

REPORT OF THE ALTERNATIVE APPEALS PANEL

Date: 24 January 2008
Appellants: Mira Networks (Pty) Ltd (SP)

Complaint Numbers: 0985, 0987, 0988, 0989, 0990, 0991 and 1001
Code version: v4.8 and Rules 1.6

1 INTRODUCTION TO THIS APPEAL

- 1.1 This appeal concerns the adjudication of seven complaints which all resulted from the same or a substantially similar SMSs received by the various complainants. The complaints were filed separately but the adjudicator considered them altogether and imposed a sanction taking into account the individual and aggregate findings.
- 1.2 Only the SP appealed to WASPA.
- 1.3 The complaints were submitted during the period of a week in February 2007 when version 4.8 of the Code of Conduct was in force.
- 1.4 Although the panel does not expect and WASPA does not require that an appeal be particularly formalistic or “legal” in nature, this appeal did rely on a number of very “legal” arguments, more so in fact than on the specific issues raised in the adjudication. In our finding, we have however, had to take note of the findings of the adjudicator in addition to the arguments of the appellant, in order to comply with the provisions of section 13 of the Code.
- 1.5 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.
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2 RELEVANT INFORMATION

- 2.1 This panel has previously considered the nature of the relationship between SP’s and IP’s, and the responsibilities of each. Some of the arguments raised by the appellant suggest that this issue has not been sufficiently ventilated and so we have decided to include the relevant texts from Code again in this report.
- 2.2 *The relationship between the SP and the IP*

WASPA alternative appeals panel
Complaints 0985, 0987, 0988, 0989, 0990, 0991 and 1001

- 2.2.1 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.”
- 2.2.2 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”.
- 2.2.3 The mobile network operator permits certain services to be run over the channels it provides by entering into agreements directly with various service providers and customers. Those agreements contain restrictions on the type of communications that may be sent over the mobile network. Where those agreements are breached, the network operator may request that a service be terminated. A service provider entering into an agreement with an information provider must in turn, bind the information provider to the same contractual provisions, and in turn, may terminate the service of an information provider if those provisions are not adhered to. The restrictions contained in the WASPA Code in relation to type of content and type of message to be sent over a mobile network, are enforceable by WASPA. Whether or not a service provider considers itself merely to aggregate content and pass it on to unsuspecting consumers does not detract from that service provider’s obligations under the Code.
- 2.2.4 In addition, a service provider and information provider derive revenue directly from the provision of the content service in whatever form, whether or not the service breaches the Code, until such time as a complaint is brought against a particular service in terms of the Code, and then until the time that an adverse finding is made.
- 2.2.5 The position is not the same as that of internet service provider, often referred to as a “mere conduit”. There is little point in debating this issue further in this report as the two sets of relationships – network operator and service provider with information provider (WASP), and internet service provider and customer, are not bound by the same Code. It is important to note, however, that the internet service provider does not benefit from the provision of a service to the same degree or in the same way – by sharing revenue – as does the service provider or information provider.

WASPA alternative appeals panel
Complaints 0985, 0987, 0988, 0989, 0990, 0991 and 1001

- 2.3 *WASPA and the public interest*
- 2.3.1 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.
- 2.3.2 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.”
- 2.4 *Application of the Code in South Africa*
- 2.4.1 The Code applies to all members of WASPA, and voting members of WASPA are required to have a relationship with one or more of the mobile network operators. Specifically, the Code applies “to all wireless application services accessed by a customer in South Africa, transmitted by a wireless application service provider and carried by a South African network operator.”
- 2.5 *Complaints procedure under section 13 of the Code*
- 2.5.1 13.1 of the Code permits “any person” to lodge a complaint against any member who, in the view of the complainant, has acted contrary to the provisions of this Code. The procedure for lodging complaints with WASPA is set out in the terms of sections 13.1.2 to 13.1.7. WASPA has discretion to use a formal or informal complaint procedure and the secretariat may itself institute proceedings against a member if it becomes aware of a breach.
- 2.5.2 Under 13.2, an informal procedure is used, which requires that WASPA notify the member of a complaint and require a remedy within 5 days.
- 2.5.3 Under 13.3, if a prompt remedy is not feasible or if a complaint has been escalated from the informal procedure where a matter is not satisfactorily resolved, the member will be notified of a complaint and WASPA will provide that member with copies of the complaint and additional relevant information. The member is required to respond within 5 working days and if no response is received, it is assumed that the member does not wish to respond. The complaint is assigned to an adjudicator to review and the adjudicator may ask the secretariat to obtain further information from any party. On the basis of all the information, the adjudicator will make a finding. In deciding on sanctions the adjudicator must take into account previous

WASPA alternative appeals panel
Complaints 0985, 0987, 0988, 0989, 0990, 0991 and 1001

complaints and previous sanctions. The written report of the adjudicator is then provided to the member who has 5 working days to notify the secretariat if it wishes to appeal the decision of the adjudicator. Unless otherwise specified in the report, sanctions are suspended if an appeal is lodged until the process is completed. If no appeal is lodged the sanctions are not suspended, and failure to comply is itself a breach of the Code.

- 2.5.4 13.4 sets out possible sanctions of the Code including a requirement to remedy the breach, an appropriate fine, payment of compensation, suspension for a defined period, expulsion, service suspension or termination, amongst other things. Sanctions may be suspended if an appeal is lodged. 13.5 sets out yet further actions that may be taken by the secretariat on the instruction of the adjudicator.
- 2.5.5 13.6 deals with appeals and sets out the process. Any member 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. Once the secretariat has been notified that a member wishes to appeal a decision, that member has 10 working days to supply the secretariat with any additional information it deems relevant to the complaint. The appeals panel, once convened, must consider all the evidence presented to the adjudicator, the decision of the adjudicator and additional information provided by the member. 13.6.13 states that "a member may not request a further review of the panel decision or request a further appeal".

3 BASIS OF THE COMPLAINTS

- 3.1 *The advertisements complained of*
- 3.1.1 Complaint 0985 concerned a message suggesting that the recipient text the word "WINK" to a short code to find out who wanted a relationship with them, at a maximum charge of R40 per SMS plus the cost of the SMS. When the text was sent another message was received requiring the recipient to text back the number of the person who they thought might want the relationship, at a cost of R20 per SMS plus the SMS cost. The adjudicator ascertained that the complaint concerned the unsolicited nature of the message.
- 3.1.2 Complaint 0987 referred specifically to a breach by the SP of section 3.1.2, 3.3.1, 5.3.1 and 5.3.2. The message complained of consisted of a "spam" message advertising a dating service, but did not specify the cost associated with the message, nor how to opt out, although a

WASPA alternative appeals panel
Complaints 0985, 0987, 0988, 0989, 0990, 0991 and 1001

website named in the message indicated that the cost to opt out would be R20 per SMS.

- 3.1.3 Complaint 0988 regarded sections 4.1.1 and 4.1.2, 5.1.1, 5.1.3, 5.2 and 5.3.1 of the Code to have been breached, in other words that the message was unsolicited, and therefore is spam, and does not meet the requirements of the Code for charging or for identifying the sender. The message was the same as that referred to in paragraph 3.1.1 above.
- 3.1.4 Complaint 0989 concerns unsolicited SMSs with an opt-out only via a premium rated number.
- 3.1.5 Complaint 0990 concerned breaches of sections 5.1.2, 6.2.4, 8.1.1 and 8.1.3, together with more general breaches of the advertising guidelines at sections 2.1 and 2.2. The message consisted of an invitation to watch a student “get nailed” by her lecturer, at a cost of R20 per SMS, and in responding to the invitation, the consumer noted that the clip contained highly unsuitable pornographic content. The message did not indicate that it was of an adult nature, and the layout of the message contravened the advertising guidelines contained in the Code. The complainant also considered that the content was being delivered from outside South Africa so as to avoid local regulations.
- 3.1.6 Complaint 0991 was based on a message which followed the format of that set out in 3.1.1 above, and apparently in response to sending the second text, the complainant then received the message described in 3.1.5 above which also formed part of the complaint. The cost to opt out of either service was expressed to be R20 per SMS.
- 3.1.7 Finally, complaint 1001 concerned breaches of sections 3.3.1, 4.1.1, 4.1.2, 4.1.3, 4.1.7, 4.2, 5.2.1, 5.3.1, 6.2.4, and 10.1.4. The WINK message was received by the complainant who responded to all of the prompts and concluded that the message was designed to elicit more numbers from customers to whom the message could be sent, at a further cost of R40 per SMS, thus generating revenue for the service provider without actually providing any service. The complainant notes that by searching on “mobilelovematch” similar complaints can be found.
- 3.1.8 In summary, the complaints concerned messages received by the complainants from the appellant in one of two (and in one case both) forms – either the WINK text inviting the recipient to send on further mobile numbers at a cost of R40 per SMS, or the lecturer/student invitation charging R20 per SMS. In all cases, the ability to opt out was unclear but cost no less than R20 per SMS.

3.2 *The Code*

WASPA alternative appeals panel
Complaints 0985, 0987, 0988, 0989, 0990, 0991 and 1001

- 3.2.1 The complaints all considered the messages to be unsolicited, and additionally, some complaints raised the provisions of the Code dealing with charging and the opt-out mechanism, and one complaint also raised concerns about the adult nature of the message and the service.
- 3.2.2 The adjudicator also took into account relevant sections of the advertising guidelines.

4 DECISIONS OF THE ADJUDICATOR

4.1 *Findings on Complaints*

- 4.1.1 In summary, the adjudicator found the following:
- 4.1.1.1 *0985*: the SMS was unsolicited and the information contained in the SMS was misleading and deceptive, giving the impression that the IP has details of someone who fancies the complainant when this is not the case, so that a response by the complainant is required in circumstances where it is not warranted. Sections 4.1.1, 4.1.2, 5.2.2, 5.3.1, 5.3.2, 6.2.4 of the Code have been breached;
- 4.1.1.2 *0987*: the member failed to respond to each allegation and therefore the adjudicator found those allegations to have been admitted. On the facts the adjudicator found that sections 5.3.1, 5.3.2 and 5.1.4 of the Code were breached;
- 4.1.1.3 *0988*: the pricing information contained in the message was difficult to find, and in addition, as in 0985, the information contained in the message is misleading and deceptive. Furthermore, there was no mechanism available to opt out. The adjudicator found that sections 4.1.1, 4.1.2, 5.1.3, 5.3.1, 6.2.4 and 6.2.5 of the Code were breached;
- 4.1.1.4 *0989*: for the same reasons set out above, and taking into account that telephoning the UK (from where the service appears to have been provided) would have been extremely costly for the complainant, the adjudicator found that sections 4.1.1, 4.1.2, 5.1.2, 5.1.4, 5.3 and 6.2.4 were breached;
- 4.1.1.5 *0990*: this was a more lengthy finding which included commentary on the seriousness of the content of the message regarding the student/lecturer, and the absence of an indication that the service was of an “adult” nature, and could have potentially disastrous consequences if viewed by a child. The adjudicator also noted that it was not in fact possible for the complainant to remove himself from the service database

WASPA alternative appeals panel
Complaints 0985, 0987, 0988, 0989, 0990, 0991 and 1001

as there was a technical fault with the website, and in addition, the pricing information was not provided in accordance with the requirements of the advertising guidelines, so that the manner of dealing with customers was neither fair nor honest. Sections 4.1.1, 5.1.2, 6.2.5, 8.1.3 and 2.1 and 2.2 of the Code were breached. In addition the adjudicator considered that delivery of a service from outside the country was not a contravention of the Code but similarly it would not assist the service provider in escaping liability under the Code for service provided in the country;

4.1.1.6 0991: having considered the “adult” nature of the message in relation to a previous complaint (see 4.1.1.5 above) the adjudicator considered the message to have contravened sections 8.1.1 and 8.1.3 in addition to 5.1.4, 4.1.2, 6.2.4 and 6.2.5 of the Code;

4.1.1.7 1001: the response by the member to the complaint was more lengthy and the adjudicator considers it fully, however the adjudicator notes that the member did not respond to requests for further information regarding the consumer’s consent. In the circumstances, the adjudicator found that sections 3.3.1, 4.1.1, 4.1.2, 4.2.1, 5.3.1, and 6.2.4 were breached.

4.2 *Sanctions*

4.2.1 The adjudicator carried over all the sanctions in relation to each finding, to the end of the report and considered the findings together in coming to a decision on a sanction. The adjudicator noted that the member and information provider showed “scant regard” for the Code, and whilst the information provider may have been responsible for the precise wording of messages, the member was ultimately liable for the actions and omissions of its information providers. The key reasons for the sanctions were the following:

4.2.1.1 “the various WINK messages misled consumers and the pricing attached to the multiple SMSs was not clearly set out, with the result that consumers are duped into spending twice as much as anticipated. The information provider has previously acknowledged that the WINK service is misleading and yet the member allowed the information provider to continue disseminating the SMSs”;

4.2.1.2 “the member offers no explanation for the grossly inflated opt out fees complained of”;

4.2.1.3 “contraventions of adult services provisions of the Code are very serious as these contraventions could potentially harm children. As previously stated, the adult SMS could easily be

WASPA alternative appeals panel
Complaints 0985, 0987, 0988, 0989, 0990, 0991 and 1001

received by a child and the content accessed by that child. The contemptuous response to the allegations does not assist the member whatsoever”;

4.2.1.4 “it is noted that one instance of misconduct can give rise to many contraventions of the code. For example, a breach of 4.1.2 will automatically give rise to a breach of 4.1.1. This has been taken into account when considering the sanction so that the member will not be penalised twice for the same conduct”;

4.2.1.5 “the sanctions for the contraventions of the Code are set out below. Given the potential damage to the industry and its credibility as a self-regulating industry as well as the potential to damage more vulnerable recipients of the SMSs, a harsh sanction is warranted.”

4.2.2 Specifically the adjudicator applied the following sanctions (direct and indirect):

4.2.2.1 the member was ordered to pay a fine of R200,000;

4.2.2.2 the member was instructed to suspend the information provider used for the deployment of the services considered herein for a period of 6 months, effective immediately;

4.2.2.3 WASPA was directed to inform the network operators as well as other WASPA members of the suspension of the information provider and the reasons therefore;

4.2.2.4 the member was suspended from operations for a period of 1 month, which period was suspended for 2 months from date of notification of this adjudication provided that should the member commit a breach during the 2-month period (ie the incident of breach must have occurred during the 2-month period) the member shall be suspended for 1 month upon finding of breach.

5 GROUND OF APPEAL

5.1 The SP submitted an appeal only after some considerable period of time had passed (over 6 months), and with the urging of the WASPA Secretariat. The panel notes that the initial notification to WASPA that it would appeal only related to clause 4 of the sanctions imposed by the adjudicator but that the appeal itself relates to the entirety of the adjudicator’s finding. We do not consider there to be any prejudice in considering the entire appeal even though the notice suggested that the appeal might be limited. Obviously in future, appellants would be well-advised to scope their appeal more broadly in their notice, so as to limit it if necessary, at the later stage, rather than the other way around.

WASPA alternative appeals panel
Complaints 0985, 0987, 0988, 0989, 0990, 0991 and 1001

- 5.2 The appellant, as we suggested at the outset of this appeal, has made use of very “legalistic” arguments, not all of which we considered to be well-founded. We have nonetheless examined them in the order in which they are raised, under the headings chosen by the appellant, in relation to the points made by the appellant and the adjudication, where possible.
- 5.3 *Notice of appeal and condonation*
- 5.3.1 The panel has decided to accept the appeal in relation to all of the sanctions, as set out above.
- 5.4 *Grounds of appeal*
- 5.4.1 The appellant argues that the adjudicator “erred in not finding that the subject matter of the complaints, being SMS’s of an emotionally misleading orientation, distributed by the same information provider, Comms International (“Comms”) was in fact of an identical or substantially similar nature to that in respect of which complaints were previously lodged with the Secretariat of WASPA and sanctions imposed on the appellant under Complaint No 0609, 0819, 0894, 0898, 0905, 0928 and 0929. The author of the adjudication handed down in respect of [these complaints] became *functus officio* after making his/her decision. The “formal legal force of the action, as embodied in the rule ne bis in idem (literally the same matter may not be heard twice) prohibits the administrator from altering or revoking his own decision” which decision can only be altered by a superior body on review or appeal. [The appellant cited the relevant case law]. In *Carlson Investments Share Block (Pty) Ltd v Commissioner, South African Revenue Services* [again the appellant gave the relevant citation] the court found that there is a sound policy reason for recognising the finality of proceedings before administrative tribunals. In making this finding, the court relied on the following extract from a Canadian decision of *Chandler v Alberta Association of Architects*...[and the appellant quoted the passage and citation]. In light of the above, it is the appellant’s submission that the Learned Adjudicator erred in that, given the identical and/or similar nature of the 2 sets of complaints, as indicated [in 2.1.1] the Learned Adjudicator, in effect, re-visited and altered his/her own decision (or at least the decision of a functionary with powers identical to his/her own).”
- 5.4.2 The appellant continued in a similar vein to suggest that cognisance should be taken of the fact that all the complaints involved in this particular appeal were lodged prior to the date of the adjudicator’s report containing sanctions in relation to the other complaints referred to above and that Comms had already been suspended as a result, on 28 February 2007.

WASPA alternative appeals panel
Complaints 0985, 0987, 0988, 0989, 0990, 0991 and 1001

- 5.4.3 The rest of the arguments raised by the appellant in this regard suggested that the matter could therefore also be regarded as “res judicata” and in raising an argument “analogous to that of an autrefois convict plea” it could be argued that the appellant had already been convicted of the same offence by a competent court and should therefore not be sanctioned further for conduct for which it had already been sanctioned.
- 5.4.4 When the panel had looked up all the Latin, French and other legal phrases in its dictionary (and bearing in mind this forum is intended to be a place where the ordinary man can come for justice), the panel considered the following issues to be noteworthy:
- 5.4.4.1 continuous and repeated breaches of the same set of rules would seem to us to indicate a flagrant disregard for the rules, rather than a failure by an adjudicator carrying out a task for which he or she is mandated by that set of rules, to apply their mind;
- 5.4.4.2 breaches of the Code may be notified to WASPA by any person affected by them or potentially affected by them, and if more than one person complains about the same or a similar breach, that cannot be said to excuse the person committing the breach of sanction in the one case of the one complaint, merely because sanction has already been applied in relation to one of the other complaints – sanctions can and will be applied in relation to each complaint so that the complainant can be assured that his or her grievance is receiving the proper attention. A murderer should surely not be excused his second murder because he has already been sentenced for his first?
- 5.4.4.3 a WASPA adjudicator is required to take into account previous breaches by a service provider and previous sanctions by another adjudicator in terms of section 13 of the Code in determining current sanctions;
- 5.4.4.4 as a matter of WASPA policy, the public interest is paramount. WASPA adjudicators are tasked with upholding this and using the powers at their disposal to do so.
- 5.4.5 In all the circumstances, the panel do not consider it necessary to take this further, nor will this ground of appeal have any bearing on our findings, save to say that we are confident that the service provider was not punished twice in relation to the same complaint submitted by the same complainant in relation to the same breach.
- 5.5 *Sanctions 1 and 4 are inappropriately harsh*

WASPA alternative appeals panel
Complaints 0985, 0987, 0988, 0989, 0990, 0991 and 1001

- 5.5.1 At the outset the panel agrees that the sanctions are harsh. As a result, the panel has given careful consideration to the conduct of the service provider and its information provider, the nature of the complaints, the number of the complaints, and the resulting actions of the service provider.
- 5.5.2 The appellant notes again that a sanction had already been applied against it in relation to several other complaints and as a result, it had already suspended the IP. The panel welcomes this positive action by the service provider. The difficulty we find ourselves faced with, however, is that the timing of the various complaints and imposition of the various sanctions overlaps. This in itself is not a reason not to impose a sanction however – in our example of the murderer, it is perfectly possible to serve two life sentences.
- 5.5.3 In principle therefore, we do not consider the existing sanction to have any bearing on the new sanction. To the extent that the service provider had already suspended the information provider, a letter to WASPA confirming this would ensure that the sanction applied only when the first period of suspension had been completed. Indeed WASPA itself advised the service provider to do just this when they enquired about how this might work (see our bullet list of relevant events and timing).
- 5.5.4 The second argument advanced by the appellant concerns the nature of a service provider, which, the appellant argues, is analogous to that of a “content aggregator” and not a traditional content provider. We are not sure what is meant by “traditional content provider” although the appellant notes that a “content aggregator” merely “provides mobile, connectivity and billing solutions to its clients”, “merely monitors and advises clients on their services, with the result that it is an easy task for the clients to modify their services once the content aggregator has approved them”. The appellant then refers to Chapter 11 of the Electronic Communications and Transactions Act No 25 of 2002 (“ECT Act”) in support of a view that it should escape liability for the actions of the information provider.
- 5.5.5 The appellant also refers to a comment made by an adjudicator in an unrelated finding in support of its argument under the ECT Act. Unfortunately the quotation dated August 2006, is taken out of context.¹

¹ **ECT Act:** This Act is intended to provide for the facilitation and regulation of electronic communications and transactions, amongst other things which include the prevention of abuse of information systems. Chapter VII is entitled “Consumer Protection” and it is within this chapter that section 45 falls. Whilst WASPA is not empowered to enforce the provisions of this Act, it may be useful to consider them in relation to the jurisdiction of WASPA and the factual liability of the parties referred to in this complaint.

Section 42 states that the chapter applies only to electronic communications and at subsection (3) it states that the chapter does not apply to a regulatory authority established in terms of a law if that law prescribes consumer

WASPA alternative appeals panel
Complaints 0985, 0987, 0988, 0989, 0990, 0991 and 1001

- 5.5.6 We have set out in part 2, relevant sections of the WASPA Code in relation to the roles of each of information and service provider in providing services as wireless application service providers. We have also noted that there are key differences between internet service providers and wireless application service providers in the same section above. Neither the argument made in reliance on the ECT Act, nor the attempt to align service providers providing wireless application services with internet service providers by defining their roles in the same way, can detract from (i) the fundamental differences between them legally and practically, and (ii) the position under the Code. To our knowledge, the appellant is not registered under Chapter 11 of the ECT Act. In addition, the further arguments advanced, as set out below, would tend to suggest that the appellant does regard itself as being bound by the Code, so we are not clear about which arguments the appellant wishes to rely on.
- 5.5.7 The appellant also regards the adjudicator to have erred in not taking cognisance of:
- 5.5.7.1 the measures already adopted by the appellant to “attempt to monitor and control the services of its clients which include the practise of suspending clients even prior to being instructed to do so by WASPA if irregularities are detected...and putting in place systems designed to assist the appellant as far as is possible, to monitor the use by clients of the international routes referred to in [clauses 2.2.4.2.2 of the appeal document]”;

protection provisions in respect of electronic transactions. At time of considering this complaint, WASPA has submitted an application to the Minister to be recognised as an industry body in terms of Chapter 11, but aggregators cannot enjoy the benefits of the Act until such time as the Minister recognises WASPA. Thus a WASP is considered to be providing an information system service and may incur liability for their own and third party content which they provide.

An “information system service” is defined in the ECT Act as including “the provision of connections, the operation of facilities for information systems, the provision of access to information systems, the transmission or routing of data messages between or among points specified by a user and the processing and storage of data, at the individual request of the recipient of the service.”

Section 45 is intended to address “unsolicited goods, services and communications”. Section 45(1) provides that:
“Any person who sends unsolicited commercial communications to consumers must provide the consumer – (a) with the option to cancel his or her subscription to the mailing list of that person; and (b) with the identifying particulars of the source from which that person obtained the consumer’s personal information, on request of the consumer.”

Section 45(3) provides that:
“Any person who fails to comply with or contravenes subsection (1) is guilty of an offence and liable, on conviction, to the penalties prescribed in section 89(1).”

The Code was created to address the concerns of this Act within the wireless application services arena. The Code contains its own consumer protection provisions and particularly provisions concerned with spamming which I will consider below. WASPA is not empowered to enforce the ECT Act.

WASPA alternative appeals panel
Complaints 0985, 0987, 0988, 0989, 0990, 0991 and 1001

- 5.5.7.2 “the challenges faced by the market and posed to the monitoring of services, which include clients now acquiring their own databases and utilising them as they please, as was the case with Comms; clients now utilising international routes, which are virtually impossible for the appellant to monitor; and the various interpretations of the Code and utilisation of gaps discovered in other markets”;
- 5.5.7.3 “the destructive effect that a suspension of operations would have on the business of a content aggregator such as the appellant when contrasted with the ease with which a content provider can suspend operations in a specific market and later attract advertising and re-introduce itself to the market at a later stage”;
- 5.5.7.4 “the fact that WASPA does not, at present, fully recognise the role of aggregators which is essentially that of managing the connectivity of clients... the Code has fallen behind the WASP industry and thus does not adequately regulate it...” and the appellant refers, by contrast, to the ISPA code adopted in February 2007 which limits liability of its members;
- 5.5.7.5 “the fact that the appellant has over 300 other clients which are reliant on the appellant for the facilitation of their services and sustainability of their businesses....” And the appellant goes on to say that by penalising it the sanctions also hurt its other customers, when the penalty is due to the uncontrolled and uncontrollable actions of one of these clients, but that “the number of clients serviced by the appellant explains the volume of complaints that have been lodged against them”.
- 5.5.8 It may be useful at this point for the panel to address these points, while they are still fresh.
- 5.5.8.1 5.5.7.1: we note that the appellant has already taken steps to suspend the errant information provider, although we also note that this was done in compliance with a previous sanction and not voluntarily, and thus we cannot take this into account in considering the sanctions in this appeal;
- 5.5.8.2 5.5.7.2: we do understand that the Code may in some cases, be capable of different interpretations. However we are not clear from the facts averred by the appellant which sections are unclear in relation to this appeal. It is therefore not possible to consider these specifically in relation to the sanctions imposed. We do not understand the reference to “gaps in other markets”. The Code requires the service provider to contractually bind its information provider to uphold the Code, and where this does not happen, we would expect

WASPA alternative appeals panel
Complaints 0985, 0987, 0988, 0989, 0990, 0991 and 1001

that those contracts would impose a back-to-back penalty on the information provider, thus protecting the conscientious service provider from the uncontrolled activities of the nefarious information provider. The failure by a service provider or inability to monitor or control an information provider where that information provider's behaviour results in a breach of the Code is unfortunately in the panel's view, not a reason not to impose a sanction for the breach. There are many service providers and information providers who do not breach the Code, and where they do, they hold the information provider accountable – why would the appellant seek to be treated any differently?

5.5.8.3 5.5.7.3: the panel does not understand the relevance of this point nor precisely what it means – the business model chosen by a service provider and its success or failure is surely not something within WASPA's control or its responsibility;

5.5.8.4 5.5.7.4: we have commented at paragraph 5.5.6 and section 2 above on the nature of an internet service provider and a wireless application service provider. We will convey to WASPA that the appellant has concerns about the currency of the Code;

5.5.8.5 5.5.7.5: higher volumes of other clients serviced by the service provider do seem to indicate that a more robust screening system may be necessary when taking on new clients, so that the appellant can avoid costly and time-consuming liaison with WASPA when those clients act in contravention of the Code – whether one or several complaints and whether the service provider is a large or small concern, WASPA must consider them all against the requirements of the Code. The panel does not consider this to be a mitigating factor in considering the sanctions imposed.

5.5.9 *Sanctions 1 and 4 are unlawful*

5.5.9.1 The appellant considers that the adjudicator failed to follow “due process” in imposing the sanctions, and in particular, failed to apply the “audi alteram partem” rule [meaning hear the other side]. The appellant considers that “adequate notice of process and proceedings must be brought to the attention of the opposite party who in turn should be afforded an opportunity to present his own side of the matter” [and the appellant quotes from a textbook on South African law]. The appellant goes on to say that the rules of natural justice suggest that any person who will be affected by a decision should be given an opportunity to be heard on the matter.

WASPA alternative appeals panel
Complaints 0985, 0987, 0988, 0989, 0990, 0991 and 1001

- 5.5.9.2 Finally, the appellant considers that in light of these legal notions, it was “not adequately afforded the entitlements required by the rules of natural justice. In particular, given that what is being appealed against is the severity of the sanction, the fact that the adjudicator felt that “a harsh sanction” was warranted but nevertheless failed to afford the appellant an opportunity to present its case in mitigation of such a harsh sanction, is clearly contrary to the rules of natural justice.”
- 5.5.9.3 The panel wishes to refer to section 13, quoted in full at the beginning of this finding. Section 13 clearly sets out the process and procedure applicable in relation to the submission and receipt of a complaint by any person about a WASP, and the process and procedure of the adjudication of a complaint, and if applicable, the appeal against the findings of the adjudicator. Time periods and requests for information are clearly provided for.
- 5.5.9.4 It is entirely relevant, in light of the appellant’s contention that the WASPA process is flawed, or that the particular process followed in this instance is flawed – the panel is unclear which contention is being made by the appellant – to recount the history of this particular matter, against the backdrop of the provisions of section 13.
- 5.5.9.5 The timing of the matter is the following:
- Complaints submitted to WASPA on 1, 2, 5 and 6 February 2007 (complaints were submitted on the same day by different people)
 - WASPA secretariat wrote to the service provider within the following week, the first notification being sent on 5 February and the last notification being sent on 12 February 2007, all sent to the same person at the service provider, and all giving the service provider 5 days within which to respond to the individual complaints
 - On 13 and 21 February 2007 the secretariat wrote again to the member, requesting a response to different complaints, if any was to be submitted, by close of business that day
 - On that day the service provider sent a response in relation to 0990 and 0988 which are quoted in the adjudicator’s report
 - On 23 February 2007 the secretariat wrote again to the service provider in relation to certain complaints

WASPA alternative appeals panel
Complaints 0985, 0987, 0988, 0989, 0990, 0991 and 1001

noting that the service provider had in fact responded to similar complaints but not to all of them, and requesting the service provider to send a late response, if any was to be submitted, as soon as possible

- On 28 February the service provider sent a response to the secretariat in relation to complaint 0989 which is considered in the adjudicator's report
- On 1 March the service provider responded in relation to complaint 1001 stating merely in most cases, that it denied any wrongdoing – the adjudicator's report considered every response in detail so we do not intend to canvass these again here
- On 7 March the service provider wrote to WASPA in relation to 0985, requesting a copy of the original complaint, to which WASPA replied on the same day
- On 8 March the secretariat wrote to the service provider requesting more information in relation to its response to complaint 0989 and giving the service provider a time limit to respond, and the service provider responded to say that they had in fact suspended the information provider and asking for advice on how to proceed.
- On 13 March the secretariat replied to suggest that the service provider deal with the specific issues raised by the complainant in relation to 0989 in its supplementary responses, and stress that it had already terminated the services based on earlier complaints, as required by section 3.9.3 of the Code. The service provider indicated that it would do so by email on the same day and also asked who should be responding to the various enquiries from WASPA, the service provider or information provider. On the same day, the secretariat responded to indicate that the service provider should reply but that the information provider could also reply if it wished to
- On 4 April the secretariat wrote to the service provider requesting more information regarding the consent (specifically in the case of 1001) which the customer was alleged to have given to the service provider in relation to receipt of messages
- From the trail of correspondence provided to us by WASPA, it would appear to us that in relation to the

WASPA alternative appeals panel
Complaints 0985, 0987, 0988, 0989, 0990, 0991 and 1001

complaint, the service provider was given in all cases, 3 opportunities to submit a response when the Code requires only 1 notification. In addition, the adjudicator wrote to the service provider in several cases requesting further information which was not provided

- In formulating the report, the adjudicator also took into account all information provided and indicated why certain conclusions had to be made in the absence of further information from the service provider
- In relation to the appeal, we again note that correspondence in relation to the appeal was entered into with WASPA over a period of some 6 months, the delay being caused largely because of an apparent misunderstanding by the service provider of the suspension of sanctions occasioned by the appeal in this case, where the service was already required to be suspended pursuant to a previous finding on other complaints (not considered in this adjudication)
- The adjudicator's report was provided to the service provider by WASPA on 31 May 2007, and the service provider was requested to note any appeal within 5 working days
- In all, following the service provider's notification to WASPA that it wished to appeal sanction 4, on 4 June 2007, WASPA was in touch with the service provider about the appeal and their formal documentation 10 times from 11 June until they finally submitted their appeal on 1 October 2007, in each case advising and even entreating the service provider to submit its appeal

5.5.9.6 In the circumstances, the panel finds it somewhat ludicrous that the appellant could, in good conscience, choose to raise any defence alleging an inability to participate in the proceedings to the fullest possible extent, with the greatest possible leniency in relation to timing.

5.5.10 *Adjudication*

5.5.10.1 This last heading is inserted by the panel for the purpose of noting that the appellant did not address the findings of the adjudicator specifically in light of its own actions to uphold the Code, but chose to focus on the more procedural and technical aspects of the proceeding as a whole.

**WASPA alternative appeals panel
Complaints 0985, 0987, 0988, 0989, 0990, 0991 and 1001**

- 5.5.10.2 The panel also notes that only sanctions 1 and 4 were appealed against.

6 FINDINGS OF APPEALS PANEL

- 6.1 The panel notes that, generally speaking, the service provider submitted only bald denials in support of its averment that it did not breach the Code in response to the complaints. When questioned as to the evidence supporting its denial of breach (for example that the complainant had given consent to receive a particular message or service) the service provider did not respond to the enquiry by the adjudicator. In fact, the service provider responded to only three of the complaints.
- 6.2 The panel has considered each ground of appeal set out by the SP above and we state our decision next to it below:
- 6.3 *Decision in relation to appeal on sanctions 1 and 4*
- 6.3.1 *Functus officio argument (5.4.1 above)* – the panel does not find that this argument is either good in law or relevant to this appeal. The adjudicator is obliged to consider every complaint in terms of section 13 of the Code. Further and similar complaints would tend to indicate that the service provider is more deserving of a harsher sanction not that the adjudicator erred in failing to consider that sanctions had already been applied in relation to separate matters. The panel does note that since the service had already been suspended, the appellant argues that it could not be suspended again. However, we disagree. The second period of suspension could take effect after the expiry of the first period of suspension, there is no bar to making this finding or to imposing this sanction.
- 6.3.2 *Res judicata argument (5.4.3-5.4.7 above)* – we examined the arguments in support of this allegation and determined, as set out above, that they had no bearing on the finding of the adjudicator, particularly given the requirements of section 13 of the Code.
- 6.3.3 *Existing sanctions (5.5.1-5.5.3)* – we have considered this in great detail throughout our report. We do not consider the imposition of similar penalties under a previous adjudication to have any bearing on this adjudication except insofar as the adjudicator in this matter was required to and did take it into account in determining the sanction. We will consider the “harshness” of the financial penalty below.
- 6.3.4 *No liability if service provider is a content aggregator (5.5.4-5.5.6)* – we have considered the nature of a wireless application service provider and its responsibilities compared to those of an internet

WASPA alternative appeals panel
Complaints 0985, 0987, 0988, 0989, 0990, 0991 and 1001

service provider, and have also considered the respective benefits accruing to both, and their roles within the mobile environment. We do not consider that a WASP can or should escape liability for the wrongful actions of its information providers, because it considers itself to operate only to “consolidate” content, or to deal with multiple numbers of information providers. The WASPA Code is clear as to the relationship between service provider and information provider and their respective responsibilities.

6.3.5 *Other arguments about liability (5.5.7-5.5.8)* – we considered the arguments raised in 5.5.7 in detail in 5.5.8 and have dismissed them.

6.3.6 *Unlawfulness of sanctions (5.5.9)* – the appellant makes much of the adjudicator’s alleged failure to comply with the rules of natural justice and in particular, the “audi alteram partem” rule. We have examined in detail why this allegation might be correct, and found that in the circumstances, it simply cannot be. In the circumstances, it is our view that the secretariat bent over backwards to accommodate and encourage the service provider to make its case known to the relevant parties, and it did not do so.

6.4 *Panel’s finding on sanction*

6.4.1 We have stated in a previous appeal on sanction, that there is no rule of thumb or formula regarding penalties – each decision is very much bound up in its own facts. The SP has not persuaded us that there was no breach. In fact its attempts to avoid liability for breach in the absence of evidence or serious mitigation cast doubt on its “bona fides” (a Latin phrase meaning “good faith”). Considering other penalties imposed by adjudicators and panellists, we do, however, consider that the financial penalty was severe. We therefore make the following finding:

6.4.1.1 We direct that the penalty be reduced by 50%, the resulting amount of R100,000 payable immediately.

6.4.1.2 The SP is directed to comply with the balance of the sanction imposed by the adjudicator including suspension of services as indicated by the adjudicator insofar as those services are not already terminated.

6.4.1.3 The appeal fee is not refundable.