



Wireless Application Service Providers' Association

Report of the Appeals Panel

Complaint number	#27343
Cited WASPA members	Odori Tech Ltd (1416)
Notifiable WASPA members	Opera Telecom (Pty) Ltd (0068)
Appeal lodged by	Odori Tech Ltd
Type of appeal	Written appeal
Scope of appeal	[X] Review of the adjudicator's decision [X] Review of the sanctions imposed by the adjudicator
Applicable version of the Code	v14
Clauses considered by the panel	7.5 and 24.24
Related complaints considered	n/a
Amended sanctions	Fine of R50 000 reduced to R15 000
Appeal fee	50% of the appeal fee to be refunded
Is this report notable?	Not notable
Summary of notability	n/a

Initial complaint

1. The complainant lodged a formal complaint against the appellant (Odori Tech Ltd), which is a member of WASPA, on 26 July 2015 after the appellant had failed to provide the complainant with copies of various logs relevant to a number of unsubscribe requests received by WASPA.
 2. The other member cited by WASPA as a party to the formal complaint was Opera Telecom who provided aggregation services to the appellant. Opera Telecom is not a party to this appeal.
 3. The appellant's initial response to the formal complaint was that it was unable to provide the requested logs as these were kept by the network operator or the aggregator. Opera Telecom did not submit any of its own logs or records relating to the complaint.
 4. The appellant also held the view that welcome and reminder messages only had to be sent to customers on request by the customer.
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Adjudicator's findings

5. The adjudicator rejected the explanation given by the appellant as to why it could not provide proper logs. The adjudicator referred to the many other WASPA members who are able to comply with these requirements of the Code without difficulty.
6. The adjudicator also rejected the view taken by the appellant that welcome and reminder messages only had to be sent to customers on request by the customer, and held that it was incumbent upon members themselves to provide the required messages. In rejecting the appellant's submission that it was unable to furnish the required proof of these messages, the adjudicator stated as follows:

Unfortunately, this does not seem to pose a problem for any other WASPA members nor does it remove the obligation placed upon the member in terms of the Code to provide WASPA with the information requested.

Further, and although this was not raised as a specific breach by WASPA in their complaint, it is not up to customers to request proof of subscription, welcome and reminder messages but is incumbent upon the member themselves to do so as required by the Code.

7. For reasons not canvassed in the adjudication report, the adjudicator focussed solely on the appellant's failure to provide detailed logs. The adjudicator did not consider whether

the aggregator, Opera Telecom, who was formally cited by WASPA in the complaint, was obliged to furnish these logs in terms of section 7.5 of the Code which provides as follows:

Members must provide WASPA with any customer records relating to any service which is the subject of a complaint, including, but not limited to:

- (a) all communications sent by or to a customer in the process of joining a service;***
- (b) all required reminder messages sent to a customer;***
- (c) a detailed transaction history indicating all charges levied and the service or content item applicable for each charge; and***
- (d) any record of successful or unsuccessful service termination requests.***

8. It is noted by the Appeals Panel that the WASPA Secretariat had corresponded with Opera Telecom during the course of the complaint and had stated as follows:

“As the aggregator of this WASPA member you have the choice to allow the relevant Affiliate member to respond to this complaint, or also to provide a response from the aggregator’s point of view”.

9. It is likely that the adjudicator would have reviewed this correspondence between WASPA and the aggregator as the correspondence formed part of the bundle of documents submitted to the adjudicator.
10. The adjudicator upheld the complaint against the appellant only and issued the following sanctions against the appellant:
- 10.1 payment of a fine of R50 000;
 - 10.2 the suspension of all campaigns until the appellant’s log process is rectified and successfully tested by the WASPA Media Monitor.

Appeal submissions

11. The appellant lodged an appeal on 3 November 2015 against the adjudicator’s decision in terms of which it appealed the findings of the adjudicator as well as the sanctions imposed.
12. In the alternative, and in the event that the appeals panel dismisses the appeal against the findings, the appellant then specifically appeals the sanctions imposed.

13. No appeal was lodged by the aggregator, nor was any appeal or cross appeal lodged by WASPA against the adjudicator's failure to uphold any complaint against the aggregator directly. Prior to considering the merits of the appellant's appeal, some discussion of the purpose and wording of clause 7.5 of the Code, the nature of the role of aggregation service providers and the WASPA appeals process itself is provided below.
14. Clause 7.5 of the Code provides a means for WASPA (and complaint adjudicators) to audit whether all required messages were sent and whether transactions were validly concluded. Where a member who is a party to a complaint ("the first member") makes use of the technical services of another member ("the second member"), and where the first member does not itself retain auditable logs but where the second member does, and where the second member is formally cited as a party to the complaint, then those records should be submitted by the second member in the course of a complaint (either directly to WASPA if the member so chooses or indirectly via the first member acting on the second member's behalf in responding to the complaint). In light of the purpose of clause 7.5, this is the interpretation that the appeals panel believes should be given to the words appearing in clause 7.5 stating that: ***"Members must provide WASPA with any customer records relating to any service which is the subject of a complaint..."*** This must be the case because the second member has both possession of the records and has been cited as a party to the complaint.
15. The appeals panel has noted that the WASPA Secretariat notified Opera Telecom that it had the *choice* of responding directly or allowing the affiliate member to respond. The appeals panel is of the view that the choice of the second member is a choice to either respond directly to the complaint (i.e. in person) or to stand by any response submitted by the first member. Notwithstanding this choice, substantive compliance with 7.5 nonetheless remains mandatory and that where the second member chooses not to respond directly, it makes that choice at its own risk of the affiliate member not furnishing the necessary information that is required by clause 7.5.
16. It appears from paragraph 2 of the appellant's appeal document that Odori Tech lodged its appeal with the "support" of Opera Telecom. Paragraph 2 of the Appeal document states as follows:
- "This appeal is lodged by Odori Tech, being the only party against whom the Adjudicator has imposed a sanction(s). Opera Telecom, as the aggregator, does not formally appeal the adjudication but supports Odori Tech in its appeal process. Wherever reference is made to actions, omissions or opinions of Opera Telecom, it is done so with Opera Telecom's knowledge and approval."***
17. Section 24.57 of the Code provides that:
- Once WASPA has been notified that a party wishes to appeal a decision, the relevant member (and the appealing party, if this is not the member) has fifteen***

(15) working days to supply WASPA with any additional information deemed relevant to the complaint. An extension to this time period may be given at the discretion of WASPA.

18. It is not clear whether section 24.57 would place a positive duty on Opera Telecom (as a relevant member, but not itself the appealing party) to furnish its logs on appeal as additional information that should be deemed relevant to the complaint and whether any failure to do so would itself amount to a potential breach of section 24.57 of the Code. That is not an issue for this appeals panel to decide. It is apparent that Opera Telecom has not appealed the adjudicator's decision and WASPA has chosen not to appeal against the adjudicator's decision not to uphold any breach against Opera Telecom (as it would have been entitled to do in terms of section 24.69). Opera Telecom is therefore quite clearly not a party to this appeal and further consideration of the merits of the appeal below is therefore limited to a review of the adjudicator's findings only insofar as they relate to the appellant with due regard for the submissions made by the appellant itself as well as WASPA's responses to those submissions in terms of clause 24.58.
19. In the grounds of appeal against the adjudicator's findings, the appellant stated that:
 - 19.1 It has been a registered member of WASPA since 3 March 2014 and during that time it has had no formal complaints made against it.
 - 19.2 It was not clear on what WASPA considers to be "complete" proof of subscription and what exactly was being requested of it.
 - 19.3 It had advised WASPA of its proof of subscription process and again stressed that Double Opt- In original logs are kept by the relevant Network Operator, but that it would request anything that WASPA requires. This clearly shows its willingness to co-operate and address WASPA's concerns.
 - 19.4 WASPA did not respond with any further request.
 - 19.5 Of the Double Opt-In process, the first opt-in request is hosted by the member while the second is hosted by the relevant network operator in all instances of subscription. It is therefore, in theory, impossible for any member to provide "complete" logs unless they obtain the second opt in record from the relevant network operator.
 - 19.6 What the adjudicator did not include in their report was that the appellant had stated to WASPA that they are willing to request these records from the networks and provide it to WASPA. However WASPA never responded. Again it being clear that the appellant was still trying to ascertain what exactly WASPA means by "complete logs" and was still co-operating with WASPA at all times.

- 19.7 It is very common in the industry that an aggregator sends “welcome” and “reminder” messages on behalf of the content provider. It reiterated this to WASPA and stated that any supplementary information or records required can be sourced from the aggregator, i.e. Opera Telecom. Again, no such request by WASPA or any response to the offer to supply this information was forthcoming.
- 19.8 Since April 2014 to August 2015, it has been providing the same format of logs to WASPA. It is only now that these logs are alleged to be incomplete.
20. In its appeal against the sanctions, the appellant stated that:
- 20.1 The fine amount was extraordinarily high considering that this was the first formal complaint ever lodged against the appellant; and the nature of the alleged breach does not directly harm or prejudice any member of the public.
- 20.2 The Appeals Panel was requested to consider previous adjudications where the amount of the fine imposed was smaller for breaches that were of a very serious nature and extremely harmful to the public directly. Reference was made to complaints 26752, 26483, and 26210.
- 20.3 Regarding the suspension of its services, it should be taken into account that no formal complaints have been made against the actual services and they have found to be compliant by the Media Monitor.
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Complainant’s response

21. The complainant responded, in terms of section 24.58 of the WASPA Code, to the appellant’s submissions on appeal as follows:
- 21.1 It confirmed that no other formal complaints have been filed against the appellant since the inception of their membership.
- 21.2 It also confirmed that the appellant had provided information on its services active in South Africa which was suitable for testing purposes shortly after receipt of the formal complaint. However, the member did not provide proper and complete logs.
- 21.3 It placed in dispute that the member may have been unable to upload logs to the WASPA unsubscribe query system and stated that it was not aware of any issue with the system.

- 21.4 It confirmed that the WASPA Code of Conduct clearly sets out what is required from a log so as to comply with the Code.
- 21.5 Regarding the member's argument that logs similar to those uploaded by it in this matter have previously been accepted by WASPA, this is not contested. However in this complaint, more complete customer records were requested but were not provided by the appellant.
- 21.6 WASPA only makes requests for customer records for services which are the subject of a complaint, and incomplete records mean that consumer queries cannot be resolved.
- 21.7 Regarding the quantum of the fine imposed by the adjudicator:
- 21.7.1 the complainant noted that there was no precedent for fines for breaches of clause 7.5 of the revised WASPA Code. However, a similar clause (11.10.2) appeared in pre-revision versions of the Code.
- 21.7.2 Most fines imposed for breaches of that clause incorporated other breaches and cannot be used as a comparison.
- 21.7.3 However, the ruling for complaint 21659 includes a sanction which is limited only to a breach of that particular clause and in that complaint, the 2 members in question were each fined R15 000.00.
- (See <http://www.waspa.org.za/code/download/21659.pdf>)
- 21.7.4 The complainant noted further that the fine imposed in that matter was based on the members' failure to provide complete logs relating to a specific consumer complaint, rather than a general failure on the part of the member to upload sufficiently detailed logs.

Deliberation and findings

22. The Appeals Panel has taken due notice of the fact that no formal complaints have been lodged against the appellant since the inception of its membership and that its services appear to be compliant with the WASPA Code of Conduct.
23. This particular complaint arose from circumstances where WASPA was not able to deal satisfactorily with customers' unsubscribe requests because complete logs of all the interactions with the relevant customers was not provided by the appellant.

24. Section 7.5 of the Code is clear on what information is required from a member when complaints are made by customers.
25. Although there are no provisions in the Code which expressly state what format and content must be included in the logs to be provided by members, it is clearly implied that the logs must contain the information that is required in terms of section 7.5.
26. It appears to not be in dispute that some of the information required from the member may need to be obtained from the relevant network operators or aggregators. However this does not detract from the appellant's responsibility to obtain this information and/or records in order to answer a request made in terms of section 7.5 or 24.24, as the case may be.
27. The Appeal Panel has also taken note of the logs now provided by the appellant as part of its "Appeal Document". With reference to Annexure C, which purports to be a log of the welcome and reminder messages sent to customers, it is clear from the face of this document that it is wholly inadequate and does not comply with the requirements of the Code.
28. In light of the foregoing, the adjudicator's findings that the appellant has breached the provisions of section 7.5 are upheld.
29. The appeals panel is also of the view that the adjudicator's referral back to WASPA of additional potential issues in terms of clauses 15.15 to 15.20 should remain undisturbed and open to WASPA to determine upon a review of all relevant information whether there is evidence of potential further breaches warranting further investigation.
30. With regard to the appeal against the sanctions imposed, the Appeal Panel does find that the sanctions imposed by the adjudicator are excessive, taking into account the following:
 - 30.1 this is the appellant's first offence;
 - 30.2 no complaints have been lodged against the subscription services themselves;
 - 30.3 the potential prejudice to members of the public is minimal.

Amendment of sanctions

31. The fine of R50 000.00 is reduced to R15 000.00, which is payable within 7 (seven) days of the appellant's receipt of this appeal panel report, and the suspension of the appellant's services is uplifted.
 32. A formal warning is also issued to the appellant to:
 - 32.1 ensure that it all logs pertaining to all interactions with its customers/subscribers, whether prepared and kept by itself or by its network operators or aggregators, serve as accurate and complete records of the information listed in section 7.5 of the Code; and
 - 32.2 ensure that any future requests for information or logs made received by it from the WASPA Secretariat are responded to timeously and in compliance with the requirements of the Code.
 33. Finally, the appeals panel requests that the Secretariat furnish a copy of this report to Opera Telecom as an interested party as well as to the WASPA Code Committee for due consideration of the points raised in paragraphs 13 to 18 above.
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Appeal fee

34. The appellant has been partially successful in its appeal and the appeals panel directs that a 50% reimbursement of the appeal fee be paid to the appellant.