



REPORT OF THE ADJUDICATOR

WASPA Member (SP) **Integrat (Pty) Ltd**

Information Provider (IP)
(if applicable) **Gozomo**

Service Type **Subscription**

Source of Complaints **Competitor**

Complaint Numbers **#0141, #0186 and #0188**

Complaint

Complaints were received in respect of the service offered by the IP through the SP. In particular the complaints concerned the bundling of content items and a subscription service, as evidenced by various advertisements for the service as placed by the IP in various publications. As the three complaints concern essentially the same issue, were submitted by the same complainant and in respect of the same service, provided by the same IP through the same SP, these three complaints have been consolidated into a single report.

The advertisements in complaints #0186 and #0188 are indistinguishable, other than that they appeared in different publications and the advertisement in complaint #0141 is substantially similar to the other advertisement, other than the fact that it appears in English rather than Afrikaans with some only minor differences in the content items on offer and no perceptible difference in the format of the advertisement or the process employed for the subscription service.

The basis of the various complaints is set out below:

Complaint Number	Section of WASPA Code of Conduct	Detailed Description	Publication	Date of Publication
#0141	11.1.2	Section 11.1.2 Clearly states that a request to join a subscription service must be an independent [sic] transaction, with the specific intention of subscribing to a service. It further states that to join a subscription service may not be bundled with a request for specific content[.]	People magazine	20 January 2006

		In the games and Top Hits section the user must SMS the code of a specific item to join the subscription service.		
#0186	11.1.2	<p>Section 11.1.2 Clearly states that a request to join a subscription service must be an independant [sic] transaction, with the specific intention of subscribing to a service. It further states that to join a subscription service may not be bundled with a request for specific content[.]</p> <p>When requesting an ring tone, you are automatically subscribed to a service.</p> <p>This is the same complaint which has been lodged numerous times against Gozomo. They have been found guilty of contravening the code of conduct, and fined, yet they continue to mislead the consumer.</p>	Huisgenoot magazine	23 February 2006
#0188	11.1.2	<p>Section 11.1.2 Clearly states that a request to join a subscription service must be an independant [sic] transaction, with the specific intention of subscribing to a service. It further states that to join a subscription service may not be bundled with a request for specific content[.]</p> <p>In the ad if you request a ring tone or a game, you are automatically subscribed to a service.</p>	TV Plus magazine	22 February 2006

The following clauses of the WASPA Code of Conduct were considered:

2.11. An “information provider” is any person on whose behalf a wireless application service provider may provide a service, and includes message originators.

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.

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.

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.

SP response

The Secretariat received several responses from the SP in its own regard as well as from the IP.

These responses are set out comprehensively (with minor editing) below:

Complaint Number	IP Response	SP Response
#0141	<p>We refer to the complaint number #141 referring to the Gozomo advertisement placed in People Magazine dated 28 January 2006 and respond as follows on behalf of Gozomo:</p> <p>We have as yet not had any response to our comments in relation to Complaints Number 26 and 58 lodged against Integrat by Exactmobile in reference to other advertisements placed by our company.</p> <p>In our response to those complaints we raised serious concerns relating to general issues including the jurisdiction of WASPA over advertisements placed by Information Providers and potential anti-competitive practises. These issues remain pertinent to the current complaint and we ask that they be taken into account once more. We remain and continue to be hampered dealing with these issues by our failure to receive any response from WASPA in regard to the concerns that we raised. To a large extent the provisions of this submission are a repeat of our comments to the last complaint raised against our company by the very same complainant however due to our failure to have had any response on these issues we will re-iterate our points.</p> <p>We do not believe that our advertisement constitutes a breach of the Code of Conduct and the consumers (end-users) are fully informed of the nature of the subscription service or bundled offering being</p>	<p>Integrat was merely the aggregator for connectivity in this case, and not the Content Provider or Content Aggregator. We would however like to comment on our observations in this matter.</p> <p>We have reviewed the attached advertisement, and found that the ad, according to our interpretation of the WASPA Code, complies with the code due to the following reasons:</p> <p>The advert did not mislead the user by grouping content. The ad clearly indicates that the service being accessed is a subscription service, and that the item to be downloaded is the first item in the series. The word Subscription Service is mentioned on the top of the page as well as in the specified section.</p>

<p>advertised and as such would have the specific intention of subscribing to the relevant service.</p> <p>In examining the details of the Complaint it appears that it is alleged that there has been a breach of Section 11.1.2.</p> <p>The relevant section of the Code reads as follows"</p> <p>"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."</p> <p>The Complainant proceeds to add that "It [Section 11.1.2] further states that to join a subscription service may not be bundled with a request for specific content.</p> <p>Section 11.1.2 has no such addition or prescription. The Complainant is presumably referring to the Advisory on Subscription Services. This Advisory is dated 8 August 2005 and is said in its introduction to</p> <p>"provide a step-by-step explanation of section 11 of the WASPA Code of Conduct. The intention of the advisory is to provide a guide for WASPs who wish to offer subscription services in a manner that is consistent with the requirements of the Code of Conduct."</p> <p>We should add that Ant Brooks at the last WASPA meeting clarified that the Advisory is nothing more than a guide to assist WASPA members - has had no formal adoption procedures and is not binding on members. The Complainant was present at that meeting and should be aware of this stance from the author of the document. As a member of the Code Committee the Complainant should also be aware of the non-binding nature of the Advisory and his failure to differentiate between the Code and the Advisory is misleading and inaccurate particularly in a formal complaint procedure. The Complainant's vague and incorrect mingling of the provisions of the Code and Advisory is a disservice to both WASPA and the Code Committee and</p>	<p>Further more, the customer receives a SMS with the response containing the fact that it is a subscription service being accessed, as well as on how to exit the service.</p> <p>We therefore believe that our customer was not in the wrong in the way the ad was presented to the public, and the ad did not contravene the WASPA code.</p> <p>This customer is further more in the process of registering as a affiliate WASPA member, and shall soon be a registered WASP as well.</p>
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

irresponsible in a complaint procedure which carries potential sanctions which could severely impact on our business.

Be that as it may nothing in the Constitution of WASPA or the Code itself gives any binding authority to such an Advisory and as such we believe it to be of illustrative force and effect only. Certainly nothing in WASPA's Code of Conduct provides for any sanction for a breach of an "advisory."

Insofar as the Advisory does deal with Section 11.1.2 of the Code it states the following

"A request from a subscriber to join a subscription service may not be bundled with a request for specific content. It must be an independent transaction. For example, "This picture is an example funny picture. To subscribe to the daily funny picture, SMS FUNPICS to 12345," does not bundle any particular content with a subscription service. However, "To get this picture, SMS FUNPICS to 12345. You will also be subscribed to the daily funny picture," is an offer bundling a subscription service with a specific item of content (the picture in the advert), and is thus not allowed.

We categorically reject this expansion of the Code of Conduct in what purports to be a "guide" to the Code of Conduct and which has not been approved by WASPA members in the same manner as the Code of Conduct. The proposed interpretation is unprecedented in our experience and unnecessarily restrictive on our business practice and commercial offering.

Our problem with the advisory arises not from the example given above but from the general "new requirement" that a request to join a subscription service may not be bundled with a request for specific content.

Rather than serve as a protection to the end user this provision would actually prevent us offering the consumer a choice of content to start the subscription cycle. By way of analogy this is like asking a publisher not to sell a years subscription to

a monthly magazine "starting with this month's edition."

As one of the leading providers of subscription services we were not consulted with regard to either the code or the so-called advisory. We have not come across any similar regulation in any of our international operations

We do not believe that our response to this Complaint is the proper forum to address fully these deficiencies in the Advisory nor does the simple nature of the Complaints procedure adequately provide for a full airing of views when an interpretive issue of the Code is in question.

We have once more in addition been hampered in our efforts to adequately respond to the Complaint by the Complainants lack of detail in the Complaint. In the circumstances we can only state generally that we believe that our advertisement provides full and adequate information which will enable the end user to ascertain the nature of the service being offered.

Due to our rejection of the general prohibition against "bundling" we believe that the only real question which arises from Section 11.1.2 of the Code in relation to our advertisement is "Is there an independent transaction in order to subscribe?" The answer to this question is clear and unequivocal - there is only one transaction that a subscription customer can order through our advertisement, and that is a subscription service. There are no non-subscription services offered to subscription network customers and as such no other transactions are possible.

Even were the example of the advisory quoted above to be followed one will notice an important distinction in our advertising. Using the language of the advisory by way of analogy instead of saying

"To get this picture, SMS FUNPICS to 12345. You will also be subscribed to the daily funny picture,"

	<p>our advertising in effect says</p> <p>Subscribe to FUNPICS - to start your subscription with pic1 SMS X to 12345, to start with pic2 sms y to 12345 etc.</p> <p>Our advertising in question states clearly both above the section heading as well as at the top of the page itself that the service offered is a subscription service.</p> <p>Finally and perhaps most importantly the Complainant relies for its complaint upon the advertisement alone which does not provide a full picture of the transaction between us and the end user. In each and every case where an end user is able to request a specific item of content as the commencement of the subscription a double opt in procedure is used to give end users further opportunity to confirm the nature of the transaction.</p> <p>We trust that our concerns and submissions noted above will be given the necessary consideration and that no further action will be required in respect of this complaint.</p>	
<p>#0186 & #0188</p>	<p>We refer to WASPA Code of Conduct complaint #0186 and WASPA Code of Conduct complaint #0188 and wish to respond to these complaints on behalf of Gozomo, the Information Provider in respect of each of these advertisements.</p> <p>As WASPA should be aware we have been the target of a number of complaints in respect of the same subject matter from the same complainant under Complaints 0002, #0011, #0026, #0037 and #0058. The report of the adjudicator in these matters was only received by us on 2 February 2006. Both of the advertisements referred to were submitted for publication on the 26th of January of this year at 14:00, about a week before we received these findings.</p> <p>Mr Penkins [sic] as the complainant is conversant with the lead times of print advertisements in the industry and either is aware or should be aware that these advertisements were placed well before the adjudicators report on these matters were received. He also should be aware that the</p>	<p>Herewith the response from our customer with regards to the above complaints. This customer is in the process of registering a South African company to enable them to register with WASPA as a member.</p> <p>Integrat did not advertise the content or were not part in the process of producing the adverting material, but were merely the Connectivity Aggregator in this case. We also do not have any history about the process followed for producing the advertisement, and therefore can not respond to the</p>

	<p>adjudicator set a grace period of 45 days for the compliance by us as Information Provider with his findings and that the advertisements referred to fall within this grace period. As such his continued lodging of complaints during this period is not in good faith or in accordance with the adjudicator's order. We believe this constitutes continued abuse of the WASPA complaints procedure by Mr Penkin.</p> <p>In addition we should note that we as the Information Provider disagree strongly with the findings of the adjudicator and have lodged an appeal against the adjudicator's findings. We would like our comments in the review of the adjudicator's findings in respect of Complaints 0002, #0011, #0026, #0037 and #0058 in relation to the issue of bundling to be taken into account in consideration of the current complaints. To summarize we do not believe that the Code of Conduct is at all clear on the issue of bundling and in fact does not prohibit the promotion of subscription services linked to specific content.</p> <p>We should point out that the proceedings in respect of WASPA complaints are in no way privileged. As such we regard Mr Penkin to be treading on dangerous ground when he alleges that we have been misleading consumers. He should also be aware that WASPA has no jurisdiction over us directly and accordingly we have not been found guilty of anything binding on us nor have we been the subject of any fine. These findings were made against and the fine levied against the Service Provider, Integrat. In any event we do not accept that our advertisements are misleading to customers and we regard this to be a serious allegation which may cause substantial damage to the reputation of our company. We have warned Mr Penkin on previous occasions and we will re-iterate that we will not hesitate to take action should he or any other person or body defame our company. We will be addressing this issue directly with Mr Penkin and his company.</p>	<p>complaint with the required information.</p> <p>We hoverer know that the adjudicator has not yet responded to the appeal against the same customer for a similar case, and considering their response below believe these complaints should fall within the scope of the previous responses/complaints outstanding.</p>
--	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

WASPA Advertising Rules

The IP raised the issue of the status of the Advisory on Subscription Services dated 8 August 2005 (hereinafter referred to as the "Advisory"). The Adjudicator has previously held that the Advisory does not have the status of the WASPA Code of Conduct and is an attempt to explain and interpret the Code of Conduct. As such, it has a guidance role and the Adjudicator can and should consider same, however is not bound to follow the interpretation of the Code of Conduct contained therein. More particularly, no finding can be made of a contravention of the Advisory and certainly no sanction can be imposed for a failure to adhere to the Advisory. This view was upheld by the WASPA Appeal Panel in an appeal concerning complaints #0002, #0011, #0026, #0037 and #0058 in respect of the same SP and IP (and in fact the same complainant and substantially similar advertisements). This decision is hereinafter referred to as the "Appeal Decision". The Panel in the Appeal Decision has indicated:

the advisory does not form part of the Code and therefore is not binding on WASPA members, and is merely meant to serve as an interpretational guide.

However, this fails to take into consideration the provisions of the WASPA Advertising Rules, adopted by WASPA on 29 November 2005 and enforceable with effect from 1 January 2006. The Advertising Rules deal with different media types, however have a common section, namely the 'General Terms' applicable to all media types. The relevant section of the 'General Terms' is set out below. To avoid uncertainty, the extract is from Section 5, which deals with Magazine advertising:

5.3.13 SUBSCRIPTION SERVICES: Show Total Subscription Charge, Frequency of Charge, any bearer charges and any additional charge/s

(i) Must Use The Words "Subscription Service"

If the Content provider is providing a continuous, subscription-like or subscription-based service, then the words "Subscription Service" must be prominently displayed at the top section of the advertisement as well as at each Content or service section in the advertisement where various subscription types are displayed.

No acronym, letter (eg "S"), number, abbreviation (eg "Subs"), icon, or any other mark may be used as an alternative to the words "Subscription Service" anywhere in the advertisement when that Content is only available at all and/or at a particular cost as part of a subscription service.

(ii) Must Indicate Charge/s:

The advertisement must indicate in the font size, position and type as indicated:

- (a) The TOTAL charge that the consumer will incur for the subscription component of their access to that subscription service.
- (b) The frequency (and the minimum frequency, if applicable) at which they will be charged for the subscription component of access to that subscription service.
- (c) Whether, in addition to the periodic subscription charges in (a) & (b) above, there are any additional charges applicable to obtaining any particular service, Content or class of Content on the advertisement. [See (iii) below]

This indication must include the potential and cost of any (additional) bearer charges.

(iii) Must Indicate Cost Of Any (Additional) Per-Content Access

If in addition to a periodic subscription charge the consumer could additionally be charged on a per-access basis for access to any particular service, Content or class of Content on the advertisement within the subscription period and terms, then the advertiser must make it clear to the consumer that access this

Wireless Application Service Provider Association

Report of the Adjudicator

Complaints #0141, #0186 and #0188

Content or service will, over and above the periodic subscription cost, incur additional charges per Content or service access.

The periodic subscription cost, the frequency of the periodic charge, and where applicable, the additional access cost must all be displayed clearly and TOGETHER, in a position immediately above, below, or to the side of the Content, service, or class of Content. There must in particular be an indication whether bearer charges are included or not in the access cost.

- o [See also 'BEARER CHARGES' above]

(iv) Must Differentiate Clearly Between Multiple Subscription Types

If in any advertisement there may exist the possibility to subscribe to a number of individual subscription services which would ordinarily each carry a separate but additional subscription charge and associated charging frequency or additional per-Content access charge, then this possibility of the consumer being charged at multiple prices and charging frequency must be clearly indicated.

(v) Must clearly Differentiate Between Non-subscription and subscription Types if both available in the same advertisement:

Taking into account the provisions in section 11.1.2 in v3.2 of the WASPA Code Of Conduct on relating to an "independent transaction," if an advertisement has components to it that promote

- (a) Content that is ordinarily made available to a consumer on payment of a once-off payment for that individual Content without the need to subscribe to that service,

AND

- (b) Content that will be available at all, and/or at a particular price or even free only if the consumer subscribes to a subscription service,

then this distinction between the availability of non-subscription and subscription charging must be made clear by unambiguously demarcating in separate sections (and not just wording) the non-subscription portion from the subscription service portion or Content in the advertisement.

The words "Subscription Service" as well as the total charges and any additional access charges and charge frequency for that subscription service must be clearly indicated in the form specified.

ADDITIONAL BACKGROUND NOTES TO SUBSCRIPTION SERVICES:

Any request to be subscribed to a subscription service must be an INDEPENDENT TRANSACTION (see s11.1.2 of v3.2 of the WASPA Code of Conduct). Hence subscribers cannot be subscribed to a subscription service through having requested specific Content, or having being made to believe by a (practically) confusing ad design that they are requesting Content on a once-off (non-subscription) basis.

Confusion by consumers may arise in cases where a single advert may indicate the availability of Content to users (usually on a network that has not enabled subscription services) on a once-off basis, as well as on a subscription basis (to users on a network that has enabled subscription services), even though the subscription and non-subscription services may be on a different number range.

If confusing, this may create the scenario where the consumer lacks a specific intention of subscribing to a service (s11.1.2). To avoid this scenario, advertisers must avoid advertising material designs where subscription service access can be confused with non-subscription services for the same or same type of Content in the same ad. Unless this distinction is made clear, the non-subscription portion of an ad which has as its center the requesting of specific Content (on a once-off basis to users on a network that does not have subscription services) may have the effect of (possibly inadvertently) breaching the 'independent transaction' criteria of the subscription portion of the code of conduct (See also s11.1.4 of v3.2 of the Code of Conduct)

The key issue is that the requirement of an "independent transaction" set out in Clause 11.1.2 of the WASPA Code of Conduct is considered in the Advertising Rules, which are binding on WASPA members and through them, their information providers. The Advertising Rules do not use the term "bundling" as in the Advisory but instead indicates:

- distinction between the availability of non-subscription and subscription charging must be made clear by unambiguously demarcating in separate sections (and not just wording) the non-subscription portion from the subscription service portion or **Content** in the advertisement (Section 5.3.13 (v), Adjudicator's emphasis added); and

- **advertisers must avoid advertising material designs where subscription service access can be confused with non-subscription services for the same [or same] type of Content in the same ad.** Unless this distinction is made clear, the non-subscription portion of an ad which has as its center the requesting of specific Content (on a once-off basis to users on a network that does not have subscription services) may have the effect of (possibly inadvertently) breaching the 'independent transaction' criteria of the subscription portion of the code of conduct (Section 5.3.13 Additional Background Notes, Adjudicator's emphasis added)

A consideration of the Advertisements giving rise to the three complaints considered in this report appear, *prima facie*, to possibly give rise to multiple possible breaches of the Advertising Rules and those dealing with independent transactions in particular, which is itself a breach of Clause 6.1 of the WASPA Code of Conduct. However, the complainant has made no reference to such Advertising Rules or Clause 6.1 of the WASPA Code of Conduct in any of the three complaints being considered in this report.

As such, the Adjudicator had to consider whether he was entitled to consider the possible breach/es of the WASPA Advertising Rules and/or Clause 6.1 of the WASPA Code of Conduct, without the SP or the IP being given notice thereof.

In this regard, the Adjudicator considered the decision of the Panel in the Appeal Decision, which states:

Clause 13.3 of the Code specifically requires the respondent to the complaint to respond to the complaint. In our view, this implies the right to respond to all allegations that make up the complaint. This is also a requirement of the Promotion of Administrative Justice Act 3 of 2000 (the "AJA Act"), which enshrines the right have a right to administrative action that is lawful, reasonable and procedurally fair. Core elements of procedural fairness include adequate notice of the nature and purpose of the administrative action and a reasonable opportunity to make representations (see specifically s3(2)(b)(a) and s3(2)(b)(b) of the AJA Act).

This raises the question of what standard of fairness must be applied when considering the WASPA Code of Conduct and the actions of the Secretariat and the Independent Adjudicator in terms thereof. The Appeals Panel in Complaint #0001 referred to the Constitution of the Republic of South Africa and the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA").

Section 33 of the Bill of Rights provisions of the Constitution provides:

Just administrative action

33(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

PAJA contains the following definitions:

'administrative action' means any decision taken, or any failure to take a decision, by -

- (a) an organ of state, when -
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

'administrator' means an organ of state or any natural or juristic person taking administrative action;

'decision' means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-

- (a) making, suspending, revoking or refusing to make an order, award or determination;
 - (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
 - (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
 - (d) imposing a condition or restriction;
 - (e) making a declaration, demand or requirement;
 - (f) retaining, or refusing to deliver up, an article; or
 - (g) doing or refusing to do any other act or thing of an administrative nature,
- and a reference to a failure to take a decision must be construed accordingly;

'empowering provision' means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken;

3 Procedurally fair administrative action affecting any person

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) -

- (i) adequate notice of the nature and purpose of the proposed administrative action;
- (ii) a reasonable opportunity to make representations;

According to Lawrence Baxter (*Administrative Law* (1984) 2), general administrative law consists of the 'general principles of [common] law which regulate the organisation of administrative institutions and the fairness and efficacy of the administrative process, govern the validity of and liability for administrative action and inaction, and govern the administrative and judicial remedies relating to such action or inaction'. While Baxter's definition pre-dates both PAJA and the Bill of Rights, it is useful as it seems to exclude a voluntary industry representative body, such as WASPA, as it is not an

“administrative institution”. Furthermore, judicial and quasi-judicial actions do not fall within the scope of administrative actions.

PAJA does recognise that juristic persons (such as WASPA) may perform administrative acts, but only “when exercising a public power or performing a public function in terms of an empowering provision”, bearing in mind that the definition of an “empowering act” includes “an agreement, instrument or other document in terms of which an administrative action was purportedly taken”. However this will not apply if the power or function is judicial or quasi-judicial in nature.

Ian Currie & Johan de Waal in Chapter 29 of *The Bill of Rights Handbook* (5th ed, 2004) are of the opinion that a voluntary procedure, such as the WASPA Code of Conduct procedure is not administrative as it is an exercise of private and not public power and therefore not subject to the administrative justice rights in the Constitution. They concur that judicial and quasi-judicial processes do not fall within the scope of administrative actions and as such are not subject administrative justice rights in the Constitution. They do indicate their view that the epithet ‘judicial’ should be reserved for dispute-resolution by individuals or entities possessing constitutional judicial authority. In this regard Currie and de Waal refer to *R v Disciplinary Committee of the Jockey Club: ex parte Aga Khan* [1993] 2 All ER 853 (Jockey Club’s powers not ‘governmental’ in nature, not performing ‘the business of government’). This is a more qualified and restrictive interpretation of the phrase than that proposed by Van Reenen J in *Van Zyl v New National Party* [2003] 3 All SA 737 (C) para 75 (‘ “exercising a public power” conveys the ability to act in a manner that affects or concerns the public’). The phrase ‘concerns the public’ is certainly too wide. See *Marais v Democratic Alliance* 2002 (2) BCLR 171 (C) para 51 which makes the point that mere public interest in a decision does not make it an exercise of public power or the performance of a public function.

Consideration of the recent decision of Harms JA in *Telimatrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* [Supreme Court of Appeal, Case Number 459/04 – as yet unreported] seems to indicate that the WASPA Code of Conduct proceedings are quasi-judicial in nature, which accords with the view of Currie and de Waal above. This indication follows from Harms JA’s consideration of the complaints adjudication function of the Advertising Standards Authority SA, which has a procedure concerning complaints of breaches of its Code of Conduct which is similar to procedure set out in the WASPA Code of Conduct.

Having regard to the above, it can be seen that the question of whether the WASPA Code of Conduct and the actions of the Secretariat and Independent Adjudicator in terms thereof are an administrative act or not, is a complex one. It is the view of the Adjudicator that such actions are not administrative acts, nevertheless the Adjudicator is willing to consider the standard set for administrative acts by the Bill of Rights and PAJA as a goal for the Secretariat and Adjudicator to strive towards and if possible meet or exceed, but not a requirement.

Bearing this in mind the Draft Code Of Good Administrative Conduct in terms of PAJA interprets the procedure in terms of Section 3(2)(b) of PAJA as requiring adequate notice of the nature and purpose of the proposed

administrative action to be given to the affected person, before the decision is taken. "Adequate notice" is defined as meaning that "the affected person must be informed that an administrative action is being planned. The person must be given enough time to respond to the planned administrative action. The person also needs to be given enough information about the planned administrative action to be able to work out how to respond to the planned action.

As such, the Adjudicator was of the view that as the adjudication of a complaint is not an administrative action, the complaint NEED NOT refer specifically (that is by clause number) to the clause or clauses of the WASPA Code of Conduct alleged to have been breached, however the possibility of the finding of a breach of the WASPA Code of Conduct MUST be clear from the complaint itself, if no clause reference is provided. In opinion of the Adjudicator and in the instant complaint, the possibility of a finding of a breach of the WASPA Advertising Rules and/or Clause 6.1 of the WASPA Code of Conduct is not sufficiently clear from the complaint of the Complainant for the SP and/or the IP to have responded thereto or to be expected to have responded thereto. As such the Adjudicator made no finding as to a possible breach of the WASPA Advertising Rules and/or Clause 6.1 of the WASPA Code of Conduct.

The Adjudicator instructed the Secretariat to institute a formal complaint against the SP in respect of the IP, relating to a possible breach of the WASPA Advertising Rules (particularly Section 5.3.13(i) – failure to display the term "subscription" at each content or subscription service section in the advertisement, where various subscription types are displayed, Section 5.3.13 (iv) – failure to differentiate clearly between multiple subscription types and in particular failure to display pricing with each category of subscription service and instead only displaying such pricing at the top section of the advertisement and Section 5.3.13 (v) – failure to clearly differentiate between Content items and subscription services) and/or Clause 6.1 of the WASPA Code of Conduct in respect thereof.

Decision

Independent Transaction

The Adjudicator considered the submission of the IP and the SP. The Adjudicator disagreed with the submissions of the IP regarding subscriptions in other contexts, as the subscription model employed by the IP is in no way analogous to those for magazines, newspapers and the like. The Adjudicator concurred that the WASPA Code of Conduct is not as clear as it could be with regard to the meaning of an "independent transaction", however, rather than proceeding with an examination of such phrase, as has been done in previous reports, the Adjudicator referred to the Appeal Decision, where the Panel held:

Clause 11.1.2 is not as clear as it should be. The interpretation of this clause is complicated by the fact that the text of clause 11.1.2 does not specifically refer to content. The ordinary grammatical meaning of words must be followed. Where the grammatical meaning of the words is unclear the words must be interpreted in light of their immediate linguistic context. The wider legal context

may also be determined by referring to internal sources (the Code, especially clause 11.1) and external sources. The meaning of clause 11.1.2 becomes apparent if it is read in context with the rest of clause 11.1, especially the heading of clause 11.1 ("Manner of subscription) and clause 11.1.4. Clause 11.1.4 provides that customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. It becomes clear that clause 11.1.2 prohibits the subscription service from being dependent on the ordering of content and that the customer must be specifically intent on subscribing to a subscription service and not the ordering of content.

The second part of clause 11.1.2 also makes it clear that an offer to customers to sign up for a subscription service should not mislead customers to believe that they are subscribing to anything other than a subscription service. We are therefore of the view that clause 11.1.2 prohibits requests for subscription services from being dependent on requests for specific items of content.

The advertisements to which complaints #0002, #0011 #0026 and #0058 relate all required customers to put in a request for specific content first, whereupon they would be subscribed to a subscription service that would deliver similar content in future. We find this practice to be in contravention of clause 11.1.2 of the Code..

The Adjudicator noted the IP's contention that its advertising amounted to an advertisement for a subscription service and the content items contained in the advertisement merely allow a prospective customer to select the first content item to be received as part of the subscription service. This contention is clearly rejected by the Panel in the Appeal Decision holding that "clause 11.1.2 prohibits requests for subscription services from being dependent on requests for specific items of content".

The Adjudicator concurs with the succinct and considered view of the Panel in the Appeal Decision and in the absence of any other factors and having regard to the substantial similarity of the advertisements in the instant complaints and complaints #0002, #0011 #0026 and #0058 (particularly with regard to ring tone downloads), the Adjudicator followed the decision of the Panel in the Appeal Decision in finding the IP, through the SP, to have breached Clause 11.1.2 of the WASPA Code of Conduct.

Liability of the SP and IP

The SP raised the same issue in all three instant complaints as raised by it and the IP them in the appeal giving rise to the Appeal Decision, namely the liability of an SP acting as a mere conduit. In this regard the Panel in the Appeal Decision held:

Nevertheless, we believe that it is implicit in the Code that non-member IPs must comply with the rulings of the Adjudicator, where the Adjudicator finds that there has been a breach of the Code, or risk the termination of their contractual relationship with their SP. This much is clear from clause 3.9 of the Code, which states:

“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.”

In addition, the Adjudicator noted the comment of Harms JA in the *Telematrix* decision:

The only aspect raised on the plaintiff’s behalf was the fact that the plaintiff was not a member of the ASA but was nevertheless ‘indirectly bound’ by its rulings because its advertising agent was a member of a constituent body of the ASA. In Matthews v Young (1922 AD 492), counsel reminded us, by joining the union Young bound himself to its process. The answer is really this. If the plaintiff was not legally bound to the ruling through those whose services it engaged, the plaintiff could have ignored the ASA’s decision but, if it chose to abide by it, its loss would have been caused by its election and not by the incorrect decision. By engaging the services of someone who is a member of a professional organisation, one has to accept the consequences of that person’s professional rules and standards.

Again, the Adjudicator concurred with the decision of the Panel, which is further in accordance with national law as set out in *Telematrix*.

Furthermore, the Adjudicator considered the behaviour of the SP in regard to other complaints against it in respect of the services of the IP. The SP has failed to take any pro-active steps to ensure compliance by the IP with the WASPA Code of Conduct, instead taking a *lassiez-faire* approach of allowing the IP to act as it will, notwithstanding mounting complaints against the services offered by the IP through the SP, the advertisements for such services and the findings of the WASPA Adjudicator and Appeal Panel in respect of this and similar services. As such, the SP cannot rely on its inaction in the face of mounting evidence of numerous and repeated breaches of the WASPA Code of Conduct.

Lack of detail in complaint

The Adjudicator concurs that the complaint submitted by the complainant is lacking in certain respects which is surprising considering the complainant’s familiarity with the WASPA Code of Conduct. In particular, the Complainant’s failure to raise the question of a possible breach of the WASPA Advertising Rules has resulted in a further complaint needing to be instituted in respect of the same advertisements, when these could have conveniently been dealt with in this report. However the Adjudicator did not find that the SP or the IP were unduly hampered by the inadequacy of the complaints submitted and as such there was no substantive or procedural unfairness in deciding the various complaints on the basis of the information submitted.

Grace period in Adjudicator's Report regarding Complaints #0002, #0011, #0026, #0037 and #0058

The Adjudicator noted the IP's submission that the SP and IP were afforded a "grace period" in terms of the Adjudicator's Report regarding complaints #0002, #0011, #0026, #0037 and #0058. Had this "grace period" continued to apply, the IP may indeed have been correct that the advertisements in question fell within this "grace period" and the instant complaints should accordingly be dismissed. However, the SP and the IP appealed the Report of the Adjudicator in complaints #0002, #0011, #0026, #0037 and #0058. In the Appeal Decision, the Panel disagreed with the sanction of the Adjudicator and substituted a new sanction therefore. The sanction imposed by the Adjudicator is as such substituted in its entirety and the IP cannot rely on part thereof while enjoying the benefit of the more lenient sanction imposed by the Panel. No such "grace period" is provided in the sanction contained in the Appeal Decision and as such, need not be considered for the purposes of the instant complaints.

Misleading of consumers

As insufficient information was provided by the complainant in this regard, the allegation of the IP and/or the SP intentionally confusing consumers was not considered. The Adjudicator restricted this report to a consideration of the alleged breach of Clause 11.1.2 of the WASPA Code of Conduct.

Conclusion

As such, the complaints in respect of alleged breaches of clause 11.1.2 of the WASPA Code of Conduct, are upheld.

Sanction

In considering the sanction to be imposed arising from the breaches of the WASPA Code of Conduct raised in the complaints under consideration:

- The Adjudicator took note of the decision of the Appeals Panel in respect of Complaint #0#0002, #0011, #0026, #0037 and #0058;
- The Adjudicator considered Clause 3.9 of the WASPA Code of Conduct, 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.
- The Adjudicator had regard to the fact that subscription services remain an extremely contentious issue within WASPA.

- The Adjudicator noted that the IP has behaved in an extremely provocative manner by persisting with advertisements substantially similar to those found to be in contravention of the WASPA Code of Conduct in the Adjudicator's Report concerning complaints #0002, #0011, #0026, #0037 and #0058. This was done under the guise of:
 - The "grace period" afforded by the Adjudicator in the aforementioned report, however as the SP and IP's appeal against such report was successful, such grace period does not apply; and
 - The appeal noted by the SP and the IP against the Adjudicator's report concerning complaints #0002, #0011, #0026, #0037 and #0058. In this regard it must be noted that the WASPA Code of Conduct is unclear as to whether the decision of an Adjudicator is stayed or suspended during such appeal process, though principles of natural justice indicate that such stay or suspension is appropriate. However, noting an appeal does not entitle the SP and/or IP to continue with persistent breaches of the WASPA Code of Conduct, during such appeal process. Moreover, it is apparent from the Appeal Decision that the IP is able to compile an advertisement which complies with the WASPA Code of Conduct (viz. the advertisement in complaint #0037). From the Appeal Decision it is apparent that the IP is aware that advertising of the type referred to in complaint #0037 complies with the WASPA Code of Conduct, yet persists with providing a service and advertising such service, in a manner previously found to be in breach of the WASPA Code of Conduct.
- The Adjudicator noted that financial sanctions do not appear to deter the IP and the IP from their persistent breaches of the WASPA Code of Conduct.
- The Adjudicator noted further that subscription services are enabled by the Online Billing System utilised by Vodacom and the Event Based Billing utilised by MTN.

The Adjudicator accordingly imposed the following sanction:

- The network operators are requested to block the SP from obtaining any new access to the relevant network operator's Online Billing System and/or Event Based Billing for a period of 3 (three) months (or any similar billing system introduced during such 3 (three) month period), in accordance with Clause 13.4.2(b) of the WASPA Code of Conduct. This sanction will include blocking the SP from obtaining any new short codes for accessing such Online Billing System and/or Event Based Billing for a period of 3 (three) months but will not block the SP from accessing existing or new service unrelated to the Online Billing System and/or Event Based Billing, other than as set out below;
- The network operators are requested to block access to the short codes "31996" and "40994" as well as any other short codes used by the SP in relation to the IP, for a period of 1 (one) calendar month from the date of

receipt of this report, in accordance with Clause 13.4.2(a) of the WASPA Code of Conduct;

- The SP is reprimanded for allowing the IP to breach the WASPA Code of Conduct.
- The SP is ordered to pay a fine to WASPA in the amount of R200 000 (two hundred thousand Rand).
- The SP is ordered to suspend the service of the IP for a period of 1 (one) calendar month from the date of receipt of this report.
- The Secretariat is ordered to simultaneously notify all members of WASPA of such suspension and that providing any service to the IP during such period shall constitute a breach of the WASPA Code of Conduct.