

REPORT OF THE ALTERNATIVE APPEALS PANEL

Date: 24 November 2006
Appellant (IP): Xcite Mobile CC (Excite)
Complaint Numbers: 0075
Code version: v3.2

1 INTRODUCTION TO THIS APPEAL

- 1.1 This appeal concerns the adjudication of a complaint by Exact Mobile (Pty) Ltd. (Exact), a member of WASPA, against ViaMedia (Pty) Ltd. (ViaMedia), a member of WASPA and also the Service Provider (SP) in the matter complained of. The complaint in addition cites Xcite Mobile CC. (Xcite), the Information Provider (IP) and Appellant in this matter.
- 1.2 The Report of the Adjudicator is dated 17 July 2006. The subject matter of the complaint relates to a possible breach of the WASPA Code of Conduct (the Code) and the possible non-adherence to the WASPA Advertising Guidelines (Ad Guidelines) in connection with a television advertisement flighted by M-NET on 05 November 2005. The applicable Code is Version 3.2 which was valid from 01 September 2005 to 20 April 2006.
- 1.3 The Appeals Panel have adopted an informal structure and the findings made are set out below as follows:
- Part 2: Summary of the complaint and the response;
 - Part 3: Summary of the relevant sections of the Code;
 - Part 4: Summary of the adjudicator's decisions;
 - Part 5: The IP's grounds of appeal; and
 - Part 6: Findings of the appeals panel.
- 1.4 For the sake of the participants in this matter and readers in general, we record that it is not the role of the appeals panel to start the enquiry anew, but only to review the facts which are brought before it by the WASPA Secretariat. We record in addition that there is no right for a review of the appeals panel decision.
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2 SUMMARY OF THE COMPLAINT AND THE RESPONSE

2.1 *The Complaint*

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- 2.1.1 The complaint was lodged by a Director of Exact and submitted to the WASPA Secretariat via the online web form on 14 November 2005.
- 2.1.2 The complaint was made against ViaMedia and “*OtherID: 31314 TV ad run on Mnet on 05 Nov 2005*”, subsequently identified as Excite, the IP.
- 2.1.3 Exact cites ViaMedia, the SP and Excite, the IP, as having breached the WASPA Code and alleges in addition a lack of adherence to the Ad Guidelines in a television advertisement flighted by M-NET on 05 November 2005 as follows:

“Code_Breached: Section 1.1.2 (this is an erroneous reference to 12.1.2) Any request from a customer to a subscription service must be an independent transaction, with the specific intention of subscribing to a service”;

“Pricing

Section 6.2.5 The price for a Premium Rated Service must be clearly and easily visible in all advertisements. The price should appear with all instances of the Premium number display”;

“Detailed_Description_Complaint: Section 11.1.2 Clearly states that a request to join a subscription service must be an independent 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”;

“Pricing. The ad states that the content costs R1.00. In the fine print in the corner they state that this is a subscription service and you are charged R5.00 per week”.

2.2 *The Response*

- 2.2.1 A combined response from ViaMedia, the SP and Xcite was received by the WASPA Secretariat on 15 November 2005.
- 2.2.2 ViaMedia insist that all their “*partners conform to the Code*” and as part of adhering to the Code, all advertisements are reviewed prior to flighting. In addition, they state that the Marketing Director of ViaMedia had reviewed the advertisement and confirmed that it conformed to both the Code and the Ad Guidelines. ViaMedia’s response refutes any breach of clause “1.1.2” of the Code (repeating the erroneous reference used in the complaint).
- 2.2.3 The response by the IP included the provision of a “*good*” copy of the advertisement, with a request that it be viewed as a “*full screen in order to appreciate the size and the costs etc*”.
- 2.2.4 The response from the IP included further detailed information recorded below (the original clause references are repeated):

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“The Complainant cites Section 1.1.2 of the Code” (yet another erroneous reference to 11.1.2) “and suggests the advert is bundling”.

- a. *NO Bundling occurs: The technical functionality of the service makes bundling impossible. The users DOESN'T get an item of content when they submit either TONE or LOVE keywords, these are specifically reserved for CLUB membership requests (as are LOGO, PICTURE, WALLPAPER, TEXT). They ONLY get a 'Welcome messages' with - Pricing details, Frequency details, Unsubscribe Details, Contact details and Download instructions. Mr. Penkin” (the Complainant) “on the other hand, is himself offering a 'Free' item bundled with his subscription requests, which we would suggest is indeed bundling.*
- b. *The advert is clearly advertising an independent Club/Subscription service request, which is reinforced through:*
 - i *The voice over which reaffirms this is a club service in the following ways:*
 1. *"Choose from our club menu"*
 2. *"Join the Club" repeated twice.*
 3. *No specific item of content is being sold but clearly a TONE and LOVE Club service e.g. we DON'T make use of wording like - Get the LONLEY ringtone now or get a POEM now.*
 - ii *The fact that it's a Club or subscription service is very clear in both:*
 1. *the Terms and condition (Zurich font, 15 point, 20 second display) AND;*
 2. *in the "Price Triangle" (Black on white contrast, Zurich font, 15 point, for the full duration of the ad)*

The Complainant cites Section 6.2.5 and suggests the price in not clear in the ad

- a. *The price of R5 per week and the word "Subscription" is displayed in the 'price triangle' as per the Advertising Guidelines (Black on White contrast, 18 and 12 pt respectively, for the full duration of the ad)*
- b. *Additional bear costs. "+/- 50c/request" are communicated in the 'price triangle'*
- c. *Both subscription price and bearer costs are repeated in the terms and conditions (15 point, 20 seconds display)*
- d. *The price of R1 per item is completely valid for club members and is the Xciting benefit that our service offers.*

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Let it be noted as an indication of our attempt to ensure clarity of the advert, we presented it to a focus group, 2 weeks ago. Based on the response we received, we have modified the advert in question. We have:

** Removed the 'R1 only' from the 'price triangle' as users suggested it was too busy".*

** We've made "Vodacom Only" bolder and bigger*

** We've added "For members R1 only" in the special star instead of "R1 Only"*

Our panel felt this would make the advert, just that much clearer and we agreed. The new adverts should be ready any day now."

3 SUMMARY OF THE RELEVANT SECTIONS OF THE CODE

3.1 We note that the IP has not appealed the finding in relation to the complaint concerning an alleged breach of section 11.1.2 (erroneously referred to as section 1.1.2 in the complaint). The panel is therefore not required to consider the facts in relation to this finding.

3.2 The relevant section of the applicable Version 3.2 of the Code referred to in the complaint is clause 6.2.5: "The price for a premium rated service must be easily and clearly visible in all advertisements. The price should appear with all instances of the premium number display". Clause 6.2.5 falls under the heading "Pricing of Services" and is more fully detailed at clause 3.5.1 below.

3.3 The WASPA Advertising Guidelines Version 1.6 were approved by the Network Operators on 17 November, by Codecom on 18 November and by Mancom on 29 November 2005, as such, they are not strictly applicable to complaint number 075 that arose from the flighting of the advertisement on 05 November 2005. See 5.4 below. However, the IP has referred to them specifically in its appeal and has made it clear that it regarded the guidelines as very persuasive, if not binding on it in relation to the advertisement complained of. The panel has therefore incorporated the relevant provisions in its finding. The panel commends the IP for having taken these into account when they were not in fact, binding.

3.4 Reference will be made in the first instance specifically to Section 6.2.5 of the WASPA Code and secondly to the remainder of the provisions of Section 6 in general, in dealing with "Advertising and Pricing" as follows:

3.4.1 **"6.1. WASPA advertising guidelines**

6.1.1 *In addition to the provisions listed below all members are bound by the WASPA Advertising Guidelines, published as a separate document.*

6.1.2 *The latest version of the WASPA Advertising Guidelines will always be available on the WASPA web site.*

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6.2. Pricing of services

- 6.2.1 *All advertised prices must include VAT.*
- 6.2.2 *All advertisements for services must include the full retail price of that service.*
- 6.2.3 *Pricing must not contain any hidden costs. Where applicable, pricing for content services must include the cost of the content and indicate any bearer costs that may be associated with downloading, browsing or receiving that content.*
- 6.2.4 *Pricing contained in an advertisement must not be misleading. If multiple communications are required to obtain content, then the advertised price must include the cost for all communications required for that transaction. A clear indication must always be given that more premium messages are required.*
- 6.2.5 *The price for a premium rated service must be easily and clearly visible in all advertisements. The price should appear with all instances of the premium number display.*
- 6.2.6 *Unless otherwise specified in the advertising guidelines, the name of the WASP or the information provider providing the service must appear in all advertisements for premium rated services.*

3.4.2 WASPA AD RULES (summary document of V1.6, published Dec. 2005)

“Television and Cinema Advertisements:

Whenever a unique access number is displayed onscreen or is mentioned by an announcer, this event must be accompanied by a display of on-screen text that clearly and simultaneously shows both the:

- a. *Full access cost, for 100% of entire ad time in 18 point 'Zurich' font and placed in a special box or triangle on a to corner of the screen.*
- b. *T&C, which must be displayed horizontally in 15 points (MINIMUM) 'Zurich' font for a minimum of 10 seconds per mention by an announcer or the display on the screen of an access number, and in a Title Safe Area.*

See examples in Sections 4 and 5.

4 DECISION OF THE ADJUDICATOR

4.1 *Adjudicator's Decision – Section 11.1.2*

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4.1.1 The Adjudicator decided that there were no grounds for a finding of “bundling” of subscription and content services or for a finding that the advertisement was misleading. Accordingly, he dismissed the complaint of a breach of section 11.1.2 of the Code. The panel is therefore not required to consider this part of the finding.

4.2 *Adjudicator’s Findings – Section 6.2.5*

4.2.1 The Adjudicator found that the price for the subscription service was visible in the advertisement and displayed with all instances of the premium number. He was however not satisfied that the price for the subscription service was “*easily and clearly visible*”, basing his reasons set on the following:

4.2.1.1 The equivalent price per individual content download was displayed in a comparatively larger font in a moving image while the weekly minimum price was displayed in a comparatively smaller font and at an angle of 45 degrees to the horizontal viewing plane.

4.2.1.2 The diagonal pricing information contained reference to the R1 per item charge and in a considerably larger font size than the R5 per week charge.

4.2.1.3 There was a limit to how much information a consumer could pay attention to at one time. A reasonable viewer’s attention would be drawn to the moving images and larger horizontal pricing that appear in the advertisement and away from the angular display of the weekly price in the smaller font.

4.2.1.4 The advertisement contained numerous other moving graphic images that, each time they appeared on the screen, would draw a reasonable viewer’s attention away from the static pricing that appeared throughout the advertisement or the temporary pricing information that appears at the foot of the advertisement.

4.2.1.5 The R1 per item charge displayed more prominently in the advertisement was not the actual charge that the consumer would pay, but an equivalent charge that a consumer would bear per item assuming he downloaded 5 items per week. The horizontal pricing that explained that additional content downloads would be charged for at a separate and higher rate of R5 per download appears for only an approximate 5 seconds in both the “TONE” and “LOVE” components of the advertisement and in the smallest font of all font sizes used in the advertisement.

4.3 *Adjudicator’s Decision – Section 6.2.5*

4.3.1 The Adjudicator found that as a whole the pricing information was displayed but that it was not “easily” visible as required by section 6.2.5 of

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the Code. He interpreted “easily” visible to mean capable of being noticed by a consumer with little or no effort.

4.3.2 The Adjudicator accordingly upheld the complaint of a breach of section 6.2.5 of the Code.

4.4 *Sanction*

4.4.1 The Adjudicator imposed a fine of R20 000, R14 000 of which was suspended for a period of twelve months from the date of the Adjudication on the condition that that the SP does not breach the provisions of section 6.2.5 of the Code in that period.

5 GROUNDS OF APPEAL

5.1 On 16 August 2006 the SP lodged an appeal against the Adjudicator’s decision and provided the WASPA Secretariat with support material being a detailed response from Xcite which included various video and image files illustrating comparative competitor advertisements.

5.2 The IP in fact makes the appeal as follows:

5.2.1 They record their reticence to appeal against the decision and state that they do so because *“this case sets an unacceptable precedent”* and, in the interests of certainly for the industry as a whole regarding WASP advertising.

5.2.2 They state that the advertisement in question completely conformed to and exceeded the WASPA Advertising Rules (Guidelines).

5.2.3 They state that the Advertising Rules exist to avoid subjective opinions on font size, display time, position and the like and allege that the Adjudicator’s finding that section 6.2.5 had been breached was based on his own subjective opinion.

5.2.4 The IP suggests that the price was easily and clearly visible and states that *“it is customary in adverts (and in fact the purpose thereof) to make a hero of the benefit e.g. “From only RX.XX”, “At ONLY RX.XX while stocks last!” etc”*.

5.2.5 In providing examples of comparative competitor material, the IP alleges that their advertisement conformed to the Ad Guidelines in that:

- The font type is correct
- The font size is larger than required
- Text on the contrasting background triangle is clear

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- The position (of pricing) is correct
 - It (pricing) was displayed for the full duration of the advertisement
- 5.2.6 As such, the IP fails *“to see how the price could not be easily and clearly visible”*. The IP is of the opinion that an advertisement that conforms to the Advertising Rules should be *“closer to ... easily and clearly visible than not”* particularly in regard to a subjective opinion.
- 5.2.7 The IP appeals against the Adjudicator’s finding with regard to comparative font size and moving and static images set out in 4.3.1.1 above on the basis that:
- “The weekly minimum price” is correctly displayed according to the Ad Guidelines and should therefore be reasonably assumed to be easily and clearly visible.
 - “The weekly minimum price” is displayed in the correct position for the entire duration of the advert. Within the price triangle there is no animation or obstruction to hinder the ease of view or clarity.
 - The price triangle and the 45 degree orientation of the text are completely endorsed by the Advertising Rules and are actually one of the proposed examples of conforming pricing in that document.
 - It is common practice to promote the benefits of a product as the hero of an advert, and there is certainly no section of the Code of Conduct or the Advertising Guidelines that indicate that one cannot display the benefit in a larger font than the required pricing section.
 - It should be noted too that the display of the benefit is temporary and transient, unlike the pricing section which is consistent and visible throughout the advert.
- 5.2.8 The IP appeals against the Adjudicator’s finding regarding presentation in the price triangle as set out in 4.3.1.2 above on the basis that:
- The Adjudicator compared the size of the displayed benefit to that of the *“conformingly displayed weekly charge which, although smaller, is easily and clearly visible”*.
 - The purpose for displaying the *“R1 per item”* in the price triangle was to allow users to see *“all pricing info together, for the entire duration of the advert”*. In addition, *“there is nothing in the Advertising Rules or even acceptable advertising practice that suggests that one shouldn’t promote the benefits of the product”*, which is the purpose of advertising.
 - The weekly charge remained easily and clearly visible.
- 5.2.9 The IP appeals against the Adjudicator’s finding regarding the reasonable viewer’s ability to pay attention to information as set out in 4.3.1.3 above. While the IP acknowledges that their advertisements are *“very colourful*

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and full of animation” this is deliberate, given their younger target market. The basis of the appeal is:

- The pricing information is displayed in the correct size, position and format for the entire advertisement, while the horizontally displayed benefit is displayed only temporarily.
- The pricing information is displayed “*completely alone or almost so*” for some time in the advert.
- It must be therefore easily and clearly visible to the viewer for some time considering their eyes will move around the entire screen.
- The Advert has only 4 main items: Keyword, Short code, benefit and Pricing information. Only the pricing information remains unmoving, persistent and unobstructed for the entire advert. It is close to unavoidable for a reasonable viewer.

5.2.10 The IP appeals against the Adjudicator’s finding regarding the impact of moving images. While again acknowledging the high degree of movement and colour used in their advertisements in the interests of their audience, the basis of the appeal against the findings set out in 4.3.1.4 above, is:

- The pricing information is correctly displayed for the entire time of the advertisement.
- TV by its very nature is all about colour and movement. The IP questions what an alternative might be.

5.2.11 The IP appeals against the Adjudicator’s findings relating to the prominence of the various prices set out in 4.3.1.5 above on the basis that:

- The findings are either incorrect or relevant.
- It was not necessary to mention the market related price per “*EXTRA*” item at all because, the user would not be charged for extra items when interacting with the advertisement.
- Only once a user had downloaded five items at R1 from the menu, would the extra item charges become applicable and only after a number of clear warnings to the user on the menu.
- As a result, pricing was inserted under the Terms and Conditions, which while displayed for only 5 seconds and in the smallest font in the advertisement, still conformed to and exceeded the requirements.
- The IP believes that the pricing information in the advertisement was completely acceptable, a fact which it believes is supported in that the advertisement conforms to and exceeds the Ad Guidelines.
- The IP contends that their advertisement “*is as clear or an improvement on the majority of adverts*” running at the time.

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- The IP alleges that the findings are again the result of the Adjudicator's subjective opinion, *"are very strong and are mainly based on the comparison of other elements in the advert, not on the pricing information element, as prescribed in the Ad Rules"*.
- 5.3 IP alleges that it has adhered to the WASPA Ad Guidelines and will in addition *"embrace any changes to these should they be made"*, their contention is that they do not believe that they should be penalised, having conformed.
- 5.4 IP records that even though the Advertising Rules were not required by the Code of Conduct at the time of this complaint, they had been circulated with the clear communication that they should be adhered to as soon as possible.
- 5.5 The following material was attached to the IP's appeal:
- Xcite Mobile Ad.mpg - a copy of the advert in question

 - 4 Adverts of the major players in South Africa.
- 5.6 The IP has requested the appeals panel to review the display of pricing in the above material by way of comparison and with respect to:
- The animation;
 - The contrasting colours;
 - The font;
 - The amount of information;
 - The duration; and
 - Price information element.
- 5.7 The IP contends that all the sample material (embedded above) falls *"foul to the arguments of the Adjudicator"* as these are no *"more or less clear than the Xcite advert"* and the comparison is drawn simply to illustrate that the Xcite pricing is reasonably clear and easily visible.
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6 FINDINGS OF APPEALS PANEL

- 6.1 *The general submission of the IP is that it has complied with the requirements of the WASPA Code of Conduct and the WASPA Advertising Guidelines and that it is appealing against the decision of the Adjudicator for the sake of clarity and in order to establish an acceptable precedent in respect of the practical application of Advertising Rules for the benefit of the industry as a whole –*

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- 6.1.1 The panel has considered the IP's initial response to the complaint and its detailed response in the matter of this appeal and finds that whilst Version 1.6 of the WASPA Advertising Guidelines is not strictly applicable, the IP itself has referred to it and has made it clear that it regarded the guidelines as very persuasive, if not binding on it. The panel has therefore incorporated the relevant provisions in its finding, and agrees with the IP that it could apply.
- 6.1.2 The panel commends the IP for having taken the provisions of the Advertising Guidelines into account, for its diligence in applying them and its expressed intent to embrace and adhere to future provisions.
- 6.1.3 The panel supports the IP's contention that the Advertising Guidelines exist in an effort to avoid subjective opinions in regard to advertisements, font size, time of display, position and the like. The panel however, considers it almost impossible to mechanically impose a rigid set of rules in respect of advertising that is not susceptible to subjective interpretation given the sensory and subliminal affects of the visual and aural media.
- 6.1.4 In light of the above, the panel thanks the IP for providing comparative advertising material from some of the other major service providers to assist them in this review. The panel has taken note of the material provided and agrees that certain advertising standards and styles have evolved and concedes that it would be inequitable not to apply the WASPA Advertising Guidelines consistently.
- 6.1.5 The panel has accepted that the facts supplied by the IP (clause 5.2.5) that font size and type, contrast of background and foreground, price position and display time, conform to the Advertising Guidelines.
- 6.1.6 The panel takes note of the IP's comment that it fails to see how substantial compliance with the WASPA Advertising Rules can result in censure for the IP and in uncertainty for the industry as a whole (clause 5.2.6) The panel concedes to the difficulties inherent in the application of rules or guidelines and is aware of its constraints under the provisions of Clause 13 of the WASPA Code of Conduct detailing the appeals process, with the result that it is limited in this matter to review only the material before it. The panel notes that it is the responsibility of WASPA itself to amend the Advertising Guidelines if and when WASPA deems this necessary.
- 6.1.7 The panel notes the grounds of appeal against the Adjudicator's findings regarding font size and the moving and static images and also the IP's conformance in applying the Advertising Guidelines in respect of minimum pricing, use of the recommended price triangle, time of display, as well as the general purpose of advertising

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(clause 5.2.7 and 5.2.8). The panel finds that the IP has in fact complied with the Guidelines in this regard.

- 6.1.8 The panel has considered both the Adjudicator's view of the reasonable viewer not being able to pay attention to all the information being provided, as well as the view expressed by the IP regarding the needs of its "younger" target market which according to the IP responds to colourful and animated advertising (5.2.9). The panel is of the view that while the target market may not be the same as the "reasonable" legal norm, the issue needs to be balanced against the protection and education of the youth. The panel finds that there is no clear application of a rule in this regard and urges the IP to seek a balance.
- 6.1.9 The panel has noted the IP's grounds for appeal against the Adjudicator's findings regarding the moving images, colour, pricing information and the nature of TV advertising in general (5.2.10) and concedes that these are indeed inherent in TV advertising.
- 6.1.10 The panel has considered the IP's grounds of appeal against the Adjudicator's findings relating to the prominence of the prices of the various items (5.2.11). The panel does not agree with the IP that the Adjudicator's findings are either incorrect or irrelevant. The reasons given by the IP in this regard relating to the technicalities of the service offering are beyond the knowledge of the panel and the scope of this appeal. However, it is the view of the panel that to incorporate these provisions in the Terms and Conditions is of little value to the viewer.
- 6.1.11 In conclusion, the panel finds that the Adjudicator erred in his findings that the IP breached the provisions of Section 6.2.5 of the WASPA Code of Conduct in that the IP substantially conformed to the WASPA Code and Advertising Guidelines even prior to their formal adoption.
- 6.1.12 The appeal against the Adjudicator's decision is upheld and the following order made:
- 6.1.12.1 The sanction imposed on the IP is withdrawn; and
- 6.1.12.2 The appeal fee in an amount of R10 000 is to be refunded by WASPA to the Appellant.

7 APPEALS PANEL ADDITIONAL COMMENTS

- 7.1 The panel wishes to record that in arriving at its decision, it was bound by its interpretation of Section 13 of the WASPA Code of Conduct and as

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such was constrained in regard to several issues, most importantly the inability to review the Adjudicator's findings on the grounds of the first complaint relating to Section 6.2.5 of the WASPA Code of Conduct.

7.2 Given the importance of this appeal as a precedent for WASPA members, the panel wishes to draw attention to the following aspects of this matter that the panel did in fact consider and might have found upon had it not considered that its actions in doing so would be ultra vires:

7.2.1 The panel members, as requested by the IP, independently, and at full size on a 57cm TV, watched the advertisement numerous times, coming to the conclusion that the images and the voice over are indeed confusing with the result that this view becomes objective rather than subjective.

7.2.2 Furthermore, the panel asked several young people between the ages of 20 and 30 (maybe too old?) to view the advert. Consensus was that if the advertisement was viewed repeatedly, a correct understanding of the contractual issues may eventually be understood, but this was by no means clear.

7.2.3 The panel leans to the objective standard and to the fact the advertisement is indeed confusing, if not in relation to "bundling", to pricing and other contractual issues and cautions that the Adjudicator may have erred in his finding on aspects of the complaint that the panel was precluded from reviewing.

7.2.4 The panel concluded that as detailed in the body of the appeal above, there was in fact substantial compliance with the letter (law) of the Code of Conduct and the Advertising Guidelines, however, the panel is strongly of the opinion that the spirit and intention of the provision has not been met. The panel considers that it is possible that an advertisement achieves complete conformity with the WASPA provisions, yet at the same time bypasses the Code's purpose and intention in relation to consumer protection.

7.2.5 The panel wishes to:

7.2.5.1 recommend to WASPA that in future it censure any IP for not adhering to the spirit of the Code set out in Section 3.1.1 "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";

7.2.5.2 encourage all Service Providers to meet the high standards of the Code not only in letter but in spirit also, thereby

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contributing to the growth and maturity of the industry and the protection of consumers; and

7.2.5.3

request that WASPA considers the powers of the appeals panel in regard to reviewing an entire matter under appeal, *de novo*, and not only the individual complaints appealed against, in the interests not only of protecting the consumer, but the members themselves.