

REPORT OF THE ALTERNATIVE APPEALS PANEL

Date: 14 December 2007
Appellants: Integrat (Pty) Ltd (Integrat or SP) and Gozomo Inc (Gozomo or IP)
Complaint Numbers: 0272, 0277, 0278, 0290, and 0310 (parts 1 and 2)
Code version: v4.6

1 INTRODUCTION TO THIS APPEAL

- 1.1 This appeal concerns the adjudication of five complaints which all resulted from the same or a substantially similar television advertisement aired on etv. In the case of 0310 the complaint concerned two advertisements flighted one after the other, only the first of which was similar to that complained of in the other 4. The complaints were filed separately but the adjudicator considered 0272, 0277, 0278, 0290 and part 1 of 0310 together and separately adjudicated part 2 of 0310 which addressed the second of the two advertisements flighted together.
- 1.2 The IP and SP have each submitted independent appeals on different grounds. The SP has indicated that the IP's submission should be considered separately. We note this only for completeness as the finding made in this appeal will affect both parties.
- 1.3 The IP has appealed the adjudication in relation to complaints 0272, 0277, 0278, 0290 and 0310 part 1 (Adjudication 1). The SP has appealed those complaints dealt with in Adjudication 1 and in addition, the part 2 adjudication of 0310 (Adjudication 2).
- 1.4 The complaints were submitted during the period March to May 2006 when version 4.6 of the Code of Conduct was in force.
- 1.5 This appeal concerned some very complex arguments, in part because the way the arguments were stated was difficult to follow, but also because the facts of and decisions made in the adjudications required some considerable review. At the outset therefore, the panel wishes to note pertinent clauses of the Code of Conduct which guided this appeal:
 - 1.5.1 Section 13.5.5 provides that the appeals panel must consider the evidence presented to the adjudicator, the adjudicator's decision and any additional information provided by the service provider.
 - 1.5.2 On the basis of the evidence presented, the panel will decide under section 13.5.6, whether there has, in fact, been a breach of the Code.

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- 1.5.3 If the panel determines that there has been a breach, then it must review the sanctions recommended by the adjudicator, according to section 13.5.7.
- 1.5.4 Under section 13.5.8, the panel may maintain the same sanctions recommended by the adjudicator, or may determine such other sanctions as it deems appropriate, given the nature of the breach and the evidence presented.
- 1.6 We have (i) summarised key relevant issues by way of background in part 2; (ii) summarised the complaints received and the relevant sections of the Code referred to in part 3; (iii) specifically considered the adjudicator's decisions in part 4; (iv) reviewed the SP's grounds of appeal in part 5; and (v) made our finding in part 6.

2 RELEVANT INFORMATION

- 2.1 *The relationship between the SP and the IP*
- 2.1.1 The definition of "*information provider*" in the Code states that this is "any person on whose behalf a wireless application service provider may provide a service, and includes message originators". A "*wireless application service provider*" is "any person engaged in the provision of a mobile service, including premium-rated services, who signs a WASP contract with a network operator for bearer services enabling the provision of such services."
- 2.1.2 Section 3.9.1 of the Code (information providers, general provisions) states that "members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene this Code of Conduct". Section 3.9.2 provides that "the member must suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct".
- 2.1.3 As stated in point 1.2 above, the IP and SP have each submitted independent appeals on different grounds. The SP has indicated that the IP's submission should be considered separately. The IP submitted to the jurisdiction of WASPA at the time it responded to the complaints, and at the time it lodged its appeal although it was not, at that time, an affiliated member of WASPA. The panel understands that the IP is now a member of WASPA.
- 2.2 *WASPA and the public interest*
- 2.2.1 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

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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.

- 2.2.2 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."
- 2.3 These principles have informed our decision and our reasoning.

3 BASIS OF THE COMPLAINTS

3.1 *The advertisements complained of:*

- 3.1.1 We refer to the adjudications in respect of complaints 0272, 0277, 0278, 0290 and 0310 part 1 as "Adjudication 1". The adjudication in relation to part 2 of 0310 is referred to as "Adjudication 2".
- 3.1.2 Adjudication 1 concerned an advertisement which in all but 0310 depicted a message accompanied by a fairy which stated "...to order *this* animated fairy..." and the number 31996.
- 3.1.3 In 0310 the advertisement stated "...to order *animations* of this fairy..." with the same short code.
- 3.1.4 Adjudication 2 concerned an advertisement which was flighted immediately after (and as if it were part of) the fairy advertisement in 0310, but concerned the promotion of Yo Mama jokes. The Yo Mama advertisement required an order to be placed to the same short code.
- 3.1.5 The complaints cited the Code at sections 6.2 (pricing of services) and 11 (subscription services).
- 3.1.6 The same complainant submitted all the complaints.

3.2 *The complaints*

- 3.2.1 In complaints 0272, 277 and 0278 the complainant relied specifically on section 6.2.2 which states that:
- "All advertisements for services must contain the full retail price of that service".
- In those complaints and in 0290 the complainant also relied on section 11.1.2 which states that:

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“Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing for a service. A request from a subscriber to join a subscription service may not be bundled with a request for a specific content item.”

In complaint 0310 the complainant also cited sections 6.2.1, 6.2.5 and 6.2.6 in addition to 6.2.2:

6.2.1: “All advertised prices must include VAT.

6.2.2: All advertisements for services must include the full retail price of that service.

6.2.5: The price for a premium rated service must be easily and clearly visible in all advertisements. The price must appear with all instances of the premium number display.

6.2.6: Unless otherwise specified in the advertising guidelines, the name of the WASP or the information provider providing the service must appear in all advertisements for premium rated services.”

- 3.2.2 The complaints indicated that section 11.1.2 applied because the advertisement of the fairy amounted to a subscription service bundled with the content item. The complaints also indicated that section 6.2 applied because the correct price was not advertised and that more was charged than the price indicated (that was actually advertised).
- 3.2.3 The SP responded in relation to 0272, 0277 and 0278 to indicate that it was not liable for any breach and attached the response from its IP. Further it indicated that as an SP it was not an advertiser or producer but only a “connectivity aggregator” and did not carry out hosting or transactions. In relation to 0290 it also referred to the IP’s role, but stated in addition it had no involvement in production, development, flighting, placement of advertisements, formatting or the initiation of delivery, but it (the SP) acted only as a medium to carry information to a subscriber and equivalent in this to a network operator.
- 3.2.4 The IP’s initial response was stated to apply to complaints 0272, 0277 and 0278 but its actual response to 0290 referred to the responses in relation to these other complaints. In summary, the IP objected to a competitor using a forum that it could not “have a voice on”. Furthermore it claimed that section 11.1.2 was subject then to review by WASPA. On the advertisement itself, the IP stated that fairy animations was a generic category of subscription services and the “remainder” of the advertisement made it clear that subscription was a separate transaction which required a customer to sign up and therefore the advertisement was in accordance with section 11.1.2.

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- 3.2.5 In relation to section 6.2 the IP argued that it had no knowledge of any price other than that which was indicated in the advertisement being charged.
- 3.2.6 The SP did not respond to complaint 0310 in relation to the Yo Mama advertisement. The IP responded to acknowledge that a breach of section 6.2 had taken place but that this resulted from an error by its editing and media consultants who omitted the pricing and terms and conditions from the advertisement. The IP also stated that the advertisement was withdrawn after only 3 showings, that it had subsequently de-activated the keywords advertised, and that it had unsubscribed anyone who had signed up to the service. It requested WASPA to take these actions into account in considering the complaint.
- 3.2.7 On the complaint regarding section 11.1.2 which related to the fairy advertisement, the IP stated that it did not consider that complaint to have any merit as the advertisement offered a generic service which was not linked to specific content, which amounted to promotion by category rather than by individual item, and this constituted compliance with the requirements for a subscription service.
- 3.2.8 The IP attached some correspondence to its responses but we do not consider this to add anything to the appeal by the SP or IP.

4 DECISIONS OF THE ADJUDICATOR

4.1 *Findings on Adjudication 1*

- 4.1.1 As we explained above in points 3.1.1 to 3.1.3, the adjudicator made one finding in relation to complaints 0272, 0277, 0278, 0290 and part 1 of 0310 relating to the fairy animation.
- 4.1.2 The adjudicator noted the differences between the advertisements which formed the substance of each complaint, noticeably the change in text from “this animated fairy” in the advertisement complained of in the first 4 complaints, to “animations of this fairy” in the advertisement complained of in the 5th complaint, part 1.
- 4.1.3 The adjudicator then repeated the SP and IP responses verbatim.
- 4.1.4 The adjudicator also considered the Advertising Guidelines published by WASPA on 29 November 2005 (Ad Rules) but did not consider that they applied as the complainant had not specifically referred to them in the first 4 complaints. The adjudicator’s reasoning was that the SP and IP had not had an opportunity to respond to them. In the interests of expediency and fairness and with a view to concentrating only on the already complex facts and

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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 panel review.

4.1.5 In summary, the adjudicator found the following:

4.1.5.1 *the SP and IP are both liable under the Code* – looking at case law, the IP has bound itself to the process both at the adjudication and appeals stage and had subsequently become a member of WASPA in its own right;

4.1.5.2 *pricing* – the complaints were not upheld;

4.1.5.3 *independent transactions* – the adjudicator referred to a previous appeals panel decision in relation to section 11.1.2 in which a request for specific content which resulted in customers becoming subscribed to receive similar content in future was in contravention of section 11.1.2 of the Code. The adjudicator noted that this was effectively what was happening in this case. In complaints 0272 to 0290 (excluding 0310) the advertisement was for specific content namely the fairy advertised as “this fairy”. In 0310 the advertisement was, according to the adjudicator, improved by reference to “animations of this fairy”, however content advertised for subscription services should, he argued, be used by way of example only. The adjudicator gave useful indications of when a content item might be used as an example for subscription services. In weighing up the use of the fairy in 0310, the adjudicator found that “the IP’s efforts (while cogent and significant) were not sufficient as to obviate the harm of advertising a single content item”, and accordingly the SP and IP were found to have breached section 11.1.2 of the Code.

4.2 *Sanctions in Adjudication 1*

4.2.1 The adjudicator set out 6 bullet points summarising the circumstances which had been considered in applying the sanction:

4.2.1.1 Previous decisions of the adjudicator and appeals panel in relation to subscription services;

4.2.1.2 Clause 3.9 of the Code relating to IPs (noted at point 2.1.2 above);

4.2.1.3 The contentious nature of subscription service even within WASPA;

4.2.1.4 That financial sanctions do not deter the IP from persistent breaches of the Code;

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- 4.2.1.5 Subscription services are enabled by Vodacom and MTN using particular billing systems;
- 4.2.1.6 Sanctions were imposed previously on the SP in relation to 3 other complaints (namely 0141, 0186 and 0188).
- 4.2.2 Specifically the adjudicator applied the following sanctions (direct and indirect):
 - 4.2.2.1 The SP was reprimanded for allowing the IP to breach the Code;
 - 4.2.2.2 Network operators were requested to block the SP from obtaining new access to relevant billing systems for a period of 3 months in relation to the previous 3 matters and the matters under appeal;
 - 4.2.2.3 The IP was ordered to suspend the provision of any subscription service in which the animated fairy or phone fairy was delivered for a period of 1 month commencing on the expiry of the suspension in the previous sanction;
 - 4.2.2.4 The SP was ordered to block the number 31996 in respect of any keyword or letter previously used in relation to the animated fairy or phone fairy subscription services for a period of 1 month commencing on the expiry of the suspension in the report on the previous 3 complaints, and in particular the SP was directed not to process any new or existing billing transactions for the IP relating to the animated or phone fairy subscription service on existing or new short codes;
 - 4.2.2.5 The Secretariat was directed to notify the network operators of the sanction and to request their assistance in monitoring and if necessary enforcing the sanction;
 - 4.2.2.6 The SP was instructed not to resume the IP's service unless the service complied with the Code and was reminded of its obligations as SP under the Code;
 - 4.2.2.7 The IP, as a WASPA member, was reprimanded for its failure to comply with the Code and ordered to pay a fine of R100,000 to WASPA in relation to the subscription service in breach (the amount of the fine having regard to the fine imposed in the previous 3 complaints but lower because of the IP's efforts to avoid consumer confusion which are considered to mitigate the amount); and
 - 4.2.2.8 The Secretariat was ordered to simultaneously notify all members of WASPA of the suspension and that providing any service in relation to the animated or phone fairy during the relevant period would constitute a breach of the Code.

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4.3 *Findings in Adjudication 2*

4.3.1 This adjudication concerned what the adjudicator termed “part 2” of 0310, the complaint regarding the Yo Mama advertisement which appeared at the end of the fairy advertisement considered in Adjudication 1.

4.3.2 In this adjudication the adjudicator referred to the Ad Rules in addition to the sections alleged to have been breached, namely sections 11.1.2 and 6.2. The adjudicator refers to section 6.1 of the Code which specifically provides that members of WASPA are bound by the Ad Rules in addition to the other provisions of the Code. The provisions of section 6.2 are set out in full at point 3.2.1 above. It is not clear why the adjudicator would have applied the Ad Rules in this case when the facts seem to be the same as those considered in Adjudication 1, namely the complainant did not refer to the Ad Rules in his complaint, and the SP and IP did not refer to the Ad Rules in their response, even though they were in force at the time. In these very specific circumstances, the appeals panel determines that the Ad Rules will not be considered to add more weight to any finding, but see our general view stated at point 4.1.4 above. We have not therefore considered the provisions of the Ad Rules.

4.3.3 In this decision the adjudicator found against the SP only. It would appear however, that the IP’s bona fides were however noted specifically and taken into account in applying a sanction and making a decision.

4.4 *Sanction in Adjudication 2*

4.4.1 The adjudicator referred to a finding in complaint 0047 in relation to the parties and his proposed sanction, although stated that 0047 was considered at a time when the Ad Rules did not apply.

4.4.2 The adjudicator found in all the circumstances (including the Ad Rules) that television is a “medium with far greater appeal and impact” than any other, which factor must be taken into account in determining the sanction.

4.4.3 The adjudicator finally noted that the IP had contended that a fine would serve no purpose since, in essence, the IP had already admitted an error and taken steps to deal with it.

4.4.4 Taking the bona fides of the SP into account, the adjudicator applied 3 sanctions:

4.4.4.1 The SP was reprimanded for the breach of the Code by the IP;

4.4.4.2 The SP was ordered to refund those customers who had subscribed to the IP’s Yo Mama subscription service

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irrespective of whether those customers had received content or not, and to provide the Secretariat with proof; and

- 4.4.4.3 The SP was ordered to pay a fine to WASPA of R5,000, which the adjudicator noted was higher than that imposed for complaint 0047 because the Ad Rules had not applied at that time, but “several levels lower” than might have been applied had there not been an error by a third party to be taken into account in this case.

5 GROUND OF APPEAL

- 5.1 The SP submitted an appeal in relation to both Adjudications 1 and 2 despite not responding to complaint 0310 in its own name, prior to the making of either adjudication.
- 5.2 *Appeal by SP against Adjudication 1*
- 5.3 The SP requested the panel to consider the IP’s response “separate to our response... the IP has responded in their own right for they were also addressed in the adjudicator’s report”.
- 5.4 Specifically the SP listed 7 steps which it took to assist “the client to comply”. It is not clear to the panel who the client might be although we assume it is the IP. The 7 steps listed by the SP do not all constitute grounds for an appeal, although we note that these matters would have been relevant as a response to the complaint. Unfortunately the SP did not include any of these matters in its response at the time.
- 5.5 The 7 points made by the SP are, in summary:
- 5.5.1 “...After the first complaint the SP immediately instructed its customers to change its advertising material and reviewed it;
- 5.5.2 The SP asked WASPA to review some material and implemented WASPA’s recommendations;
- 5.5.3 When subsequent complaints were received the advertising material was reviewed and changes implemented but didn’t have guidance from WASPA because the outcome of the complaints was still pending so the SP didn’t know if they were compliant or not. Every time a change was needed the client took immediate action. The SP will be exposed to actions for damages from [sp] its clients should it disable clients’ accounts prematurely. That is, before the result of any complaint is received;
- 5.5.4 The SP received the appeal’s panel report for the IP’s appeal for the first complaints against them on 2nd June 2006 which was partially

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- upheld. The SP received complaints relating to the same issue before and on the date indicated above;
- 5.5.5 During the week of 5th June 2006 and 12th June 2006 the SP was in discussion with the client to consider changes to their TV advertising and the introduction of the CLUB model. The SP also had multiple discussions with Vodacom to obtain further insights on the issue of bundling;
- 5.5.6 Subsequent to consultation with Vodacom it appeared that the client was in fact in breach on the 16th June. We instructed Gozomo and other customers with similar breaches to immediately retract all advertising from the market, which they did. This was done at an estimated cost of R120,000 to the IP;
- 5.5.7 The IP then took a retro-active approach to attempt to start an education process in the market....”
- 5.6 The SP goes on to say that “it is noteworthy to know that the sanctions in the previous matter against this IP as well as some of the latest sanctions imposed for the above complaints has [sp] been severed fully or partially. The sanctions were imposed at the time and are therefore irreversible, and by the time this appeal has been heard would have lapsed or partially lapsed. The sanctions pertaining to the fines however can still be reversed which includes a fine of R100,000 as well as any further suspensions of the service. We therefore request these sanctions to be reversed”.
- 5.7 *Appeal by IP against Adjudication 1*
- 5.7.1 The IP states in its opening paragraph that its appeal is “aimed primarily at the Sanction that has been imposed by the Adjudicator which we believe to be totally disproportionate in the circumstances. We should stress to the Appeal Panel that what is proposed inter alia is that an entire aspect of our business be suspended for a month. This relates to the offering of an entire category of various content items.... and is entirely unrelated to the question of whether or not we are able to offer this content in a manner which is consistent with the WASPA Code. In addition the proposed sanction relates to subscribers who were subscribed via our other methods of advertising, which in no way breached the Code.”
- 5.7.2 The IP continues its opening gambit with “The power to impose financial sanctions including the suspension of a company's business is an extremely severe sanction and one that should be utilized only in extreme cases with the utmost caution and responsibility. We also want to bring to the appeals panels attention that this will be the second consecutive sanction imposed on us for what is essentially the same complaint submitted by the same complainant repetitively relating to the same breach of the same clause in the Code of Conduct. Due to the excessive delays in the

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WASPA complaints procedure we could not get clarity on these complaints until after we received the Appeal panel finding on the issue on May 30th 2006. Since this date we have not received another complaint.... Whilst we welcome the role of the WASPA complaints process in providing clarity and interpretation on the WASPA code, the proposed sanctions are entirely disproportionate in the context of the history and background to the complaints under consideration as well as the nature of the breach found to have been committed and the conduct and approach of our company that has lead to the breach [sic].”

5.7.3 The IP has set out its appeal in headings. We will address the appeal in the same headings, summarising the grounds below.

5.7.4 *The complaints*

5.7.4.1 The IP contends that each advertisement complained of clearly stated that it was offering a subscription service.

5.7.4.2 The IP states that the dispute was in essence regarding whether or not it was found to be offering a content category, or a specific item of content linked to a subscription service. The IP makes reference to certain recent amendments to the Code and states that the amendments demonstrate that the Code was previously not clear in relation to content items, although it appears to argue that it was nonetheless compliant, albeit with an unclear provision.

5.7.4.3 In the absence of aggravating factors or behaviour and because of a finding of mitigating factors, the Code should not be used to impose severe penalties.

5.7.5 *Adjudication*

5.7.5.1 The IP refers to both the Code and Ad Rules but states that neither require that cost and frequency of charge be included in the voice over, therefore it is unjust for the adjudicator to make such a suggestion in his ruling and dismiss the requirements that the advertisements did actually contain. The IP contends that it is the adjudicator's role to review the complaint and not suggest requirements that are not in the Code. The panel notes, purely as an aside, that blind people may wish to subscribe, and the voice over therefore does become critical.

5.7.5.2 By a “reasonable standard” the IP argues that the amount and nature of the sanction is entirely disproportionate to the nature of the breach and context of the complaint. The IP also notes that not one single member of the public complained that they

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had been subscribed to the service when they tried to order a single piece of content.

5.7.6 *History*

5.7.6.1 In this section, the IP explains the history of the company and its thinking and approach, and background to the findings.

5.7.6.2 The IP submits that its arguments are to some extent “moot” given the findings of other panels.

5.7.6.3 The IP also refers to other appeals panel findings although these are not specific references

5.7.6.4 The IP confirms that it was not previously a member of WASPA and therefore not permitted to put its case to role players. The IP does state in relation to a competitor, that “certain parties not least our competitors...were vigorously opposed to the subscription model in general and our company as one of the provider’s [sic] of these services in particular. It was our impression that an image of our company had been created which inaccurately portrayed us as being insensitive to either WASPA or the needs of consumers. We hope to demonstrate the inaccuracy of this by elaborating on the steps that we took at various times in response to WASPA’s actions. We also hope to explain that our actions to date have been motivated by what we regard as a reasonable objection to WASPA’s interpretation of the regulations in relation to bundling.”

5.7.7 *Response to WASPA complaints and suggestions*

5.7.7.1 The IP contends that when it received the first complaint it immediately contacted WASPA and asked for comment and advice on how to make sure that it was compliant with the Code. It states further that it received advice on a “double opt-in” procedure which it adopted from then on. However the IP argues that WASPA doesn’t allow for discussion and therefore it wasn’t able to air issues and provide details on the double opt-in. In particular the IP states “we believe that by not subscribing a consumer prior to them confirming by a second sms their subscription, we were satisfying the WASPA Code requirement of confirming a “specific intention to subscribe” to our services.” By implementing the WASPA advice the IP states its intention was to comply.

5.7.7.2 The IP states that the adjudicator rejected the double opt-in but it does not know on what grounds.

5.7.7.3 The IP does not regard itself as having been in “wilful breach” as stated by the adjudicator simply because there were

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numerous complaints against it, and avers that all advertising after the appeals panel finding of 30th May 2006 has incorporated the findings of the panel.

5.7.8 *Gravity of the sanction*

5.7.8.1 The IP has already set out in its introduction, its reasons for believing the sanction to be overly severe and “disproportionate to the breach which has been found to have taken place”.

5.7.8.2 The IP believes that “the adjudicator has indicated a predisposition to act in a punitive manner... In no instance that we are aware of is the adjudicator instructed by the WASPA code of conduct to impose such a severe sanction. The adjudicator is mandated to adjudicate on issues placed before him and decide on sanctions that are appropriate in the circumstances...We believe that [suspension of business] was included within the range of contemplate sanctions in order to ensure that an adjudicator had means of preventing severe and ongoing hardship to consumer [sic] or abuse of services. We certainly do not believe that it is appropriate in the context of the enforcement of an admittedly unclear provision of the Code where there are ongoing “efforts to clarify issues such as the nature of an independent transaction”. While we acknowledge that the adjudicator does not “enjoy the luxury of foresight” we believe that acting on a provision that is admitted not as clear as it should be should not then motivate the adjudicator to use the most severe penalty in his armory [sp].”

5.7.8.3 The IP repeats the adjudicator’s language in relation to taking steps to ensure its TV advertising was compliant, and in particular that the adjudicator had said “the IP’s efforts (while cogent and significant) were not sufficient so as to obviate the harm of advertising a single content item.” The IP states that it does not understand why the adjudicator, having recognised its efforts to comply, would still impose the most severe of fines and sanctions against it, “in the history of WASPA”. The IP goes on to say “we are at a loss to understand how our cogent attempts to clarify that our services are subscription services have justified a proposed suspension of our services. we can only believe that the adjudicator seems to believe that subscription services per se are harmful to the consumer. Surely this severe sanction is only meant to protect consumers from shady and unscrupulous service providers.”

5.7.8.4 The IP also raises concerns with the tone of the adjudicator’s report, and argues that stating that “financial sanctions do not appear to deter the IP from its persistent breaches of the Code

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of Conduct reveals an unmotivated and unsupported predisposition by the adjudicator.”

5.7.8.5 Finally in this regard, the IP states that “while we are not raising again the question of the correctness of the decision at this stage, we think that the lack of clarity in clause 11.1.2 justified us in having our own view of its interpretation, and asking the appeal panel to rule on this issue. Pending this decision we also believe that it was reasonable for us to continue to advertise and conduct our business in accordance with our interpretation. In fact, the WASPA code of conduct when dealing with the complaints mechanism provides that when a Service Provide [sic] receives an adjudication report it can either comply with it or Appeal.”

5.7.9 *Misleading the consumer*

5.7.9.1 The IP states that in considering the Code the key factors should be the interests of the consumer and the industry as a whole. Its changes to advertisements and attempts to comply with the Code should be taken into account by the panel, argues the IP, in addition to the IP’s initiative to educate consumers.

5.7.9.2 The IP notes to the panel the identity of the complainant in all complaints, and states that no other consumer or person has lodged a complaint on the same grounds. It asks the panel to consider this as well, and to consider that the complainant has been reprimanded by WASPA in the past because of “abuse of the complaints procedure”.

5.7.10 *Timing of WASPA reports*

5.7.10.1 The IP argues that the view of Gozomo as a “serial offender” has been compounded if not created, by the delays in the complaints process. It argues that had it “received a prompt adjudication on complaint 002 and been able to appeal that immediately, this issue could have been resolved before there were so many complaints involved”. The lack of a prompt definitive appeal response has, it argues, “hurt our ability to decide the question fully.”

5.7.10.2 The IP asks the panel to consider the current appeal in interpretation of the WASPA code.

5.7.10.3 The IP notes that it has already had fines imposed on it of R239,500, and that a further R100,000 is a substantial amount and a deterrent to any business. When there is no ongoing behaviour or action to be deterred they do not understand the severity of the penalty and do not believe the adjudicator is

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aware of the severity of the penalties imposed in his findings. The IP also notes that it has never previously shown any disregard for a financial sanction.

5.7.10.4 The IP distinguishes between the subject matter of the current complaints (namely television voice overs and text) and print advertisements which, it argues, formed the basis of previous complaints.

5.7.10.5 Finally it notes that one of the sanctions imposed against it is not actually a sanction contemplated by the Code in that the "list of potential sanctions does not include the ability to direct other WASPA members not to co-operate with the Service Provider or Information Provider being sanctioned".

5.7.11 *Summary*

5.7.11.1 The IP concludes by stating that the panel should find that these issues all revolve around a question of interpretation which has now been resolved finally by WASPA in its appeal panel finding of 30 May 2006.

5.7.11.2 It asks the panel to consider its efforts to comply with the code and co-operate with WASPA, and its efforts to educate and not mislead consumers.

5.7.11.3 The IP specifically requests the panel to take the timing of the complaints into account, and the delay in obtaining a final decision from 'the' appeals panel (we presume this means in a prior appeal).

5.7.11.4 The IP confirms that on the receipt of the adjudicator's report it de-activated the phone fairy content categories and keywords and removed it from its tv advertising in terms of the ruling, and only reactivated it when WASPA told it the sanction was suspended.

5.7.11.5 It asks the panel to recognise the severity of the impact which the request for suspension of its service has already had on its business and the fact that it has already been fined in 002, 0011, 0026, 0037, and 0058.

5.7.11.6 The IP requests that all instances of alleged breaches of section 11.1.2 regarding advertisements submitted prior to 30 May 2006 should be seen as one issue pending the resolution of the panel, and that the panel recognise the severity of existing sanctions and not seek to impose further penalties.

5.8 *Appeal by SP against Adjudication 2*

5.8.1 The SP states that in this case it provided evidence to show that the error made by the IP's outsourced editing and media consultants

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was not made intentionally, in that the layers containing terms and conditions and pricing information were omitted inadvertently during the final rendering process, and took place after the IP had approved the pricing and terms. Therefore the advertising material “was flighted by the broadcaster as was provided by the above consultant and yet Integrat was fined for this error.”

- 5.8.2 The SP states that it agrees with the refunds to subscribers but do not agree that an additional fine is reasonable under the circumstances. The SP states further “this error was clearly made due to human error and it is therefore our humble submission that it is not reasonable to fine the SP for errors made by a third party acting on behalf of the IP.” The SP requests the panel to “overturn and cancel” the R5,000 fine.

- 5.9 *The IP did not appeal Adjudication 2.*

6 FINDINGS OF APPEALS PANEL

- 6.1 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 – it’s like breaking the speed limit, either you did drive too fast, or you didn’t.

- 6.2 *Decision in relation to SP appeal on Adjudication 1*

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

- 6.2.1 *After the first complaint the SP immediately instructed its customers to change its advertising material and reviewed it – this is not a ground of appeal although it might be taken into account in considering the sanction. However the panel notes that these matters should have been raised at the time of the complaint when they could have been taken into account in the adjudication;*
- 6.2.2 *The SP asked WASPA to review some material and implemented WASPA’s recommendations – whilst this is a useful step WASPA is*

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not bound to give recommendations to industry bodies nor are its recommendations to be considered to be approval of any advertisement – WASPA has apparently issued various statements and caveats in this regard therefore this is also not a valid ground of appeal and could be interpreted as shifting the responsibility for compliance to WASPA, which would be a very undesirable outcome;

- 6.2.3 *When subsequent complaints were received the advertising material was reviewed and changes implemented but didn't have guidance from WASPA because the outcome of the complaints was still pending so the SP didn't know if they were compliant or not. Every time a change was needed the client took immediate action. The SP will be exposed to actions for damages from [sp] its clients should it disable clients' accounts prematurely. That is, before the result of any complaint is received – (i) this is not a ground of appeal, this is a recordal of actions taken by the SP after complaints were already received; (ii) see 5.4.2 above; (iii) it is unclear what the relevance of the last 2 sentences is to the appeal;*
- 6.2.4 *The SP received the appeal's panel report for the IP's appeal for the first complaints against them on 2 June 2006 which was partially upheld. The SP received complaints relating to the same issue before and on the date indicated above – the panel fails to see the relevance of this is to the appeal although will take into account the implication that punishment might have been repeated;*
- 6.2.5 *During the week of 5th June 2006 and 12th June 2006 the SP was in discussion with the client to consider changes to their TV advertising and the introduction of the CLUB model. The SP also had multiple discussions with Vodacom to obtain further insights on the issue of bundling – this has no relevance to the appeal;*
- 6.2.6 *Subsequent to consultation with Vodacom it appeared that the client was in fact in breach on the 16th June. We instructed Gozomo and other customers with similar breaches to immediately retract all advertising from the market, which they did. This was done at an estimated cost of R120,000 to the IP –The panel will note this in our consideration of the sanction;*
- 6.2.7 *The IP then took a retro-active approach to attempt to start an education process in the market – this has no relevance to the appeal.*
- 6.3 *Request for reversal of fine:* The panel assumes that this is intended to indicate that where the sanction imposed by the adjudicator, for example, a suspension of service, has already been imposed and implemented, by the time the appeal is finalised that may be irrelevant, whereas the amount of a fine could be revisited because the money hasn't expired, so to speak. Our response is the following:

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- 6.3.1 The panel considers it entirely appropriate to impose a fine as a sanction.
- 6.3.2 The panel is satisfied that the SP should take liability for the actions or omissions of the IP under the Code and makes no finding about the appropriateness of imposing the sanctions on the SP.
- 6.3.3 The grounds for appeal do not constitute sufficient reason to review any other sanctions imposed by the adjudicator in Adjudication 1.
- 6.3.4 Given the application of other sanctions, the panel considers the fine to be punitive.
- 6.3.5 In the circumstances, given the efforts apparently made by the SP to remedy breaches by the IP, the panel reduces the fine from R100,000 to R50,000, R50,000 suspended for a further period of 3 months. If the SP or any of its IPs should breach the Code in any manner whatsoever resulting in a complaint, then the SP shall immediately become liable to pay the balance of the fine to WASPA.
- 6.3.6 The appeal fee is not refundable to the SP in these circumstances.

6.4 *Decision in relation to appeal by SP on Adjudication 2*

- 6.4.1 *Error made by contractor which flighted the advert in an incorrect format without terms and conditions and after approval by the IP – the panel counsels the SP and IP to enter into very strict back-to-back agreements with any outsourcing partner which carry over the responsibility which they bear to comply with the Code, to that partner. In the same way, fines or other penalties should be carried over to the partner under contract – this is likely to act as an incentive to third parties to act carefully in relation to advertisements in the wireless application service sector.*
- 6.4.2 *Fine is not reasonable in the circumstances and should be overturned or cancelled – the appeals panel is bound by the provisions of section 13 which are set out at the beginning of this appeal. Having determined that there was a breach of the Code, the panel can take the sanction under consideration. We note that the advertisement was flighted only 3 times, and that action was taken immediately to refund consumers and de-activate keywords. We therefore suspend the payment of the fine of R5,000 by the SP for a period of 3 months from the date of this appeal. If the SP or any of its IPs should breach the Code in relation to section 6 resulting in a complaint from the public, then the SP shall immediately become liable to pay the fine to WASPA.*
- 6.4.3 We note that the SP has not appealed any other sanction and even so, we find the other sanctions to be appropriate in the circumstances.

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6.5 *IP submission on Adjudication 1*

6.5.1 *Introduction* – The IP has somewhat contradicted itself in the appeal, resulting in confusion regarding (a) whether or not there was an actual suspension of services, (b) whether the IP is arguing only in relation to the sanction that it should be reduced or dismissed, and not in relation to the finding that it be reversed or amended, and (c) what the grounds of appeal are. Our intensive and repeated reading of the appeal has led us to believe that the key issue in it is the severity of the sanction and not the alleged contravention. We have attempted to resolve the confusion in our detailed response to each section of the appeal in the paragraphs below.

6.5.2 *The complaints -*

6.5.2.1 The panel finds that the service was a subscription service. The panel agrees with the assertion by the adjudicator that bundling has taken place in the complaints determined in adjudication 1.

6.5.2.2 The panel finds that although amendments may have been made to the Code, and although the timing is unfortunate, this is not an adequate ground of appeal, other than to indicate that there was confusion in the industry regarding the meaning of the Code, and we have taken this into account in considering the sanction.

6.5.2.3 Since the IP has itself argued that it was compliant with the then version of the Code, we do not consider it necessary to examine the section and the timing of any changes.

6.5.3 *Adjudication -*

6.5.3.1 The panel finds the argument that it is not necessary to express price in a voice over to be insupportable, given the wording of section 11.1.2. It is our view that there is no need for either the Code or Ad Rules to refer directly to a voice over for the general rule regarding pricing to apply.

6.5.3.2 The fact that not one single member of the public complained that they had been subscribed to the service when they tried to order a single piece of content, is in our view, not relevant to the facts before us. Even one complaint must be considered (particularly if one takes into account the fact that members of the public at large may not be aware that a complaints procedure exists).

6.5.3 *History* – As a ground of appeal this is not strictly relevant, although the panel has taken it into consideration as background information. In general the facts proffered by the IP concern previous disagreements with WASPA concerning aspects of the Code and the interpretation of the IP, which it would not be appropriate to consider in this appeal, given the role of the appeals panel in terms of section 13 of the Code.

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- 6.5.4 *Response to WASPA complaints and suggestions*
- 6.5.4.1 As stated in clause 6.2.2 above, 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 apparently issued various statements and caveats in this regard. Therefore this is also not a valid ground of appeal, however the panel has taken into account the efforts made by the IP to find a solution.
- 6.5.4.2 The IP states that the adjudicator rejected the double opt-in but it does not know on what grounds. The adjudicator referred to other complaints in this regard but did not in fact take this into account in determining the breach or setting the penalty. We do not, therefore, regard it as relevant to the appeal.
- 6.5.4.3 The IP does not regard itself as having been in “wilful breach” as stated by the adjudicator simply because there were numerous complaints against it, and avers that all advertising after the appeals panel finding of 30th May 2006 has incorporated the findings of the panel. The IP also lists out all the matters in which complaints have previously been adjudicated upon. This is not, unfortunately, giving the panel much confidence that the IP’s stated intentions in relation to adherence to the Code are in good faith. As we do not think it useful to debate this in our finding, we have decided to address the sanctions in the next section. We do note, however, that the IP appears to accept that WASPA’s approach to bundling would foreclose their approach, and that sanction of some sort must follow.
- 6.5.5 *Gravity of the sanction*
- 6.5.5.1 Again we record that we are not clear about whether the IP agrees with or disagrees with the adjudication other than in relation to sanction. Given the repetition of its arguments in this regard, and the relative lack of argument in relation to the other elements of the adjudication we are more inclined to focus intently on the R100,000 sanction, having considered the breach in the balance of clause 6.5.
- 6.5.5.2 The IP has already set out in its introduction, its reasons for believing the sanction to be overly severe and “disproportionate to the breach which has been found to have taken place”. The IP also states that “the adjudicator has indicated a predisposition to act in a punitive manner...”. The full text of the appeal in this regard is set out in clause 5.7.8.2 above. The panel has given due consideration to the Code provisions, the type of penalties adopted in other adjudications, the IP’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 no suspension 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

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should not be seen however, as a finding that we do not support the suspension. 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.

6.5.5.3 Since the IP states that “while we are not raising again the question of the correctness of the decision at this stage, we think that the lack of clarity in clause 11.1.2 justified us in having our own view of its interpretation, and asking the appeal panel to rule on this issue. Pending this decision we also believe that it was reasonable for us to continue to advertise and conduct our business in accordance with our interpretation. In fact, the WASPA code of conduct when dealing with the complaints mechanism provides that when a Service Provider [sic] receives an adjudication report it can either comply with it or Appeal.” The panel records that this view is not correct. It is not the role of the panel to determine how, at a particular point in time, a provision could have been applied or interpreted, but to assess on the facts before it, how it was in fact applied or interpreted and what resulted. It is not the role of the panel to determine if, at a particular point in time, the IP as appellant was justified in providing a service based on its own interpretation of a provision of the code, but to assess on the facts before it, if the IP's interpretation of a provision and how it was applied, ultimately resulted in a breach of the code.

6.5.6 *Misleading the consumer* – The IP is referred to our general statements on the role of the Code and WASPA. The initiative in relation to education is not relevant to the appeal either in defending a breach or arguing for mitigation of sanction. It is not the role of the panel to determine who should make a complaint.

6.5.7 *Timing of WASPA reports* –

6.5.7.1 The IP argues that the view of Gozomo as a “serial offender” has been compounded if not created, by the delays in the complaints process. The panel notes this but, like any court, the panel can only deal with matters as they are presented and in the order in which they are presented. Where the volume of complaints and/or appeals is such that a delay is occasioned, this is an unfortunate fact of administration. In relation to the adjudications of other matters, they cannot be considered in this matter. In relation to previous appeals, since each matter is decided on its own facts, the IP's argument that its approach to the Code has been affected cannot be upheld, to do so would create an untenable precedent where parties waited in case any adjudication or appeal might have some relevance to their own case.

6.5.7.2 Whilst in relation to appeals, it might be relevant in some circumstances where the appellant can demonstrate prejudice, in this case, the appellant has not paid a fine or had its business suspended. We do not therefore, note significant prejudice. The IP notes that it

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has already had fines imposed on it of R239,500, and that a further R100,000 is a substantial amount and a deterrent to any business. When there is no ongoing behaviour or action to be deterred they do not understand the severity of the penalty and do not believe the adjudicator is aware of the severity of the penalties imposed in his findings. The IP also notes that it has never previously shown any disregard for a financial sanction. The panel fails to see how this can be relevant to the appeal.

- 6.5.7.3 The IP distinguishes between the subject matter of the current complaints (namely television voice overs and text) and print advertisements which, it argues, formed the basis of previous complaints. 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).
- 6.5.7.4 In relation to the argument that the sanction imposed against the IP is not actually a sanction contemplated by the Code in that the “list of potential sanctions does not include the ability to direct other WASPA members not to co-operate with the Service Provider or Information Provider being sanctioned”, the panel finds against the IP. Since the Code governs all SPs and by implication, all IPs in the wireless application service environment, it goes almost without saying that a sanction might include a direction of the sort contemplated in the adjudications considered in this appeal.
- 6.5.8 *Summary* - We have found overall, a preponderance of facts supporting a finding by the adjudicator of a breach of the Code in relation to section 11.1.2. We have therefore considered only the IP’s arguments in relation to sanction in making our decision.
- 6.6 *Sanction –*
- 6.6.1 We have stated in a previous appeal on sanction, that there is no rule of thumb or formula regarding penalties – each decision is very much bound up in its own facts. We consider the findings of the adjudicator to be weighty because of their sheer numbers and relative severity, and neither the IP nor SP have persuaded us that there was no breach. We do, however, consider that on the facts the financial penalty was severe. Given the undertakings by and entreaties of the IP regarding its conduct in the past, but also given the number of previous transgressions (whether taken together or separately), we make the following finding:
- 6.6.1.1 We direct that the penalty be reduced by 50%, R50,000 to be suspended as set out in clause 6.3.5.

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- 6.6.1.2 The SP is directed to pay R50,000 to WASPA within 5 days of the date of this adjudication, and to comply with the balance of the sanction imposed by the adjudicator where this is still relevant.
- 6.6.1.3 The IP and SP are directed to resolve the payment issue between them.