



## REPORT OF THE ADJUDICATOR

<b>WASPA Member (SP)</b>	Wireless Warriors
<b>Service Type</b>	Internet Web Site Relating to the SP's Brand
<b>Source of Complaints</b>	Public
<b>Complaint Number</b>	#0053

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### Complaint

A complaint was received from a member of the public regarding the SP's alleged failure to abide by lawful conduct, as the Internet web site of its brand SexyMobile, located at [www.sexymobile.co.za](http://www.sexymobile.co.za), does not contain certain information as specified in Section 43 of the Electronic Communications and Transactions Act, Act 25 of 2002 (hereinafter referred to as the "ECT Act"). The complainant referred specifically to the information specified in Sub-Section 43(1)(a) to (r) of the ECT Act.

With regard to the WASPA Code of Conduct, the commitment of the SP to lawful conduct is contained in clause 3.1.2. of the Code, which provides "Members are committed to lawful conduct at all times." In addition, regard was had to the provisions of clause 3.9 of the Code, 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.

At the time the complaint was lodged against ExactMobile. In the interim, the SP has become a member of the WASPA in its own right. Accordingly and at the request of the SP, the SP is cited in its own right.

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### SP Response

The SP provided a response, which indicates:

In response to the complaint logged against SexyMobile through WASPA: I would like to assure the complainant [name deleted] that every effort is being made to have the relevant information available to the public on [www.sexymobile.co.za](http://www.sexymobile.co.za). We are currently in the process of updating the WEB site and expect to have the new version live by no later than the 1<sup>st</sup> November 2005.

I would also like to take this opportunity to apologize for the infringement and to thank both [the complainant] and WASPA for bringing this matter to my attention.

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### **Investigation**

The Secretariat reviewed the Internet web site referred to in the complaint and noted extensive terms and conditions available on such web site, as well as a manual published by the SP on its Internet web site in terms of the Promotion of Access to Information Act, Act 2 of 2000.

While certain of the information referred to in Sub-Section 43(1)(a) – (r) of the ECT Act can be found within these various documents, not all such information can be so found.

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### **Decision**

The Adjudicator noted the SP's response and what appears to be an admission by the SP of an infringement of the WASPA Code of Conduct and an apparent undertaking to remedy such infringement. The Adjudicator was of the view that such possible admission is not sufficient in order to justify a finding of an infringement of the WASPA Code of Conduct and as such considered the matter further.

The Adjudicator questioned whether the provision of information on an Internet web site could be regarded as a service in terms of Clause 3.9.1 of the WASPA Code of Conduct, which would render the SP liable for the conduct of the IP. For the reasons set out below, there was no reason to consider this question further.

The Adjudicator noted that neither he nor the WASPA Secretariat is a Court of Law empowered to consider possible violations of national law. Although there may be overlap between certain national laws and the WASPA Code of Conduct, any finding and sanction in this Adjudication must be founded purely on any infringements of the WASPA Code of Conduct. As such the WASPA Adjudicator cannot make a finding that the SP's Internet web site contravenes Section 43 of the ECT Act. However, Clause 3.1.2 of the WASPA Code of Conduct commits a member of WASPA, such as the SP, to lawful conduct. It is an affirmative statement requiring a positive effort on the part of the WASPA member. It is not stated in the negative (for example, "Members are committed not to participate in conduct which has been found by a court of competent jurisdiction to be unlawful and which is not the subject of an appeal"), which would obviate the need for positive effort on the part of a WASPA member.

The Adjudicator noted further that:

- Sub-Section 43(1) of the ECT Act requires information to be made "available to consumers on the web site where such goods or services are offered". The SP does not offer content downloads (the purchase of goods) from its Internet web site and as such Section 43 would not apply to its Internet web site. However, the SP does allow downloads from its WAP portal and the definitions provided in the ECT Act would appear to make a WAP portal subject to the requirements of Section 43 of the ECT Act. The complainant did not however make specific reference to the SP's WAP portal.

- Failure to provide the information specified in terms of Sub-Section 43(1) of the ECT Act does not make a supplier (as such term is defined in the ECT Act, which in the opinion of the Adjudicator would encompass the SP) liable to penalties in terms of Section 89 of the ECT Act;
- In his opinion, the consequence for a failure to provide the information specified in terms of Sub-Section 43(1) of the ECT Act, is that Sub-Section 43(3) of the ECT Act becomes operative and a consumer (as such term is defined in the ECT Act) is able to cancel a transaction concluded between a supplier and consumer in accordance with Sub-Sections 43(3) and (4) of the ECT Act. It is Adjudicator's opinion that failure to provide the information specified in terms of Sub-Section 43(1) of the ECT Act is accordingly not an unlawful action, but rather an action having a consequence specified in law.

As such, the complaint was not upheld.