

**REPORT OF THE ALTERNATIVE APPEALS PANEL**

**Date:** 4 December 2007  
**Appellants:** SMS Cellular Services (Pty) Ltd (SP) and undisclosed IP  
**Complaint Numbers:** 0350  
**Code version:** v4.3

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**1 INTRODUCTION TO THIS APPEAL**

- 1.1 The complaint was submitted in July 2006 when version 4.3 of the Code of Conduct was in force. The complainant is (or was at the time) a competitor to the SP. The complainant subsequently accepted the SP's apology and the remedy offered by the SP at the time.
- 1.2 The SP has appealed the adjudication in relation to complaint 0350, which adjudication was made in August 2006. The appeal was lodged with WASPA in November 2006. The panel apologises for the lengthy delay in responding to the appeal.
- 1.3 The IP has not submitted an appeal nor did it submit any documentation in response to the complaint. The SP submitted almost no facts in support of its position in response to the complaint, but has submitted a much longer document which it wishes to be taken into account in support of its appeal.
- 1.4 This is an interesting appeal as it gives the panel an opportunity to publish its views on appeals in general and the role of the panel itself. This is because the nature of the appeal and the argument and facts submitted in support of the appeal deal hardly at all with the breach and subsequent complaint and the substance of the Code, but mostly with the appeals procedure and WASPA's right and duty to adjudicate complaints.
- 1.5 At the outset therefore, the panel wishes to note pertinent clauses of the Code of Conduct which guided this appeal:
- 1.5.1 Section 13.5.5 provides that the appeals panel must consider the evidence presented to the adjudicator, the adjudicator's decision, any additional information provided by the service provider, and the appeal submission itself.
- 1.5.2 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.
- 1.5.3 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.

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- 1.5.4 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.
- 1.6 We have (i) summarised key relevant issues by way of background in part 2; (ii) summarised the complaint 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.
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**2 RELEVANT INFORMATION**

- 2.1 *The relationship between the SP and the IP*
- 2.1.1 It is necessary to examine this important relationship given how the SP has referred to and seems to regard, the IP. We note that in its appeal the SP states "we have always been under the impression that a WASP, like the operator concerned, is viewed in law as a conduit only and that any legal recourse should be ultimately taken against the originator of the content of the message."
- 2.1.2 The definition of "*information provider*" in the Code states that 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."
- 2.1.3 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".
- 2.1.4 The SP is a member of WASPA. We have no information on the IP. In the absence of information on the IP, the obligation to comply with the Code and to ensure that the IP complies, rests with the SP and it is against the SP that the finding of the adjudicator was made and the SP lodged the appeal. The finding of the panel therefore concerns the SP alone, and our further reasons for this are set out below.

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- 2.2 *WASPA and the public interest*
- 2.2.1 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. WASPA is required to take the public interest into account when considering any complaint.
- 2.2.2 The General provisions of the Code have application in all cases in relation to matters dealt with by WASPA. 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.”
- 2.3 These principles have informed our decision and our reasoning.
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**3 BASIS OF THE COMPLAINTS**

- 3.1 *The complaint*
- 3.1.1 The complaint concerned spam in the main. The complainant received an unsolicited message on several occasions which stated “*Urgently contact MDB attorneys regarding an imminent legal matter. Tel: (011) [number] and quote [reference].*”
- 3.1.2 The complainant alleged that he was unable to make contact with anyone at that number and could not find reference to the attorneys elsewhere. He further alleges that the intention of the message is to create call revenue to the number for the purposes of enabling the SP to split revenue with that entity.
- 3.2 *Response by the SP*
- 3.2.1 The SP was provided with details of the complaint. In response, it stated “we investigated the complaint and added a filter which will remove the customer’s cellular number who complained from receiving these messages in future”.
- 3.3 *Relevant sections of the Code*
- 3.3.1 The adjudicator considered clauses 3.3.2 (service levels), 3.9 (information providers – see above), 4.1.1-4.1.2 (provision of information to customers), 5.1.2-5.1.5, (sending of commercial communications), 5.2 (identification of spam) and 5.3 (prevention of spam) of the Code.
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## **4 DECISIONS OF THE ADJUDICATOR**

### **4.1 *Findings***

4.1.1 The adjudicator noted that the complainant had not specifically referred to sections of the Code in his complaint. The panel is of the opinion that this is frequently going to be the case given that members of the public are unlikely to be familiar with the Code nor have insight specifically into the manner of its application from a more legal point of view, but this should not preclude the adjudicator from making a finding, and indeed the adjudicator did make a finding in this case.

4.1.2 The adjudicator also noted that the complaint averred that the SP had committed a potential fraud by soliciting revenue which it might have participated in, but that the SP had not in its response to the complaint, sought to dismiss or deny this aspect at all. However, in the circumstances, the adjudicator found that the facts did not support a finding of dishonesty or fraud, and we support this finding.

4.1.3 The adjudicator notes further that the SP implicitly admits that the message was sent from its system and that it had the power to filter messages sent to that number – it was in control of that message. Unfortunately little detail was forthcoming from the SP in this regard, and the SP did not seek to put blame on its IP for the sending of the message, nor on the customer for the request to receive it. In the circumstances, the adjudicator accepted that the complaint was bona fides and that as a result, the message was unsolicited. We agree with this finding as well.

4.1.4 In the result, the adjudicator found the SP in breach of section 5.3.1 of the Code.

4.1.5 The adjudicator did note for the record, the steps taken by the SP to filter the messages to the complainant in future, however the adjudicator did not consider this sufficient in the circumstances. The panel will deal with this observation in further detail below in section 6.

### **4.2 *Sanctions***

4.2.1 The findings led to the following sanctions:

4.2.1.1 The SP was reprimanded for the breach of the Code;

4.2.1.2 The SP was ordered to disclose the name of the IP (if any) on whose behalf the SP provided the SMS messaging service;

4.2.1.3 The SP was ordered to terminate the service to that IP (if it existed) or if no IP existed, to refrain from sending any further such messages itself;

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- 4.2.1.4 The SP was ordered to pay a punitive fine in the amount of R5,000 in respect of its breach of the Code.
- 4.2.2 The adjudicator also specified that sanctions 3 and 4 should be suspended in the event of an appeal being lodged by the SP but sanctions 1 and 2 should be implemented in accordance with the Code. The panel will consider the implications of this further below in section 6.

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**5 GROUNDS OF APPEAL**

- 5.1 The SP submitted a detailed appeal despite not responding to the complaint in any detail.
- 5.2 *Appeal grounds*
- 5.3 The SP submitted a 4 page letter supported by annexures with its appeal. The letter purports to set out the grounds on which it argues that the sanction ought to be overturned. Specifically the SP states in its letter:
- “Given our track record and in the absence of even a warning in the past, the imposition of a R5,000 fine on SCS relating to complaint #350 came as a complete surprise and has generated not only concern about the complaints process and how easy it is to make unsubstantiated allegations, but also considerable anger against this decision of WASPA.... My question to the Board and the adjudicator in this case is what is there in the content of these SMSs that suggests the message is (i) “is a complete spoof”, (ii) “repeatedly receiving SPAM SMS”, or (iii) “intention is to create call revenue to the number on which the organisation sending the SMS earns a revenue share?””*
- 5.4 The other points made by the SP are, in summary:
- 5.4.1 SCS has been sending SMS messages on behalf of its extensive customer base since 1999, many of which are large corporations;
- 5.4.2 Prior to the formation of WASPA they received less than 10 complaints about the *content* of messages [panel emphasis]... and to date have had no complaints concerning short codes... Since the formation of WASPA SCS has received about 4 complaints from WASPA which have been satisfactorily resolved;
- 5.4.3 MBD Attorneys is one of the biggest debt collection organisations in SA and collect money for their own account and for customers and communicating via SMS is very efficient for them...this is the first complaint received regarding their service;
- 5.4.4 “There is no proof that this is a spam, that it is a spoof or that it is intended to generate revenue for the sending organisation...If you

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are a WASP and an adjudicator for that matter, you would know that there cannot be a revenue share model involved here” because the number to contact is a landline number; and

5.4.5 “WASPs who conduct themselves in the above manner should themselves be questioned as to their motivation and fined if found guilty. If it was the complainant’s intention to financially damage another WASP and also to waste a considerable amount of their valuable management time, then he has succeeded admirably”.

5.5 The SP also makes the following points which we consider to be irrelevant to the matter, but note them for completeness:

5.5.1 *The SP is in negotiations with a BEE partner and the costs of this negotiation will be negatively affected by the fine imposed by WASPA and costs of the appeal – we see absolutely no relevance to the consideration of the breach or the appeal in including this statement;*

5.5.2 *The complainant’s offer to forward the SMS to a number raises serious doubts about the motivation and integrity of the complainant as nowhere in the messages received is this statement made – we consider the SP to have misunderstood entirely what was meant by the complainant, who was simply offering to send on the offending message in its original form to WASPA for their consideration, rather than writing it out in the complaint.*

5.6 *Response of the panel to the appeal*

5.6.1 The SP failed to respond adequately to the complaint at the relevant time which was the time which is most important from the point of view of putting all relevant facts before the Board, ensuring the adjudicator has all the right information, and arguing for the least (if any) sanction in the result. The failure of the SP to take adequate action at the appropriate time leaves WASPA in the position where it must make the best of the information to hand, and must make a finding accordingly.

5.6.2 The SP fails to take account of the key issues arising as a result of the complaint. In the panel’s view, these are:

- The fact that the Code applies to all WASPS with the blessing of the mobile networks, and WASPs are obliged, in turn to ensure that their IPs are familiar with and compliant with the Code (we have quoted the relevant sections of the Code in full above)
- Complainants, whoever they might be, are fully entitled to put the facts as they see them before WASPA and to request an investigation – that is the purpose of forwarding the complaint to an SP and/or IP as was the case here. At that point the SP

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and/or IP is offered the opportunity to respond in full. The entire matter is then passed to an adjudicator for a finding. There is no onus on a complainant (many of whom are members of the public and quite uninformed about legal matters or the working of technology) to substantiate or prove anything other than receipt of an offending message

- An appeal is not a forum to air grievances with the world at large – it is a formal opportunity to list in detail, what it is about the adjudication that is not appropriate or that is incorrect. It is not an opportunity to set the record straight when this could and should have been done at the complaint stage. It is also not an opportunity to raise new facts.
- An appeal is governed by those sections of the Code which we listed at the start of this document. Presumably, having been in business since the start of the WASPA Code, the SP is fully familiar with these provisions.

5.6.3                    *Response of the panel to the grounds of the appeal*

5.6.3.1                5.4.1: this information is not relevant to this appeal, but useful background information. The length of time that the SP has been in business unfortunately suggests that the SP should be very familiar with the Code and its requirements, and expected to comply in full.

5.6.3.2                5.4.2: messages received by complainants can be questioned or complained of in relation to form, manner of receipt, content, or number of messages. Content is not the only ground for complaint. In this case, the fact that the SP has not received complaints does not in and of itself indicate that the SP has not acted improperly in the course of carrying out business – unfortunately the public is simply not always minded to take a stand against wrongdoing. The fact that no one complains does not mean that the service is provided properly – this is a simple proposition and we are sure the SP will agree.

5.6.3.3                5.4.3: the panel does not consider the identity of the ultimate customer or whether or not complaints have been received against their messages relevant at all. The WASPA Code is designed to protect the public from harmful messages, the harm appearing in a number of different guises. MBD ultimately rely on you as the SP, and we are sure they pay you for the service of sending messages. SPs are bound by the Code – not their customers. If you choose to bind your customers that will contractually give you a remedy against your customers, but will not excuse you from your

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responsibilities under the Code. It appears to the panel in any event that the sort of text sent on their behalf is ill-conceived in that having phoned that number ourselves, we experienced the same problems. Consumer protection principles require, amongst other things, that people's privacy be protected, that they be provided with adequate information to meet any charges, and that they are given an opportunity to respond in a meaningful way. As an aside, the panel does not consider this to have been the case in this particular instance.

5.6.3.4 5.4.4: we regard this argument as irrelevant – whether or not this is a revenue share model, the customer receives calls to it which saves it money, and no doubt pays the SP for the service. The one person who does not benefit from this model is the person required to make the call with inadequate information. In the panel's view it is not necessary to consider this argument further, as it does not advance the appeal nor does it support the argument that the sanction should be overturned since the adjudicator in any event did not consider there to be sufficient facts to support any argument in relation to fraud or dishonesty, and neither do we.

5.6.3.5 5.4.5: we do not consider this argument to advance an appeal or to support the SP's case at all. It does not amount to an argument which defends the SP's behaviour, nor does it excuse the SP's behaviour.

5.6.4 *Adjudication*

5.6.4.1 As set out above in section 4 we agree with the adjudicator's statements and findings for the reasons noted.

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**6 FINDINGS OF APPEALS PANEL**

6.1 The role of the appeals panel has been set out within the context of the Code, in section 1 above. The relationship between the SP and IP has been addressed within the context of the Code in section 2 above. In section 3 we examined the basis of the complaint. In section 4 we considered the grounds for appeal and in section 5 we stated our response to those grounds and to the findings of the adjudicator. Not much remains for us to do in this appeal, save to consider the sanction.

6.2 Before we do this however, we note that an appeal is a very important form of redress for affected WASPA members. It allows members who feel aggrieved that the adjudicator made a decision without taking into account all the information at his or her disposal, or misapplied his or her judgement, or imposed too heavy a fine in the circumstances, to require that the adjudicator's decision be assessed by a different panel for the



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reasons which the member can set out in their appeal submission. In addition, the panel will take into account principles of equity, practicality and the purpose for which the Code was created.

- 6.3 Each appeal will be assessed on its own merits. The panel will examine the original complaint, the response (if any) given to the complaint by the IP and/or SP, and the adjudicator's findings. Once a full evaluation of all the facts has taken place, the panel will agree on their findings and publish their report. There is no further recourse for members following an appeal, so the panel will treat the appeal with the utmost care and give it serious consideration.
- 6.4 In this case, whilst the panel notes that the SP feels aggrieved by the adjudicator's findings, the panel has also noted in section 5.6 what is and what is not relevant in making and ultimately in considering, an appeal.
- 6.5 In the circumstances, the findings of the panel are the following:
- 6.5.1 The panel upholds the findings of the adjudicator and upholds sanctions 1 and 2 in the form stipulated by the adjudicator.
- 6.5.2 In relation to sanction 3, the panel agrees that there is a problem with the relationship between the SP and its customer and suggests that the SP remedy its relationship and its contractual arrangements so as to ensure that the customer (any customer) provides it with the information of only those subscribers which it may lawfully contact. The panel also requires that the SP ensures that the customer supplies it with correct and appropriate contact information in the case where messages such as the one complained of, are lawfully to be sent. No sanction in this regard is applied.
- 6.5.3 In respect of sanction 4, the panel suspends the fine for a period of 6 months (after which time it will lapse) provided that no other complaints of any nature are lodged against the SP, failing which the SP will become immediately liable to pay the fine on the making of the complaint. The panel notes that the amendment to this sanction is not in recognition of steps taken by the SP following the complaint, because it is required to comply with the Code and failure to comply will always constitute a breach, regardless of what steps are taken to remedy the situation thereafter. The suspension is granted in order for the SP to demonstrate that it truly is compliant on an ongoing basis.
- 6.5.4 Finally, given that the SP has in fact lodged an appeal in terms of the Code (the terms of which are clear) and chose to submit further information in support of its appeal rather than in relation to the complaint, the appeal fee is not refundable.