

REPORT OF THE ALTERNATIVE APPEALS PANEL

Date: 25 November 2006
Appellant (SP): Independent SMS Telecommunications (Pty) Ltd (ISMS)
Complaint Numbers: 0066, 0067 and 0078
Code version: v3.2

1 INTRODUCTION TO THIS APPEAL

- 1.1 This appeal concerns the adjudication of three complaints which all resulted from the same or a substantially similar SMS received by each of the complainants. The message on the face of it, was sent or facilitated by the SP, ISMS (with a grodata.co.za domain), on behalf of or in conjunction with, or otherwise by association with, an information provider (IP) known as Promo D.o.o trading as Mob1. The adjudicator of the three complaints decided, for various reasons, to respond separately to each complaint but to aggregate the sanction for the complaints, and included this in adjudication 0078. The SP has appealed each adjudication separately in the name of the IP.
- 1.2 Each complaint was submitted during November 2005 when version 3.2 of the Code of Conduct was in force. We have therefore referred to this version of the Code in considering the appeal by ISMS. The differences in the present version and version 3.2 as regards appeals are in any event, very slight.
- 1.3 It may be useful to repeat the relevant provisions of the Code in relation to appeals, to remind ourselves and our readers that it is not the role of the appeals panel to start the enquiry anew, but only to review facts which are before it:
- 1.3.1 Under section 13.5.1 of the Code, a member who is found to have breached the Code by an adjudicator has the right to appeal for a review of the adjudicator's decision, and/or a review of the sanctions imposed by the adjudicator.
- 1.3.2 Section 13.5.5 provides that the appeals panel must consider the evidence presented to the adjudicator, the adjudicator's decision and any additional information provided by the service provider.
- 1.3.3 On the basis of the evidence presented, the panel will decide under section 13.5.6, whether there has, in fact, been a breach of the Code.

- 1.3.4 If the panel determines that there has been a breach, then it must review the sanctions recommended by the adjudicator, according to section 13.5.7.
- 1.3.5 Under section 13.5.8, the panel may maintain the same sanctions recommended by the adjudicator, or may determine such other sanctions as it deems appropriate, given the nature of the breach and the evidence presented.
- 1.4 We have adopted an informal structure for the finding we have made which we hope will result in a shorter document than may otherwise have been the case, and one which is reader-friendly. We have (i) summarised key relevant issues by way of background in part 2; (ii) summarised the complaints received and the relevant sections of the Code referred to in part 3; (iii) specifically considered the adjudicator's decisions in part 4; (iv) reviewed the SP's grounds of appeal in part 5; and (v) made our finding in part 6.
- 1.5 The IP had not previously made any representations, but the appeals have been submitted by the SP in the name of the IP, as stated above.
- 1.6 Finally, although the adjudicator did make decisions and issue findings in December 2005 ("the first decisions"), these were withdrawn by the WASPA Secretariat and the adjudicator re-issued the decisions on 31 January 2006 ("the final decisions").

2 BACKGROUND TO THE COMPLAINTS

2.1 *The reason for the complaints*

- 2.1.1 As the complaints relate to the same or a similar message received by each complainant in early November, we have set the text of the message out here and noted some slight differences in the version received by the complainants, although we do not regard these as sufficiently material to affect our finding. Each complainant submitted a complaint to WASPA on slightly different grounds.
- 2.1.2 The following message originated in each case from either number 082 004 1472 or short code 39393:
- "Your account shows 12450 mob1 bucks! Convert them into a reward valued R2000. Secure code 5135. Send COOL to 0820041472. T&C on www.mob1.biz R15/SMS max9-R135".*
- In one of the complaints the word "BONUS" was required. In a string of SMSs disclosed by the SP, the amount of R135 did not appear, and "max9" appeared as "max12". R135 seems to have

been included in the message only after the first complaint was received by WASPA.

2.2 *The relationship between an SP and an IP*

2.2.1 We have considered the definition of “information provider” in the Code and this is “any person on whose behalf a wireless application service provider may provide a service, and includes message originators”. A “wireless application service provider” is “any person engaged in the provision of a mobile service, including premium-rated services, who signs a WASP contract with a network operator for bearer services enabling the provision of such services.”

2.2.2 Section 3.9.1 of the Code (information providers, general provisions) states that “members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene this Code of Conduct”. Section 3.9.2 provides that “the member must suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct”.

2.3 *Jurisdiction of WASPA*

2.3.1 The Code was created to address the concerns of legislation including the Electronic Transactions Act, 25 of 2002, within the wireless application services arena. The Code contains its own consumer protection provisions and particularly provisions concerned with spamming which we will consider below.

2.3.2 WASPA is not empowered to enforce other laws, but WASPA has as a matter of fact, jurisdiction in relation to any service which can be termed a “wireless application service” where its members are involved in a complaint, or where its members have responsibility for the actions of third parties who may be involved in a complaint.

2.3.3 WASPA is required to take the public interest into account when considering any complaint, and in this regard, it is, in the panel’s view, appropriate to look more widely at the complaint than to the mere words used in it.

2.4 *The public interest*

2.4.1 The General provisions of the Code have application in all cases in relation to matters dealt with by WASPA, and provide a good

platform on which to base most adjudications. Section 3.1.1 provides that: "Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA." Section 3.1.2 provides that "Members are committed to lawful conduct at all times."

- 2.4.2 As we state in 2.3 above, in considering whether the conduct complained of is "lawful" WASPA may have regard to laws or aspects of the common law which can be considered to relate directly to the subject matter of the complaint.

3 BASIS OF THE COMPLAINTS

3.1 *Complaint 0066*

- 3.1.1 The complainant relied on sections 3.1.7(b) (decency, professional and lawful conduct) (which is generally accepted to have been an erroneous reference to section 3.7.1(b)); 5.3.1 (prevention of spam, commercial communications) and 6.2 (pricing, advertising and pricing).
- 3.1.2 The finding by the adjudicator that the SP had breached the Code resulted in a sanction set out in the adjudication in relation to complaint 0078.

3.2 *Complaint 0067*

- 3.2.1 The complainant relied on sections 7.2.4 (prohibited practises, children's services) and 9.1 (provision of information, competitions).
- 3.2.2 The adjudicator did not uphold the complaint in relation to section 7.2.4 of the Code, as the service provided by the SP on behalf of the IP does not fall within the definition of "Children's services" as stipulated in section 2.6 of the Code.
- 3.2.3 In considering the complaint, the adjudicator considered the SMS message dialogue supplied by the SP. The adjudicator stated that the dialogue read with the information on the website of the IP gives an impression that there is a prior commercial relationship and that the promotion is valid, but in fact both impressions are "irrelevant".
- 3.2.4 The finding by the adjudicator that the SP had breached the Code resulted in a sanction set out in the adjudication in relation to complaint 0078.

3.3 *Complaint 0078*

- 3.3.1 The complainant relied on sections of the Code relating to "spamming", which can be considered to be sections 4 (customer

relations) and 5 (commercial communications). The complainant also relied on the Consumer Affairs Act in support of its complaint, specifically the provisions dealing with competitions.

- 3.3.2 The adjudicator made certain remarks regarding the liability of the SP for the sending of the SMSs complained of, referring also to complaint 0066, and noting that the SP was in effect liable for the actions or omissions of the IP by virtue of their relationship and facts laid out before him by the SP.
- 3.3.3 The finding by the adjudicator that the SP had breached the Code resulted in a sanction consolidated in this adjudication, with the sanctions for 0066 and 0067.

4 DECISION OF THE ADJUDICATOR

4.1 Findings

- 4.1.1 In all three complaints, the adjudicator conducted an extremely thorough review of various aspects of the SMS complained of, including reviewing the website referred to in the SMS, the Lotteries Act, Act 57 of 1997 ("Lotteries Act") and the Consumer Affairs (Unfair Business Practices) Act, 71 of 1988 as read with *Government Gazette* No. 26862, Notice No. 2178 ("Consumer Affairs Act").
- 4.1.2 The adjudicator found in each case that the SP had breached clause 9.1.6(d) of the Code which specifically prohibits competition services and the promotional material for competitions from suggesting "that the party has already won a prize and that by contacting the promoter of the competition, that the entrant will have definitely secured that prize." Accordingly the adjudicator found that there was a "very strong *prima facie* indication" that the SP was conducting a competition in contravention of the Lotteries Act and relevant regulations under the Consumer Affairs Act, and particularly General Notice 303 of 2005.
- 4.1.3 Whilst noting that neither he nor WASPA is a court of law, the adjudicator stated that any overlap between the Code and national law can only result in sanctions imposed in terms of the Code in relation to breaches of it. However, the adjudicator stated that in terms of section 3.1.2 of the Code (professional and lawful conduct, general provisions), members are committed to "lawful conduct" and WASPA is therefore entitled to find that a *prima facie* contravention of national law would amount to a breach of section 3.1.2.

4.1.4 In all three complaints, the adjudicator stated that the complaint in relation to the “unsolicited SMS message and competition promoted therein” is upheld. Specifically the adjudicator found that the SP was, in assessing each complaint, in breach of the following sections of the Code – 4.1.1 and 4.1.2 (provision of information, customer relations); 5.3.1 (prevention of spam, commercial communications); 6.2.2, 6.2.4 and 6.2.6 (pricing of services, advertising and pricing) and 9.1 (provision of information, competitions).

4.2 *Sanctions*

4.2.1 The finding by the adjudicator that the SP had breached the Code resulted in a sanction set out in the adjudication in relation to complaint 0078. The adjudicator consolidated the sanctions in respect of the three complaints on the basis that the complaints dealt with substantially the same issues, and stated the sanction to have taken into account the “numerous and egregious breaches of the WASPA Code of Conduct raised in the instant complaint”.

4.2.2 Specifically the adjudicator took the following issues into consideration in imposing the sanction:

4.2.2.1 sanctions imposed on the SP and other SPs in complaints of a similar nature;

4.2.2.2 the SP’s submission that the MT message received by complainants emanated from outside South Africa, stating however, that the SP nonetheless appeared to have had a close business relationship with the IP which allowed the SP to respond to complaints on the IP’s behalf, advocating for the IP and making representations on its behalf (the SP was therefore not a mere conduit for the service of the IP but a direct participant in it, inter alia by receiving income based on the IP’s service;

4.2.2.3 the service appeared to have been terminated although the numbers used continued to be active in at least one network operator’s database;

4.2.2.4 section 3.9 of the Code relating to information providers (set out at point 2.2.2 above);

4.2.2.5 the number of similar complaints to those received in relation to the competition which was the focus of the complaints reviewed by the adjudicator in 0078;

4.2.2.6 the fact that the SP had for a fourth time breached the Code in respect of a substantially similar service which apparently was

provided by the same IP (this was a reference to complaint 0057 which the adjudicator had established also concerned the SP);

4.2.2.7 the sanction is in relation to the complaints, not the IP's service as a whole, thus further or other sanctions might be applied by WASPA if appropriate and necessary.

4.2.3 The sanction consisted in:

4.2.3.1 a reprimand for "allowing the numerous and egregious breaches" of the Code by the IP;

4.2.3.2 a direction to the SP to remedy the breach by terminating the provision of service to the IP and specifically, terminating services relating to "mob1" and "bon4u"; any competition or service which is the same or similar to "mob1" and "bon4u"; and any competition which contravenes the provisions of clause 9.1.6(a) and/or 9.1.6(d) of the Code, irrespective of the identity of the IP;

4.2.3.3 a direction to the SP to notify the WASPA Secretariat of various detailed information in its possession regarding the IP to enable WASPA to notify other members of the IP's identity and conduct;

4.2.3.4 notice by WASPA to Vodacom to block the SP's access to 082 004 1472 ("082 number") for 12 months and to Cell C, MTN and Vodacom to block the SP's access to 39393 ("short code") for 12 months;

4.2.3.5 a direction to the SP to refund the complainant in 0067 in an amount of R90 in respect of the six R15 premium-rated SMS messages dispatched; and

4.2.3.6 a direction to the SP to pay a fine to WASPA of R100,000.

5 GROUND OF APPEAL

5.1 Following the publication of the first decisions, the SP submitted a written response which was queried by the WASPA Secretariat. A series of correspondence between the SP and the WASPA Secretariat followed during January 2006 prior to publication of the final decisions on 31 January 2006. The SP submitted appeals in writing against each of the three adjudications in the final decisions separately, on 28 February 2006. The SP also submitted further information to WASPA on 7 March 2006 which has been provided to this panel for consideration.

5.2 We note that the appeals have been submitted by the SP but that the heading of each appeal indicates that it is “submitted by Promo D.o.o t/a Mob1”.

5.3 *Appeal against decision*

5.3.1 As the SP has referred to 0067 in the appeal for 0066 and has also stated that 0078 be incorporated in the appeal on 0067, there is cross-referencing throughout each appeal, and as the sanction for the three complaints has been consolidated by the adjudicator, for convenience we have set the grounds for appeal in one place, referring to the specific complaint number only where the SP draws attention to the relevant adjudication specifically. The IP requests the appeals panel first to strike the adjudicator’s decisions but in the alternative, to reconsider the sanctions.

5.3.2 *The adjudications are void because they were withdrawn* – in 0066 and 0067, the IP contends that the first decisions were published and the SP objected in the form of an appeal. The first decisions were then withdrawn and the final decisions issued, but this process did not follow WASPA’s appeal rules. Once the first decisions were published the IP regards the adjudicator as *functus officio*, and states that only the appeals panel can then alter the decision.

5.3.3 In the alternative, the following specific points are made –

5.3.3.1 *The SP did not originate the offending message* – this is ignored by the adjudicator.

5.3.3.2 *No proof that the SMS was sent by or via the SP and actually received by the complainant* – without such proof the complaint falls away. The finding that as the complainant in 0078 was a mobile network operator which stood to lose revenue because of the complaint and this gave the complaint greater credibility, has no basis, “whether the SMS was sent and received is a matter of fact, either there is proof of the latter or if not, there is no case”. It is submitted by the IP that there is no such proof and thus the whole report and sanction is null and void. The IP notes that it is interesting that the adjudicator accepted the complaint in 0066 where another provider delivered the message, not the SP.

5.3.3.3 *Relationship between IP and SP not proven to result in obligations on SP* – the adjudicator finds that the SP had an intimate relationship with the IP, meaning that the SP was not a mere conduit. However, the IP argues that most IPs and SPs have a close relationship but that does not mean the one

is entirely responsible for the SMS content of the other or even knows about it; and obtaining a transaction history does not vitiate the *bona fides* of an SP. A finding that the SP is guilty by association with the IP because otherwise it would not defend it, “does not even merit rebuttal”, is “as ridiculous as it is shocking” as assisting in defending an IP does not amount to wrongdoing.

- 5.3.3.4 *Focus on website rather than SMS content is incorrect* – by comparing the SP’s website to the SMS the adjudicator found that pricing was unclear. The SP contends that it is the content of the SMS which is at issue not the website. The reference to the omission in the SMS to the full retail price is an error as the adjudicator ought not to have compared the SMS content to that of the website.
- 5.3.3.5 *Reference to 0057 is irrelevant* – the adjudicator refers to the maximum number of messages permitted to be sent, but this statement was made in the context of a different report and should not be taken into account in this adjudication because “you cannot make a finding and impose a sanction in terms of rules introduced after an alleged infringement”, only on the basis of an ongoing service. The adjudicator has no such power and this flies in the face of legal norms.
- 5.3.3.6 *Flawed finding on rewards* – the adjudicator admits that his review is not comprehensive therefore he has no grounds to find that the rewards are likely to mislead or are false and/or deceptive. The logic used by the adjudicator in comparing the offerings of the SP and IP is twisted and convoluted.
- 5.3.3.7 *Finding of spam has no foundation* – the adjudicator’s finding that there was no direct and recent prior commercial relationship between the complainant and message originator is not supported by detail and lacks foundation. The statement by the adjudicator that he did not accept that the complainant participated in one or more of the IP’s services over the years is without basis.
- 5.3.3.8 *No reason given for finding that SP has breached 6.2.6* – the adjudicator does not give a reason or narration for this finding and uses shorthand which is inappropriate.
- 5.3.3.9 *No jurisdiction to make findings under the Lotteries Act or Consumer Affairs Act* – the adjudicator indicates that the wording of the initial SMS message “does not indicate the winning of the prize, rather the conversion of some notional currency into a reward”, but dismisses this as a semantic distinction and justifies this by suggesting that the conversion

process “appears to be a procedural step...focussed on collecting payment”. This is not a basis for the finding made or the application of other laws, and the adjudicator admits that he does not have power to make a finding about contraventions of other laws, but does so anyway by stating that there is a “very strong *prima facie* indication” that the laws have been contravened. The adjudicator states that because the Code and the laws overlap to some extent, the Code empowers him “to find breaches thereof and to impose sanctions in respect of breaches found”. This is convoluted reasoning and without substance and vitiates the entire decision and sanction imposed by the adjudicator. The IP makes further points regarding the faulty analysis by the adjudicator of General Notice 303 of 2005, which it claims is based solely on the requirement that consumers forward a type of fee to receive a prize, and not on the fact that the SP/IP is a manufacturer or retailer nor does it contact consumers by direct mail. The IP contends that the statute only applies to manufacturers and retailers who contact consumers by direct mail, therefore the Notice has no application to the IP at all.

- 5.3.3.10 *No grounds to find IP in breach of 9.1.6(d)* – because the adjudicator has no jurisdiction in relation to other laws as set out in point 5.3.3.7 above, the adjudicator cannot use other laws as grounds to find that the SP is in breach of 9.1.6(d).
- 5.3.3.11 *No grounds to find SP in breach of 3.1.2* – the adjudicator uses the flawed logic in relation to the other laws to find that there is a very strong *prima facie* indication to “compelling *prima facie* indication” of a breach of those laws and therefore the adjudicator’s finding that the SP is guilty of contravening 3.1.2 of the Code is similarly flawed and convoluted.
- 5.3.3.12 *The adjudicator has ignored the audi alterem partem rule* – the IP contends that the adjudicator has added additional “charges” to the initial charges which were limited to “scam, misleading information relating to costs (9.1 of the Code) and offending against children’s services”. Without allowing the IP an opportunity to reply and without informing it, the adjudicator added contravention of the Lotteries and Consumer Affairs Acts, value of rewards and content of the website. This constitutes a gross dereliction and denial of a basic right of any accused party to be heard and make a defence.
- 5.3.3.13 *Failure to apply mind* – it appears that the adjudicator has merely cut and pasted portions of his finding to all three

complaints instead of applying his mind to the matters.

- 5.3.3.14 *Bias and misdirection* – there is an abiding impression of bias. It appears, says the IP, “that the adjudicator and WASPA convinced themselves of the SP/IP’s guilt beforehand and merely sought any convenient “hooks” upon which to place their hangman’s rope”. The adjudicator has misdirected himself continually to such a degree that his whole decision is tainted with surmise, bias, and ultra vires exercise of alleged powers in terms of the Code. The whole decision in 0078 should accordingly be struck down.
- 5.3.3.15 *Failure to adhere to Code procedure* – WASPA has failed to adhere to its own appeal procedure in relation to 0066 and 0067, therefore these adjudications are both nullities.
- 5.3.4 *Sanctions should be reconsidered in the alternative to striking out the adjudicator’s decision –*
- 5.3.4.1 “The sanctions as a whole are totally void, based as they are on faulty and totally vitiated decisions, and in particular the fine of R100,000 induces such shock as to be totally unreasonable. Again the adjudicator mistakenly takes into account alleged “breaches” and in effect finds the SP guilty of contravening the Lotteries and Consumer Affairs Acts.”
- 5.3.4.2 The adjudicator mistakenly validated complaints 0066 and 0067 which are void of substance.
- 5.3.4.3 He used emotive language such as “numerous and egregious” to justify a “shockingly high fine” besides making guilty findings regarding the Lotteries and Consumer Affairs Acts.
- 5.3.4.4 He gave no indication of sanctions imposed on the SP and others in similar cases.
- 5.3.4.5 He regarded an SP/IP business relationship and the SP assisting in making representations on the IP’s behalf as evidence of guilt.
- 5.3.4.6 The adjudicator gave a spurious interpretation of “lawful conduct” an expression so wide as to be devoid of meaning and then proceeded to “convict” the IP/SP of contravening it. “Apparently WASPA members are expected to enforce the “affirmative” nature of lawful conduct. The next time anybody goes through a stop street....beware!”.
- 5.3.4.7 He validated previous decisions by saying that “this is the 4th such”.

6 FINDINGS OF APPEALS PANEL

6.1 *The general submission of the IP is that the adjudications are void because they were withdrawn, therefore this process is flawed –*

6.1.1 The panel has considered the dates and content of the email and document exchange between WASPA and the SP during the period November 2005 to January 2006, and the reasons given by WASPA for withdrawing the previous findings.

6.1.2 The SP wrote to WASPA by email on 9 January that it noted the refund required by the adjudicator of R90 in relation to 0067 although they were not responsible for transmitting the SMS. They also queried whether “the fine then applied would be in full and final settlement against all complaints lodged against us” – this was the fine applied under the first decisions.

6.1.3 Whilst the SP indicated by email on 12 January that it had some issues with the first decisions, when queried by WASPA as to the nature and form of its appeal, it did not pursue this, possibly because WASPA then indicated that the first decisions were being withdrawn. The reason for the withdrawal appears to be the additional information provided by the SP pursuant to the first decisions (and therefore only after the complaints had been made and the SP’s response sought). WASPA in fact gave the SP a further and very specific opportunity to clarify the roles of each of the SP and IP in relation to the origination of the messages. The SP stated that it “wished to appeal the R10,000 fine imposed on us on complaint 0067. The reason for this is that we (SP) were/are not responsible for transmitting the initial SMS message”. On 16 January the SP wrote to “clear up a contradiction before we can go ahead” and stated that the suspension of the sanction imposed in the first decisions on 0066 should apply to 0067 well. On 17 January WASPA again wrote to the SP to advise that it had consulted with the independent adjudicator and in light of the additional information provided and the overlap between complaints 0066, 0067 and 0078, “we believe that all of the reports dealing with the Mob1 promotion require further review. Therefore the WASPA Secretariat hereby withdraws the reports issued for complaints 0057, 0066 and 0067 with immediate effect... Note that in your original response to complaint 0067, ISMS did not deny having originated the messages. Any information you may have concerning the origination of these messages would greatly assist the independent adjudicator in finalising these complaints.” On 17 January the SP wrote to WASPA in the terms set out in 6.2.1.2 below.

- 6.1.4 We are not able to find correspondence between the parties thereafter until the submission of the appeals in relation to the final decisions, and then until 7 March 2006 when the SP submitted a further email and attachment in support of its appeal.
- 6.1.5 The objective of WASPA is to protect the public interest in wireless services. In the course of carrying out its duty, an adjudicator is not prevented by the Code from withdrawing its adjudication where the SP or IP has not already complied with a sanction, or at all. In the circumstances, having regard to the correspondence entered into between the parties following the first decisions, the new information which was presented by the SP, WASPA's mandate, to the fact that the adjudications on the SP's own version, do not differ materially from one another save in relation to the consolidation of the sanction, and having regard to the SP's ability to appeal the final decisions and to submit further information to be considered, we do not regard the withdrawal of the first decisions as a bar to the making of the final decisions. The SP has taken full advantage of the appeals procedure and the balance of the provisions of section 13 in relation to the final decisions but did not do so formally in relation to the first decisions. We therefore do not consider the SP to have been prejudiced in any way by the making of the final decisions, nor do we find that the WASPA Secretariat or the independent adjudicator has in any way contravened or exceeded its mandate under the Code. Accordingly, we do not uphold the general ground of appeal.
- 6.2 *Alternative submissions* – we have considered these individually.
- 6.2.1 Looking at the specific points made in the alternative –
- 6.2.1.1 *The SP did not originate the offending message* – the two parties involved in this matter (both writing from the grodata domain) have stated various different things – they did not “originate” the message, or they are not aware of the content of it, or the SP is not responsible for the IP's services, or the sending of the message implies responsibility for it whereas if no proof can be found that the message was sent by the IP then there is no liability for it. We do not believe it useful to prolong a debate on this point. The IP has appealed the finding and in so doing defended the SP. The SP previously defended the IP. The Code states clearly at section 3.9, quoted above in 2.2.2, that members are liable for the actions or omissions of information providers. A message was received by the complainant in each case, indicating that either the sender or response number or both was the 082 number or short code. The message appears to have been

sent in each case in a form that contravenes the Code (as further discussed below).

6.2.1.2

The panel wishes to describe an anomaly in the submissions and in the appeal, which, in our view, has contributed to the actions of WASPA in relation to the SP. ISMS has not denied either that it is an SP or liable for the actions of its IP. The emails to WASPA (from ISMS) indicate that the IP is an entity in Croatia, and that ISMS played no role in the “origination” of the messages. On 17 January 2006, ISMS wrote to WASPA that “in Aug05 we (SP) cut the IP’s service since we did not like what was happening. The IP then went to Clickatell to run their service. In the mean time there were some system upgrades done on our side and the service was unfortunately open to them (IP) again. The IP was then also cut by Clickatell, this is when they went strongly through our connection.” Unfortunately the SP did not make these statements in its appeal. Taking them into account now, it is possible that ISMS did not originate messages, however, the responsibility for the actions of the IP rests firmly with the SP in terms of the Code, and in this case, the SP acknowledges that the IP was able to access and use its system and send messages unimpeded by the SP. The Code holds members liable for contraventions. This ground of appeal is not upheld.

6.2.1.3

No proof that the SMS was sent by or via the SP and actually received by the complainant – the fact of the complaints, the similarity in messages, the use of the 082 number and short code, and the SP and IP’s own equivocation in relation to the responsibility for the message dictates that in the absence of proof to the contrary, the panel is required to uphold the public interest. The panel therefore supports the assumptions made by the complainants. Neither the SP nor IP was able to show with any conviction, how or why a third party might have gained access to the 082 number or short code, and the identical text of the message, and indicates that the IP was in fact, able to access its system. This ground of appeal is not upheld.

6.2.1.4

Relationship between IP and SP not proven to result in obligations on SP – we have addressed this point in 6.2.1.1. This ground is not upheld.

6.2.1.5

Focus on website rather than SMS content is incorrect – the panel agrees that the SMS content is relevant, however the SMS itself indicated that the recipient should refer to the website for the terms and conditions. It then becomes

relevant to consider the terms of the website. It is in fact a step taken in the SP/IP's favour that the adjudicator considered the website in such detail, particularly in relation to pricing, given the absence of pricing information in the message, as required by the Code. This ground is not upheld. The panel agrees, however, that the further reference to the Lotteries Act and Consumer Affairs Act, may in this context, have been a step too far, and we deal with this in more detail below.

6.2.1.6 *Reference to 0057 is irrelevant* – it is relevant to consider other findings in terms of section 13.3.7(d) of the Code if they bear on the subject matter of the complaint. This ground of appeal is not upheld.

6.2.1.7 *Flawed finding on rewards* – the panel does not consider section 9.1 to have been contravened in relation to rewards. The finding made by the adjudicator after considerable effort and care, was intended in our view, to indicate grounds to find that the SP/IP had contravened section 3.1.2, but having regard purely to section 9.1 in relation to rewards, the appeal on this ground is upheld.

6.2.1.8 *Finding of spam has no foundation* – the panel agrees in part with the submission of the IP in relation to the assumptions made by the adjudicator in finding that there was no prior commercial relationship between the parties in respect of complaint 0067, however spam was raised only in complaints 0066 and 0078. The SP has not, in our view, taken the steps envisaged in the Code to ensure that the IP has a sufficient relationship as required by section 5.2.1(a), and the IP itself indicates no reason for us to think that it has done so. Reference to an assumption that the IP has obtained the customer details from a database is not adequate as a defence to a contravention of this important clause. Fundamental to our Constitution is the right to privacy, and WASPA has attempted to protect this important right in the Code by listing precautions to be taken by parties when dealing in personal information. We therefore disagree that the finding of spam in relation to complaints 0066 and 0078 has no foundation and this ground of the appeal is not upheld in relation to these two complaints.

6.2.1.9 *No reason given for finding that SP has breached 6.2.6* – it would seem to the panel that when the IP inserted the pricing reference of “R135” it had not, by its own admission, prior that time, sufficiently indicated pricing information in the message.

The website, which became relevant when the IP made it relevant by referring to it in the message, gave more information than the SMS, also indicating that the SMS itself lacked sufficient detail and that a recipient of the SMS would also have to consult the website. The adjudicator fully explored the issue of pricing in his decisions, going so far as to include a table of comparative charges for messages, and calculating relative cost of 9, and then of 12, SMSs. This ground of appeal is not upheld.

- 6.2.1.10 *No jurisdiction to make findings under the Lotteries Act or Consumer Affairs Act* – the panel finds that WASPA does not have jurisdiction to make a finding under these Acts. We uphold this ground of appeal but see also our finding in 6.2.1.12 below. However it is our view that WASPA does not need to found jurisdiction under any law, but merely under the Code. We used this logic in coming to this conclusion – if it can be shown that an SP has been inviting customers to deposit funds to its own account for widgets, for example, but never sending goods out, we are sure that the SP/IP in this case would also regard this as theft or at the least fraud. WASPA would, in these circumstances, be entitled to consider the SP/IP to have broken a law, and therefore the adjudicator would be entitled to find that the SP/IP was in breach of section 3.1.2. WASPA would be entitled to apply a sanction in relation to this breach, under section 13, having taken into account the relevant considerations set out in the Code. In this case, the complainant in 0078 has in fact referred to the Consumer Affairs Act specifically.
- 6.2.1.11 *No grounds to find IP in breach of 9.1.6(d)* – see 6.2.1.7 and 6.2.1.10 above. In our view, the adjudicator has jurisdiction in relation to section 9.1 and this was the subject of a complaint, however in our view it was not necessary to consider the Lotteries Act in this regard. We deal with this in more detail also in 6.2.1.12. This ground is not upheld.
- 6.2.1.12 *No grounds to find SP in breach of 3.1.2* – the adjudicator has taken great pains to indicate that were WASPA empowered to adjudicate matters under the relevant Acts, it would then have powers to mete out appropriate penalties. Since he did not have power under those Acts to apply penalties, the adjudicator had recourse to the Code, and found that section 3.1.2 states that members are committed to lawful conduct at all times. Having considered the commitment by and the actions and omissions of the IP/SP in light of the Code, taking into account the relevant provisions of other laws, it was within

the powers of the adjudicator to consider the breach of section 3.1.2 in imposing a sanction. However, there is an important distinction in our finding, between the ability to impose a sanction where a breach has been determined, and whether it is appropriate to take a possible breach into account in the first place. Because only complaint 0078 refers to the Consumer Affairs Act, and because section 9.1 of the Code does not itself refer specifically to the Lotteries Act, we regard the adjudicator's statements in relation to the contravention of the Lotteries Act in all complaints, and in relation to the contravention of the Consumer Affairs Act in 0066 and 0067 as "obiter" and therefore do not consider that the application of section 3.1.2 is correct in these circumstances. However, we find that the IP's reasoning in relation to the application of the Consumer Affairs Act is not correct, given the wide definition in the Act of the entities to whom the Act applies. This ground of appeal is therefore upheld in relation to 0066 and 0067 for both Acts, and in the case of 0078, in relation to the Lotteries Act.

6.2.1.13

The adjudicator has ignored the audi alterem partem rule – the panel finds that in making a finding that the SP was in breach of section 3.1.2, the adjudicator had to take into account the acts and omissions of the SP in relation to the Lotteries Act and Consumer Affairs Act. From the information presented to us, it does not appear that any complaint referred to an unlawful competition although complaint 0078 referred to the Consumer Affairs Act, but no complaint referred to the Lotteries Act or indicated sufficient reason to have taken this Act into account. We set out in points 3 and 4.1.4 above the grounds on which each party complained and the adjudicator's assessment of related sections of the Code. In the circumstances, the adjudicator did not receive, request or consider the SP's response to the issue of lawful action under the Lotteries Act. We therefore uphold this ground of appeal in relation to the Lotteries Act in all complaints, and in the case of the Consumer Affairs Act, in relation to complaints 0066 and 0067.

6.2.1.14

Failure to apply mind – the adjudicator clearly applied his mind in assessing the complaints, to the extent that they were withdrawn to allow for consolidation of what appeared to be similar matters into a similar finding. Cutting and pasting information that is relevant and identical in each adjudication does not of itself indicate a failure to apply his mind. This ground of appeal is not upheld.

- 6.2.1.15 *Bias and misdirection* – the SP has advanced no evidence to support this contention or to indicate that the adjudicator did anything to contradict his mandate under the Code, and this ground of appeal is therefore not upheld.
- 6.2.1.16 *Failure to adhere to Code procedure* – the procedure is as we outlined it in point 1.3.5 above, it is not a complicated procedure nor a detailed one, so that ordinary members of the public and WASPA members who are not lawyers or advised by legal people can also undertake appeals. The purpose of an appeal is to allow a member to have a decision which is unfavourable to it, to be reviewed by a further impartial body. We gave this matter considerable thought however, as it is not straightforward in this case, given the correspondence which passed between the parties in the intervening period between decisions. We came to the conclusion, which is in line with our thinking in 6.1 and particularly 6.1.5, that in the absence of a bar to withdrawing decisions and re-issuing them and where an SP has not already taken steps to comply with a decision, the balance of convenience actually favours the SP that the decisions be withdrawn if there is a reasonable chance that new evidence might affect the decisions. The fact that in this case it would appear that the evidence did not favour the SP, does not detract from the general approach of WASPA. Taking into account WASPA's objectives and its mandate, we do not regard the withdrawal of the first decisions to be in contravention of Code procedure and this ground of appeal is not upheld.
- 6.2.2 *Sanctions should be reconsidered in the alternative to striking out the adjudicator's decision* –
- 6.2.2.1 Our first duty is to review the decision made by the adjudicator and decide whether or not it was correct in finding that there was a breach of the Code, and then we are required to consider the sanction imposed in the light of any breach. In coming to this conclusion we are also bound to have regard to the grounds of appeal.
- 6.2.2.2 As set out above in our response to the grounds of appeal, we have found that:
- 6.2.2.2.1 In relation to rewards (6.2.1.7) the finding was not correct on the facts;
- 6.2.2.2.2 In relation to spam (6.2.1.8) the complaint submitted under 0067 did not concern spam;
- 6.2.2.2.3 The adjudicator was not required to consider the Lotteries

Act for any complaint or the Consumer Affairs Act for complaints 0066 and 0067 (6.2.1.10, 6.2.1.12 and 6.2.1.13) and therefore the finding that the SP is in breach of section 3.1.2 of the Code cannot be upheld;

6.2.2.2.4 In considering these Acts, the adjudicator ought to have given the SP an opportunity to respond specifically in 0066 and 0067 in relation to the Consumer Affairs Act, and in relation to the Lotteries Act, the adjudicator ought to have given the SP an opportunity to respond in relation to all complaints (6.2.1.12 and 6.2.1.13).

6.2.2.3 We have taken these matters into account in assessing the sanctions imposed.

6.3 *Sanction –*

6.3.1 The panel notes the reasons advanced by the adjudicator in making his decision on sanction, and the matters taken into account, both of which we have set out above in points 4.1 and 4.2.2.

6.3.2 In the main we consider the reasoning to be sound, and we find that the sanctions imposed other than the fine are fair, reasonable and appropriate in the circumstances. Since we disagree with the finding of the adjudicator in relation to those four matters set out above, what remains is to adjust the amount of the fine imposed by the adjudicator to more accurately reflect the findings we have made.

6.3.3 There is no rule of thumb or formula regarding penalties – each decision is very much bound up in its own facts. Assuming, for the benefit of the SP, that the matters highlighted by the panel in 6.2.2.2 are all a significant feature of the calculation of the penalty imposed by the adjudicator (because the penalties were consolidated), we have notionally allocated a weighting of 50%. We consider the balance of the findings of the adjudicator to be weighty because of their sheer numbers and relative severity, and must therefore consider them to also have a weighting of 50%. We have not taken any other potential breaches of the Code into account.

6.3.4 We therefore direct that the appeal be upheld for the reasons summarised in 6.2.2.2 above and that the penalty be reduced by 50%. The SP is directed to pay R50,000 to WASPA and to comply with the balance of the sanction imposed by the adjudicator in the final decisions, in accordance with the Code.

6.3.5 In case there should be any residual confusion, it is the SP that this decision applies to, and the SP to whom the sanction is to be applied.