



REPORT OF THE ADJUDICATOR

In the matter between:

Gavin Penkin

COMPLAINANT

and

Integrat (Pty) Ltd in respect of Peach Mobile (Pty) Ltd

RESPONDENT

23 September 2005

WIRELESS APPLICATION SERVICE PROVIDER ASSOCIATION

Complaint #001

The Complainant launched a complaint against a print advertisement for the services of Peach Mobile (Pty) Ltd (hereinafter the "Information Provider") in terms of the Code of Conduct of the Wireless Application Service Providers' Association ("WASPA"). The print advertisement was published in People Magazine, a weekly, mass-market, celebrity and gossip magazine. According to the South African Advertising Research Foundation's All Media and Products Survey, People Magazine has an average readership of 618 000, with 16-24-year-olds making up 32% of People Magazine's regular readers.

The advertisement, in essence, encourages consumers to send an SMS to the Respondent enabling them to receive various content from the Information Provider for their mobile phones.

COMPLAINT

The Complainant submitted that the Code of Conduct clearly states that a request to join a subscription service must be an independent transaction and may not be bundled with content. The Complainant alleges that advertisement in People Magazine offers content and when you download content you are subscribed to the service. The Complainant alleges that consumers are accordingly not made aware that by sending one SMS they are in fact subscribing to a subscription service for which they will pay subscription fees. The Complainant further alleges that opting to receive weekly content as a result of buying one item is confusing and misleading to the consumer.

RESPONSE

In the response, the Respondent indicated that it is an aggregator of content only and based its reply on that of the Information Provider.

The Information Provider indicated that:

- The advertisement was in an edition of People Magazine dated 2 September 2005, however this edition was in fact distributed on 29 August 2005, prior to the Code of Conduct coming into effect on 1 September 2005.
- The advertisement clearly states the price and the frequency of the services, i.e. R10 per week, thereby implying that the request to purchase is a subscription request and not a one-off sale. The Information Provider concedes that this may not be identical to the requirements as set forth by the Code of Conduct and had (as of the date of the complaint) "rectified this going forward".
- It only received the updated Advisory in respect of Section 11 of the Code of Conduct on 22 August 2005. It alleges that it has made every effort to enforce the Code of Conduct with immediate effect, even though they perceive the notice period as extremely short. They admit that there were advertisements that had already been submitted to the magazines for print and thus may not have been 100% compliant with the Code of Conduct, as amplified by the aforementioned advisory. This advertisement in People Magazine is an example of one of them. The Information Provider alleges that it is not possible at all to expect or even request that a magazine reprints an issue.
- It believes that the Complainant, as an executive of a competitor, regularly initiates frivolous complaints and legal action against his competitors presumably in an endeavour to stifle competition. As such, the Information Provider recommends that an organization such as WASPA should not (or would not) allow itself to be used as an instrument of such an unfair business practice.
- It is "very serious about adhering to the Code of Conduct".
- It has taken all necessary steps to ensure that every single advertisement that is submitted to print going forward will be compliant with the Code of Conduct, as amplified by the Advisory and attached an example, which it alleges reflects the most recent amendments to the content of its print advertisements.

The Respondent did however indicate:

- It agrees with the response of the Information Provider.
- It received the WASPA Advisory on Subscription Services on 8 August 2005. After review, this information was forwarded to the Information Provider on 22 August 2005, which the Information Provider immediately implemented. This

however was too late for the issue of People Magazine already in print and therefore the Information Provider missed the deadline.

- The Information Provider always adheres to good practice the advertisement very clearly indicates to subscribers that the service being requested is a subscription service. This is indicated on the top of the page, above each content category, below the price, below content types as well as in the terms and conditions section. Although this does not comply fully with the WASPA interpretation of the Code of Conduct due to the delays mentioned above, the intent of both the Respondent and the Information Provider to adhere to the guidelines, is indicated. The Respondent further alleges that the Information Provider has also always committed to support the WASPA practices, although they are not currently allowed to become a member.
- It believes WASPA should change its constitution to allow all companies providing Mobile Services to become WASPA members, even though they use an Aggregator like the Respondent. This will allow for the information to be communicated to them, directly and in time, and to not be dependant on the Aggregator to communicate the information to them. The respondent, as an aggregator, and a member of WASPA, does not wish to bombard our customers with all communications from WASPA, much of which the Respondent alleges is irrelevant.

RELEVANT CLAUSES OF THE CODE OF CONDUCT

In light of the complaint the following clauses of the Code were taken into account:

- Clause 11 – Subscription services

In addition, the Adjudicator took the following clauses of the Code into account:

- Clause 3.9 - Information providers
- Clause 4 - Provision of information to customers
- Clause 6 - Advertising and pricing
- Clause 8 - Adult services
- Clause 9 - Competitions
- Clause 10 - Contact or dating services.

RULING

The Adjudicator has considered the relevant documentation submitted by the respective parties.

The Respondent (and through it, the Information Provider) essentially responded by submitting firstly that sufficient time was not given to rectify deficiencies in it advertising and secondly that the material has been amended.

The nature of the complaint is such that the Adjudicator cannot consider the question of whether the amendment addresses the complaint without considering the merits of the complaint. For this reason the Adjudicator has considered the material on which the complaint is based, and has attempted to outline a principle that will guide the Respondent in its amendments, as well as the industry as a whole on the vexed issue of subscription services and the advertising thereof.

There are also a number of preliminary issues that must first be disposed of –

Information Providers

The Information Provider, Peach Mobile is an Information Provider as defined in the Code of Conduct (Clause 2.11. An “**information provider**” is any person on whose behalf a wireless application service provider may provide a service, and includes message originators) and as such is not a member of WASPA. Accordingly, the Code of Conduct does not bind the Information Provider, nor does this decision - however, the member is responsible for content of the Information Provider in terms of clause 3.9, which provides:

3.9. Information providers

3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.

3.9.2. The member must suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.

It is accordingly appropriate to consider a potential contravention of the Code of Conduct in respect of the advertisement of the Information Provider, as:

- the Respondent is obligated to bind the Information Provider contractually to adhere to the Code of Conduct; and
- a form of sanction (albeit limited to suspension or termination of services) can be imposed by the Adjudicator on the Information Provider, through the WASPA member.

Complainant

A number of accusations are made concerning the use of the Code of Conduct and particularly the complaints process in terms thereof by the Complainant as abusive, a mechanism to stifle competition, gain competitive advantage or as being unlawful.

This is of grave concern to the Adjudicator, as abuse of the complaints process in terms of the Code of Conduct could bring the Code of Conduct and particularly the complaints process, into question. This is a matter that requires careful monitoring by both the WASPA Secretariat and the Adjudicator going forward to ensure that abuse of the process does not take place. However in this complaint, the Adjudicator rejects the allegation of abuse of the complaints process for the following reasons:

- The Complainant submitted the complaint in his own name, however clearly indicated his involvement as an employee and director of a competitor of the Respondent and the Information Provider;
- There is a case of *prima facie* non-compliance with the Code of Conduct and same is admitted in part by the Respondent and the Information Provider (with a potentially exculpatory explanation); and
- The Adjudicator has not been able to identify any unlawful conduct on the part of the Complainant.

The Adjudicator commends the Complainant for bringing this matter to its attention and his vigilance. Nevertheless, the Adjudicator cautions that the complaints process is intended to protect consumers and enhance the reputation and business practises of wireless application service providers, not as a mechanism to obtain a competitive advantage. As such, a complaint brought by a competitor to ensure equivalent levels of compliance across all WASPA members and accordingly fair competition, is acceptable. However complaints brought purely to frustrate, inconvenience or stymie a competitor will be frowned upon.

The Adjudicator also questions the bringing of the complaint in the name of an individual rather than in the name of the competitor. It is not possible to ascertain whether the complaint has been submitted by the Complainant in his personal capacity or in his capacity as a representative of the member, the Adjudicator accordingly recommends that future complaints of this nature be brought in the name of the member, not an employee, director or other individual associated with the WASPA member. The Adjudicator further refers to the practice of the Advertising Standards Authority of South Africa, requiring payment for the determination of complaints brought by competitors and recommends to WASPA that it consider such a practice.

Advertising Guidelines

According to clause 6.1 of the Code of Conduct:

6.1. WASPA advertising guidelines

6.1.1. In addition to the provisions listed below all members are bound by the *WASPA Advertising Guidelines*, published as a separate document.

6.1.2. The latest version of the *WASPA Advertising Guidelines* will always be available on the WASPA web site.

however, as at date of publication of the advertisement, submission of the complaint and adjudication thereof, the WASPA Advertising Guidelines have not been finalised. Accordingly, the Respondent cannot be sanctioned for non-compliance with the WASPA Advertising Guidelines. Nevertheless drafts of the WASPA Advertising Guidelines have been circulating for some time and the Respondent (and through it Information Providers that rely on the Respondent's services) should be working towards full compliance with the WASPA Advertising Guidelines.

In the opinion of the Adjudicator, neither the advertisement giving rise to this complaint, nor the version submitted by the Information Provider to indicate compliance with the Code of Conduct, meet the requirements of the draft WASPA Advertising Guidelines.

As such the Adjudicator recommends that significant attention be paid to the requirements of the draft WASPA Advertising Guidelines and compliance therewith, failing which further complaints may be received. Indeed, according to clause 13.1.5 of the Code of Conduct, the WASPA secretariat may initiate a complaint against a WASPA member on behalf of WASPA, should it become aware of an apparent breach of the Code of Conduct.

Restriction to the Complaint Received

In making a decision on a complaint, the Adjudicator is obliged by clause 13.3.7 of the Code of Conduct, to:

13.3.7 carefully review:

- (a) the complaint;
 - (b) any response the member has made to the complaint;
 - (c) the WASPA Code of Conduct;
 - (d) any other material relevant to the complaint, as supplied by WASPA.
- 13.3.8. On the basis of the evidence presented, the adjudicator will decide whether there has been a breach of the Code. Each case will be considered and decided on its own merits.

There is no obligation on the Adjudicator to restrict the review or decision solely to the complaint received. Indeed a review of the advertisement complained of in conjunction with the Code of Conduct seems to indicate a number of other *prima facie* breaches of the Code of Conduct, which the Complainant has not raised but which nevertheless fall within the power and authority of the Adjudicator to review, in terms of clause 13.3.7 of the Code of Conduct.

This power and authority stems from the fact that the *prima facie* breaches of the Code of Conduct are apparent from the body of the advertisement itself, a copy of which was annexed to the complaint (and the advertisement submitted by the Information Provider) or could be regarded as "material relevant to the complaint, as supplied by WASPA". It is clear that the advertisement falls clearly within the scope of clause 13.3.7 of the Code of Conduct and as such the Adjudicator is not restricted to deciding on the complaint only but may consider the advertisement as a whole.

The specific circumstances can now be considered:

Subscription Services

For the purposes of convenience, the definition of a subscription service in the Code of Conduct and the provisions of clause 11 of the Code of Conduct regarding subscription services are set out below in full.

2.20. A "subscription service" is any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction.

11. Subscription services

11.1. Manner of subscription

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services".

11.1.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service.

11.1.3. Where feasible, billing for a subscription service must indicate that the service purchased is a subscription service.

11.1.4. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

11.1.5. Subscription services with different billing frequencies should not have a subscription mechanism likely to cause a customer to accidentally subscribe to a more frequent service.

11.1.6. Members must ensure that children accessing subscription services confirm that they have permission from a parent or guardian do to so.

11.1.7. Once a customer has subscribed to subscription service, a notification message must be sent to the customer containing the following information:

- (a) The cost of the subscription service and the frequency of the charges;
- (b) Clear and concise instructions for unsubscribing from the service;
- (c) The member's contact information.

11.2. Customer support

11.2.1. Assistance, such as 'help' information, for subscription services must be easily available to customers, and must not be limited to a medium that the customer is unlikely to have access to.

11.3. Termination of a service

11.3.1. Instructions on terminating a subscription service must be clear, easy to understand, and readily available.

11.3.2. All subscription services must have an unsubscribe facility available at no more than one rand.

11.3.3. Where feasible, customers should be able to unsubscribe from any subscription service using no more than two words, one of which must be 'STOP'.

11.3.4. Members must ensure that the termination mechanism is functional and accessible at all times.

The majority of the content and/or services appearing in the advertisement in question fall clearly within the definition of subscription services, the two exceptions being the competition and the FLIRTnet service appearing on the top right hand side of the advertisement and in respect of which no indication as to whether same are subscription services or not. The Adjudicator has not undertaken an independent investigation of the content and/or services offered by the Information Provider through the Respondent.

The Information Provider is to be commended on the clarity of its advertising and the clear identification thereof as a subscription service (particularly when compared with some other advertising practices in the industry). Nevertheless, the advertisement contains a number of significant breaches of the Code of Conduct, in particular:

- **Differentiation Between Networks**

The Adjudicator recognises that business practices differ between the network operators (Vodacom on the one hand and MTN and Cell C on the other hand) regarding subscription services. Within the limitations of these differing business practices, the advertisement does not give the consumer sufficient information to make an informed decision, particularly MTN and Cell C subscribers, where the minimum charge of R20 differs significantly from the pricing advertised and no indication is given as to how a subscriber from these

networks chooses the content falling within their chosen selection (for example, will sending the keyword for a particular polyphonic ring tone allow the consumer to choose the remaining polyphonic ring tone in the selection or is this chosen by the Information Provider? If the consumer sends the different keywords for two different polyphonic ring tones, will they be charged once or twice?).

In addition, the description of the composition of the selection for MTN and Cell C subscribers in the body of the advertisement is confusing and can be understood as entitling the consumer to all of the selected content (5 wallpapers, 5 info services AND 1 game) rather than one of these selections (5 wallpapers OR 5 info services OR 1 game).

The wording of the terms and conditions at the foot of the advertisement is an improvement, but still creates the possibility for confusion.

This is not a specific breach of clause 11 of the Code of Conduct, rather of clause 6.2.4, which requires that pricing contained in an advertisement must not be misleading. Clause 6.2.4 proceeds to give a specific example of intentionally misleading pricing, yet this example is not exhaustive. In the current circumstance it is the finding of the Adjudicator that the pricing information in the advertisement is misleading. It is not necessary to decide if the pricing is intentionally or negligently misleading, however for the purposes of sanction, the assumption has been made that the provision of misleading pricing information is not intentional and merely negligent.

- **Bearer Costs**

The pricing information does not include bearer costs, a clear breach of clause 6.2.3. which provides that pricing must not contain any hidden costs. Where applicable, pricing for content services must include the cost of the content and indicate any bearer costs that may be associated with downloading, browsing or receiving that content.

The terms and conditions contain an oblique reference to bearer costs viz "Standard WAP & GPRS rates apply". This is given insufficient prominence and some indication of expected bearer costs must be given, preferably in the main body of the advertisement and with reasonable prominence having regard to the quantum of such costs.

- **Differentiation Between Subscription Frequency**

The Information Provider uses a single letter to differentiate between daily and weekly wallpapers. This is capable of significant confusion and accidental subscription to a service of the incorrect frequency, a breach of clause 11.1.5. Again the assumption has been made that this is a negligent breach of the Code of Conduct and the Information Provider (through the Respondent) is required to introduce alternate key words to obviate this issue, for example "daily celeb278" and "weekly celeb278" rather than "celeb278" for the daily service and "celebs278" for the weekly service, as is currently provided.

In addition, information services are placed under a heading indicating a charge of R4 per day, however a mix of daily and weekly frequencies are included under this single heading and some of these services have no frequency indicated. This also requires remediation.

- **Bundling of Content and a Subscription Service**

The key issue of the complaint is the bundling of content and a subscription service. Again, the Information Provider is to be commended for the clarity of its advertising and the generic nature of the information services and wallpapers are suitably generic to fall outside of the complaint.

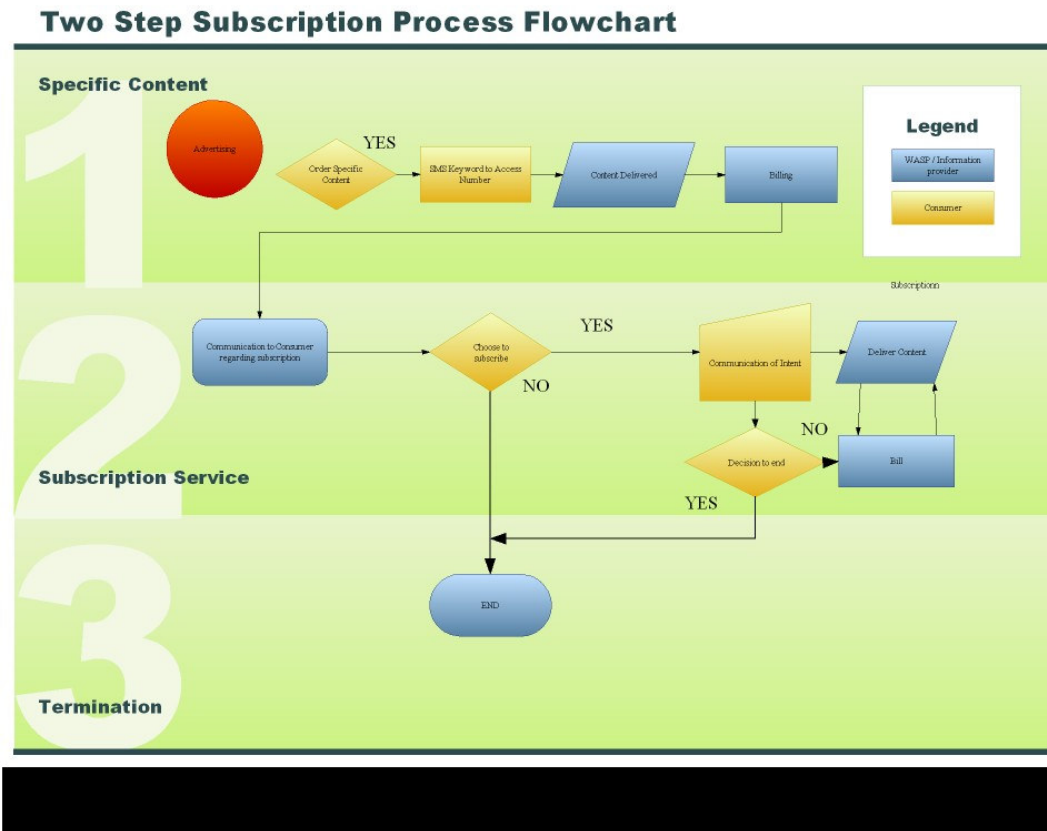
However, the Information Provider breaches this provision of clause 11.1.2 read in conjunction with clause 11.1.4 of the Code of Conduct regarding the ring tones and games advertised. The key issue is that once a consumer has obtained a specific item of content, the consumer then forfeits such choice and is subscribed to receive further content items of the Information Provider's choice. This is wholly unacceptable.

The Information Provider and the Respondent allege that this issue has been remedied in its subsequent advertising and an example of such advertising is provided. Indeed, the example of the subsequent advertising is a significant improvement on the advertisement forming the basis of this complaint in a number of respects (dealt with more fully below). However, regarding the specific issue of bundling content and a subscription service, the amended advertisement does not ensure compliance with clause 11.1.2 read with 11.1.4 of the Code of Conduct. Advertising a specific content item with a subscription service is clearly prohibited and the provision of better information by the Information Provider in its amended advertisement does not remedy such breach.

The Adjudicator recognises that the Information Provider sends a confirmation message to the consumer along the following lines: "Welcome. U will get 1 Real sound msg/week. 2 unsubscribe sms *****278 STOP to 31993. Cost R2/msg". Other than the question of a R3 charge for unsubscribing, sending to such a message obviates much of the potential damage that could accrue to a customer misled by the advertisement.

It is not the intention of this decision to require only generic content be used in advertisements for subscription services. If a member (or an Information Provider) wishes to refer to specific content in advertising, this must be done in such a way that a reasonable consumer will understand that the specific content referred to is only an example of the content to be received by subscription. Alternatively the member (or an Information Provider) must implement a process to ensure that the initial transaction for specific content is independent of the subscription service. Such a process could include a double opt-in, in terms of which a request to receive specific content and an opt-in to subscribe are contained in two separate consumer initiated communications and/or transactions requiring a specific action [but not the inaction] of the consumer).

Viewed graphically this can be seen as:



There is no indication that such a process is employed and as such the transaction to obtain an item of specific content and the joining of a subscription service are not independent transactions and could give rise to a situation where a subscription to a subscription service is initiated as a result of a consumer requesting non-subscription content.

This is a breach of clause 11.1.2 of the Code of Conduct and raises the possibility of an inadvertent (but potentially negligent) breach of clause 11.1.4 of the Code of Conduct.

The following additional breaches or potential breaches of the Code of Conduct have been identified:

- **Adult Content**

It is noted the advertisement promotes a significant number of adult services (2.1. An "adult service" is any service where the content or product is of a clearly sexual nature, or any service for which the associated promotional material is of a clearly sexual nature, or indicates directly, or implies that the service is of a sexual nature).

The Code of Conduct specifically requires:

- Adult services to be clearly indicated as such in promotional material and advertisement;
- Promotions for adult services to be in context with the publication in which they appear;
- A member to take reasonable steps to ensure that only persons of 18 years of age or older have access to adult services; and
- Explicit confirmation of a user's age prior to the delivery of an adult service.

In the context of the publication in which the advertisement appeared and the demographic of its readership, it is the *prima facie* view of the Adjudicator that the various adult services are inappropriate in an advertisement of this nature. In addition, there is no clear separation between adult and general services or indication of adult services. The note regarding the age restriction for adult services is appreciated, but not sufficient.

There is also a potential breach of clause 3.1.2 of the Code of Conduct requirement for members (and through them Information Providers) to act lawfully at all times, due to possibly infringement or non-compliance with the Film and Publications Act.

The Adjudicator has not been given sufficient information by WASPA regarding the adult services contained in the advertisement to make a decision regarding the adult services and the adjudicator's decision in this regard is withheld, pending further review.

- **Competition**

The competition appearing in the advertisement appears *prima facie* to breach the provisions of clause 9 of the Code of Conduct, by failing to provide full details of the operation of the competition (inter alia clauses 9.1.2, 9.1.4 and 9.1.5) and the reference to an Internet hyperlink not readily available to all consumer and not working at the time of this decision according to information supplied by WASPA.

There is also a potential breach of clause 3.1.2 of the Code of Conduct requirement for members (and through them Information Providers) to act lawfully at all times, due to possibly infringement or non-compliance with the Lotteries Act.

The Adjudicator has not been given sufficient information by WASPA regarding the competition contained in the advertisement to make a decision regarding the competition and the adjudicator's decision in this regard is withheld, pending further review.

- **Contact and Dating Services**

Regarding the FLIRTnet service contained in the advertisement, this appears to be a contact and dating service as defined in the Code of Conduct. The advertisement does not contain the information and warnings required by clause 10 of the Code of Conduct in respect of contact and dating services, however the processes used by the Information Provider may remedy this *prima facie* breach of the Code of Conduct.

The Adjudicator has not been given sufficient information by WASPA regarding the contact and dating services contained in the advertisement to make a decision regarding the compliance of such contact and dating services and the adjudicator's decision in this regard is withheld, pending further review.

In any event, there is no indication of the cost of this service, in clear contravention of clause 6.2.2 of the Code of Conduct. Accordingly, the Adjudicator finds a breach of clause 6.2.2 of the Code of Conduct regarding the pricing of this service.

Improvements and deficiencies

The Adjudicator recognises the efforts of the Information Provider to improve its advertising and welcomes the amended advertisement submitted as proof thereof. The Adjudicator notes that the amended advertisement is an improvement in some respects, particularly the description of the subscription service, the differentiation between the networks and general information regarding the subscription service but remains deficient with regard to:

- Bundled content and subscription services;
- Adult services, competitions, contact and dating services and bearer costs.

FINDING

The Adjudicator therefore finds breaches of the WASPA Code of Conduct in the respects outlined above, in respect of the advertisement that is the subject of this complaint.

These are material breaches, however they cannot be remedied by the withdrawal of the advertisement in question.

SANCTION

The Respondent (and through it the Information Provider) is formally reprimanded and ordered to:

1. Ensure that all future advertisements do not breach the Code of Conduct in the respects outlined above;
2. Notify WASPA of any advertisements placed prior to the date of this decision for publication after date hereof and which cannot reasonably be amended to comply with 1 above and an explanation why such amendment cannot reasonably take place;
3. Implement processes (whether as described in this report or otherwise) appropriate to remedy the breaches of the Code of Conduct identified in this Report and in particular to obviate these breaches during the period while pre-booked advertising is running (as per 2 above);
4. Pay a fine of:
 - a. R20 000 in respect of the bundling of content and a subscription service, such that they are not independent transactions; and
 - b. R30 000 in respect of the remaining breaches of the Code of Conduct.

The Adjudicator recognises that:

- There is has made no finding of an intentional breach of the Code of Conduct in respect of the advertisement;
- The Information Provider has taken significant (but insufficient) steps to remedy the breaches of the Code of Conduct;
- The date of publication of the edition of the magazine in which the advertisement appeared and its proximity to the introduction of the Code of Conduct and the release of the WASPA Advisory on Subscription Services; and
- The Code of Conduct was adopted by WASPA in June 2005, yet provided for a hiatus in implementation of over two months to avoid exactly the type of situation the Information Provider and the Respondent seek to use to explain their non-compliance with the Code of Conduct.

Accordingly, the fines imposed are suspended for a period of twelve (12) months from date of this Report; provided that no further breaches of the Code of Conduct in the specific respects detailed in this Report are identified in such twelve (12) month period from the date of this Report and acknowledging that complaints in respect of the advertisements referred to in 2 above will not apply for the purposes of the suspension

of these fines as long as clauses 2 and 3 above have been complied with. As the Respondent is an integrator for a number of information providers, a further breach will only be considered if it relates to content provided by the Respondent or the Information Provider.

The complaint is upheld.

A handwritten signature in black ink, appearing to read 'Milbe', with a large, sweeping underline.

ADJUDICATOR