



REPORT OF THE ADJUDICATOR

WASPA Member (SP) Integrat (Pty) Ltd

Additional WASPA Member Peach Mobile (Pty) Ltd

Information Provider (IP) Peach Mobile (Pty) Ltd

Service Type Subscription

Source of Complaints Competitor

Complaint Numbers #0219 & 0311

Complaint

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

One of the advertisements referred to in complaint #0219 and the only advertisement referred to in complaint #0311 are indistinguishable, other than that they appeared at different times on the same television channel (E-TV). The difference between this advertisement and the other advertisement referred to in complaint #0219 is in the content used to advertise the subscription service and there is no perceptible difference in the format of the advertisement or the process employed for subscribing to the subscription service.

The basis of the complaints is set out below:

Complaint Number	Section of WASPA Code of Conduct	Detailed Description	Date Flighted
#0219	11.1.2	Section 11.1.2 Clearly states that a request to join a subscription service must be an independant (sic) transaction, with the specific intention of subscribing to a service. It further states that to join a subscription service may not be bundled with a request	Weekend 10, 11, 12 March 2006

		<p>for specific content.</p> <p>There are 2 ads which are currently running.</p> <p>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</p> <p>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.</p> <p>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.</p> <p>I further request that this complaint be handled urgently as this company has previously been found guilty of infringing the same rules in print medium. They are now doing the same on TV.</p>	
#0311	11.1.2	<p>Section 11.1.2 Clearly states that a request to join a subscription service must be an independant (sic) transaction, with the specific intention of subscribing to a service. It further states that to join a subscription service may not be bundled with a request for specific content</p> <p>When you SMS G to 31357, you are send this item and automatically subscribed to the service where you are sent other content every week.</p>	Weekend 20 / 21 May 2006

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

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

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

3.9. Information providers

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

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

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

SP response

The Secretariat received a response from the SP in its own regard as well as from the IP. The SP's response in complaint #0311 indicates that the IP is a WASPA member in its own right and as such the complaint should have been addressed to the IP and not the SP. This issue is also dealt with by the IP in its response (set out below), as a point *in limine*.

The IP submitted a single consolidated response in respect of both complaints, which is set out comprehensively (with minor editing) below:

WASPA Complaint No. 0219 AND Complaint No. 0311

Exact Mobile (Pty) Ltd

Complainant

Integrat (Pty) Ltd

First respondent

Peach Mobile (Pty) Ltd

Second respondent

15 June 2006

Alleged Breach of Code of Conduct Section 11.1.2

1. The complainant, Exact Mobile has lodged a complaint to WASPA in respect of an alleged breach of Section 11.1.2 of the Wireless Application Service Providers Association Code of Conduct.
 2. The version of the Code of Conduct which has been used for purposes of this submission is version 4.3.
 3. Complaint Number 0219 relates to two television advertisements, one known as "Madam (answer the phone)" and the other known as "Druk (the Groenknoppie)".
 4. Complaint Number 0311 relates to a television advertisement known as "Druk die Groenknoppie" which was aired on E-TV on the weekend of 20/21 May 2006.
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5. The First Respondent, Integrat (Pty) Ltd ("Integrat") is a wireless application service provider ("SP") and a member of WAPSA.
6. The respondent cited in complaint number 0219 is Mantella Trading 145 CC ("Mantella"). Mantella is a member of WAPSA. Mantella trades as "Yello Telecom", a provider of IVR Services. Yello Telecom is in no way involved in the advertising or providing of mobile ring tones. We submit that as a *point in limine*, that complaint number 0219 be dismissed on the basis that the party being cited (Mantella) has no casual connection to the alleged breaches of conduct.
7. The second respondent in complaint number 0311 is Peach Mobile ("Peach"). Peach is neither a member or associated member of WAPSA. Intergrat acts as the aggregator of Peach. It is submitted as a point *in limine* that WASPA has no jurisdiction to adjudicate this complaint vis-à-vis both Mantella and Peach.
8. Section 11.1.2 of the code 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."
9. In considering the alleged breach we shall also refer to Clause 11.1.4 of the code which states that

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

As shall be shown hereunder, no offer was made for non subscription content.
10. Reference in this reply is be made to Clause 11.1.4 in order to amplify and contextualise the submissions made by the second respondent in this complaint. It should not be construed that the second respondent admits any breach of Clause 11.1.4. In any event the complaint does not relate to a contavention (sic) of 11.1.4 ,and WASPA has no jurisdiction to adjudicate on any perceived breach of this clause.
11. WASPA has created an advisory in regard to the application of Clause 11.1.2. The relevant part of the advisory states:

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

12. The advisory does not form part of the code and is therefore not binding on WASPA members and is merely meant to serve as an interpretational guide. Nevertheless, as shall be shown hereunder the respondents have complied with paragraph 11.1.2 of the code, and have furthermore complied with the provisions and spirit of the WASPA advisory.

13. In the appeal judgement of WASPA appeal on complaint numbers 0002, 0011, 0026, 0037 and 0058 in the matter of Integrat (Pty) Ltd and Gozomo Incorporated (Appellants) ("Gozomo Appeal"), WASPA set out two requirements that must be met in order to comply with Clause 11.1.2 namely:

12.1 A transaction for a subscription service must be an independent transaction.

12.2 Customers must subscribe to a subscription service with the specific intention of subscribing to that service.

14. The appeal judgement was delivered after the two complaints to Mantella and Peach were lodged and therefore cannot be applied retroactively to the above matter. Notwithstanding, it is submitted that the respondents have in fact complied with the two requirements as set out in the appeal judgement.

15. It was ruled in the above Gozomo Appeal number that

"Clause 11.1.2 is not as clear as it should be. The interpretation of this clause is complicated by the fact that the text of Clause 11.1.2 does not specifically refer to content. The ordinary grammatical meaning of words must be followed. Where the grammatical meaning of the words is unclear the words must be interpreted in light of the immediate linguistic context. The wider legal context may also be determined by referring to internal sources (the code, especially Clause 11.1) and is read in context with the rest of 11.1, especially the heading of 11.1 ("Manner of Subscription") and Clause 11.1.4.

*Clause 11.1.4 provides that customers may **not be automatically subscribed** to a subscription service as a result of a request for any non-subscription content or service. It becomes clear that Clause 11.1.2 prohibits the subscription service from being **dependent on the ordering of content** and that the customer must be **specifically intent** on subscribing to a subscription service and not the ordering of content. The second part of Clause 11.1.2 also makes it clear that an offer to customers to sign-up for a subscription service **should not mislead** customers to believe that they are subscribing to anything other than a subscription service. We are therefore of the view that Clause 11.1.2 prohibits requests for subscription services from*

*being dependent on **requests for specific items of content.*** (bold type emphasis added)

16. The TV advertisements which are subject to the complaints are approximately 20 (twenty) seconds long. The TV ads consist of an animation with a banner on the top and a banner at the bottom of the TV screen which appears in the advertisement for the full duration of the advertisements.
17. In each advertisement an animated cartoon appears together with an example of "a hilarious ringtone" i.e. "Madam answer the phone" and "Druk die Goenkoppie". These ring tones are used for illustrative purposes as "a hilarious ring tone" the wording of the advert is clear that the offer is to subscribe to "**a** hilarious ring tone", and NOT to **this** hilarious ringtone". This is consonant with the WASPA advisory on clause 11.1.2, which makes a distinction between the words "**a**" and the words "**this**".
18. The top portion of the banner states as follows
"Subscription service R5 per message R1 to unsubscribe. Content received twice weekly."
From the wording of this top banner it is entirely unambiguous that the service being offered is a subscription service. The wording indicates "**R5 per message**" the wording "**per**": indicating that more than one message (ring tone) will be delivered pursuant to the acceptance of the advertised subscription offer.
19. It further goes on to state "*R1 to unsubscribe*". This further unambiguously infers that the service is a subscription service.
20. The advertising banner continues
"content received twice weekly".
This furthermore is an unambiguous reference to the fact that content will be received twice weekly upon the customer's acceptance of the advertised subscription offer.
21. The bottom banner of the advertisement states:
*"to **unsubscribe** SMS G STOP to 31357"*.
This further creates the unambiguous inference that the service being offered is a subscription service.
22. The audio portion of the advertisement is clear on the terms of the subscription offer being advertised. The advertisement starts off with an example of a hilarious ring tone either "Druk die Groenkoppie" or "Madam answer the phone". This is accompanied by a visual animation. The audio portion then continues

*"to get a hilarious ring tone twice a week SMS G to 31357, that is G to 31357".
"Peach Mobile we like to play"*

The wording is unambiguous in this offer. It states "to get **a** hilarious ring tone twice a week ..." (emphasis added) the offer does not refer to one specific ring tone and does not use the words "**this ringtone**". The words used are "**a** hilarious ring tone" which refers to one of many ring tones which are intended to be sent to the customer pursuant to the subscription service which is clearly indicated in print on the top and bottom banners.

23. There have been a number of versions of the advertisements aired on TV some have included the words "twice a week" in the audio portion and some have not. Nevertheless the wording accompanied with the banner print is clear that the service being offered is a subscription service and that the ringtones would be delivered twice a week.
24. The wording of the advertisement takes into account the provisions of the non-binding advisory, to Section 11.1.2. The advisory does make a distinction between the use of the word "**A**" and the word "**this**". The word "**A**" refers to one of many whereas the word "**this**" refers to a specific item of content.
25. In reference to the two requirements as set out in the Gozomo appeal the respondents assert that the offer for a subscription services was clearly an independent transaction. There was no offer for the subscription for any specific item of content and the advertisement was clearly only for the subscription "to get **a** hilarious ring-tone ...".
26. The following words were used in order to specifically bring to the customer's attention that the offer was for a subscription service;
 - 26.1.1 "Subscription service"
 - 26.1.2 "R5 **per** message"
 - 26.1.3 "R1 to **unsubscribe**"
 - 26.1.4 "Content receive **twice** weekly"
 - 26.1.5 "**To unsubscribe SMS G Stop**"
 - 26.1.6 "To **get a** hilarious ring tone ..."
27. It is submitted that the wording of the top and bottom banners ,together with the audio portion in the TV advertisements interpreted in its plain and ordinary meaning is unambiguous that a subscription service is being offered.
28. There was never any offer for a specific item of content in the advertisement and to infer same would be contrived and capricious. There was no bundling of any specific item with a subscription service.
29. Following a SMS acceptance of the subscription offer, the customer is sent a welcoming SMS, (for which the customer is not charged). The offer for a

subscription service is further amplified by the wording of this SMS message with the following wording:

"Hi .U'll get a real sound twice a week R5 / sound.2 unsubscribe sms E STOP tp 31357 .Want 2`meet some1 special.sms PEACH to 34123 .Help 082 887 3359.

30. Thereafter the subscriber is sent the first ringtone in the subscription library. The first ring tone in the library is sent as a WAP link in an SMS to the subscriber. This ringtone is the first in the ringtone library in the subscription series, and is not sent independently to the subscription service.
31. 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.
32. 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.
33. 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".
34. As a *point in limine* the respondents request, that in the event that this complaint is dismissed and that in the event that WASPA finds no merit in the complaint that appropriate measures should be taken against Exact Mobile for the vexatious and contrived manner in which they have lodged these complaints. In this regard it is known that the Managing Director of Exact Mobile, Mr. Gavin Penkin has been in our opinion over-zealous in the submission of complaints to WASPA and has contrived and obfuscated facts in his complaints to place an undue burden and to stifle free competition with his competitors.
35. It is stated in paragraph 1.2 of the code that
*"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 ..."*
36. It is the clear contemplation of the code that it is there to protect **customers and consumers** with a mechanism. It is not contemplated in the code to provide competitors with a mechanism to stifle free and fair competition and to lodge disingenuous and contrived complaints to WASPA.

37. In the circumstances, the respondents request that the complaints be dismissed and appropriate censure of Exact Mobile be given in regard to this vexatious and frivolous complaint.

WASPA Advertising Rules

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

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

However, this fails to take into consideration the provisions of the WASPA Advertising Rules, adopted by WASPA on 29 November 2005 and enforceable with effect from 1 January 2006. The Advertising Rules deal with different media types; however have a common section, namely the 'General Terms' applicable to all media types. The provisions specifically dealing with television advertising indicates:

2.2.2 COST OF ACCESS TEXT DISPLAY RULES

Trigger:

At any display of, or mention by a voice-over, of a unique access number

Display Length:

100% of the length of the advertisement

Display Text Font:

'Zurich' font

Display Text Font Size:

18 points MINIMUM

Display Text Font Position:

In a visible block or triangle in a top corner of the screen in the Title Safe Area (see diagrams)

Display Text Font Colour:

Contrasted colour superimposed on the block/triangle

Block/Triangle Colour

Contrasted colour, behind the display text

Display Text Type:

- Text must be static
- No Caps (except for the first letter of the first word) or italics may be used as the display font for the word subscription.
- No italics may be used as the display font for the price text.
- No text must be placed around the access cost text that may obscure clear reading
- The access cost text must not be positioned or formatted in a manner where it may be obscured by

other text or visual information that may be displayed as part of the ad

- The access cost must not be part of a colour scheme that may obscure easy reading of complete details of the access cost
- The access cost text must not be obscured by any background flashing or other visual animations that practically and objectively obscures easy reading of complete details of the cost

Example:

R10/SMS or

**R10/week
Subscription**

2.2.3 T&C TEXT DISPLAY RULES**Trigger:**

At any display of, or mention by a voice-over, of a unique access number

Display Length:

- Minimum 10 seconds
- If applicable, of the 10 seconds display time for T&Cs, a minimum of 5 seconds must be allocated to informing the user that they will be subscribing to a subscription service.

Display Text Font:

'Zurich' font

Display Text Font Size:

15 points MINIMUM

Display Text Position:

On bottom edge of title face of the screen

Display Text Type:

- No CAPS-only or Italics-only text is permitted for the T&C font.
- The T&C text must be static and horizontal for the requisite minimum display time, changing as is necessary to show all the T&Cs in equal time proportion
- The T&C text may not scroll on the screen, either right to left, left to right nor any other direction.
- The T&C text must not be positioned or formatted in a manner where it may be obscured by other text or visual information that may be displayed as part of the ad
- The T&C must be formatted so that each sentence is distinct. Each sentence must end with a period.
- The T&C text must not be part of a colour scheme that may obscure easy reading of complete details of the T&C
- The T&C text must not be obscured by any background flashing or other visual animations that practically and objectively obscures easy reading of complete details of the T&C text.

T&C DISPLAY TEXT TYPES (ALL, OR COMBINATION OF EXAMPLES BELOW):

- Two SMSs Required at R--- each
- WAP and GPRS access required
- Adults Only.
- Prize awarded after 1 Jan 20--.
- Free SMS/Minutes do not apply.
- VAS cell rates apply.
- Failed Requests billed.
- Updates sent until cancelled.

Minimum T&C Display Text For Subscription Services:

"This is a subscription service. You will be automatically charged R--- every 7 days until you unsubscribe."

OR: "This is a subscription service. You will be charged R-- every 7 days until you unsubscribe, plus R-- per xxxx".

(where xxxx is the type of content delivered as part of that service)

The relevant section of the 'General Terms' is set out below. To avoid uncertainty, the extract is from Section 2, which deals with television advertising:

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

(i) **Must Use The Words "Subscription Service"**

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

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

(ii) **Must Indicate Charge/s:**

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

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

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

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

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

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

- o [See also 'BEARER CHARGES' above]

(iv) **Must Differentiate Clearly Between Multiple Subscription Types**

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

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

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

- (a) Content that is ordinarily made available to a consumer on payment of a once-off payment for that individual Content without the need to subscribe to that service,
- AND**
- (b) Content that will be available at all, and/or at a particular price or even free only if the consumer subscribes to a subscription service,

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

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

ADDITIONAL BACKGROUND NOTES TO SUBSCRIPTION SERVICES:

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

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

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

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

- distinction between the availability of non-subscription and subscription charging must be made clear by unambiguously demarcating in separate sections (and not just wording) the non-subscription portion from the subscription service portion or **Content** in the advertisement (Section 2.3.13 (v), Adjudicator's emphasis added); and
- advertisers **must avoid** advertising material designs where subscription service access can be confused with non-subscription services for the same [or same] type of Content in the same ad. Unless this distinction is made clear, the non-subscription portion of an ad which has as its center the requesting of specific Content (on a once-off basis to users on a network that does not have subscription services) may have the effect of (possibly inadvertently) breaching the 'independent transaction' criteria of the subscription portion of the code of conduct (Section 2.3.13 Additional Background Notes, Adjudicator's emphasis added)

Other sections of the Advertising Rules, which may have been breached by the IP include Section 2.3.4 - "Bearer Requirements & Charges", Section 2.3.6 - "Contact Details", Section 2.3.11 - "Network Compatibility" and Section 2.3.12 - "Pricing". These sections of the "General terms" are not set-out here in full (for reasons which will become clear), however it should be noted that Section 2.3.12 gives an example of pricing in a subscription service scenario:

- **EXAMPLE 3b (where part of a subscription service that eq has a minimum of 5 weeks subscription):**
Correct: "Subscription Service. R5/week for 6 weeks. Cost R30 + WAP charges for 6 pictures."
Incorrect: "R5/picture. Minimum 6 pictures"

Reasons:

- Subscription nature of service not shown (Should be eg R5/week)
- Minimum frequency of subscription billing not shown (should be 6 weeks)
- No Bearer Requirement Shown (if required)
- No Total Cost To Consumer Shown (should be **R30 + WAP charges**)

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

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

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

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

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

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

Just administrative action

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

PAJA contains the following definitions:

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

(a) an organ of state, when -

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

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

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

(a) making, suspending, revoking or refusing to make an order, award or determination;

(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;

(d) imposing a condition or restriction;

(e) making a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article; or

(g) doing or refusing to do any other act or thing of an administrative nature,

and a reference to a failure to take a decision must be construed accordingly;

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

3 Procedurally fair administrative action affecting any person

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

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

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

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

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

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

Ian Currie & Johan de Waal in Chapter 29 of *The Bill of Rights Handbook* (5th ed, 2004) are of the opinion that a voluntary procedure, such as the WASPA Code of Conduct procedure is not administrative as it is an exercise of private and not public power and therefore not subject to the administrative justice rights in the Constitution.

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

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

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

Bearing this in mind the Draft Code Of Good Administrative Conduct in terms of PAJA interprets the procedure in terms of Section 3(2)(b) of PAJA as requiring adequate notice of the nature and purpose of the proposed administrative action to be given to the affected person, before the decision is taken. "Adequate notice" is defined as meaning that "the affected person must be informed that an administrative action is being planned. The person must be given enough time to respond to the planned administrative action. The person also needs to be given enough information about the planned administrative action to be able to work out how to respond to the planned action.

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

breach of the WASPA Advertising Rules and/or Clause 6.1 of the WASPA Code of Conduct.

The Adjudicator instructed the Secretariat to institute a formal complaint against the SP in respect of the IP, relating to a possible breach of the WASPA Advertising Rules (particularly Section 2.3.4 – failure to indicate Bearer Charges, Section 2.3.6 – failure to provide Contact Details, Section 2.3.11 – failure to indicate Network Compatibility, Section 2.3.12 and 2.3.13(ii) – failure to indicate (in the text or voice over) the full or potential cost for obtaining the advertised content or service, in particular by the ambiguous use of the unrelated terms “per message” and “weekly” in the phrase: “R5 per message. ... Content received twice weekly” rather than clear pricing, and Section 2.3.13(v) – failure to clearly differentiate between Content items and subscription services) and/or Clause 6.1 of the WASPA Code of Conduct in respect thereof.

Point *in limine*

Complaint #0219 is made against Mantella Trading 145 CC trading as Yello Telecom (“Mantella”) while complaint #0311 is made against the SP in respect of the services of the IP.

The IP raised the issue *in limine* regarding which entity should be the subject of this report, Mantella or the IP. The IP does not contest the submission of complaint #0311 against the SP, but does argue that complaint #0219 was incorrectly submitted against Mantella. The SP, conversely, argues that complaint #0311 should have been submitted against the IP and not it, as the IP is a WASPA member.

The IP claims it is in fact Mantella which is a member of WASPA and the records supplied by the WASPA Secretariat indicate that Mantella indeed applied for membership of WASPA on 27 October 2005. Prior thereto there had been some discussion regarding the requirement that only corporate entities incorporated in the Republic of South Africa could become WASPA members and there was some suggestion that Mantella was used for this purpose.

However, on this application form, as submitted to WASPA's Mancom, it appears clear that the entity applying for membership was the IP:

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| Public email address: info@peach.co.za
| Public web address:  http://www.peachmobile.co.za
| Telephone Number:   *****
| Fax Number:         ****
| Postal Address:     P O Box 28883
|                     Sandringham
|                     2131
| Street Address:    Sandton Office Towers
|                     MTN 1st Floor
|                     Sandton City
| Contacts:
| Primary/Tech/Billing: Mr David Trope
| email:             david@yello.co.za
| Direct Line        *****
| Mobile:            *****
|
| Network Liaison    Mrs Pauli van Greunen
| email:             pauli@yello.co.za
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| Direct line ****
| Mobile: ****

On 13 February 2006 (which is prior to the date of submission of either complaint), the Secretariat was asked to update the records of Peach Mobile's membership to reflect the following information:

| Name: Peach Mobile (Pty) Ltd
| Trading as: Peach mobile
| Registration Number: 2005/012/611/07

Furthermore, perusal of the Mantella Internet web site indicates that Mantella "has an interest" in the IP, which is a separate legal entity. A preliminary search of the database of the Companies and Intellectual Property Registration Office indicates that both entities share a registered physical and postal address and consideration of the WHOIS information for the IP's Internet domain indicates that the administrative contact for such domain is part of Mantella. As indicated above, the e-mail addresses used for the contact persons of the IP are within the Internet domain of Mantella. This gives a clear indication that the business of Mantella and the IP are intimately intertwined. Despite this close connection, the Adjudicator recognises the clear corporate distinction between Mantella and the IP and found no basis to "pierce the corporate veil" between such entities.

As such, the Adjudicator found that it is the IP that is the member of WASPA and not Mantella. Notwithstanding the fact that the IP is a WASPA member, the IP provides its subscription services through the SP.

Liability of the SP and IP

The Adjudicator has previously noted the liability of an SP for the actions of an IP and without burdening this report overly, repeats the comment of the Panel in the Appeal Decision, which held:

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

"Information providers

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

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

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

*The only aspect raised on the plaintiff's behalf was the fact that the plaintiff was not a member of the ASA but was nevertheless 'indirectly bound' by its rulings because its advertising agent was a member of a constituent body of the ASA. In *Matthews v Young* (1922 AD 492), counsel reminded us, by joining the union *Young* bound himself to its process. The answer is really this. If the plaintiff was not legally bound to the ruling through those whose services it engaged, the plaintiff could*

have ignored the ASA's decision but, if it chose to abide by it, its loss would have been caused by its election and not by the incorrect decision. By engaging the services of someone who is a member of a professional organisation, one has to accept the consequences of that person's professional rules and standards.

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

Consequential Issues

Having found that the complaint could validly be brought against the IP, the Adjudicator turned to the questions that emanate from such a finding:

- In complaint #0219 the complainant incorrectly refers to Mantella as the WASPA member, rather than the IP. Can the complaint submitted against Mantella apply to the IP?

The Adjudicator understands the confusion between the IP and Mantella created in the mind of the complainant, which is as a result of the close and sometimes intertwined relationship between the two entities and the recent nature of the change of the IP's details with the Secretariat.

As such, the test that the Adjudicator applied was one of fairness and in particular procedural fairness. Having regard to the lengthy discussion of PAJA above, the Adjudicator held that the action to be taken in adjudicating complaint #0219 was not an "administrative action", nevertheless he was to be guided by the principles of PAJA. Here the test is whether the IP has been adequate notice of the nature and purpose of the proposed action and a chance to respond thereto, before any decision is taken.

In the view of the Secretariat, the complaint was against the IP and not Mantella. The complaint was not rejected on the basis of the incorrect citation of the IP, as such details had only been amended approximately one month earlier and recognizing the error, the complaint was forwarded to the IP for its response. It should also be noted that the contact details in the possession of the Secretariat for both Mantella and the IP are the same.

Furthermore, it is clear from the IP's response that the IP has in fact received adequate notice of complaint #0219 and an opportunity to respond thereto. Not only had it received such notice, but it also chose to avail itself of the opportunity to respond and deal directly with aspects of complaint #0219. In particular, complaint #0219 deals with both the "Groen knoppie" and "Madam" advertisements, while complaint #0311 deals only with the "Groen knoppie" advertisement. Yet, in its response, the IP deals specifically with the "Madam" advertisement in at least two places (at paragraphs 17 and 22), a clear indication that it intended to deal with complaint #0219.

The IP cannot both approbate and reprobate. It cannot claim *in limine* that complaint #0219 should be dismissed as the incorrect party has been cited and then deal with issues raised exclusively in respect of complaint #0219.

- In complaint #0311 the SP has argued that it should not be cited, as the IP is a member of WASPA. It is a well established practice in the industry for WASPs (service recipients) to engage other WASPs (service providers) to provide services to them, particularly when the service concerned falls within the particular expertise of the service provider while the service recipient does not necessarily have the same expertise in this particular field.

The reason why the IP uses the services of the SP is not indicated and is of little relevance. What is directly at issue is that the IP provides its subscription services through the SP and in terms of the WASPA Code of Conduct, this renders the SP liable for the actions of the IP. As such the Adjudicator held that the SP is correctly cited in complaint #0311.

- Having found that the SP is correctly cited in complaint #0311, is it possible to also apply findings made in respect of complaint #0219 against the SP, where it is not cited.

While various correspondence between the SP and the WASPA Secretariat seems to indicate that the SP was aware of complaint #0219, a formal indication thereof has not been provided to the Adjudicator. As such the SP cannot be held liable for any breach of the WASPA Code of Conduct, in respect of complaint #0219.

However, both complaints #0219 and #0311 where viewed in context, are not only complaints against specific advertisements, but more importantly complaints in respect of the IP's subscription service and subscription process **as evidenced by two advertisements**. The Adjudicator has expressed this view previously, which view has neither been accepted nor rejected by the Appeal Panel. In complaints concerning subscription services, the Adjudicator has not imposed a sanction based on the number of advertisements found to have contravened the WASPA Code of Conduct, but rather on the perceived harm an incorrectly configured service or process is causing both consumers and the industry.

The SP is intimately associated with the IP's subscription service, yet was not formally notified of complaint #0219. As such, the Adjudicator was of the view that great caution had to be exercised in dealing with the imposition of any possible sanction against the SP in respect of complaint #0219.

Decision

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.

Independent Transaction

The Adjudicator considered the submission of the IP.

The Adjudicator did not agree with the submission at paragraph 14 thereof that considering the Appeal Decision would be allowing same to be applied retroactively. The Panel in the Appeal Decision interpreted the WASPA Code of Conduct and as such, the Adjudicator is bound to consider such decision in terms of clauses 13.3.7 and 13.3.11 of the Code of Conduct.

The Adjudicator concurred that the WASPA Code of Conduct is not as clear as it could be with regard to the meaning of an "independent transaction", however, rather than proceeding with an examination of such phrase, as has been done in previous reports, the Adjudicator referred to the Appeal Decision, where the Panel held:

Clause 11.1.2 is not as clear as it should be. The interpretation of this clause is complicated by the fact that the text of clause 11.1.2 does not specifically refer to content. The ordinary grammatical meaning of words must be followed. Where the grammatical meaning of the words is unclear the words must be interpreted in light of their immediate linguistic context. The wider legal context may also be determined by referring to internal sources (the Code, especially clause 11.1) and external sources. The meaning of clause 11.1.2 becomes apparent if it is read in context with the rest of clause 11.1, especially the heading of clause 11.1 ("Manner of subscription) and clause 11.1.4. Clause 11.1.4 provides that customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. It becomes clear that clause 11.1.2 prohibits the subscription service from being dependent on the ordering of content and that the customer must be specifically intent on subscribing to a subscription service and not the ordering of content.

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

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

The Adjudicator noted the IP's contention that its advertising amounted to an advertisement for a subscription service and the content items contained in the advertisement 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".

The Adjudicator has previously held that content may be provided for illustrative purposes (inter alia in complaint #0022) where the Adjudicator held:

The Adjudicator considered the use of content items to advertise a subscription service and whether this practice constitutes a breach of the WASPA Code of Conduct:

- *The purpose of Clause 11.1 of the WASPA Code of Conduct is to protect customers and potential customers from confusing or misleading subscription services. Clause 11.1 of the WASPA Code of Conduct requires providers of subscription services to ensure that customers and potential customers are fully informed of the nature of the service. Clause 11.1 of the WASPA Code of Conduct specifically requires an independent transaction for subscribing and prohibits the practice of automatically subscribing a customer who has requested a non-subscription content item or service.*
- *It is reasonable and appropriate for providers of subscription services to give customers and potential customers of their subscription service an indication of the type of content or service to be delivered. However, use of one or more specific items of content as an indication or example of content to be provided in terms of a subscription service, has the possibility of confusing a customer or potential customer so that they believe they are acquiring a specific content item or service rather than subscribing to a subscription service. This is prohibited in Clause 4.1.1 of the WASPA Code of Conduct requiring honest and fair dealings with customers and Clause 4.1.2 of the WASPA Code of Conduct requiring members to “not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission”. Advertising of this nature is also likely to be in breach of Clause 11.1 of the WASPA Code of Conduct.*
- *However, the WASPA Code of Conduct does not specifically prohibit the use of a content item or items in advertising for a subscription service; provided that the content item or items is clearly and only being used as an indication or example of the type of content to be provided in terms of the subscription service. This is of course subject to the further proviso that such use does not breach Clauses 4.1.1, 4.1.2 and 11.1.1 of the WASPA Code of Conduct and that the business processes involved do not breach Clauses 11.1.2 and 11.1.4 of the WASPA Code of Conduct (as these Clauses or other Clauses of the WASPA Code of Conduct may be amplified or further explained by advisories issued by WASPA from time to time, in this case the WASPA Advisory on Subscription Services).*
- *Assessing whether a content item or items is clearly and only being used as an indication or example, or whether it is likely to mislead (intentionally or unintentionally) can only be done in the context of the specific advertisement. There are a number of factors to be considered, both individually and in relation to each other inter alia and by way of example only, including:*
 - *The use of keywords. Specific content is more likely to be an example only if a single, generic keyword used for the subscription request, while the use of one or more content*

specific or content related keywords is likely to cause confusion.

- *The indication that the service being advertised is a subscription service and the prominence and clarity of such indication (visual, auditory or otherwise); particularly in comparison with the indication (visual, auditory or otherwise) of the content example/s.*
- *The indication that there will be a continual billing process and the billing frequency as well as an indication of the amount to be billed and the prominence and clarity of such indication.*
- *The indication that there will be ongoing, continual and regular delivery of content and the frequency of such delivery, having regard to the prominence and clarity of such indication.*
- *Whether there is a mix of content items and a subscription service being advertised or only a subscription service.*
- *Whether the same short code or access number is used for both content items and a subscription service.*
- *Whether similar key words are used for content items and a subscription service.*
- *The clear differentiation between the content examples or indicators and the subscription service itself.*

There accordingly must 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.

The IP has set out the factors in the advertisement, both text and audio, which clearly indicate that the advertisement is for a subscription service. As against that the Adjudicator had to weigh the following:

- The use of only one content item to illustrate a subscription service;
- The use of a different keyword to initiate the subscription in each of the advertisements, the letter “G” in the one, the letter “M” in the other, rather than a generic keyword like “funny” or “real” or the like;
- The fact that the text *prima facie* does not comply with the requirements of the WASPA Advertising Rules;
- The use of unrelated terms to indicate cost and frequency, namely “twice a week” in the audio and “twice weekly” in the text, yet a reference to a cost of “R5 per message” in the text;
- Much emphasis is placed by the IP on the use of the word “a hilarious real sound” rather than “this hilarious real sound” in both advertisements.

However the subtlety of this distinction 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.

Having weighed the efforts of the IP in revising its television advertising so as to inform a customer of 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. The IP's submission (at paragraph 28) that inferring an offer for a content item would be "contrived and capricious" is rejected in its entirety.

The Adjudicator noted the IP's contention that its advertising amounts to an offer for a subscription service, which is accepted by a customer. The Adjudicator is of the view that this is incorrect and that the IP's advertisement is not such an offer, but rather an invitation to do business¹. It is the consumer who makes the offer, which is then accepted or rejected by the SP on behalf of the IP. Generally the basis for such acceptance or rejection is whether the consumer is able to pay for the service. If this were not the case, the IP would be obliged to provide content irrespective of whether the consumer is able to pay for it or not. The SP, on behalf of the IP, then indicates is acceptance of the offer to the consumer by means of the "welcoming SMS" referred to at paragraph 29 of the IP's submission). If the consumer did not understand the nature of the service, his/her only option is to unsubscribe at this stage and s/he will be charged for the first content item (of that consumer's selection) and will in fact receive a WAP address in order to access such chosen content item.

In the view of the Adjudicator, this connects the specific content item too closely to the subscription service for the consumer's transaction to be an independent transaction. Thus, despite the IP's efforts, the content item and the subscription service are entwined in a single transaction and a customer is required "to put in a request for specific content first, whereupon they would be subscribed to a subscription service that would deliver similar content in future", which has been found by the Panel to contravene the WASPA Code of Conduct.

The Adjudicator concurs with the succinct and considered view of the Panel in the Appeal Decision and the Adjudicator followed the decision of the Panel in the Appeal Decision in finding the IP, through the SP, to have breached Clause 11.1.2 of the WASPA Code of Conduct.

Lack of detail in complaint

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

¹ This follows a long line of case law regarding offer and acceptance and the legal status of advertisements.

procedural unfairness in deciding the various complaints on the basis of the information submitted.

Conclusion

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

Sanction

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

- The Adjudicator took note of the decision of the Appeals Panel in respect of complaint #0001 against the same SP and IP as well as its decision in respect of complaints #0002, #0011, #0026, #0037 and #0058;
- The Adjudicator considered Clause 3.9 of the WASPA Code of Conduct, which provides:

3.9. Information providers

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

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

- The Adjudicator had regard to the fact that subscription services remain an extremely contentious issue within WASPA. The Adjudicator is aware and welcomes the efforts to amend the WASPA Code of Conduct to clarify issues such as the nature of an independent transaction, however the Adjudicator is bound to follow the WASPA Code of Conduct as at the date of the complaint and does not enjoy the luxury of foresight into future amendments or clarifications.
- The Adjudicator noted that financial sanctions do not appear to deter the IP from its persistent breaches of the WASPA Code of Conduct.
- The Adjudicator noted further that subscription services are enabled by the Online Billing System utilised by Vodacom and the Event Based Billing utilised by MTN.
- The Adjudicator noted that sanctions were imposed on the SP in respect of complaints #0141, #0186 and #0188.

The Adjudicator accordingly imposed the following sanction:

- The SP is reprimanded for allowing the IP to breach the WASPA Code of Conduct.
- 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.

- 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.
- 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.
- 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.
- 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.
- 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).
- 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.