



Report of the Appeals Panel

Complaint number	#61079
Cited WASPA members	PM Connect Africa (Pty) Ltd (1763)
Notifiable WASPA members	None.
Appeal lodged by	The Member
Type of appeal	Written appeal
Scope of appeal	<input checked="" type="checkbox"/> Review of the adjudicator's decision <input checked="" type="checkbox"/> Review of sanctions
Applicable version of the Code	17.9
Clauses considered by the panel	5.4; 22.4 read with 22.1
Related complaints considered	n/a
Amended sanctions	The R10 000 fine for breach of clause 5.4 is overturned. The R10 000 fine for breach of clause 22.4 as read with clause 22.1 is confirmed on appeal.
Appeal fee	50% of the appeal fee is refunded.
Is this report notable?	Yes.
Summary of notability	Clause 5.4 should not be considered to have been breached if another clause in the WASPA Code of Conduct is directly applicable and if there is no additional cause of action or factor which would justify the consideration of clause 5.4.

Initial complaint

1. The WASPA Compliance Department conducted a test on an application called “ABC Flash Cards for Kids – Teachers Paradise” on the 17th January 2025. During the test the user was referred to a “League Pass” which then referred the user to a Vodacom Network Hosted Confirmation Page for a subscription service called “NBA League Pass” which cost R9.00 per day.
 2. The WASPA Compliance Department then ended the test due to the alleged contraventions of the WASPA Code of Conduct.
 3. When informed of the complaint the Member indicated that they only used Google Ads as this service provider was the best in the industry, but, despite this, it was well known that Google’s ad placement was not 100% accurate. This was due to Google only providing a “content suitable for families” exclusion rather than an exclusion for children as Google was concerned that such an exclusion can be used by nefarious actors.
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Adjudicator’s findings

4. The Adjudicator considered the evidence and found that:
 - 4.1. The Member knew that the advertisements could target children but continued with the advertisements anyway and this action constituted “intention” in the form of *dolus eventualis* - or being reckless to the possibility of the harm being suffered - for the purposes of clause 22.4.
 - 4.2. The adjudicator then found the Member guilty of breaching both clause 5.4 (and imposed a fine of R10 000) as well as clause 22.4 and imposed another fine of R10 000.
 - 4.3. It is worth noting that the adjudicator bundled the breach of clause 5.4 with the breach of clause 22.4.
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Sections of the Code considered

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

22.1. *A “child” refers to a natural person under 18 years of age.*

22.4. *Subscription services must not be intentionally targeted at children.*

Appeal submissions

5. In its appeal submission the Member disputed that it had breached the WASPA Code of Conduct on the basis that it was not able to take any other steps than what it had done to avoid advertising to children. Despite this, it then detailed that it would conduct a weekly audit

of Google Ad placement reports to attempt to exclude the reoccurrence of advertising to children.

6. The Member further indicated – presumably as a mitigating factor - that despite this additional action of auditing the Google Ads, there remained a statistically unlikely possibility that advertisements would be placed in inappropriate apps.
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Deliberations and findings

MERITS

7. This is a rather curious appeal in that the Member has conceded the breach of the WASPA Code of Conduct but alleges that the breach was unavoidable. The Member then, in its appeal submission, sets out the step (an audit) it will take to avoid the recurrence of this breach thereby undermining its argument relating to the impossibility to avoid the breach of the WASPA Code of Conduct.
8. There is nothing that the Member provided that would justify the intervention of this appeal panel with the adjudication, with the exception of the issue set out below.

CLAUSE 5.4

9. Clause 5.4 of the WASPA Code of Conduct is an extremely powerful - if short - clause which states that “Members must have honest and fair dealings with their customers.” Arguably the entire WASPA Code of Conduct is concerned with setting out what is “fair” and “honest” and so clause 5.4 of the WASPA Code of Conduct is a general clause which is intended to be able to be applied where the conduct of the Member is clearly “unfair” or “dishonest” but that specific conduct has not (yet) been addressed by a specific clause within the WASPA Code of Conduct.
10. In recent years there has been a tendency by adjudicators to rely on clause 5.4, rather than to identify the specific clause that would more closely relate to the conduct by the Member. To a degree this tendency is understandable as the WASPA Code of Conduct is quite lengthy and is frequently updated and as a result a comprehensive knowledge of the entire Code of Conduct is not easy to maintain.
11. In a like manner, South African law had a similar challenge in that it was easier to challenge the conduct of a person based on a breach of the broad provisions of the South African Constitution, rather than to find and target the specific clause in subsidiary legislation which specifically addresses the conduct complained about.
12. In order to address this challenge South African law developed the principle of “subsidiarity”, which provides that if a specific piece of legislation exists to address a particular issue then the legislation must first be applied, before directly invoking the South African Constitution.
13. In the appeal panel’s view, all parties should be wary of applying the blunt instrument of clause 5.4 to a particular complaint without first interrogating whether there is a more specific and targeted clause of the WASPA Code of Conduct that applies to the conduct that was complained about. Moreover, when the Member’s conduct is addressed by a clause other than clause 5.4, then adjudicators should avoid finding that the Member also breached clause

5.4 as a finding that the Member also breached clause 5.4 in such a situation would amount to the imposition of a double penalty for the same conduct.

14. In the present case, clause 22.4 exactly describes the conduct of the Member and it is clear that the Member contravened this clause. What is not clear, however, is what additional action/inaction resulted in a breach of clause 5.4 in addition to the breach of clause 22.4? In the absence of any other factor the appeal panel upholds the appeal regarding the breach of clause 5.4 for the simple reason that the actions or inaction of the Member have already been more specifically sanctioned for the breach of clause 22.4.

SIZE OF SANCTION

15. The sanction imposed by the adjudicator in this complaint was R10 000 and is well within the range of sanctions imposed for a breach of clause 22.4. As a general rule the appeal panel should be hesitant to amend the sanction imposed by the adjudicator unless such a sanction is clearly misdirected or instills a sense of shock in the appeal panel. This is not such a case and as a result the appeal panel finds that the sanction for the breach of clause 22.4 should remain undisturbed.

Amendment of sanctions

16. The Member's appeal against the breach of clause 5.4 is hereby upheld.
17. The Member's appeal against the breach of clause 22.4 is hereby dismissed.

Appeal fee

18. As the Member was partly successful, 50% of the appeal fee should be refunded to the Member.