

**WASPA appeals panel
Complaint 6684**

REPORT OF THE APPEALS PANEL

Date: 8 July 2013
Service Provider: Integrat
Information Provider: Mobile Guru
Complaint Number: 6684
Applicable versions: 7.0

1. BACKGROUND TO THE APPEAL

1.1. On 1 June 2009 the WASPA Monitor lodged complaint no. 6684 citing Service Provider Integrat (SP).

1.2. The text of complaint 6684 reads as follows:

Firstly on the start page it is extremely unclear that this is a subscription service. It only says in untidy and unclear writing it that it is a R4.99 daily subscription service.

Also only when you scroll down will you become aware that there are in fact T&C's further below this advert. No consumer would think to scroll down when the screen shot shows that all information needed in doing the love calculator.

Also after entering my pin and being subscribed to the service, I received this message in my inbox as well (As stated above) Try as many names as you want, sms LOVE then the 2 names to 31359. E.g. sms LOVE JACK JILL to 31359. No where does it tell you that by doing this you will be charged an extra R5.50 every time! This is complete misleading information with hidden costs.

So basically when your aim is to do a love calculator you are subscribed to a service at R4.99 a day and if you don't enter different people's names to 31359 you receive absolutely nothing from this subscription.

In my attempt to see if this Love calculator is an actual calculator, which calculates the compatibility of two peoples names, I tried this a third time entering LOVE STONE WATER (i.e. not using peoples names at all) and still received my "compatibility results". This just goes to show that the service is completely misleading.

Also you are charged R5.50 every time you send one those smses so in fact the service is much more than R4.99 a day.

If you don't send any LOVE compatibility messages to 31359 you are basically subscribed to a service that does nothing but deduct R4.99 a day off your phone.

1.3. Given that the case file constituting the complaint, the Information Provider's response, the Adjudicator's Report and the IP's Appeal sets out all relevant information, including screen shots and sms logs; only

elements directly pertinent to this Appeal have been included here.

2. CLAUSES OF THE CODE CONSIDERED

- 2.1. The original complaint cites alleged breaches of the following clauses: 3.3.1; 4.1.1; 6.2.3; 11.1.1; 11.1.2 and 11.1.5.
- 2.2. Complaints in respect of clauses 3.3.1 and 11.1.5 were dismissed by the Adjudicator, who did not levy any sanctions in respect of these clauses, and as there was no appeal by the IP in respect of those decisions, the Panel does not consider them further.
- 2.3. The Adjudicator considered clauses 4.1.1 and 6.2.3 collectively, and in view of the IP's appeal arguments doing the same, this Panel has followed that pattern.

3. WASPA MONITOR'S COMPLAINT, THE SERVICE PROVIDER'S RESPONSE, AND THE ADJUDICATOR'S FINDINGS and SANCTIONS:

3.1. The abridges case record in respect of Clauses 4.1.1 and 6.2.3:

Clause 4.1.1: *Members are committed to honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.*

WASPA Monitor Notes: There is absolutely no pricing information stating that every single time you sms another two names to 31359 R5.50 will be deducted.

Information Provider Response: *The ability to sms additional names to receive a love compatibility score is an additional on-demand service that has recently been requested by our customers. This additional service has only recently been implemented. The terms and conditions on the web page were adjusted to include the additional costs. See highlighted wording below.*

Terms & Conditions: *This is a subscription service for lovescopes based on your love compatibility. Joining fee R5. You will receive daily love compatibility messages at R4,99 per msg, until you unsubscribe. Free minutes do not apply. You will be billed R5.50 for each Love Calculation request via sms. Premium rates apply. All prices include VAT. Obtain bill payers consent. By subscribing you will also receive marketing messages periodically. To unsubscribe sms STOP to 31359 (cost R1). Premium rates apply. Support: 0822350499.*

The sms used to inform the customer of this new on-demand service is "Try as many names as u want, sms LOVE then the 2 names to 31359. Eg. Sms LOVE JACK JILL to 31359."

While we believe the customer is advised of the costs of the on-demand service via the terms and conditions on the website we agree with the complainant that it would be better to advise the customer of the costs in the notification message as well.

We have therefore changed the message to "Try as many names as u

want, sms LOVE then the 2 names to 31359. Eg. sms LOVE JACK JILL to 31359. Cost \$5.50 / msg.”

While we agree that the communication in relation to the on-demand service could have been better we do believe that the pricing information for services were clearly and accurately conveyed to customers and potential customers and therefore we are not in breach of this section of the code.

Clause 6.2.3: *Pricing must not contain any hidden costs. Where applicable, pricing for content services must include the cost of the content and indicate any bearer costs that may be associated with downloading, browsing or receiving that content.*

WASPA Monitor Notes: Once again, no pricing information in the message given prompting you to try out all different names to 31359.

Information Provider Response: (in addition to the response to 4.1.1 above) *The customer is actually charged R5 for the content and 50c bearer charges for the on –demand content request (MO message). The terms and conditions mentions R5.50 rather than separating the 2 costs.*

Adjudicator’s Decision (clauses 4.1.1. and 6.2.3): The IP has conceded that there was no notification that each time a consumer sent a new compatibility request he or she would be billed an additional R5.50. This constitutes a clear breach of sections 4.1.1 and 6.2.3 of the Code. The full costs of using the service were neither advertised on the website nor in the subscription notification message. The IP has argued that the individual item costs and bearer costs that were omitted from the subscription notification message resulted from a technical error. This might have relevance when considering the extent of any sanction to be applied, but it cannot negate the fact that a very clear and serious breach of sections 4.1.1 and 6.2.3 of the Code occurred. It also does not answer why full pricing for the service was not contained in a clear and prominent manner on the web site.

3.2. The abridges case record in respect of Clause 11.1.1

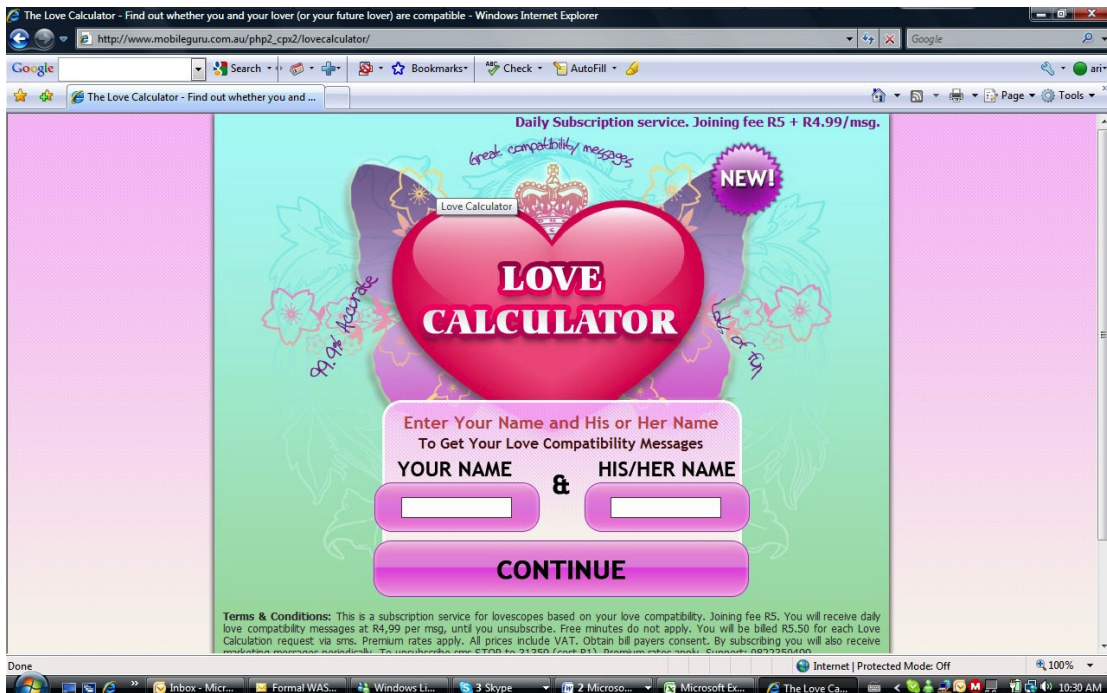
Clause 11.1.1: *Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”. This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.*

WASPA Monitor Notes: The fact that the only time it shows you it is a subscription service is written in untidy unclear handwriting round the top right of the page and once again only when you scroll down to look to see for any terms and conditions is definitely not prominently and explicitly enough identifying the love calculator as a subscription service.

Information Provider Response: *IP: We believe the service is clearly identified as a subscription service. This has been communicated through:-*

1. The webpage -

http://www.mobileguru.com.au/php2_cpx2/lovecalculator/ The complainant acknowledges that the website does promote the fact that it is a subscription service but they are concerned that the promotion is not clear enough because the “only time it shows it is a subscription service is written in untidy unclear handwriting round the top right of the page.” We do not believe the wording or letters are unclear. Furthermore the size of the font is consistent with the advertising guidelines. We do however agree that the writing could be clearer and as a result we have changed the font to a more standard font. See image of website below.



2. The terms and conditions: The terms and conditions on the website read as follows: Terms & Conditions: This is a subscription service for lovescopes based on your love compatibility. Joining fee R5. You will receive daily love compatibility messages at R4,99 per msg, until you unsubscribe. Free minutes do not apply. You will be billed R5.50 for each Love Calculation request via sms. Premium rates apply. All prices include VAT. Obtain bill payers consent. By subscribing you will also receive marketing messages periodically. To unsubscribe sms STOP to 31359 (cost R1). Premium rates apply. Support: 0822350499. The complainant suggested that the Terms and Conditions were below the fold, however we have looked at the service on a number of screens including laptop screens and while not all the Terms and Conditions are visible, most of them are. See screenshot above. The display of the website of a customer's screen is dependent on a number of factors including screen size and screen resolution setting. The size and font of the Terms and Conditions is compliant with the advertising guidelines.

3. PIN Message The pin message the customer receives clearly indicates that the service is a subscription service. “Enter 173438 on the web for your Love Scopes! U'll b subscribed to MobileGuru @ R4.99/day. Help? Call 0822350499 (VAS). To unsubscribe, sms STOP to 31359.” The

service is clearly promoted as a subscription service on the website, in the terms and conditions on the website and within the PIN message itself. While we agree that the font on the website could have been clearer (and we have now changed it accordingly) we believe that given the service was promoted as a subscription service on the website, in the terms and conditions on the website and within the PIN message we are not in breach of this section of the code.

Adjudicator's Decision: The screen shots submitted by the Monitor have not been disputed by the IP. Having examined the screen shots, I am of the opinion that the font, positioning and background colour scheme used to advertise the subscription nature of the service resulted in the nature of the service not being "prominent" within the overall context of the web page. As such, the complaint of a breach of section 11.1.1 of the Code is upheld.

3.3. The abridges case record in respect of Clause 11.1.2:

Clause 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 a request for a specific content item.*

WASPA Monitor's Notes: The customer is wanting to do a love calculation, not join a subscription service. The only way the customer can get the calculation is by entering the pin and subscribing to the service, even though the customer had no intention of subscribing to a service anyway.

Information Provider Response: *The terms and conditions of the service clearly indicate that – "This is a subscription service for lovescopes based on your love compatibility." All requests to join the service are NOT to receive a specific content item. They are to receive daily lovescopes which are based on their compatibility score. All the messages that are sent to the customer are lovescopes including the first content message "Overall u r 94% compatible. Sexual 92%. Intellectual 100%. Physical 90%. Comment: The passion & intensity of ur relationship is amazing. True love is in the air". Based on our interpretation of the code, it seems this clause was to prevent content providers from selling a particular content item which can be identified ie, Britney Spears ringtone and then subscribing the customer to a ringtone service. With our service the customer cannot choose a specific content item. They simply go through the process and subscribe to lovescopes. We do not believe we are in breach of this section of the code.*

Adjudicator's Decision: It follows from section 11.1.2 that if a request to join any subscription service is dependent on a request being made for any specific content item, then the request would not be an "independent" transaction within the meaning of section 11.1.2.

"Content item" is not a term defined in the Code. However, section 2.11 of the Code defines a "content subscription service" as including "any subscription service providing or offering access to content including, by

way of example only and not limitation: sound clips, ring tones, wallpapers, images, videos, games, text or MMS content or information.”

A “content item” ought therefore to be construed to include a sound clip, ring tone, wallpaper item, image, video, game, text or MMS content or information.

Section 11.1.2 must therefore be interpreted as prohibiting the bundling of any request to join a subscription service with a request to receive any specific sound clip, ring tone, wallpaper item, image, video, game, text or MMS content or information.

In the present case, even though the IP has stated that the Monitor was not actually subscribed to the service due to a technical error, it is apparent that a subscription is intended to be activated when the compatibility score is requested by the initial submission of names by a consumer. The compatibility score generated by the service is a “specific content item” as contemplated by section 11.1.2 of the Code.

Following a request by the consumer for the compatibility score, the content item is delivered in text form to the consumer and the subscription is activated. In this sense the subscription activation is not an independent request but a bundled request that is entirely dependent on the content item request.

The subscription activation process would comply with the consumer protection offered by section 11.1.2 of the Code if the compatibility score were first generated for free or for a once off content item fee and, thereafter, the consumer was invited to independently request and transact for his or her subscription to the service at advertised rates.

The complaint of a breach of section 11.1.2 of the Code is accordingly upheld.

3.4. **Sanctions:** The Adjudicator’s sanctions set out in the Report:

Subscription pricing and activation methods that fail to comply with the strict requirements of the Code are serious breaches of the Code as they frequently result in disgruntled consumers feeling duped into an expensive service they did not intend to subscribe for. Complaints of hidden charges and inadvertent subscription to services are frequent and pose a significant threat to the industry’s ability to provide for any measure of self-regulation in future. If service providers do not adhere strictly to the provisions of the Code relating to advertising and transparent subscription mechanisms, then not only consumers, but the entire membership body of WASPA will be substantially prejudiced.

In mitigation of the breach of sections 4.1.1. and 6.2.3 the IP has stated that the individual item costs and bearer costs that were omitted from the subscription notification message resulted from a technical error. Details of this technical error were not provided but it appears that the technical error was likely to have resulted from an avoidable programming error.

In the circumstances, the following sanctions are imposed:

1. The SP is directed to:

1.1 immediately suspend the service and all billing for the service;

1.2 pay over to WASPA a fine of:

1.2.1 R100 000 in respect of the breach of sections 4.1.1 and 6.2.3; and

1.2.2 R100 000 in respect of the breach of sections 11.1.1 and 11.1.2;

within 5 days of the delivery of this report failing which the SP's membership of WASPA shall be suspended for a period of 30 days or until such time as the fines have been paid in full, whichever period is the longer; and

1.3 pending full compliance by the SP with the sanctions contained in paragraph 3 below:

1.3.1 withhold payment of all amounts due by it to the IP as contemplated by the provisions of section 13.4.1(i) of the Code; and

1.3.2 preserve and retain all revenue paid to it by any cellular network operator in respect of the any service offered by the IP and to refrain from dissipating such revenue in any way other than in fulfilment of the fines provided for in paragraph 1.2 above; and

1.3.3 send an SMS message to all current and past subscribers to the service advising them as follows:

"The [name of service] has been suspended due 2 breach of WASPA Code of Conduct. Further communications will follow. For help contact [telephone number of SP]".

2. In terms of section 13.4.2 of the Code, the sanctions contained in paragraphs 1.1 and 1.3 above may not be suspended pending any appeal that may be instituted in this matter but shall become effective immediately on the publication of this report.

3. The SP is further directed:

3.1 within 5 days of the delivery of this report to send an SMS message to all current and past subscribers advising them that the service breached the WASPA Code of Conduct and advising such persons of their right to claim a refund of all subscription fees paid by contacting the SP's help desk by 5pm on a date falling 15 days after the sending of such message or the first business day thereafter if that date falls on a weekend or public holiday; and

3.2 as contemplated by the provisions of section 13.4.3(g) of the Code, to issue a blanket refund to all subscribers claiming a refund within the period mentioned in paragraph 3.1 above within 10 days of the expiry of such period.

4. The suspension of the service shall continue until such time as all sanctions have been fully complied with and until the WASPA Secretariat has received a report on all refunds issued and approved of a detailed description of all advertising for and revisions to the service designed to ensure full compliance with the Code in future.

4. GROUNDS OF APPEAL

4.1. The Information Provider's Grounds of Appeal in respect of the Adjudicator's Decision and Sanctions for clauses 4.1.1 and 6.2.3:

The adjudicator writes as part of their decision "The IP has conceded that there was no notification that each time a consumer sent a new compatibility request he or she would be billed an additional R5.50" and based on this statement he concludes "This constitutes a clear breach of sections 4.1.1 and 6.2.3 of the Code".

The statement which the adjudicator relies on to make his decision is however completely INCORRECT. The IP does NOT concede there was no notification at all. The IP does concede that there was a temporary lack of notification on the sms itself, however it clearly refers to the notification on the website which reads "You will be billed R5.50 for each Love Calculation request via sms".

The Adjudicator then goes on to say "The full costs of using the service were neither advertised on the website nor in the subscription notification message" This statement again is also completely incorrect as the IP clearly mentions in the response that the pricing is mentioned on the website which reads "You will be billed R5.50 for each Love Calculation request via sms". In addition the PIN message also provides the cost of the message.

The adjudicator then mentions that the IP has argued that "the individual item costs and bearer costs that were omitted from the subscription notification message resulted from a technical error", however again this is not the case. The IP does not present this argument at all in relation to this matter.

As stated in the IP's response the IP argues that "While we believe the customer is advised of the costs of the on-demand service via the terms and conditions on the website we agree with the complainant that it would be better to advise the customer of the costs in the notification message as well."

It seems the adjudicator clearly did not read or comprehend the IP's response and argument in relation to this section.

The fact is that the IP did disclose the relevant information on the website, however the IP does concede that it would have been better to ALSO disclose it in the message and proceeded to do so as soon as the complaint was received.

It is our view that the adjudicator did not adequately consider the IP response and was erroneous in his interpretation of the IP's response.

Furthermore we also believe the sanctions imposed are extremely severe. The IP in his response wrote "The ability to sms additional names to receive a love compatibility score is an additional on-demand service that has recently been requested by our customers. This additional service has only recently been implemented."

More specifically the on-demand service was requested by a customer in mid May 2009. This was implemented on 28 May 2009 and the sms message was changed on 3rd June 2009 to incorporate the cost on the sms as well. In total there were a total of 5 customers (1 of which was the complainant) that responded to the message. Upon receiving the complaint from WASPA all 4 customers were contacted telephonically regarding a refund of R5.50.

In summary it is clear the adjudicator when making its decision and imposing the sanctions:

- Failed to understand the IP's response.*
- Did not recognise that the pricing was shown on the website.*
- All relevant pricing was disclosed on the website.*
- There was no malicious intent.*
- Changes were made to the sms message in question as soon as the IP became aware of the complaint.*
- Refunds were offered to all those customers (4 customers) that received the message in question.*

The IP takes compliance very seriously and took appropriate action in the interests of its customers as soon as it received the complaint.

It should also be noted that this service was suspended (ceased being marketed) on 5 July 2009.

Based on the above information we appeal:-

- the decision of the adjudicator, and*
- the extent of the sanctions imposed.*

4.2. The Information Provider's Grounds of Appeal in respect of the Adjudicator's Decision and Sanctions for clause 11.1.1:

We appeal the decision of the Adjudicator based on the following circumstances:-

1. The subjective nature of the adjudicator's decision – The adjudicator does not dispute that the website mentions the service is a Subscription Service, but has an opinion that it is not "prominent" enough. The website does however meet the relevant requirements in terms of existence, size and font. The fact that the adjudicator thinks it is not "prominent" enough is a matter of opinion and not fact.

2. The Adjudicator did not consider other factors which include the fact that:-

- a. the website did in fact mention "R4.99 Subscription service".*
- b. the term subscriptions services was mentioned numerous times within the Terms and Conditions*
- c. Subscription service was indicated twice in the PIN message which the*

customer has to read BEFORE subscribing to the service.

3. The purpose of this section of the code is to ensure the subscriber knows that the service is a subscription service and its the IP's view that by mentioning the subscription service numerous times BEFORE the subscriber joins the service it is ultimately meeting the codes objective.

4. It should also be noted that the complainant was never subscribed to the service and as such the website was not at that time a subscription service. If the subscriber was in fact subscribed then the complainants case may be argued, however this is not the case.

Furthermore we also believe the sanctions imposed are extremely severe and that the Adjudicator did not adequately consider :-

1. The fact the terms "R4.99 Subscription service" was on the website in an appropriate position and in the required font size.

2. The fact the customer was made aware numerous times via the website, terms and conditions and pin message that the service was a subscription service which is what the section of the code is trying to accomplish.

3. The IP changed the font and position of the term "R4.99 Subscription service" as soon as the complaint was received.

4. There was no malicious intent.

5. The complainant was not actually subscribed to the service

The IP takes compliance very seriously and took appropriate action in the interests of its customers as soon as it received the complaint. It should also be noted that this service was suspended (ceased being marketed) on 5 July 2009.

Based on the above information we appeal:-

- the decision of the adjudicator, and
- the extent of the sanctions imposed.

4.3. The Information Provider's Grounds of Appeal in respect of the Adjudicator's Decision and Sanctions for clause 11.1.2:

The adjudicator explains his interpretation of section 11.1.2 and effectively concludes that every first item of a subscription service is a "specific content item" and should be sent out for free or alternatively at a cost with a further invite to join the subscription service.

It is our understanding from reading the code and its interpretation and various emails with WASPA members that this is clearly not the intention of the code.

A critical factor that needs to be taken into account is the delay in adjudication. Since the complaint was lodged there has been much debate and discussion about the bundling clause which has in fact resulted in the code being amended and clarified. At the time of the complaint this was not the case which is leading to significant prejudice against the IP.

The current version of the code does not include the words ‘may not be an entry into a competition or quiz’ – since these words were later added to add clarity WASPA itself concedes that this clause was not as clear as it could have been. We would further like to note that the Code of Conduct does not define what a quiz is. Does a quiz not imply some skill which the subscriber should employ to gain a result? This service is a calculation and more akin to a horoscope type service not a competition or quiz. The service was also clearly identified as a subscription service in various ways – MT messages as well as on the actual advert including the top of the screen and the T&Cs. We would like the above to also be taken into account as mitigating factors. The Code was not and still is not very clear in this regard.

Lastly, the complainant WAS NOT subscribed to any service and did not receive any content other than the first content item and therefore could not have been in a position to adequately judge the clarity of the service and classify the service as bundling.

The Adjudicator cannot make a decision and impose such severe sanctions based on what may have happened and the content a subscriber may have received if they were subscribed. This should surely also be taken into account as a mitigating factor.

The adjudicator has also ordered the IP to refund subscribers – this service was ceased at the time the complaint was lodged – which is about a year ago. The IP is not in any way responsible for the delay in adjudication and can therefore not be held responsible to refund subscribers for subscriptions that were terminated over a year ago. Due to churn patterns in the market most of these subscribers will not be the users who subscribed to the service in the first place.

Nevertheless the IP has agreed to sms a message to all current and past subscribers from 1/1/2010 advising that the service is under investigation by WASPA. There were a total of 991 subscribers to this service with 31 still active as at 1 Jan 2010.

Summary of mitigating factors:

- There was no malicious intent*
- The service was identified as a subscription service*
- Immediate remedy*
- Delay in adjudication and practicality of sanctions as well as changing perceptions in the mobile market*
- Misinterpretation of the IP’s response by the adjudicator*
- Clarity of the Code and lack of proper definition of terms*
- User was never subscribed and subsequently never received MT messages which identify the service as being bundling*
- SMS sent out to subscribers that received a message since 1/1/2010*
- Penalties are very high considering the number of subscribers the service generated.*

It should also be noted that this service was suspended (ceased being marketed) on 5 July 2009.

Based on the above information we appeal:-

- *the decision of the adjudicator, and*
- *the extent of the sanctions imposed.*

It should also be noted that IP did not act with malicious intent and has always taken compliance very seriously always acting rapidly with regard to any customer or WASPA complaints.

The IP is a small business and does not have the amount of funds required to pay the amount of the sanctions being imposed.

We ask the Appeal Court to kindly take into consideration the IP's appeal and reduce the sanctions to a warning.

5. FINDINGS OF APPEAL PANEL

5.1. Version of the Code.

The WASPA Monitor lodged the initial compliant 6684 on 1 June 2009, to which end the WASPA Code of Conduct version 7 is applicable.

5.2. Clauses 4.1.1 and 6.2.3:

This Panel understands the Adjudicator's Report to refer to the lack of pricing information required by the Code of Conduct, implicitly referring to (1) visible prominent pricing information at the website during the Complainant's use of the service (ie: Pricing information other than that included in the service terms and conditions), and (2) pricing information in sms communications by the IP to the Complainant.

The grounds of appeal are that (1) the correct terms were included in the terms and conditions at the website, and that (2) there was no malicious intent by the IP.

In its submissions, the IP concedes that (1) there was no information required by clauses 4.1.1 and 6.2.3 in its sms messages to the Complainant, and that (2) there was no information required by clauses 4.1.1 and 6.2.3 prominently visible at the website during the Complainant's use of the service (ie: Pricing information other than that included in the service terms and conditions).

The Panel finds that the Adjudicator fully understood the IP's response, and took into account the IP's contention that the information was presented in the IP's terms and conditions.

The Panel finds that remaining grounds of appeal (No malicious intent; subsequent changes to pricing information presented; refunds to customers, and termination of service) either have reference in considering any appropriate mitigation of penalties, or were required by

the terms of the sanctions ordered in the Adjudicator's Report.

The Panel upholds the Adjudicator's decision in respect of clauses 4.1.1 and 6.2.3, and dismisses the Information Provider's appeal.

5.3. **Clause 11.1.1:**

The text of clause 11.1.1 reads as follows: "*Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services."*"

The IP's main argument on appeal is the 'subjective nature' of the Adjudicator's assessment that the subscription information does not qualify as sufficiently prominent and explicit, which is on the IP's version compliant with all remaining relevant provisions.

Unfortunately the Service Provider in this matter has previously fallen foul of similar 'subjective' assessments in matters previously heard by WASPA Adjudicators (ref. complaints 2048 and 4784). The Adjudicator concludes in the latter complaint: "*SP managed to comply with most of the nitty gritty of the Rules regarding size, time frames, positioning etc (apart from the font) without ultimately complying with the overarching and crucial principle that the costs and T & C must be 'easily and clearly visible'.*"

This Panel concludes that the SP in this matter has facilitated the IP to provide services to customers in terms of which information required by clause 11.1.1, while otherwise complying with the Code of Conduct, fails to comply with the overarching requirement of clause 11.1.1, in that it does not prominently and explicitly identify the service as a subscription service.

The IP's secondary argument on appeal is that the necessary information was sufficiently identified in ancillary material (The service's terms and conditions, and sms's sent by the IP after subscription was meant to have completed). The focus of the information required to be prominently and explicitly identified by clause 11.1.1 is self-evidently required to be displayed as part of the initial information a customer might encounter, and clearly does not include reference to ancillary material (Terms and Conditions, follow-up sms's).

The IP's remaining arguments on appeal, namely (1) the complainant was never subscribed to the service; (2) the sanctions imposed are extremely severe; (3) the IP changed the font and position of the term "R4.99 Subscription service" as soon as the complaint was received; (4) There was no malicious intent; and (5) that this service was suspended (ceased being marketed) on 5 July 2009; have no bearing on its assessment of these heads of appeal, and do no progress the IP's case.

The Panel upholds the Adjudicator's decision in respect of clause 11.1.1, and dismisses the Information Provider's appeal.

5.4. **Clause 11.1.2:**

The text of clause 11.1.2 reads as follows: "*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 a request for a specific content item.”

The IP's main arguments on appeal in respect of clause 11.1.2 are (1) the IP's service offering does not constitute 'bundling'; (2) it has suffered prejudice in the delay in adjudication, particularly when combined with a lack of clarity of the Code of Conduct; and (3) the complainant was not subscribed to any service.

The SP conducts business in a manner which has led to various complaints against it based on clause 11.1.2: In 13 complaints in which clause 11.1.2 has been cited, the complaints have been upheld in seven matters, and partially upheld in a further three cases, with three complaints dismissed.

This Panel finds, particularly in view of its earlier finding that the IP failed to prominently and explicitly identify the subject of this complaint as a subscription service, that it bundled the offer of a content item in a subscription sign-up in contravention of clause 11.1.2.

The IP's remaining arguments that there was (1) no malicious intent and that (2) it is a small business and does not have the amount of funds required to pay the amount of the sanctions being imposed, have no bearing on this Panel's determinations on the applicability of clause 11.1.2.

The Panel upholds the Adjudicator's decision in respect of clause 11.1.2, and dismisses the Information Provider's appeal.

5.5. Summary:

This Panel finds that the Adjudicator meticulously interrogated each aspect of the Complaint, and clearly understood and gave due consideration to each argument raised by the IP, and that the Adjudicator came to the correct conclusion in every regard.

Accordingly, this Panel concludes that the IP's grounds of appeal have no merit, and its Appeal is accordingly dismissed.

6. SANCTIONS

This panel has considered the IP's arguments in mitigation of sanctions, and concludes that there is sufficient evidence by the IP to justify amending the sanctions to be imposed to:

- 6.1. R1,000 in respect of the IP's breach of WASPA Code of Conduct clauses 4.1.1 and 6.2.3; and
- 6.2. R1,000 in respect of the IP's breach of clauses 11.1.1 and 11.1.2.