

**REPORT OF THE APPEALS PANEL**

**Date:** 24 September 2009  
**Appellant (SP):** Altech Autopage Cellular  
**IP:** Blue World Agencies CC t/a SMS Portal  
**Complaint Numbers:** 1743, 1986, 2090 and 3557  
**Code of Conduct Versions:** 5.3 with regards to complaint 1743, 1986, 2090 and 5.7 with regards to complaint 3557

---

**1. INTRODUCTION TO THIS APPEAL**

- 1.1 This appeal concerns the adjudication of four complaints. Three of the complaints namely 1743, 1986 and 2090 resulted from spam messages originating from the IP, Blue World Agencies t/a SMS Portal, which were received by consumers. The fourth complaint concerns the adjudication of complaint 3557, instituted by WASPA against the SP, Altech Autopage Cellular, because of the SP's non-compliance with the sanctions imposed in terms of the adjudications in complaints 1743, 1986, and 2090. The WASPA Management Committee condoned the late filing of the appeal by the SP.
- 1.2 The initial three complaints were submitted when version 5.3 of the Code of Conduct was in force and the fourth complaint was submitted when version 5.7 of the Code of Conduct was in force. For the purposes of this appeal, however, the fact that different versions of the Code of Conduct were in force at the times at which the adjudications appealed against were made, does not have any material effect.
- 1.3 The panel has (i) summarised the main issues by way of background in part 2 of this Report; (ii) specifically considered the adjudicator's decisions in part 3 of this Report; (iii) reviewed the SP's grounds of appeal in part 4 of the Report; and (iv) made our findings in part 5 of the Report.
- 

**2. RELEVANT INFORMATION**

- 2.1 The IP, which was not a member of WASPA during the time the complaints appealed against were adjudicated, submitted responses that were identical in all material respects for the adjudication of complaints 1743, 1986 and 2090. The IP did not, however, submit any evidence in support of an appeal.
- 2.2 The SP did not at any stage during the adjudication of complaints 1743, 1986 and 2090, dispute any of the substantive issues, essentially relating to spam, in terms of which the adjudicators found that the IP and

WASPA Appeals Panel  
Complaints 1743, 1986, 2090 and 3557

therefore the SP had breached several subsections of clause 5 of the Code of Conduct.

- 2.3 In this appeal the SP has similarly not raised any grounds of appeal dealing with the merits of the adjudications in complaints 1743, 1986 and 2090..
  - 2.4 The only substantive issue raised by the SP during the adjudication of all four complaints appealed against, is the fact that the relationship between the SP and IP is based on the SP's Service Provider License and not the SP's WASP license, and that WASPA consequently did not have jurisdiction to find the SP liable in respect of breaching the WASPA Code of Conduct. This is because the SP provides the IP with SIM cards and airtime (contracts) and does not deal directly with the IP's end users. The SP also claimed that it has a contract for resale with the networks and cannot therefore suspend the IP's activities itself.
  - 2.5 The above is similarly the SP's main substantive ground of appeal.
  - 2.6 The appeal in essence therefore deals with the nature of the relationship between the IP and the SP, and consequently, the SP's potential liability for any sanctions imposed for the IP's breaches of the WASPA Code of Conduct.
  - 2.7 The panel therefore accepts as common ground that the IP did in fact breach the subsections of clause 5 of the Code of Conduct as found by the adjudicators in complaints 1743, 1986 and 2090. The panel will thus not consider the substantive merits of the first three adjudications, except the jurisdictional issue as stated in 2.4 above, in this appeal.
- 

**3. RESPONSES TO THE COMPLAINTS AND DECISIONS OF THE ADJUDICATORS**

3.1 Apart from the jurisdictional issue, neither the IP nor the SP provided any grounds of appeal which deal directly with any other substantive issues regarding complaints 1743, 1986 and 2090. We will not, therefore, recite in detail the responses from the IP with regards to the initial complaints. The SP itself, apart from relaying information between the various parties concerned, also did not provide a separate response to these complaints. The timeline of events and the communications associated therewith are discussed in detail in the adjudication reports which are accessible on the WASPA website. These events and communications had no direct bearing on our decision in this appeal.

3.2 Sanctions in complaints 1743, 1986 and 2090

3.2.1 Complaint 1743

The adjudicator imposed the following sanctions:

- (i) A fine of R2500 on the SP for the breach of clause 5.1.4(a) of the Code;

WASPA Appeals Panel  
Complaints 1743, 1986, 2090 and 3557

(ii) A fine of R5000 on the SP for breach of clause 5.3.1 of the Code;

(iii) The SP was issued with a formal reprimand for the breach of clause 5.3.2 of the Code;

(iv) The SP was further ordered to suspend the services of the IP for a period of at least 14 days or until such time it has satisfied itself that the IP is in compliance with the Code. This suspension the adjudicator ordered was to run simultaneously with those imposed in complaints 1986 and 2090; and

(v) The WASPA Secretariat was ordered to notify all WASPA members of the said suspension.

### 3.2.2 Complaint 1986

The adjudicator imposed the following sanctions:

(i) A fine of R2500 on the SP for the breach of clause 5.1.4(a) of the Code;

(ii) A fine of R2500 on the SP for the breach of clause 5.1.5 of the Code;

(iii) A fine of R5000 of the SP for its breach of clause 5.3.1 of the Code;

(iv) A suspension period similar to that of complaint 1743 to run simultaneously with the suspension period imposed in complaints 1743 and 2090; and

(v) The WASPA Secretariat was ordered to notify all WASPA members of the said suspension.

### 3.2.3 Complaint 2090

The adjudicator imposed the following sanctions:

(i) A fine of R2500 on the SP for the breach of clause 5.1.4(a) of the Code;

(ii) A fine of R5000 on the SP for breach of clause 5.3.1 of the Code;

(iv) The SP was further ordered to suspend the services of the IP for a period of at least 14 days or until such time it has satisfied itself that the IP is in

WASPA Appeals Panel  
Complaints 1743, 1986, 2090 and 3557

compliance with the Code. This suspension the adjudicator ordered was to run simultaneously with those imposed in complaints 1743 and 1986; and

(v) The WASPA Secretariat was ordered to notify all WASPA members of the said suspension.

3.3 Complaint 3557 was lodged by WASPA on the 25<sup>th</sup> of February 2008 because the SP was unwilling to comply with the sanctions imposed by the adjudicator for complaints 1743, 1986 and 2090. The reasons for this were set out, mainly, in two letters dated 4 February 2008 and 6 February 2008.

3.4 SP's response to complaint 3557

3.4.1 The SP submitted the following formal response to complaint 3557 which was dated 4 March 2008:

**“Without Prejudice”**

**RE: COMPLAINT IN TERMS OF SECTION 13.3 OF THE CODE OF CONDUCT – COMPLAINT #3557**

1. Altech Autopage Cellular (Pty) Ltd (“Autopage Cellular”) is a wholly owned subsidiary of Allied Technologies Limited (“Altech”) and accordingly, I am authorised to provide this response to you on behalf of Autopage Cellular.

2. We refer to your recent notification regarding the complaint under Section 13.3 of the Code of Conduct. According to WASPA, this complaint arises as a result of the failure of Autopage Cellular to comply with the sanctions imposed on it by WASPA on the basis that “the failure of any member to comply with any sanction imposed on it, will itself amount to a breach of the Code”.

3. We are advised that Mr XXXXXXXX, the Financial Director of Autopage Cellular, has been involved in extensive discussions regarding the sanctions under complaints 1743, 1986 and 2090. The sanctions imposed, relate to a fine payable by Autopage Cellular and that Autopage Cellular suspends its services to the IP for a period of 14 days or until such time as it has satisfied itself that the IP is in compliance that it is in provision with clauses 5.1.4(a) and 5.3.1 of the Code of Conduct.

4. As advised in writing by Mr XXXXXX, the IP in question is SMS Portal which has concluded a Subscription Agreement with Autopage Cellular and is not at provider of content under the Wireless Application Service Provider Agreement (“WASP Agreement”).

5. Accordingly, the relationship between Autopage Cellular and SMS Portal is governed by the Service Provider Agreement concluded between it and the network in question.

6. The basis upon which you seek to sanction Autopage Cellular under the aforesaid complaints is wholly incorrect. As previously advised,

WASPA Appeals Panel  
Complaints 1743, 1986, 2090 and 3557

Autopage Cellular cannot be held accountable under the WASPA Code of Conduct for the actions of an independent third party who is not a content provider and in turn, not bound by any WASP Agreement signed by Autopage Cellular and the relevant network.

7. Furthermore, as advised herein above, the relationship between SMS Portal and Autopage Cellular is governed by the Service Provider Agreement concluded between Autopage Cellular and the network. In terms of that Agreement, the only basis upon which Autopage Cellular is entitled to suspend services to the relevant subscriber is where a fraud or unlawful act is committed by the subscriber. Therefore, the suspension of the services to SMS Portal would constitute a breach of the Subscriber Agreement and would expose Autopage Cellular to a damages claim. The sanction under complaints 1743, 1986 and 2090 including the complaint under 13.3 of the Code of Conduct constitute an unlawful inducement of Autopage Cellular to breach its Subscription Agreement with SMS Portal.

8. Autopage Cellular also objects to the unilateral imposition of the fine by WASPA for the actions of SMS Portal who are an independent third party and are not bound by a WASP Agreement.

9. Accordingly, we would suggest that prior to the imposition of a further charge of misconduct, Autopage Cellular be granted an opportunity to clarify the validity and the nature of the sanctions. Failing which Autopage Cellular will have no alternative but to seek all remedies available to it in law, the cost of which will be for your account.

10. Please also be advised that the submissions contained herein are not exhaustive, and Autopage Cellular reserves its rights to amplify the content of this letter at the appropriate time and in the appropriate forum.

11. In the interim, Autopage Cellular's rights remain strictly reserved."

3.5 Adjudicator's decision

3.5.1 The adjudicator firstly made it clear that the decision was made in terms of an independent adjudication about the SP's failure to comply with the sanctions imposed in complaints 1743, 1986 and 2090 and that it is not in terms of an appeal against the three adjudications.

3.5.2 The adjudicator continued by explaining that he/she did not enter into a review of the merits of the underlying adjudications.

3.5.3 The adjudicator stressed that the only question that needed to be decided was whether or not the SP complied with the sanctions imposed in terms of the underlying adjudications.

WASPA Appeals Panel  
Complaints 1743, 1986, 2090 and 3557

- 3.5.4 In answering this question the adjudicator found that the SP had clearly not complied with the sanctions imposed in the underlying adjudications, while noting that the SP has not appealed the underlying adjudications or set its views before the correct forum.
- 3.5.5 In explaining that the obligation on the SP to comply with the sanctions imposed flows from the SP's membership of WASPA and specifically from section 13.3.16 of the Code the adjudicator states that the SP is in terms of the peremptory language in this clause of the Code obliged, in the absence of the lodging of an appeal, to comply with the sanctions imposed in the underlying adjudications.
- 3.5.6 The adjudicator then made it clear that he/she has no latitude to deviate from the complaints process set out in the Code in order to take into account the SP's efforts to resolve the matter outside the scope of the Code or to conduct what would amount to an appeal of the underlying adjudications.
- 3.5.7 The adjudicator consequently found that the SP had indeed breached clause 13.3.16 of the Code.
- 3.5.8 In setting out the sanction in terms of the complaint the adjudicator indicated three considerations that made a decision regarding the appropriate sanction particularly difficult:
- (i) the fact that no sanction was imposed on the IP and that the refusal to comply was that of the SP alone;
  - (ii) the fact that the SP did try to resolve the matter notwithstanding that the efforts made in that regard were made outside of the structures dictated by the Code; and
  - (iii) the fact that the adjudicator believed that a further punitive sanction would not be of assistance in resolving the matter and that the sanction should seek to provide a basis for a pragmatic solution.
- 3.5.9 Notwithstanding the above three considerations the adjudicator stressed the fact that the SP's failure to comply with a sanction is a very serious offence which goes to the heart of the ability of WASPA to function as self-regulating body.

The adjudicator issued the SP with a formal reprimand in terms of section 13 of the Code and suggested that:

- (i) the SP be allowed to make an application for condonation in respect of the lodging of appeals against

the underlying adjudications and that WASPA consider such application favourably;

(ii) the WASPA appeals process be followed; and

(iii) in the event of the SP failing to avail itself of the opportunity to appeal the underlying adjudications the matter be referred back to the adjudicator with the understanding that the adjudicator will have little alternative but to impose a sanction which would involve either the suspension or the expulsion of the SP from WASPA.

---

#### 4. **SP's GROUNDS OF APPEAL**

4.1 The SP followed the suggestion made by the adjudicator, by making an application for condonation in respect of the lodging of appeals against the adjudications of complaint numbers 1743, 1986 and 2090, which was dated 9 December 2008. Together with the application for condonation, the SP submitted appeals against the adjudications in complaints 1743, 1986 and 2090 on the 9<sup>th</sup> of December 2008.

4.2 It should be noted that the SP lodged the exact same grounds of appeal in respect of all three the adjudications appealed against. The grounds of appeal which follow are therefore in respect of the adjudications of complaints 1743, 1986 and 2090.

##### 4.2.1 SP's grounds of appeal

4.2.1.1 The SP firstly explains that the reason the appeals process was not followed originally is the fact that WASPA requested an appeal fee to be paid by the SP which the SP believes to be unreasonable given that the complaints in question did not fall under WASPA's jurisdiction. In the same ground of appeal the SP makes mention of the fact that an application has been made to WASPA to waive the appeal fees in respect of this appeal.

4.2.1.2 The SP continues to explain that its relationship with the IP is such that the SP provides the IP with SIM cards and airtime contracts as required by the IP. The SP further explains in this ground of appeal that it does not have the mandate nor the capacity to regulate what the end customer uses the SIM cards and airtime contracts for.

4.2.1.3 The SP then refers to telephonic discussions between its commercial legal manager and an employee from WASPA as well as to meetings with the Chairman of WASPA. In these discussions and meetings the SP claimed that its relationship with the IP is based on the SP's Service Provider license and not its WASP license. The SP states that at no stage whatsoever was the IP operating under the SP's WASP

WASPA Appeals Panel  
Complaints 1743, 1986, 2090 and 3557

license, and that the SP was therefore not liable for any fines imposed by WASPA in respect of breaching the Code.

- 4.2.1.4 The SP then makes mention of the fact that it obtained an assurance from the IP regarding stringent measures that have been put in place by the IP to prevent future customer complaints. The SP refers to a letter to that effect. The letter referred is also according to the SP, meant to serve as proof that the relationship between the SP and the IP is governed by the SP's Service Provider agreement and not the Code.
- 4.2.1.5 Subsequent to the SP highlighting their view regarding the distinction between WASP agreements and SP agreements the SP states that it requested the IP to become a member of WASPA so that complaints could be dealt directly by the IP, thus minimizing the time to resolve customer queries while also 'closing a potential loophole in eliminating spam.'
- 4.2.1.6 The SP then makes mention of the fact that it changed its name on the WASPA website to refer specifically to its WASP division in order to reduce future confusion over the distinction between SP and WASP services.
- 4.2.1.7 The SP in its last ground of appeal states that it will only suspend services to customers which are governed by its Service Provider agreements if so directed by the 'Networks' in cases where the 'Networks' have identified fraud or an illegal act and that it could therefore not suspend the services of the IP as requested.
- 4.2.1.8 The SP in conclusion requests that the findings and fines imposed by WASPA be withdrawn.

---

**5. FINDINGS OF APPEALS PANEL**

- 5.1 The panel notes for the record that we did not consider the merits of complaints 1743, 1986 and 2090 in as far as the complaints pertain to the adjudicators' findings regarding the sending of commercial communications and 'spam'. Neither the SP nor the IP lodged any grounds of appeal to any of the three relevant complaints in this regard. An examination of the documentation and timeline of events also support the findings of the adjudicators. We therefore accept as common ground that the IP did in fact breach the clauses of the Code pertaining to the sending of commercial communications and spam as found by the adjudicators in the individual underlying three adjudications.
- 5.2 The main question before this panel is the question of jurisdiction. The main substantive issue raised by the SP during the adjudication of all four of the underlying complaints, is the fact that the relationship between the SP and the IP is based on the SP's Service Provider License and not the SP's WASP license, and that WASPA consequently did not have jurisdiction to find the SP liable in respect of breaching the WASPA Code of Conduct. The appeal, as stated in 2.6 above, in essence therefore, deals mainly with the nature of the

WASPA Appeals Panel  
Complaints 1743, 1986, 2090 and 3557

relationship between the IP and the SP, and consequently, the SP's potential liability for any sanctions imposed for the IP's breaches of the WASPA Code of Conduct.

5.3 This panel has previously, in a number of appeals, considered the nature of the relationship between SPs and IPs, and the responsibilities of each. The most comprehensive discussion in this regard can be found in the appeal against complaints 0985, 0987, 0988, 0989, 0990, 0991 and 1001. Some of the arguments raised by the SP in the appeal before us suggest that this issue is still shrouded in uncertainty and so we have decided to include, as was done in the above mentioned appeal, references to the relevant texts from the Code again in this report.

5.4 The relationship between the SP and the IP

5.4.1 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."

5.4.2 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". Particularly relevant to this appeal is Section 3.9.3 which provides that "the member must act in accordance with the WASPA complaints and appeal process and if appropriate, suspend or terminate the services of any information provider."

5.4.3 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 provide access to the networks, in this case providing the IP with SIM cards and airtime contracts, does not detract from that service provider's obligations under the Code.

WASPA Appeals Panel  
Complaints 1743, 1986, 2090 and 3557

5.4.4 In addition, service providers and information providers derive revenue directly from the provision of the content service in whatever form. This is not in dispute. It is also not disputed that the IP did offer services that fall within the scope of application of the WASPA Code.

5.5 WASPA and the public interest

5.5.1 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.

5.5.2 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.”

5.6 Application of the Code in South Africa

5.6.1 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.

5.6.2 Specifically, the Code applies in terms of section 1.4 “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.”

5.7 Complaints procedure under section 13 of the Code

5.7.1 The WASPA Code of Conduct is very clear and unambiguous with regards the procedures to be followed in resolving a complaint.

5.7.2 Because the complaints procedure forms an integral part of this appeal, the procedure under section 13 of the Code will for the sake of completeness be highlighted:

5.7.2.1 Section 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.

WASPA Appeals Panel  
Complaints 1743, 1986, 2090 and 3557

5.7.2.2 Under section 13.2 of the Code, an informal procedure is used, which requires that WASPA notify the member of a complaint and require a remedy within 5 days. This informal procedure was used in an effort to resolve the complaints in this appeal, without success.

5.7.2.3 Under section 13.3 of the Code, 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 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. Of particular importance for this appeal is the fact that, 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.

5.7.2.4 Section 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. Section 13.5 sets out yet further actions that may be taken by the secretariat on the instruction of the adjudicator.

5.7.2.5 Of particular relevance to this appeal is section 13.6 of the Code which deals with the appeals 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

WASPA Appeals Panel  
Complaints 1743, 1986, 2090 and 3557

panel, once convened, must consider all the evidence presented to the adjudicator, the decision of the adjudicator and additional information provided by the member. Section 13.6.13 states that “a member may not request a further review of the panel decision or request a further appeal”.

- 5.8 The SP states as a ground of appeal, referred to in 5.2.1.1 above, that it did not follow the appeals procedure because of the fact that appeal fees were payable, and that the SP believes this to be unreasonable given that the complaint in question did not fall under WASPA’s jurisdiction, in its view. This panel does not accept this ground of appeal as valid under the circumstances for the following reasons:
- 5.8.1 At no time during the resolution of the three complaints from the time the first complaint was communicated to the SP by WASPA, till the adjudicator rendered a decision in complaint 3557, did the SP display any serious intention or willingness to comply with the procedures or time frames stipulated in the Code.
  - 5.8.2 At no time before the adjudicator in complaint 3557 warned the SP of possible suspension or expulsion from WASPA if the SP did not avail itself of the opportunity to appeal the underlying adjudications in his/her decision, did the SP indicate any intention of submitting such appeals. The SP simply ignored the sanctions stipulated in the underlying three adjudications.
  - 5.8.3 This panel cannot think of any reason why the SP should be treated differently than any of the other WASPA members that were parties to complaints in the past.
  - 5.8.4 We are concerned with the possible repercussions of allowing any WASPA member to dictate time frames and procedures not in line with the Code. An unwillingness to act within the structure and spirit of the Code, for example, refusing to comply with sanctions or an unwillingness to pay costs associated with the appeal procedure, cannot be tolerated.
  - 5.8.5 Appeal fees are always payable by appellants but may be refunded to appellants which are successful.
  - 5.8.6 It was not for the SP to decide that WASPA had no jurisdiction, and that it was therefore, in terms of its own opinion, not liable to pay any appeal fees. That is exactly why the process makes provision for an appeal procedure. The appeal process allows the opportunity for parties to state their side of a complaint and voice their opinions. The process does not allow for parties to hold the process, WASPA or this panel at ransom by fulfilling the role of an appeal panel themselves.
- 5.9 The panel agrees that it has no mandate, nor the capacity to regulate what an end customer uses the SIM cards and airtime contracts for. The fact that the SP has no mandate, nor the capacity to regulate the activities of their customers is, however, only true in so far as the use of the SIM cards and airtime contracts are legal and in compliance with their Service provider agreements and the WASPA Code of Conduct.

WASPA Appeals Panel  
Complaints 1743, 1986, 2090 and 3557

- 5.9.1 The SP is, according to this panel, responsible for ensuring that the IP which obtains access to the networks, and consequently consumers, through its SIM cards and airtime contracts, does not contravene the Code of Conduct.
- 5.9.2 The SP should bind all its IPs by way of the necessary contractual provisions in the agreements it concludes with its IPs. In exactly the same way as network operators permit certain services and exclude other services, to be run over its channels by entering into agreements directly with various service providers and customers.
- 5.10 No details regarding the content or outcomes of the conversations or meetings referred to by the SP in its grounds of appeal, in 5.2.1.3 above, were provided. The panel takes note of these conversations and meetings only in so far as they indicate a willingness on the part of the SP to resolve the underlying complaints.
- 5.11 A distinction between whether the IP operated under the SP's Service Provider license or WASP license is artificial in determining the applicability of the Code and the SP's consequent liability. If the IP sent unsolicited commercial messages and/or spam to consumers by way of wireless application services provided by the SP, the Code is applicable. The Code should be made applicable to the IP in terms of provisions to that effect contained in all the SP's relevant agreements with the IP, irrespective of whether such an agreement is based on the SP service provider license or the SP's WASP license.
- 5.12 The panel takes note of the fact that the SP obtained assurance from the IP regarding the stringent measures that have been put in place by the IP to prevent future customer complaints.
- 5.13 The panel does not agree with the SP's averment that the letter referred to by the SP in its appeal constitutes any form of proof that the relationship between the SP and IP is governed by the SP's service provider agreement and not the Code. The SP cannot simply decide on its own behalf if the Code will, or will not govern the relationship between the SP and the IP.
- 5.14 The panel takes note that the SP requested the IP to become a member of WASPA as stated in 5.2.1.5 of the SP's grounds of appeal. According to the WASPA secretariat the IP has since become a member of WASPA. We wish to emphasize the fact that the SP can potentially still be held liable for actions or omissions of the IP, even though, the IP is now a member of WASPA. The fact that the IP is a member of WASPA does not rid the SP of its responsibility to ensure the IP's compliance with the Code.
- 5.15 The panel specifically notes the SP's statement in its grounds of appeal, stated in 5.2.1.5 above, that the IP's membership of WASPA could close a 'potential loophole in eliminating SPAM'. The SP itself admits that the fact that the IP is not a member of WASPA creates a 'loophole in eliminating SPAM'. For this very reason SP's can be held liable for the actions or omissions of their IPs in terms of the Code.
- 5.16 The panel notes the fact that the SP changed its name on the WASPA website in order to better reflect the distinction between its SP and WASP services.

WASPA Appeals Panel  
Complaints 1743, 1986, 2090 and 3557

- 5.17 We do not agree with the SP's statement that it will only suspend services to customers governed by its Service Provider agreements, based on direct instruction from the Networks, where the Networks have identified fraud or any illegal act. It is this panel's opinion that the SP, as a member of WASPA, is bound by the WASPA Code of Conduct - a Code supported by the Networks to ensure that members of the public can use mobile services with confidence. The SP will consequently be obliged to suspend the services of IPs if so instructed by a WASPA adjudicator in terms of the Code.
- 5.18 It is, in conclusion, this panel's opinion that the SP is responsible for the actions of the IP in terms of the WASPA Code of Conduct and that the SP is liable for any fines and sanctions imposed by a WASPA adjudicator in respect of breaches of the WASPA Code of Conduct. It is open to the SP to pass these sanctions on to its IP in its contract which we have often suggested in other appeals, ought to be back to back to ensure that IPs are bound by the same terms and conditions and obligations to WASPA and industry, as are SPs. The SP's grounds of appeal are not upheld.
- 5.19 Panel's finding on sanction
- 5.19.1 We view the SP's attempts to avoid liability in a serious light and find the SP's disregard for the procedures prescribed in the Code troubling. The SP's dismissive behaviour and sometimes even confrontational attitude during some of the proceedings falls short of the conduct expected of members of WASPA and the spirit of the Code. We agree with the adjudicator of complaint 3557 that the SP's failure to comply with a sanction is a very serious offence which goes to the heart of the ability of WASPA to function as self-regulating body.
- 5.19.1.1 We direct that the SP comply with the financial penalties imposed by the adjudicators in complaints 1743, 1986 and 2090. All fines are therefore payable immediately.
- 5.19.1.2 We are of the opinion that the suspension of the IP as ordered by the adjudicators in the underlying adjudications will at this late stage not serve the required purpose as envisaged by the adjudicators. This is not to say that we do not agree with the sanction of suspension. We find the sanction of suspension to be an appropriate sanction for the particular breaches of the Code but consider suspension of the IP under the circumstances of this appeal to be unnecessary, taking into account the time that has lapsed since the initial complaints were lodged as well as the fact that no recent complaints have been lodged against the IP.
- 5.19.1.3 We confirm the formal reprimands issued by the adjudicators in complaints 1743 and 3557.
- 5.19.1.4 Although the SP and WASPA made an arrangement regarding waiver of the appeal fee, we are of the opinion that the appeal fee should be paid by the SP, for the reasons provided in 5.8 of our findings. We therefore recommend to WASPA's Mancom that the SP be held liable for the payment of the appeal fee, but

WASPA Appeals Panel  
Complaints 1743, 1986, 2090 and 3557

leave it to the discretion of WASPA's Mancom to decide whether or not to enforce our recommendation.