1. *The pricing information is on-screen the entire duration;*
  - 21.2. *The font is clear;*

- 21.3. *The display is prominent in that it is legible and is the first piece of information in the terms that remain on-screen for the entire duration;*
  - 21.4. *In so far as there is a call to action, which I dispute, the price is always the next readable piece of information after the SMS number;*
  - 21.5. *There is similarly no intervening visual between the so-called call to action and the price;*
  - 21.6. *The price is legible;*
  - 21.7. *The price is horizontal;*
  - 21.8. *The price does not require closer inspection;*
  - 21.9. *The price is not obscured;*
  - 21.10. *The price is not animated.*
22. These clear and explicit findings taken individually form a basis for objective assessment of compliance. They are in turn reinforced by the lack of evidence of consumer harm or prejudice arising out of the “blending” or incorrect placing of pricing information as presented by the Media Monitor or WASPA and by the lack of complaints by ViaMedia received from the ASASA, WASPA or directly from consumers in respect of the advertisements.

Regards

██████████

Ellipsis