

REPORT OF THE ALTERNATIVE APPEALS PANEL

<u>Date:</u>	<u>12 December 2007</u>
<u>Appellants:</u>	<u>Appellants: Integrat (Pty) Ltd (first Appellant) and Peach Mobile (Pty) Ltd (Second Appellant)</u>
<u>Complaint Numbers:</u>	<u>219 & 311</u>
<u>Version of Code</u>	<u>#219 Code version 3.2 & #311 Code version 4.3</u>

1. INTRODUCTION TO THIS APPEAL

- 1.1 This appeal concerns the adjudication of a complaint by a competitor, I a member of WASPA, against Integrat (Pty) Ltd, a member of WASPA and also the Service Provider (SP) in the matter complained of. The complaint also cites Peach Mobile (Pty) Ltd, the Information Provider (IP). Integrat (Pty) Ltd and Peach Mobile (Pty) Ltd are the first and second appellants, respectively, in this matter.
- 1.2 The Report of the Adjudicator is dated 31 July 2006. The subject matter of the complaints relates to a possible breach of the WASPA Code of Conduct (the Code) in connection with television advertisements flighted by etv during the weekend of 10 – 12 March 2006 (complaint #0219) and during the weekend of 20 – 21 May 2006 (complaint #0311).
- 1.3 The findings of the Appeals Panel are set out below as follows:
- Part 2: Summary of the complaint and the response;
- Part 3: Summary of the relevant sections of the Code of Conduct;
- Part 4: Summary of the adjudicator's decisions;
- Part 5: The Appellant's Grounds of Appeal;
- Part 6: Findings of the Appeals Panel.

2. SUMMARY OF THE COMPLAINTS AND THE RESPONSE

2.1 The Complaints

- 2.1.1 Complaint #0219 was lodged by the complainant and submitted to the WASPA Secretariat via the online web form on 16 March 2006.

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- 2.1.2 The reference to the various parties in the appeal by the appellants appears to be somewhat confused. The panel has simplified matters in the findings, by accepting that the complaints were against the first and second appellants and it is them or it is on their behalf that the appeals were made.
- 2.1.3 Complaint #0311 was lodged by the same complainant and submitted to the WASPA Secretariat via online web form on 22 May 2006. The Complaint was made against Integrat (Pty) Ltd (the SP), the first appellant in this appeal.
- 2.1.4 In complaint #0219 the complainant cites Peach Mobile (the IP) as having breached the WASPA Code of Conduct in two television advertisements run on ETV on the weekend 10, 11, 12 March 2006 as follows:

“Code_Breached: Section 1.1.2 (this is an erroneous reference to 11.1.2) Any request from a customer to a subscription service must be an independant transaction, with the specific intention of subscribing to a service.

Detailed_Description_Complaint: Section 11.1.2 Clearly states that a request to join a subscription service must be an independant 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.

There are 2 ads which are currently running.

Ad 1 : Madam answer the phone - The ads promotes a specific content item promoting a ring tone called Madam answer the phone. When you respond to the ad by sending M (for madam) you get an SMS back saying: Please go to <http://fonics.net/get/JD45Y2M9D3> (on yr mobile) with WAP to get Madame_The_Phone.Probs?info@mobileguru.com.au Thereafter after seeing an ad for Madam answer the phone, you are sent this specific item to download. You are also subscribed to a subscription service where you are charged R5.00 per week.

In the second ad Druk die groen knoppie, you are asked to send "G" (for Groen) via SMS. As above you are given the link to download this specific item and automatically subscribed to the service.”

- 2.1.6 In complaint #0311 the complainant cites Integrat (the SP) as having breached the WASPA Code of Conduct in a television advertisement for run on ETV on the weekend 20 / 21 May 2006 as follows:

“Code_Breached: Section 11.1.2

Detailed_Description_Complaint: Section 11.1.2 clearly states that a request to join a subscription service must be an independant 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

When you SMS G to 31357, you are send this item and automatically subscribed to the service where you are sent other content every week.”

- 2.1.6 The complainant made additional statements in both the complaints that they themselves have not contacted the SP, believing the matter required WASPA's attention as well as declaring its bona fides in making the complaints.
- 2.1.7 Complaint #0219 and complaint #0311 concern essentially the same issue, were submitted by the same complainant, in respect of the same service provided by the same IP through the same SP and have been responded to by the SP and the IP in a consolidated response. The adjudicator therefore consolidated the complaints into a single report.

2.2 The Response

- 2.2.1 A single consolidated response in respect of both complaints was submitted.
- 2.2.2 In the consolidated response a point *in limine* is raised regarding the incorrect citing of Mantella as the respondent in complaint #219 and it is argued that the complaint should therefore be dismissed.
- 2.2.3 The consolidated response also contains a second point *in limine* in which it is submitted that WASPA has no jurisdiction to adjudicate complaint #0311 vis-a-vis both Mantella and Peach Mobile (the IP).
- 2.2.4. The consolidated response further includes detailed information, with specific reference to relevant Code of Conduct clauses, a WASPA advisory in regard to the application of clause 11.1.2 as well as the appeal judgement in complaint numbers #0002, #0011, #0026, #0037 and #0058. In summary the response states *"It is accordingly submitted that the provisions of Clause 11.1.7 have been complied with fully and the offer of a **subscription service** has been offered for acceptance by the customer. The respondents have complied with the provisions of the code and that there can be no inference that anything other than a subscription service was being offered. The provisions of 11.1.4 (albeit not the subject matter of this complaint) are not relevant to the complaint in question inasmuch as there was no "non-subscription service" being offered. A subscription for "a hilarious ringtone" was offered NOT a subscription for "**this** hilarious ringtone"."*
- 2.2.5 The consolidated response concludes with a further point *in limine* in which the respondents request that measures be taken against the complainant for the vexatious and contrived manner in which they have lodged complaints #0219 and #0311 and requests that *"the complaints be dismissed and appropriate censure of "the competitor" be given in regard to this vexatious and frivolous complaint."*

3. SUMMARY OF THE RELEVANT SECTIONS OF THE CODE

- 3.1 Complaint #0219 as set out in 2.1.5 above, details the complainant's erroneous reference to clause "1.1.2" of the Code. The correct reference should be to clause 11.1.2. All parties do, however, correctly refer to clause 11.1.2 thereafter and will this reference be used consistently in this report.

- 3.2 Version 3.2 of the Code of Conduct applied at the time when complaint #0219 was made, while version 4.3 of the Code of Conduct applied when complaint #0311 was made. The adjudicator states in his report that having regard to the fact that the provisions of the code relevant to these complaints have not been altered, he considered each complaint in respect of the version of the Code applicable at the time the complaint was made.
- 3.3 The relevant section of the Code referred to in the complaint is:

11. Subscription services

11.1. Manner of subscription

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. A request from a subscriber to join a subscription service may not be bundled with a request for a specific content item.

- 3.4 The relevant sections of the Code referred to in the response, apart from clause 11.1.2 referred to in 3.3 above are:
- 3.4.1 Clause 1.2 of the Code

1.2. Objectives of the Code of Conduct

The primary objective of the WASPA Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services. The Code aims to equip customers and consumers with a mechanism for addressing any concerns or complaints relating to services provided by WASPA members, and a framework for impartial, fair and consistent evaluation and response to any complaints made.

The Code of Conduct also sets standards for advertising mobile application services, and includes a framework for the provision of adult services, to ensure adequate protection of children from potentially harmful content.

- 3.4.2 Clauses 11.1.4 and 11.1.7

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.

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

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

- 3.5 The relevant sections of the Code referred to in the Report by the Adjudicator, apart from the clauses referred to in 3.3. and 3.4 above are:

3.5.1 Clauses 2.11, 2.20, 3.9.1 and 3.9.2

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

3.6 It should be noted that although the Report of the Adjudicator makes reference to the WASPA Advertising Rules and/or Clause 6.1 of the Code, the adjudicator made no finding as to a possible breach of the WASPA Advertising Rules and/or Clause 6.1 of the Code of Conduct.

3.7 The relevant clause in the Code referred to in the Appellant's Submissions of Appeal, apart from the clauses referred to in 3.3, 3.4 and 3.5 above is:

3.7.1 Clause 13.4.1

13.4. Sanctions

13.4.1. Possible sanctions that may be imposed on a member found to be in breach of the Code of Conduct are one or more of the following:

(h) a requirement for the member to suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct:

3.7.1.1 It should be noted that the appellants erroneously refer to Clause 13.4.2 and Clause 13.4.2 (h) respectively on pages 1 and 2 in their Grounds of Appeal. The correct references are Clause 13.4.1 and 13.4.1 (h) respectively.

4. SUMMARY OF THE ADJUDICATOR'S DECISION

4.1 Adjudicator's finding regarding applicable version of Code of Conduct

4.1.1 The adjudicator makes the following statement in his report regarding the question of which version of the Code of Conduct is applicable in this matter:
“At the outset, the Adjudicator considered which version of the WASPA Code of Conduct is applicable in this matter, as Version 3.2

thereof applied at the time when complaint #0219 was made, while Version 4.3 applied when complaint #0311 was made. Having regard to the fact that the provisions of the Code relevant to these complaints have not been altered, the Adjudicator considered each complaint in respect of the Version of the Code applicable at the time the complaint was made.”

- 4.2 Adjudicator’s findings – Section 11.1.2 (Referred to as “Independent Transaction” page 20 of Adjudicator’s Report)
- 4.2.1 The Adjudicator stated in his report that he had considered the submission of the IP and that he did not agree with the submission at paragraph 14 thereof that considering the Appeal Decision would be allowing same to be applied retroactively. The adjudicator stated that the Panel in the “Gozomo Appeal” Decision interpreted the WASPA Code of Conduct and as such, the Adjudicator felt bound to consider the decision in terms of clauses 13.3.7 and 13.3.11 of the Code of Conduct.
- 4.2.2 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” in clause 11.1.2 of the Code. Rather than proceeding with an examination of such phrase, the Adjudicator referred to the Appeal Decision in detail.
- 4.2.3 The Adjudicator noted the IP’s contention that its advertising amounted to an advertisement for a subscription service and that the content items contained in the advertisement are merely provided for “illustrative purposes”. 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”.
- 4.2.4 The Adjudicator then stated that the adjudicator has previously held that content may be provided for illustrative purposes (inter alia in complaint #0022) and goes on to make reference to the decision and the view held regarding clause 11.1.2 of the Code. The adjudicator consequently states that there must therefore be a comparison of the indicators the IP provides to customers and potential customers to show that the service being advertised is a subscription service as against the indicators that may potentially confuse a customer or potential customer in the advertisements which are the subject of the two complaints.
- 4.2.5 The adjudicator then goes about weighing out the factors the IP has set out in the advertisements, both text and audio, which clearly indicate that the advertisements are for a subscription services against a number of factors he considers relevant.
- 4.2.5.1 The adjudicator states that the subtlety of the distinction between “a hilarious real sound” rather than “this hilarious real sound” must be weighed against the visual stimulus of the animation and the volume of the real sound immediately prior thereto, as against the voice over.
- 4.2.6 The adjudicator then rejects in its entirety the IP’s submission (at paragraph 28) that inferring an offer for a content item would be “contrived and capricious” after having weighed the efforts of the IP in revising its television advertising so as to inform a customer or potential customer that a subscription service is being advertised, summarised in paragraph 26 of the

IP's submission, against the advertisements themselves. The adjudicator held that the IP's efforts (while cogent and significant) were not sufficient so as to obviate the harm of advertising a single content item, with an individual key word linked only to that content item.

- 4.2.7 The adjudicator further noted the IP's contention that its advertising amounts to an offer for a subscription service, which is accepted by a customer. The adjudicator then sets out in detail why he disagrees with the view of the IP in this regard.
- 4.2.8 The adjudicator found that the IP, through the SP, had breached Clause 11.1.2 of the WASPA Code of Conduct and concurs with the succinct and considered view of the Panel in the Gozomo Appeal Decision.

4.3 Lack of detail in complaint

- 4.3.1 The Adjudicator did not find that the SP or the IP was unduly hampered by the inadequacy of the complaints submitted and that as such there was no substantive or procedural unfairness in deciding the various complaints on the basis of the information submitted.
- 4.4 The adjudicator upheld the complaints in respect of the alleged breaches of clause 11.1.2 of the WASPA Code of Conduct.
- 4.5 The adjudicator proceeds by listing a number of factors considered in imposing the sanction arising from the breaches of the WASPA Code of Conduct raised in complaints #0219 and #0311.
- 4.6 The adjudicator accordingly imposed the following sanctions:
- 4.6.1 "• The SP is reprimanded for allowing the IP to breach the WASPA Code of Conduct.
- 4.6.2 • The Adjudicator requested the network operators 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 in respect of complaints #0141, #0186 and #0188. Such sanction shall apply against the SP in respect of complaint #0311 as well, with no extension or alteration of the 3 (three) month time period.
- 4.6.3 • 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 and in particular not to process any new or existing billing transactions for the IP on either its existing short codes or any new short code. In this regard, the SP is instructed to intercept transactions to the number "31357" and only to allow customer initiated STOP messages through to the IP. The IP will then need to reply with the STOP confirmation message. In particular, no new billing transactions on such number are to be processed.
- 4.6.4 • The Secretariat is instructed to notify the mobile operators of the above sanction and to request their assistance in monitoring and if necessary enforcing such sanction.
- 4.6.5 • The SP is instructed not to resume the IP's service unless such service (and in particular the subscription service process employed) complies with the WASPA Code of Conduct. The SP is reminded of its obligations, in terms of the WASPA Code of Conduct and the WASPA Advertising Rules, to ensure that an information provider's service as well as all advertisements for such

service offered through the SP, comply with the WASPA Code of Conduct and the WASPA Advertising Rules.

- 4.6.6 • The IP, as a WASPA member (and failing the IP, the SP at the IP's cost), is instructed to send a SMS message to all the IP's customers subscribed to the IP's subscription services, with at least the following information (amended as necessary to reduce the size to a single SMS message while not interfering with intelligibility:
- “You are subscribed to the PEACH MOBILE [name] subscription service. You are billed on a [period] basis at [cost] per [period]. To unsubscribe from the service, SMS the word [name] STOP to 31357 at [cost] per unsubscribe request. Call 0828873359 for support. Standard VAS rates apply.
- 4.6.7 • The IP, as a member of WASPA, is reprimanded for its failure to comply with the WASPA Code of Conduct and is ordered to pay a fine to WASPA in the amount of R100 000 (one hundred thousand Rand) in respect of the subscription service process it employs, which has been found to contravene the WASPA Code of Conduct. The amount of such fine has been determined having regard to the fine imposed in complaints #0141, #0186 and #0188 and is lower than that fine owing to the IP's efforts to avoid consumer confusion (which has been found to be insufficient, but which have been noted and considered as mitigating factors in determining the amount of the fine imposed).
- 4.6.8 • 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.”
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5. THE APPELLANTS' GROUNDS OF APPEAL

- 5.1 As stated above, Integrat (Pty) Ltd (the SP) and Peach Mobile (Pty) Ltd (the IP), lodged a consolidated appeal of the adjudicator's decision regarding complaint #219 and #311, as first appellant (the SP) and second appellant (the IP) respectively dated 5 September 2006.
- 5.1.1 The SP and the IP set out their consolidated appeal in headings. We will address the appeal in the same headings, summarising the grounds below.
- 5.2 “1. INTERPRETATION OF THE CODE AND THE SANCTION OF SUSPENSION”
- 5.2.1 The appellants refer to clause 13.4.1 of the Code of Conduct which provides that:
- “Possible sanctions that may be imposed on a member found to be in breach of the Code of Conduct are one or more of the following:
- (h) a requirement for the member to suspend or terminate the services of any information provider **that provides a service in contravention of this Code of Conduct.**” (emphasis added by appellants)
- 5.2.2 The appellants aver as grounds of appeal various errors in interpretation of this particular clause, by stating the following: (original clause references are repeated)”

- 5.2.2.1 1.2 The wording in bold font refers to a continuing course of conduct and does not mean “one *who has committed a breach or breaches of any provision of the Code*”; nor does it mean “*who has repeatedly committed a breach or breaches of any provision of the Code*”. It is the “*service*” that has to be in contravention of the Code.
- 5.2.2.1 1.3 Clause 13.4.2 of the WASPA code also envisages a continuous course of conduct. The phrase – “*in breach of the code*” is not apt to describe the case of a member who has transgressed the Code by a particular act **in the past - and who has since ceased from such conduct.** (emphasis added)
- 5.2.2.3 1.4 The adjudicator erred in considering that the sanction of recommendation of suspension can be used as a punitive sanction .The purpose of the sanction of suspension as contemplated in the code is to ensue the cessation of any **ongoing transgressions** of the code,
“..... *to suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.*” (emphasis added)
- 5.2.2.4 1.5 The adjudicator erred in interpreting that “.....provides a service in contravention of this Code” to include the suspension of services which are not at present in contravention of the code.
- 5.2.2.5 1.6 The adjudicator erred in the imposition of sentence by applying the sanction of suspension in circumstances where there is no ongoing transgression of the code. The services to be suspended by the sanction imposed by the adjudicator (i.e. the services currently being offered by the IP), do not contravene the code.
- 5.2.2.6 1.7 The grammatical meaning of the word “*provides*” implies the present tense. The word “*provided*” refers to the past tense. The code makes no provision for sanctions to be imposed for past conduct which is no longer being continued. If clause 13.4.2 (h) was intended to apply a suspension to a past (and since ceased) infringement of the code it would have stated:
“..... *to suspend or terminate the services of any information provider that provides or provided a service in contravention of this Code of Conduct.*” (emphasis added)
- 5.2.2.7 1.8. The use of wording in the Code of “*provides*” as opposed to the use of the word “*provided*”, refers that the sanction of suspension can only be applied to conduct which is present and ongoing at the time of the imposition of the sanction, and does not apply to conduct which is past and which has since ceased.
- 5.2.2.8 1.9 In the event that the appeal finds that the imposition of suspension is an enforceable sanction, (which the Appellants oppose) the appellant submit that the adjudicator failed to consider or weigh that the IP took immediate and decisive steps to comply with the rulings of WASPA following this complaint (and the ruling of WASPA pursuant to complaints to other WASPA Members).The imposition of a suspension of services is unduly punitive, excessive and disproportionate to the infringing conduct of the appellants.”

- 5.3 “2. PROCEDURAL RULES ARE NOT IN ACCORDANCE WITH THE RULES OF NATURAL JUSTICE --- NO SEPARATION OF FINDINGS AND SENTENCE PROCEDURE.”
- 5.3.1 The appellants as a second ground of appeal aver that their case was prejudiced because the procedural rules are not in accordance with the rules of natural justice. The appellants then state the following in support: (original clause references are repeated)
- 5.3.1.1 “2.1 No opportunity was given to the Appellants to address the adjudicator on the question of sentence. This is a failure to observe a basic principle of natural justice.
- 5.3.1.2 2.2 The ambit of this appeal has in turn been widened. **The sanctions have been imposed without the opportunity by the appellants to advance any evidence or argument in mitigation.** This has prejudiced the appellants’ case. Considering that the sanctions involve the suspension of all activities of the IP, the failure to provide the Appellant the opportunity to address any evidence and argument in mitigation has created the inference that the issue of sanction has been prematurely ruled on and pre-judged, without taking consideration of all the material evidence. The impartiality and fairness of the forum has been accordingly compromised.
- 5.3.1.3 2.3 This has entailed **the Appellant having to lead evidence in mitigation in this Appeal.**”
- 5.4 “3. SINGLE LETTER CODE/ GENERIC WORD”
- 5.4.1 The appellants appeal against the adjudicator’s findings relating to the use of single letters to initiate the subscription services in the advertisements which form the subjects of the complaints. The appellants go on to state the following arguments in support of this ground of appeal: (original clause references are repeated)
- 5.4.1.1 “3.1. The adjudicator erred in ruling that the use of a different keyword to initiate the subscription in each of the advertisements – (such as the letter "G" in the one and the letter "M" in the other), rather than a generic word like "funny" or "real" was used with the intent to offer specific content as opposed to a subscription service. The IP had no such intent.
- 5.4.1.2 3.2. The use of the single letter "G" or "M" as opposed to a generic word like "funny" or "real" was not used to offer specific content bundled with a subscription service. The Adjudicator failed to consider the intentions of the IP, namely that it is more expedient and easier to a subscribing customer to SMS one letter rather than four or five. Therefore to SMS one letter i.e. "G" would constitute a convenience to a subscriber as opposed to sms-ing a five-letter word (such as “funny”) on a cell phone keypad.
- 5.4.1.3 3.3 The reason that different letters are used as opposed to the use of one generic word such as "funny" is that as part of the IP's advertising strategy they are required to tabulate and track the

responses to various advertisements. Therefore, for example, an advertisement flighted on a Saturday night at 11 p.m. would use the letter "M" whereas **the same** advertisement flighted on a Sunday at 10 p.m. would use the letter "D". The responses by subscribers who SMS the letter "M" or "D", as the case may be would provide the IP with important data and customer tracking information. This would greatly assist the IP in assessing which day and time is most effective for their advertising campaign. The IP has used all of the letters in the alphabet including "AA", "BB" and "DD" as codes to indicate the acceptance of a subscription service. The letters "M" and "D" are not used to confuse or to in any other way to induce a customer to accept an offer for specific content.

5.4.1.4 3.4 The adjudicator failed to take into consideration that the use of these single letters is used for advertising tracking purposes and is not used or intended for signing up to a single content item. This is evidenced by the fact that the use of single and double letters is used in all subscription services by the IP. For example, in the month of June, a TV advertisement called "MISSIS" was flighted with the keyword S and an advertisement entitled "O SOLO MIO" was flighted on the keyword E.

5.4.1.5 3.5 The adjudicator accordingly incorrectly considered, **alternatively** gave too much weight to the fact that a single letter code was used as opposed to a generic word, and incorrectly considered, alternatively inferred that that a customer would think that he is subscribing for a single piece of content by using a single letter code."

5.5 "4. THE USE OF UNRELATED TERMS"

5.5.1. The appellants further aver that the adjudicator made an error "in considering the use of, "unrelated terms" to indicate cost and frequency, namely 'twice a week' in the audio 'twice weekly' in the text, yet a reference to a cost of 'R5 per message' in the text". The adjudicator failed to consider that the terms "twice a week" and "twice weekly" have the exactly the same meaning and are not unrelated terms. The term "R5 per message" relates to the issue of cost and was necessary to provide all information to the customer in apprising them of the material terms of the subscription service."

5.6 "5. USE OF WORDS "A" AND "THIS"

5.6.1. The appellants also refer to various grounds on which they base their claim that the adjudicator erred regarding the use of the words "A" and "THIS" in the advertisements which form the subjects of the complaints lodged. In this regard the appellants state the following: (original clause references are repeated)

5.6.1.1 "5.1 The adjudicator erred in considering "... the subtlety of the distinction (between the word 'this' and the word 'a'" and stated that this "must be weighed against the visual stimulus of the animation and the volume of the real sound that had been playing immediately prior thereto, as against the voice-over". The adjudicator failed to take into account that there were no less than **five** visual and audio prompts indicating to the consumer that a subscription service was

being offered and that in adding up all of these factors, together with the use of the word "*this*", the cumulative effect was not to be misleading. Rather ALL the factors when cumulatively considered and when tested against the understanding of the reasonable man, would leave one with an understanding that the IP was offering a subscription, and not an offer for specific content.

- 5.6.1.2 5.2 The IP in previous advertisements used the words "*to obtain **this** hilarious ring tone*", and subsequently in order to comply with the rules pertaining to subscription services changed the wording to "*to subscribe to **a** hilarious ring tone*". This was done with the *bona fide* intention to comply with the code and to provide a clear offer to customers for a subscription service.
- 5.6.1.3 5.3 The Adjudicator erred in failing to consider that the IP had addressed the issue of the change in wording (from "**a**" to "**this**") with WASPA in an email dated 3 March 2006. (The email was provided, but will not be included here)
- 5.6.1.4 5.4 The IP took proactive steps immediately after their perceived infringement of the code for which the WASPA secretariat replied "*We sincerely appreciate proactive notification of potential problems. Thanks very much for taking the time to notify us.*"
- 5.6.1.5 5.5 The WASPA secretariat stated that they had "*forwarded your (the IP's) message on to the complaints team and to the adjudicator, and I (the secretariat) will ensure that it is taken into account should we receive any complaints regarding this advert.*"
- 5.6.1.6 5.6 The adjudicator erred in failing to mention the existence of the email dated 3 March 2006 in their report, and failed to consider or weigh the "*proactive notification of potential problems*" that the IP took in order to abide by the code.
- 5.6.1.7 5.7 The transmission of the above email, **prior to any complaint to WASPA** illustrates the *bona fides* and seriousness of the IP in abiding by the code. The adjudicator erred by incorrectly considering that the IP had acted recklessly and with a blatant disregard of the provisions of the code."
- 5.7 "6. THE USE OF ONLY ONE CONTENT ITEM TO ILLUSTRATE A SUBSCRIPTION SERVICE"
- 5.7.1 The appellants further appeal that the adjudicator made various errors regarding the consideration and interpretation of the fact that only one content item was used in the both advertisements to illustrate a subscription service. In this regard the appellants averred the following: (original clause references are repeated)
- 5.7.1.1 "6.1 The adjudicator erred in considering, alternatively placed too much weight on the "use of only one content item to illustrate a subscription service". The IP set out numerous factors both in text and audio, which clearly indicate that the advertisements were for a subscription service (ad page 22 of the Adjudicator's Report). The

adjudicator weighed the following: "the use of only one content item to illustrate a subscription service".

- 5.7.1.2 6.2 The adjudicator failed to take adequate consideration that a number of snippets of ring tones in one 25 second advert would lose their humorous nature if edited and shortened in length. The adjudicator failed to consider, alternatively placed insufficient weight on the fact that it is extremely impractical to play two or more incomplete ring tones in a TV advertisement. The adjudicator failed to take adequate consideration that the use of only one item of content to illustrate the subscription service was not effected with intention to deceive.
- 5.7.1.3 6.3 In regard to complaint #001 and the subsequent complaints that were bundled with it (which were ruled by WASPA to all be related to the same issue). WASPA imposed a sanction of a R50 000 suspended fine.
- 5.7.1.4 6.4 The IP reacted with serious concern to the WASPA ruling and immediately introduced a double opt in on ring tones for all the print ads, which was considered as an acceptable remedy at that time.
- 5.7.1.5 6.5 The adjudicator failed to consider that the IP made the following enquiries to WASPA, namely:
- 6.5.1 Attended numerous WASPA meetings to gain a better understanding of the rules.
- 6.5.2 Actively participated on Codecom in an effort to understand and positively work with WASPA and its Code of Conduct.
- 6.5.3 Regularly spoke to WASPA members and members of Mancom in an effort to understand if the IP was in compliance with regard to the bundling issue.
- 5.7.1.6 6.6 The adjudicator failed to consider that at the time, there was uncertainty around the interpretation on the bundling issue and even today many IP's are ambiguous to the exact requirement to comply with the code in regard to the bundling issue.
- 5.7.1.7 6.7 All sanctions are extremely detrimental to the IP'S brand and their financial situation. The IP has not wilfully or recklessly disregarded the code of conduct of WASPA, and has taken bona fide and wide-ranging efforts to comply with WASPA rulings."
- 5.8 "7. ADVERTISING RULES"
- 5.8.1 The appellants also aver that the adjudicator not only erred in taking into account the WASPA Advertising Rules in making the ruling but further erred by incorrectly taking into consideration the alleged non-compliance with the advertising rules.

- 5.8.2 The appellants further state that they have not breached the Advertising Rules as set out by the adjudicator on page 12 of the adjudicators report.
- 5.8.3 The appellants also state that they have taken bona fide and significant measures to comply with the Advertising Rules and attached a letter from Palomino Productions, as proof thereof.
- 5.8.4 The appellants also raised the following with regards to the Advertising Rules as ground of appeal according to them for “the sake of clarity and completeness”: (original clause references are repeated)
- 5.8.4.1 “7.8.1 In regarding the issue of “bundling” the adjudicator referred to the advertising rules which states that
- “advertisers must avoid advertising material designs where subscription services can be **confused** with non subscription services for the same (or same type) of content in the same ad”* (section 2.3.13 additional background notes)
- 5.8.4.2 7.8.2 The issue of “confusion” as set out above is a subjective issue. Words such as “confusion” and “unambiguous” (as used in the advertising rules), can only be interpreted and understood by subjectively taking into account the context and circumstances in which they occur.
- 5.8.4.3 7.8.3 The adjudicator erred in failing to apply the standards of the reasonable man in contextualising the interpretation to be ascribed to the words “*confusion*” and “*unambiguous*”.
- 5.8.4.4 7.8.4 The adjudicator erred by failing to take into consideration the significant and bona fide measures taken by the IP in the TV advertisements to avoid any confusion and to create the unambiguous offering of a subscription service.
- 5.8.4.5 7.8.5 The adjudicator erred by failing to take into account that (even if it is held that the TV ads were confusing, which is denied) that such confusion was inadvertent and not occasioned by a deliberate intention to mislead.”
- 5.9 “EFFORTS TO COMPLY WITH THE CODE”
- 5.9.1 The appellants then aver that the adjudicator did not take enough consideration of the efforts of the IP in revising its advertising even though the adjudicator stated that the IP’s efforts were “cogent and significant”. It is also submitted in terms of this particular ground of appeal that the adjudicator “incorrectly considered, alternatively placed too much weight on the issue of “individual keywords linked to specific content”.”
- 5.10 “NO PRIOR MONETARY SANCTIONS”
- 5.10.1 It is submitted by the appellants that it is not true that prior financial sanctions had been imposed on the IP and that the adjudicator therefore made an error in considering that:

"the financial sanctions do not appear to deter the IP from its persistent breaches of the WASPA Code of Conduct".

5.11 " 10 .EFFORTS BY THE IP TO STRICTLY ABIDE BY THE WASPA CODE AND TO EDUCATE CONSUMERS OF THE CONTENTS OF THE CODE AND THEIR RIGHTS."

5.11.1 The appellants then lead various arguments in mitigation of the sanctions imposed by the adjudicator which include the following:

5.11.1.1 The fact that the IP has engaged in an extensive and costly advertising campaign to educate consumers of their rights and procedures involved in SMS subscriptions. (An email sent to the legal compliance officers of Vodacom, MTN and Cell C forms part of this ground of appeal.)

5.11.1.2 Reference was made to the website www.smseducation.org which has been set up to educate South African consumers regarding all issues related to the sms industry in South Africa as well as to television and print advertising that were affected. (A copy of the print advertisement forms part of this ground of appeal).

5.11.1.3. The IP further submitted that: "they have gone to great time, effort, and expense to rectify and clear up any ambiguity relating to consumers and the WASPA code. The IP has taken steps far beyond that demanded by WASPA to educate consumers. Their bona fides and contrition is manifest by their efforts to comply in the fullest respects of the WASPA Code."

5.12 "11. NO CONSISTENT BREACHES"

5.12.1 The appellants submit that the adjudicator erred in considering that the IP had engaged in "persistent breaches of the WASPA Code of Conduct". They state that the previous breaches of the Code by the IP were all related to print advertising and were all related to the same issue and that the complaints were joined in one combined complaint being # 001.

5.13 "12. ADVERTISING CAMPAIGNS"

5.13.1 The appellants submit as a ground of appeal that the adjudicator failed to take into consideration: "that the IP has gone to great lengths in order to develop and offer a clear and transparent advertising campaign for their subscription services."

5.13.2 The appellants further submit that: "considerable effort was made to obtain the opinion from members of the WASPA Mancom and the WASPA Secretariat as to the compliance of the IP's advertisements in respect of "bundling". Although no one at WASPA was ever prepared to go on record in any type of official capacity, they were all unanimous in that the advertisements were appropriate and in compliance of the code." (In this regard the appellants include an email as an example of one of the many attempts made by the IP to clarify the rules around bundling.)

5.14 “13. PRE APPROVAL AND VETTING”

5.14.1 The appellants submit that the adjudicator did not take the fact that the IP has on previous occasions requested WASPA to vet and pre-approve its advertising content as to be firmly within the confines of the WASPA Code into consideration.

5.14.2 The appellants further submits that: “The adjudicator failed to take into consideration that pursuant to the IP’s appeal under WASPA complaint #001 and since November 2005, the IP submitted a complete schedule and copy of every print advertisement and displayed to WASPA that the IP had not repeated any offence after they became aware of any infringement of the code (bearing in mind that the code was ambiguous in certain respects, and that any infringements of the code were done inadvertently and without intention to breach the code.)”

5.14.3 The appellants also state in this regard that: “the IP had previously flighted a number of TV advertisements which were the same as the advertisements being the subject of this complaint. The contents of these advertisements were known to WASPA. WASPA did not indicate any objection to the advertisements. The inference was *bona fide* created that the said advertisements were satisfactorily within the ambit of the code. The IP was under the understanding that the said advertisements were within the bounds of the WASPA rules.”

5.15 “14. HARSHNESS OF THE FINE AND SUSPENSION”

5.15.1 The appellants note the following motivations in this ground of appeal as motivation for their submission that the sanctions of a fine and suspension as imposed by the adjudicator in this complaint are too harsh: (original clause references are repeated)

5.15.1.1 “14.1. The adjudicator failed to take adequate consideration that this is the first fine that has been imposed for payment on the IP, and that a fine of R100 000-00 (one hundred thousand rand) in light of the afore going submissions is excessive.

5.15.1.2 14.2. The adjudicator failed to take adequate consideration that the suspension for 30 days of the IP’s services would entail severe financial detriment to the IP and could possibly result in the retrenchment of staff from the IP. The adjudicator failed to take adequate consideration that the suspension is so harsh in its scope that it would in effect close down the entire business of the IP for a month without any possible source of revenue.

5.15.1.3 14.3. The adjudicator failed to take into consideration that the suspension of the IP’s services for 30 days, or at all, would be detrimental to consumers who have bona fide subscribed to the IP’s services. Those wanting to receive on going content will be precluded from doing so.

5.15.1.4 14.4. The adjudicator failed to take consideration that the suspension of services for a thirty-day period, or at all, has an extremely damaging effect on the goodwill, good standing and position

of the IP in the market. The effect of such suspension and detriment to its brand and reputation in the market place would be felt by the IP for well over the 30-day period. In such light the sanction is unduly harsh and a hammer blow to the business and services of the IP, and an infringement of the IP's ability to engage in free economic activity, even after the contemplated suspension period. The suspension would create the direct effect of customer confusion and dissatisfaction. All of the IP's services (all of which are currently fully compliant) would be tarnished, and the reputation of the IP as a provider of high quality and consistent provider of content would be damaged for a period far in excess of the suspension period.

5.15.1.5 14.5. The adjudicator failed to take adequate consideration that the suspension imposed on the IP would apply to all of their business. The suspension would cover services, which are completely unrelated to the specific services, which were the subject of the complaint. All of the IP's other services are fully compliant with the code. In the circumstances the blanket suspension of all applications and "short codes" (when taken cumulatively with the mitigating factors as set out in this appeal) is unduly punitive and an overextension of the purpose of the sanction of suspension.

5.15.1.6 14.6 The adjudicator failed to take adequate consideration that the vast majority of the IP's services and content is fully compliant with the WASPA code. The sanctions imposed have been so harsh in their scope that they have contemplated a suspension of services, including all fully compliant content."

5.16 "15. NO PREVIOUS CUSTOMER COMPLAINT"

5.16.1 The appellants further submit as a ground of appeal that in determination of sanctions the adjudicator failed to weigh as a mitigating factor that the IP has not been subject to any previous meritorious complaints emanating from customers or members of the public. It is stated that all complaints received from customers against the IP were dismissed by WASPA. In this regard the following is stated: "The IP has been subject to six complaints from customers. **All** of these complaints were dismissed by WASPA. Significantly, WASPA found in all six of these cases that the IP was fully compliant in their adherence to the Code of Conduct, as well as the advertising guidelines. The adjudicator erred in taking account of these complaints as an aggravating factor."

5.16.2 The appellants further argue that the adjudicator failed to take into account that the only complaint received against the IP was made by a competitor and not from a member of the public or a customer from the IP. The appellants appeal against the findings of the adjudicator relating to the fact that no complaint was made against the IP by a member of the public or a customer of the IP on the basis that: (original clause references are repeated)

5.16.2.1 "15.3. The adjudicator failed to take into consideration that the only substantive complaint made against the IP emanated from a competitor and NOT from a member of the public or customer of the IP.

It is noted It states in clause 1.2 of the WASPA code that

“1.2. Objectives of the Code of Conduct

*The primary objective of the WASPA Code of Conduct is to ensure that **members of the public** can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services. The Code aims to equip **customers and consumers** with a mechanism for addressing any concerns or complaints relating to services provided by WASPA members, and a framework for impartial, fair and consistent evaluation and response to any complaints made”.*

- 5.16.2.2 15.4 The code contemplates that the *raison d'être* for the code is to protect members of the public and customers and consumers. The adjudicator erred in failing to consider as a mitigating factor or otherwise that the complaint *in casu*, did not emanate from a member of the public or a customer, but rather emanated from a competitor of the IP.
- 5.16.2.3 15.5 The adjudicator erred in failing to consider as a mitigating factor that no member of the public or customer has laid any complaint against WASPA, nor have they laid complaint to either of the appellants in regard to the TV advertisements in question.
- 5.16.2.4 15.6 The adjudicator erred in failing to consider that there has been no reported dissatisfaction in the manner in which the services were advertised, and that there has been no known prejudice to any member of the public or consumer.
- 5.16.2.5 15.7 The sanctions imposed in regard to the fine and more significantly in regard to the imposition of a suspension of the IP's services is extreme, unwarranted and unreasonably punitive in light of there being no known or reported prejudice or confusion to customers.
- 5.16.2.6 15.8 The adjudicator failed to fully consider or weigh the fact that the alleged breaches of the code did not cause a single member of the public to complain that they didn't understand that they were subscribing for a service.”

5.17 “16. GOOD FAITH”

- 5.17.1 The appellants as a ground of appeal aver that the adjudicator did not take adequate consideration of the fact that the IP has acted in good faith with all parties and immediately upon becoming aware that their advertisements may be in breach of the Code, cancelled and amended the advertisements on TV media and at great cost to the IP.
- 5.17.2 The appellants argue that: “the IP's efforts to advertise their services as a subscription service and to notify all potential customers that they are subscribing to a service were held to be “cogent and significant.””
- 5.17.3 The appellants further appeal against the adjudicator's findings on the basis that the adjudicator did not take adequate account in his determination of sanctions of the following: (original clause references are repeated)

5.17.3.1 “16.3. The adjudicator did not take adequate account in his determination of sanctions that:

16.3.1. The IP did not act recklessly or with any intention to deceive customers;

16.3.2. Did not flagrantly disregard the code;

16.3.3. the code itself is ambiguous in regard to what specifically constitutes a subscription service and in the circumstances the IP took significant measures to advertise its service as a subscription service, which included a banner on the top and bottom of the screen stating that a subscription service was being offered together with the words:

1. “R5 per message”
2. “R1 to unsubscribe”
3. “Content received twice weekly”
4. “To unsubscribe SMS “G”
5. “To get a hilarious ring tone”.”

5.18. “17. COMPOUNDING OF SUSPENSION PERIOD”

5.18.1 The appellants state that the IP suspended their services pending the submission of this appeal. This was according to the appellants not affected as an admission of the correctness of the adjudicator’s decision, but in a situation of uncertainty relating to the question of the enforcement of sanction pending this appeal.

5.18.2 The appellants as a ground of appeal ask that the fact that the IP was effectively suspended from trading for ten days be taken into account in mitigation of sentence on appeal.

5.19 “18. CONCLUSION”

5.19.1 The appellants, in light of the above grounds of appeal, pray for the following:

- a. all or part of the sentence to be overturned on Appeal, and/alternatively
- b. for all or part of the sanctions to be overturned on Appeal, alternatively
- c. for all or part of the sanctions to be suspended on Appeal further alternatively
- d. such other finding and ruling as the Appeal Board may determine.”

5.20 The SP, the first appellant in the submissions of appeal discussed above, also submitted a separate appeal to WASPA relating to the WASPA sanctions for complaints #219 and #311 dated 19 August 2006.

- 5.20.1 In this separate appeal the SP states that it wishes to appeal certain sections of the adjudicator's report, and make the appeal panel aware of the following (original clause reference are repeated; emails referred to are not included)
- 5.20.2 The SP refers to an email it sent WASPA in response to a complaint received on 8 June 2006 in which the SP stated that the complaint is according to the SP, against the IP and that the complaint therefore needed to be directed to the IP.
- 5.20.3 The SP then states that the appeal panel needs to be made aware of what seems to be separate and/or additional grounds of appeal: (original clause references are repeated)
- 5.20.3.1 "2) Integrat responded in this way because Integrat was under the impression that Peach Mobile was a member of WASPA, and were the same company as Martelle (Yello). Integrat was not contracted to Peach Mobile but to MIG (Mobile Investment Group), the information provider, and was not aware of the fact that Peach was not a member of WASPA . Peach Mobile is a company in its own right selling product provided by the information provider (MIG), through its own advertising effort.
- 5.20.3.2 3) Integrat did not intentionally make this error.
- 5.20.3.3 4) Integrat accepted that all and any complaint relating to a member, must be directed to the member itself, as other complaints against Peach mobile was directed directly to them.
- 5.20.3.4 5) Integrat therefore did not respond to the complaint in question, and assumed this was sent to us by the secretariat in error.
- 5.20.3.5 6) To further substantiate this, Integrat usually receives notice of confirmation from the secretariat which we did not receive for complaint #311. *(The SP also included an example of such a response)*
- 5.20.3.6 7) This to us was an indication that we acted correctly and no further action was required form our side.
- 5.20.3.7 8) Integrat also wishes to bring to the attention of the adjudicator the following:
Integrat became aware of apparent breaches by the CLIENT in consultation with Vodacom, on the 16th of June, and immediately instructed the CLIENT to retract their advertising from the market.
- 5.20.3.8 9) The CLIENT gave immediate order to the advertising agencies and all advertising was retracted at the first possible date, which was the Monday the 19th of June.
- 5.20.3.9 10)This came to a cost of more than R120 000 (One hundred and twenty five thousand rand to the CLIENT and the CLIENT and has taken action to correct the errors in their advertising immediately, before any new advertising was done by them again.

- 5.20.3.10 11)INTEGRAT also wishes to bring to the attention of the adjudicator, the fact that the client has not received any previous successful adjudications against them relating to TV advertising.
- 5.20.3.11 12)The IP has also taken a retro-active approach to attempt to start an education process in the market with a SMS Education Campaign which can be found at www.smseducation.org. These campaigns were also advertised in PEOPLE magazine by the client.”
- 5.20.4 The SP submits that it is therefore of the respectful opinion that the appeal against the sections of the complaint, as is relevant to and has a bearing on the SP should be upheld and that it reserves its options in regard to the balance of the allegations in the complaint and leaves the appeal and adjudication thereof in the hands of this appeal panel.
- 5.21 ADDITIONAL GROUNDS OF APPEAL RECEIVED BY THE PANEL SUBSEQUENT TO THE FILING OF THE ORIGINAL GROUNDS OF APPEAL
- 5.21.1 The panel received additional information submitted by the appellants in their appeal against the ruling and the sanctions of the adjudicator. The appellants state that the additional information aims to mitigate the imposed sanctions. The additional information (“evidence” as stated in the document received) seems to be two additional grounds of appeal.
- 5.21.2 “PROCEDURAL RULES
- 5.21.2.1 In the first additional ground of appeal the appellants refer to the Constitution of the South Africa, in particular section 33(1) which provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- 5.21.2.2 The appellants also refer to a ministerial determination that sets out guiding principles which industry representative bodies of information system providers, like WASPA, are advised to take into consideration in the administration of its affairs and the execution of its mandate. The appellants continue by stating that there is an obligation to fair administrative procedure placed on all bodies enabled by parliamentary legislation and that the prerogative for self-regulation of the information system sector is enabled by the “Electronic Communications Act”.
- 5.21.2.3 The appellants then refer to a document which they wish to submit which mitigates the charges against them and which according to the appellants demonstrates the inconsistencies in the assessment of complaints.
- 5.21.3 “SANCTIONS”
- 5.21.3.1 In the second additional ground of appeal the appellants again refer to the Ministerial Guiding Principles referred to in 5.21.2.2 above, in particular to point 2.11 of these principles which according to the appellants entrenches the principles of fairness in the procedure of

self-regulating industry bodies in that “Requirements should be fair and not adversely affect the viability of the ISPs”.

- 5.21.3.2 The appellants question the imposition of the sanction of suspension of their service for a period of one month, which the appellants claim severely threatened the economic viability of the 1st appellant (the SP).
 - 5.21.3.3 The appellants then set out the possible sanctions for transgressions of the Code as well as what network operators may be advised to do in terms of the Code.
 - 5.21.3.4 The appellants continue by stating that they find it difficult to understand the adjudicator’s decision to impose one of the harsher sanctions, particularly in light of the measures taken to remedy the perceived breach.
 - 5.21.3.5 The appellants state further that the imposition of sanctions is, in the absence of a sanction guideline, at best unpredictable and at worst entirely at the discretion of an adjudicator.
 - 5.21.3.6 In furtherance of this argument the appellants submit that in the interest of transparency and just administration that a document indicating which transgressions will be met with which sanctions, ought to be formulated.
 - 5.21.3.7 The appellants again draws the panel’s attention to the fact that the definition of “bundling” which now forms part of the Code had not been adopted at the time of the adjudicator’s report. They conclude by indicating that the sampling of “tones” is still the most effective method of advertising “tone clips”.
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6. FINDINGS OF APPEALS PANEL

6.1 General Comments

- 6.1.1 It is not the role of the panel to applaud good behaviour – members of WASPA are expected to comply with the Code. To the extent that the members note a potential problem or breach and take steps to remedy this, we do not consider this behaviour to deserve any special consideration at the appeal stage, except in relation to the sanction where it might be taken into account in mitigation. Even so, the panel are reluctant to approve a practise which for all intents and purposes permits contraventions then applies lesser sanctions if the defaulter has taken a particular number or type of actions to fix the situation so as to be compliant, which is the starting position required under the Code in any event. Each case should be evaluated strictly on its own merits. In general the panel’s view is that contraventions are contraventions.
- 6.1.2 WASPA has as a matter of fact, jurisdiction in relation to any service which can be termed a “wireless application service” where its members are involved in a complaint, or where its members have responsibility for the

actions of third parties who may be involved in a complaint. WASPA is required to take the public interest into account when considering any complaint.

6.1.3 The General provisions of the Code have application in all cases in relation to matters dealt with by WASPA. Section 3.1.1 provides that: "Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA." Section 3.1.2 provides that "Members are committed to lawful conduct at all times."

6.1.4 These principles have informed our decision and our reasoning.

6.1.5 The Panel has considered each ground of appeal set out by the IP and the SP above, and we state our decision next to it below:

6.2 IP and SP's grounds of appeal

6.2.1 INTERPRETATION OF THE CODE AND THE SANCTION OF SUSPENSION

6.2.1.1 The panel does not agree with the appellant's restrictive interpretation of the Code in clauses 1.1 – 1.8 of their grounds of appeal in that the sanction of suspension of services can only be applied to conduct which is present and ongoing.

6.2.1.2 The panel considers it entirely appropriate to impose the sanction of suspension of services in cases where the consumer interest is potentially at stake, and where a breach of the Code has taken place. The panel finds the imposition of suspension an enforceable sanction which may also be applied to past conduct. We are of the opinion that this sanction should be imposed with care and only in circumstances where the interest at stake and seriousness of the breach of the Code is proportionate to the sanction of suspension of services. Clauses 1.1 – 1.8 of this ground of appeal are not upheld.

6.2.1.3 The panel has given due consideration to the Code provisions, the IP's and SP's appeal, the reasons advanced by the adjudicator for his sanctions, and the sanctions themselves. On the facts we consider that the sanctions are severe. We are also aware that in terms of earlier versions of the Code (up to version 4.3 of the Code), it was not entirely clear if sanctions applied notwithstanding the lodging of an appeal. Since a part of the suspension (10 days) actually resulted from the adjudication because of the uncertainty regarding the interpretation of earlier versions of the Code and since the time period for application of the suspension is now past, we do not uphold the suspension. This should not be seen however, as a finding that we do not support the sanction of suspension in general. On the contrary, the panel considers it an entirely appropriate sanction in cases where the consumer interest is potentially at stake, and where a breach of the Code has taken place. Clause 1.9 of this ground of appeal is therefore upheld.

6.2.2 PROCEDURAL RULES ARE NOT IN ACCORDANCE WITH THE RULES OF NATURAL JUSTICE --- NO SEPARATION OF FINDINGS AND SENTENCE PROCEDURE.”

6.2.2.1 We are as stated in 6.2.1.3 above aware that in terms of earlier versions of the Code (up to version 4.3 of the Code), it was not entirely clear if sanctions applied notwithstanding the lodging of an appeal.

6.2.2.2 We also specifically note that the IP’s services were suspended for a period of 10 days without the appellants having had the opportunity to address evidence and argument in mitigation.

6.2.2.3 The panel took note of this fact in consideration of sanction.

6.2.2.4 This ground of appeal is upheld.

6.2.3 SINGLE LETTER CODE/ GENERIC WORD

6.2.3.1 This ground of appeal needs to be considered in the context of all the relevant circumstances and factors that could have an influence on the issue of bundling. Even though the use of a single letter code instead of a generic word in itself does not constitute bundling, the panel agrees with the adjudicator that the use of the specific “G” and “M” single letter codes in the advertisements that form the subjects of the complaints in this appeal, contribute to the perception that a specific content item is bundled with a subscription service.

6.2.3.2 It is not possible for the panel to rule with any certainty on what the intention of the IP was when it decided to use the specific single letter codes. The panel however finds the use of the specific two single letter codes namely “G” for the “Druk die groen knoppie” advertisement and “M” for the “Madam” advertisement too much of a coincidence not to consider it a definite possibility that these two single letter codes could have been used with the intention of creating the impression in the minds of consumers that they will receive specific items of content if these single letter codes are used.

6.2.3.3 If what the appellants aver in this ground of appeal is true, in that the IP uses all the letters of the alphabet including “AA”, “BB” and “DD”, the question can rightly be asked why the IP used these specific two letters instead of, for example, “AA”.

6.2.3.4 The panel can also not attach any significant weight to the fact that other single letters were used in other advertisements, in June 2006, because the advertisements were flighted after these complaints were lodged.

6.2.3.5 It is not the role of the panel nor should it be, that form take precedence over substance – the rule in the Code is intended to prevent harm to consumers, and it must be interpreted in whatever way is necessary to give effect to this outcome. This ground of appeal is not upheld.

6.2.4 THE USE OF UNRELATED TERMS

- 6.2.4.1 The use of unrelated terms is again only one of many potential factors to be considered in determining whether the Code was breached. Although the use of unrelated terms lends itself to different possible interpretations, the panel is of the opinion that the terms used by the IP are sufficiently clear as to not attach any significant weight thereto.

6.2.5 USE OF THE WORDS “A” AND “THIS”

- 6.2.5.1 The panel notes all the efforts as well as the proactive steps taken by the IP as stated in this ground of appeal. The panel also specifically notes the email dated 3 March 2006.

- 6.2.5.2 As were the case with the previous two grounds of appeal the use of the words “a” or “this” is only one of many potential factors that could possibly be considered in order to determine if a breach of the Code has taken place.

- 6.2.5.3 The panel agrees with the appellants that the use of the word “a” instead of the word “this” lends itself more to an interpretation that the service advertised are subscription services rather than advertisements for specific content. The panel, however, also agrees with the adjudicator in that the use of the word “a” instead of the word “this” does not in itself obviate the other possible factors and circumstances that could cumulatively lend itself to a different interpretation.

6.2.6 THE USE OF ONLY ONE CONTENT ITEM TO ILLUSTRATE A SUBSCRIPTION SERVICE

- 6.2.6.1 The panel takes note of the arguments forwarded by the appellants regarding the practical difficulties and loss of effect in using more than one content item to illustrate a subscription service. The panel is, however, not in a position to make findings on the practicalities or marketing effect of using only one content item to illustrate a subscription service in an advertisement, nor is the panel in a position to make recommendations in this regard.

- 6.2.6.2 The panel agrees with the adjudicator that the use of only one content item to illustrate a subscription service is a factor that, together with a number of other factors, could be an indication that that bundling of a specific content item is taking place.

- 6.2.6.3 The panel finds that although amendments have been made to Code, and although the timing is unfortunate, that the indication that there was confusion in the industry regarding the exact interpretation of the Code regarding the bundling issue is not an adequate ground of appeal that outweighs all other considerations when deciding whether bundling did take place in a particular advertisement. This would have the effect of giving weight to form over substance, which is not the intention of the Code.

- 6.2.6.4 The panel notes the IP's efforts with regards to compliance. The panel cannot however consider these efforts themselves in determining whether the Code was breached. See comments in 6.2.12.1 below regarding WASPA enquiries.

6.2.7. ADVERTISING RULES

- 6.2.7.1 The adjudicator also considered the Advertising Guidelines published by WASPA (Ad Rules) but did not consider that they applied as the complainant had not specifically referred to them in the complaints. The adjudicator's reasoning was that the SP and IP had not had an opportunity to respond to them. The panel notes what seems to be the adjudicator's inconsistent use and referral to this issue. In the interests of expediency and fairness and with a view to concentrating only on the already complex facts and appeal argument, the panel has decided not to consider the Ad Rules in this appeal but notes that in fact the Ad Rules apply whether or not a complainant cites them specifically and would have applied at the time, to the advertisement. In future appeals we recommend that the Ad Rules form part of the subject matter.

6.2.8 EFFORTS TO COMPLY WITH CODE

- 6.2.8.1 The panel notes the efforts of the IP in revising its advertising. These efforts however do not have bearing on the question whether the Code was in fact breached or not. These efforts may however be taken into consideration in mitigation of sanction. See comments in 6.1.1 in this regard.

6.2.9 NO PRIOR MONETARY SANCTIONS

- 6.2.9.1 The panel agrees that the statement made by the adjudicator seems to indicate that the adjudicator considered that "financial sanctions did not appear to deter the IP" as an aggravating factor. This statement of the adjudicator seems not be based on fact (no prior financial sanctions). This ground of appeal is therefore upheld.

6.2.10 EFFORTS BY THE IP TO STRICTLY ABIDE BY THE WASPA CODE AND TO EDUCATE CONSUMERS OF THE CONTENTS OF THE CODE AND THEIR RIGHTS

- 6.2.10.1 See comments made by the panel in 6.1.1 above. These efforts are noted by the panel although this has no relevance to the appeal.

6.2.11 NO CONSISTENT BREACHES

- 6.2.11.1 See comments made in 6.2.9.1 above. This ground of appeal is upheld.

6.2.12 ADVERTISING CAMPAIGNS

- 6.2.12.1 Whilst obtaining an opinion from WASPA as to compliance is a useful step WASPA is not bound to give recommendations to industry bodies nor are its recommendations to be considered to be approval of any advertisement – WASPA has issued various statements and caveats in this regard. We therefore do not regard this as a valid ground of appeal. Giving weight to WASPA advisory notes would tend to shift the burden of compliance to WASPA which would be a very undesirable outcome.

6.2.13 PRE APPROVAL AND VETTING

- 6.2.13.1 See comments made in 6.2.12.1 above.

6.2.14 HARSHNESS OF THE FINE AND SUSPENSION

- 6.2.14.1 The panel has given due consideration to the Code provisions, the type of penalties adopted in other adjudications, the appellant's appeal, the reasons advanced by the adjudicator for his sanctions, and the sanctions themselves. On the facts we consider that the financial penalty is severe. Since a short period of suspension (10 days) actually resulted from the adjudication and since the time period for application of the suspension is now past, we do not uphold the suspension. This should not be seen however, as a finding that we do not support the sanction of suspension under warranted circumstances. On the contrary, the panel considers it an entirely appropriate sanction in cases where the consumer interest is potentially at stake, and where a breach of the Code has taken place. We do however feel that in the particular circumstances of this appeal where the suspension of the services resulted because of uncertainty regarding earlier versions of the Code that the sanctions are severe. This ground of appeal is therefore upheld.

6.2.15 NO PREVIOUS CUSTOMER COMPLAINT

- 6.2.15.1 It is not the role of the panel to determine who should make a complaint. Any complaint, regardless of who lodged the complaint should be considered. The fact that not one member of the public complained that they had been subscribed for a service, is in our view not relevant to the facts before us.

6.2.16 GOOD FAITH

- 6.2.16.1 The panel does not consider this to be a ground of appeal although it will be taken into account in considering the sanction.

6.2.17 COMPOUNDING OF SUSPENSION PERIOD

- 6.2.17.1 Since a short period of suspension (10 days) actually resulted from the adjudication and since the time period for application of the suspension is now past, we do not uphold the suspension. We again reiterate that this should not be seen as a finding that we do not support the sanction of suspension in general. On the contrary, the panel considers it an entirely appropriate sanction in cases where the consumer interest is potentially at

stake, and where a breach of the Code has taken place. See in this regard comments made in 6.2.14.1 above. This ground of appeal is upheld.

6.2.18 CONCLUSION

6.2.18.1 See panel decision regarding sanctions below.

6.3 SP's additional grounds of appeal

6.3.1 The SP in its additional grounds of appeal as stated in 5.20.3.1-5.20.3.6 above explains in detail why they were initially of the opinion that they did not need to respond to the complaints lodged against the IP. The panel wishes to highlight the the relationship between SP's and IP's in terms of the Code, as set out in the appeal above.

6.3.1.1 The panel notes the SP's grounds of appeal as stated in 5.20.3.1 – 5.20.3.6. The Code, with reference to the above, is very clear in that SP's must take responsibility for the actions of their IP's, which includes transgressions of the Code.

6.3.1.4 In light of the above the panel does not regard this as a valid ground of appeal.

6.3.2 With regards to 5.20.3.7 – 5.20.3.9 of the SP's additional grounds of appeal the panel refers to its comments in 6.1.1 above. The panel however will note these grounds of appeal in our consideration of the sanction.

6.3.3 In 5.20.3.10 the SP states that “the client has not received any previous successful adjudications against them relating to TV advertising.” The panel has already noted this fact in the consolidated grounds of appeal in 6.2.9.1 above.

6.3.3.1 The SP in 5.20.3.10 apparently distinguishes between the subject matter of the current complaints (namely television voice overs and text) and other forms of media advertisements. However, the Code applies to all forms of media. The Ad Rules are guidelines in relation to how the Code might be applied in the different forms. It is not useful to compare complaints based on media and the panel does not find it needs to do so (if it did, it would probably support the view expressed by the adjudicator that television has potentially a greater impact).

6.3.4 The panel does not see the relevance of 5.20.3.11 of the SP's grounds of appeal.

6.4 Additional grounds of appeal received by the panel subsequent to the filing of the original grounds of appeal

6.4.1 The additional grounds of appeal were filed by both the appellants (IP and SP). The appellants state that the submission aims to mitigate the imposed sanctions.

- 6.4.2 In the first additional ground of appeal “PROCEDURAL RULES” as stated in 5.21.2 above, the appellants refer to section 33(1) of the Constitution which makes provision for procedural fairness as well as a Ministerial determination which also places an obligation on quasi judicial bodies like WASPA to fair administrative procedures. With due regard to the comments made regarding the 10 day suspension of the IP above (see 6.2.14.1 and 6.2.17.1), the panel finds no other possible reasoning behind these references other than that the appellants are by implication averring that the WASPA adjudication process is according to them in principle unfair. The panel strongly objects to this implication, in that there is absolutely no justification or objective grounds on which the WASPA Code itself (and the procedures contained therein), neither the WASPA Secretariat and/or any of its intermediaries could be accused of being unfair.
- 6.4.2.1 The panel further notes the attached document marked addendum “B”. Apart from the fact that the complaints referred to deal essentially with different transgressions of the code it should also be noted that the circumstances of each of the adjudications differ. The panel therefore notes the addendum but does not attach any significant weight thereto. Please note the general comments with regard to sanctions in 6.4.3 below
- 6.4.3 In the second additional ground of appeal “SANCTIONS” as stated in 5.21.3 above, the appellants essentially repeat the grounds of appeal with regards to sanction already dealt with in previous grounds of appeal. Considering that the panel already made reference to the fact that we find the sanctions imposed by the adjudicator to be severe we will not again address the appellants grounds of appeal with regards to sanction in detail. The panel does however feel that in dealing with this additional ground of appeal submitted by the appellants that it is necessary to make the following comments regarding sanction:
- 6.4.3.1 All WASPA members are subject to the Code and its provisions. All WASPA members are therefore deemed to be aware of the provisions of the Code, which include the provisions regarding sanction. WASPA members cannot therefore aver that a particular sanction is not applicable to them if and when the Code is breached.
- 6.4.3.2 The panel, and WASPA for that matter, agree with the appellants that the development of sanction guidelines is necessary. We, however, wish to emphasize the fact that a decision regarding sanction, even with the assistance of guidelines cannot be pre-empted with certainty. Each individual complaint is factually different and the surrounding circumstances unique. Each decision regarding sanction is therefore based on different considerations. It is the opinion of this panel that sanction guidelines should not be more than guidelines and that a document indicating which transgressions will be met with which sanctions, as suggested by the appellants, is not an expectation that can realistically be fulfilled.

6.5 SUMMARY

- 6.5.1 The panel finds overall, facts supporting a finding by the adjudicator of a breach of the Code in relation to section 11.1.2. Neither the IP nor the SP has persuaded us that there was no breach. We also record a censure of the IP for not upholding the spirit and the purpose of the provision.
- 6.5.2 Sanctions
- 6.5.2.1 The imposed sanction as stated in 4.6.1 above is upheld.
- 6.5.2.2 The sanctions imposed in 4.6.2 – 4.6.6 and 4.6.8 above are for the reasons provided in 6.2.1.3; 6.2.14.1 and 6.2.17.1 above not upheld.
- 6.5.2.3 In the circumstances, the panel considers that on the facts the financial penalty was severe. We direct that the penalty in 4.6.7 above be reduced by 50%, from R100 000 to R50 000, R50 000 suspended for a period of 3 months from the date of this appeal. If the IP should breach the code in any manner whatsoever resulting in a complaint, the IP shall immediately become liable to pay the balance of the fine to WASPA.
- 6.5.2.4 The appeal fee is not to be refunded to the appellants.