

**WASPA appeals panel
Complaint 6219**

REPORT OF THE APPEALS PANEL

Date	20 August 2010
Information Provider (IP)	Avericomm Inc.
Service Provider (SP) and Appellant	Sybase 365
Complaint Number	6219
Code Version	7.0

1 INTRODUCTION TO THIS APPEAL

- 1.1 This appeal concerns the adjudication of a complaint lodged by the WASPA Media Monitor in April of 2009, for an advertising breach involving subscription services.
 - 1.2 The 'Name Analyser' service, which is the subject of the complaint, was provided by Avericomm Inc., the Information Provider (IP), a company based in the United States of America, through Sybase 356, the Service Provider (SP) and full member of WASPA.
 - 1.3 At the time of the complaint, the IP was an affiliate member of WASPA. At some time prior to this appeal being lodged, the IP ceased providing services in South Africa and terminated its WASPA membership.
 - 1.4 Between April 2009 when the complaint was lodged, and June of 2009, when the Media Monitor requested the complaint proceed to formal adjudication, WASPA and the WASPA Media Monitor communicated directly with the IP in an ongoing attempt to guide the IP to comply with the WASPA Code of Conduct (Code) and avoid the formal complaints procedure.
 - 1.5 During the two-month period mentioned above, the IP made certain improvements to its service with the result that the adjudicator's report speaks of breach, prior to and post, certain amendments being made to the service.
 - 1.6 Except for the initial communication of the complaint which was sent by WASPA to the SP on 14 April 2009, all communications thereafter, until 03 December 2009, when the adjudicator's report was provided to the SP, were between WASPA and the IP.
 - 1.7 The appeal has been lodged by the SP alone.
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2 APPROACH TO THIS APPEAL

- 2.1 The facts relating to this complaint are well documented. Precise details of the Media Monitor's test on the service have been provided to this appeal panel, together with a record of communications between WASPA, the IP and the SP.
- 2.2 As these, and the adjudicator's report, are available to the parties involved, they will not be repeated here in full. Certain findings and sanctions of the adjudicator have been repeated below for ease of reference.
- 2.3 The appeal panel will focus below on the appeal documentation provided by the SP.
- 2.4 The reason for this is that the SP has provided, in three documents, the first and second, being letters 10 and 29 December 2009 and the third, an undated document headed 'Supplementary Submission by Sybase 365', a complete record of the events. The latter document consolidates the events and in many respects, provides additional information.
- 2.5 It is the panel's view that this appeal can best be dealt with by systematically working through the SP's appeal documentation and this is the approach followed below.
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3 FINDINGS AND SANCTIONS OF THE ADJUDICATOR

- 3.1 *Findings on the Complaint*
- 3.1.1 The adjudicator found that sections 4.1.1 (honest and fair dealings with customers), 6.2.5 (price to be easily and clearly visible), 6.2.12 (c) (price for initiation of subscription services to be directly in the text of the WAP link or, adjacent), and 11.1.2 (request for subscription service to be independent and not linked to a specific content item) of the Code had been breached at the time of the complaint.
- 3.1.2 The IP continued to breach section 11.1.2 thereafter, while the other sections were no longer breached due to the amendments made by the IP under the guidance of WASPA.
- 3.2 *Adjudicator's Assessment*
- 3.2.1 In a lengthy sanctions section of the report, the adjudicator records that:
- 3.2.1.1 The method of subscription that applied prior to the IP amending the subscription process constituted an extremely serious breach of the Code.
- 3.2.1.2 It was important that the SP educate foreign-based IPs regarding the Code.

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- 3.2.1.3 Breaches such as these cause harm to consumers and the wireless application service industry as a whole.
- 3.2.1.4 In consideration of appropriate sanctions, the adjudicator had reference to complaints number 4335, 4336 and 5165, which had 'been upheld against the SP [and its customers (sic)] previously'.
- 3.3 *Sanctions imposed*
- 3.3.1 The sanctions section of the adjudicator's report is comprised of five parts, as follows:
- 3.3.1.1 Part 1 - Directions to the SP
- immediately suspend the service and all billing
 - pay a fine of R100,000.00 to WASPA within five days
 - pending full compliance with Part 3, withhold payments due to the IP, retain all revenue received from any cellular network operator in respect of the service and send an SMS to all subscribers of the service, advising them that the service has been suspended due to breach of the Code
- 3.3.1.2 Part 2 - Sanctions in Part 1 may not be suspended pending appeal
- part one sanctions in force on publication of the adjudicator's report
 - if any appeal is successful, then the fine must be refunded by WASPA to the SP
- 3.3.1.3 Part 3 - Further directions to the SP
- furnish monthly statements of account to WASPA
 - authorise WASPA to verify and audit statements
 - send an SMS to all subscribers, advising them of suspension due to breach of the Code and advising them of their right to claim a refund
 - issue a "blanket" refund to all subscribers
 - how IP revenue held by the SP should be dispersed
 - pay to WASPA, a fine of either 100% of revenue due to the SP from the service or R100,000.00, whichever is the greatest
 - pay to WASPA a fine of 100% of revenue due to the IP from the service or R100,000.00 to be collected from the IP

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- 3.3.1.4 Part 4 - Instructions relating to shareholding and control
 - 3.3.1.5 Part 5 - Ongoing suspension of the service
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4 THE SERVICE PROVIDER'S APPEAL

- 4.1 *Letter dated 10 December 2009*
 - 4.1.1 This letter addressed to WASPA, requests a review of the adjudicator's report and records that:
 - 4.1.1.1 The SP does not directly contract with customers for mobile services, and does not itself provide the services which are the subject of the complaint.
 - 4.1.1.2 The services are provided by the IP.
 - 4.1.1.3 That the letter is to serve as a request for a review of the adjudicator's decision and the sanctions imposed.
 - 4.1.1.4 The sanctions in the adjudicator's report are being capable of suspension pending appeal.
 - 4.1.1.5 The SP had suspended the relevant accounts for the services and would retain revenues as instructed by the adjudicator.
 - 4.1.1.6 Section 13.4.2 of the Code provides guidance on sanctions that can be specified as not capable of suspension pending appeal. Neither fines nor communications sent to customers are included and can therefore be suspended.
 - 4.1.1.7 In relation to communications to be sent to customers, the SP, which does not provide the services to customers, does not have a list of customers and would need to rely on the IP to send communications as instructed by the adjudicator.
 - 4.1.1.8 To date, the SP had not received an invoice from WASPA for the fine imposed by the adjudicator.
 - 4.1.1.9 Given the above, the SP requests that the sanctions be suspended pending appeal.
 - 4.1.1.10 The SP intends to submit a formal request for appeal, specifying further relevant detail and requests confirmation of receipt of this letter by WASPA and confirmation of the date by which further appeal information is due.
 - 4.2 *Letter dated 29 December 2009*
 - 4.2.1 This letter addressed to WASPA repeats much of the content above and is included in the table below.
 - 4.3 *Undated 'Supplementary Submission by Sybase 365'*

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4.3.1 The table below details the content of SP's letter of appeal alongside the relevant provisions of the Code and the panel's assessment and findings.

We considered this to be necessary and useful in light of the arguments raised by the parties concerning liability and process, and particularly in light of the timing of the various activities including the IP's departure and the SP's interaction with WASPA.

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Ref. In Appeal Document	Appeal Submission	Relevant Section of Code and ECT Act	Appeal panel Findings
I. Overview A. Introduction	The IP welcomes the opportunity to make a supplementary submission and records that it is a global leader in mobile messaging services, committed to a properly regulated, well functioning wireless industry in South Africa.		
B. Current Procedural Position	<p>On 3 December 2009, the SP was informed by WASPA that the adjudicator's report had been published on the WASPA website.</p> <p>On 10 December 2009, the SP addressed a letter to WASPA requesting a review of the adjudicator's decision, specifically in accordance with 13.6.1 (sanctions not capable of suspension pending appeal).</p> <p>The SP requested confirmation of receipt of the letter by WASPA which was not received.</p> <p>29 December 2009, the SP sent email to WASPA, setting out additional information envisaged under section 13.6.2.</p> <p>Due to WASPA having no record of the appeal requests or documentation from the IP, WASPA offered the SP the opportunity to make supplementary submissions.</p>	<p>13.6.1. Any member found to have breached the Code of Conduct 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.</p> <p>13.6.2. Once the secretariat has been notified that a member wishes to appeal a decision, that member has ten working days to supply the secretariat with any additional information it deems relevant to the complaint.</p>	<p>The SP is the only appellant in this matter and has been accorded the rights detailed in 13.6.1 and 13.6.2. of the Code.</p> <p>WASPA has confirmed the facts set out by the SP. Specifically, that the additional submissions were requested and allowed. These have been reviewed by the panel.</p>
C. Action taken in relation to issues	The SP confirms it suspended the relevant accounts for the services.	13.4.2. When determining sanctions, the adjudicator should take note of 13.3.15, and	The panel finds that the SP complied with the adjudicator's directions with

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<p>raised in the adjudicator's report</p>	<p>The SP confirms it suspended payments of all amounts owed by it to the IP and retained all revenue to be paid to the IP.</p> <p>The SP confirms it complied with the adjudicator's sanctions, as far as it was able.</p> <p>The SP states it had not received an invoice from WASPA for the fine of R100,000 due in terms of clause 1.2 of the sanction section of adjudicator's report.</p> <p>The SP had recently received an invoice from WASPA for the appeal free of R10,000, which would be paid shortly.</p> <p>The SP was no longer conducting business with the IP.</p>	<p>specify any sanctions that will not be suspended if an appeal is lodged. Sanctions that can be specified in this way include:</p> <p>(a) Sanctions requiring a member to amend, suspend, or terminate a service being offered in breach of the Code of Conduct;</p> <p>(b) Any sanctions imposed as a result of the failure of a member to comply with previous sanctions, as specified in 13.3.16.</p>	<p>regard to suspension of accounts and retention of revenue.</p> <p>It is unknown how much money has been retained. The adjudicator's sanction related to revenue due to the SP and to the IP. The panel was not informed as to the total amount of revenue generated from the service.</p> <p>WASPA has confirmed that it instructed its accounts department to issue an invoice to the SP for the R100,000.00 fine which the adjudicator said was not capable of suspension pending appeal, but that it did not pursue payment of the amount.</p> <p>No negative inference is drawn as the panel finds that section 13.4.2 allows fines to be suspended pending appeal. Similarly, communications to be sent to customers.</p> <p>The panel does not consider it necessary, having regard to the facts, for the SP to refund customers, however this should be read with our general comments, below.</p>
<p>II. Factual Background I. Parties involved</p>	<p>The SP is a WASP that does not directly contract with customers and did not provide the services.</p> <p>The IP is a company incorporated in Nevada, USA and was until recently, an affiliate member</p>	<p>2.13. An "information provider" is any person on whose behalf a wireless application service provider may provide a service, and includes message originators.</p> <p>2.16. A "message originator" is the entity</p>	<p>The definition of a "wireless application service provider" (WASP) in the Code, makes no distinction between directly contracting with customers or not. The SP is a WASP and is bound by the</p>

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	<p>of WASPA.</p> <p>The IP was responsible for the services which were the subject of the complaint, including the creation and transmission of content and all marketing and associated sales activities.</p> <p>SP is a 'mere conduit', as detailed under section 73 of the Electronic Communications and Transactions Act, 25 of 2002 (ECT).</p>	<p>sending a commercial message and can be any person with a commercial arrangement with a WASP to send commercial messages, or a WASP directly.</p> <p>2.25. 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.</p> <p>3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.</p> <p>3.9.2. The member may suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.</p> <p>3.9.3. 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.</p>	<p>Code.</p> <p>While membership of WASPA is voluntary, once a member, including affiliate member, every WASP is bound to comply with the Code.</p> <p>The IP in this case was an "information provider" and a "message originator" as defined in the Code. The IP was not bound to become a member of WASPA, but did so apparently, as part of an agreement entered into with the SP (see below). Having done so, the IP was bound, in its own right, to comply with the Code, and became subject to the jurisdiction of WASPA.</p> <p>The panel does not agree with the SP's contention, made in its letter of 29 December 2009, that where an IP is a member of WASPA, any procedures initiated under the Code are administered directly between the IP and WASPA, without out recourse to the SP. More information on the relationship between SPs and IPs is provided below.</p> <p>The fact is that WASPA and the SP continued to communicate regarding this complaint even after the departure of the IP. Furthermore, the adjudicator found the SP to be a party to the breach and the SP lodged the appeal. These</p>
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			<p>facts prove that administrative procedures continued between WASPA and the SP.</p> <p>The panel is of the view that the SP did comply with section 3.9.1 of the Code by inter-alia requiring the IP to become a member of WASPA. We find also that the SP complied with sections 3.9.2 and 3.9.3 of the Code. These findings will be considered mitigating factors.</p> <p>The SP's contention that it is a "mere conduit" is not accepted. See below.</p>
<p>B. Agreement between the SP and the IP</p>	<p>The SP states that it seeks to ensure that all its customers comply with regulatory obligations. This is done through inter-alia, specific provisions in contracts, which include the requirement that the customer of the SP becomes a member of WASPA.</p> <p>The contract between the SP and the IP is set out in a Messaging Services Agreement, in which the SP's controlled short code is made available to the IP and through which the IP can direct the traffic to customers.</p> <p>In terms of the agreement, the IP is obliged to abide by the Code and 'associated documentation' in SA.</p> <p>The SP provides a graphical representation of the SMS message distribution chain, showing the IP accessing mobile services in South Africa through the SP and mobile operators through to</p>	<p>Above.</p>	<p>The panel has not had sight of an agreement between the SP and the IP.</p> <p>Nevertheless, it is clear from correspondence provided to this panel between WASPA and the IP, that the IP did become is a member of WASPA and that correspondence regarding the complaint was between WASPA and the IP.</p> <p>Apart from the initial notification of the complaint, which was redirected to the IP, the SP was not involved in any communications regarding the complaint, until receipt of the adjudicator's report, inculcating the SP in December, some eight months after the initial complaint.</p> <p>The panel is of the view that regardless</p>

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	customers.		<p>of the IP's obligations under the Code, the SP has its own obligations to assist in terminating services that breached the Code.</p> <p>The panel is not sure what is meant by "associated documentation". This point has been excluded from our findings.</p>
<p>III. Chronology of events and SP's involvement prior to supply of the adjudicator's report to SP on 3 December 2009</p>	<p>14 April 2009, WASPA informs SP of formal complaint.</p> <p>14 April 2009, SP asks WASPA to redirect complaint to IP.</p> <p>14 April 2010 [typo should read 2009], WASPA confirms to SP that complaint has been redirected to IP.</p> <p>23 October 2009, adjudicator issues report.</p> <p>3 December adjudicator's report is provided to SP.</p> <p>Prior to 3 December 2009, the SP had no involvement in any response, submitted by the IP to WASPA.</p> <p>The adjudicator's report states that the complaint was responded to by the IP.</p>		<p>The service was provided through the combined efforts of the SP and IP. Both were members of WASPA. Each was individually bound to comply with the Code.</p> <p>Given the ongoing relationship between the SP and the IP, the panel believes that the adjudicator was correct in involving the SP in the complaint.</p> <p>As will be seen below, the panel differs from the adjudicator regarding the sanctions imposed.</p>
<p>IV. Adjudicator's report and SP's letter of 29 December 2009</p>	<p>The adjudicator imposed sanctions on the SP despite having dealt directly with the IP.</p> <p>The SP responded under section 13.3.4 (member given five working days to respond to complaints and provide additional information) of the Code.</p>	<p>13.4.1. Possible sanctions that may be imposed on a member found to be in breach of the Code of Conduct are one or more of the following:</p> <p>(a) a requirement for the member to remedy the breach;</p>	<p>WASPA and the Media Monitor, had advised the IP as a member of WASPA to remedy that breach. WASPA and the Media Monitor nevertheless continued to guide the IP in an effort to reach compliance with the Code.</p>

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	<p>The SP states that breaches were the result of the IP's conduct.</p> <p>The service used WAP pages controlled by the IP.</p> <p>It was difficult to see how the SP could have controlled the IP differently. Particularly given that the SP was reliant on the IP for the supply of relevant information relating to the service.</p> <p>Section 13.4.1, 13.4.2 and 13.4.3 of the Code detail possible sanctions for breach.</p> <p>The SP contends that the adjudicator appears to apply a hybrid of sanctions drawn from 13.4.1 and 13.4.3.</p> <p>13.4.3 includes advising the relevant network to take action.</p> <p>With reference to earlier complaints number 4335 and 4336, the SP contends it was the respective IPs in the particular complaints and not the SP that were sanctioned.</p> <p>The adjudicator directed the SP to immediately suspend the services.</p> <p>There was significant delay between the complaint (14 April 2009), the publication of adjudicator's report and its availability to the SP (3 December 2009).</p> <p>During this time, the SP believed the service to be in compliance with the Code, given WASPA's guidance.</p>	<p>(b) a formal reprimand;</p> <p>(c) an appropriate fine on the member, to be collected by WASPA;</p> <p>(d) a requirement, in appropriate circumstance, for the member to pay reasonable and valid claims for compensation;</p> <p>(e) suspension of the member from WASPA for a defined period;</p> <p>(f) expulsion of the member from WASPA;</p> <p>(g) a requirement for the member to disclose the identity of any information provider found to be acting in breach of this Code of Conduct;</p> <p>(h) a requirement for the member to suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct;</p> <p>(i) a requirement to withhold a specified amount or portion of money payable by the member to the information provider.</p> <p>13.4.3. In addition, possible sanctions against a member in breach of the Code include advising the relevant network operators to do one or more of the following:</p> <p>(a) block a member's access to a specific number for a defined period;</p> <p>(b) block a member's access to a specific</p>	<p>Following the formal complaint, the adjudicator imposed fines on both the IP and the SP, ordered suspension of the service and threatened termination of membership.</p> <p>Additionally, the adjudicator instructed the SP to pay monies received as revenue from the service, which was due to the SP and the IP, to WASPA as fines.</p> <p>The panel agrees that while the adjudicator is empowered to do all of the above, it differs from the adjudicator regarding the sanctions to be imposed.</p> <p>In regard to section 13.4.3, which allows an adjudicator to advise network operators to assist in instances where the Code has been breached, the adjudicator made no findings and issued no instructions to network operators to terminate the service.</p> <p>The fact of the matter is that the IP, as a US organisation, while subject to the jurisdiction of WASPA, through voluntary membership, escapes enforcement of sanctions, having withdrawn from the SA market.</p> <p>In the panel's view, this is the reason that South African SPs are held to so high a degree of accountability. It is SPs</p>
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	<p>Other sanctions exceed the ambit of both sections 13.4.1 and 13.4.3.</p> <p>Sanctions appear excessive in light of timing and inappropriate in relation to other adjudicator reports.</p> <p>The complaint was dealt with directly between WASPA and IP, any sanctions imposed should be imposed against the IP.</p> <p>The SP would comply with sanctions imposed under 13.4.3 and had already done so.</p> <p>Certain sanctions were detailed in the adjudicator's report as not being capable of suspension pending any appeal.</p> <p>The SP had suspended accounts and retained revenue as directed.</p> <p>SP was not able to send a communication to customers, because it did not provide the service and did not have a subscriber list.</p> <p>The SP had not received an invoice for payment of the fine.</p> <p>SP requested suspension of sanctions pending the appeal.</p>	<p>category of service for a defined period;</p> <p>(c) terminate a member's access to a specific number;</p> <p>(d) terminate a member's access to a specific category of service;</p> <p>(e) withhold a specified amount or portion of money payable by the network operator to that service provider;</p> <p>(f) pay some or all of withheld funds to WASPA, as an appropriate fine on the service provider;</p> <p>(g) issue a blanket refund to the customers of a service found to be in breach of the Code of Conduct.</p> <p>13.3.15. Unless otherwise specified in the adjudicator's report, any sanctions will be considered suspended if an appeal is lodged, until the appeal process is completed.</p> <p>13.3.16. If no appeal is lodged, or if the adjudicator has specified certain sanctions as not being suspended pending an appeal, the failure of any member to comply with any sanction imposed upon it will itself amount to a breach of the Code and may result in further sanctions being imposed.</p>	<p>that enable IPs to participate in the SA wireless market and it is SPs who should properly qualify and monitor IPs', their credentials, background, shareholding and services relation to consumer protection in SA.</p> <p>In essence, SPs' act as "qualifiers" for IPs to participate SA, if they fail in their duty of due diligence and due care, they, the SPs, will be held accountable.</p> <p>The panel is unable to change or to discount this accountability. It is able, to consider mitigating factors.</p> <p>The panel is of the opinion that the SP did a good deal to meet its obligations in terms of the Code.</p> <p>With reference to previous complaints, the adjudicator is directed under section 13.3.11 (a) and (b) of the Code to consider a member's previous record.</p> <p>Complaints 4335 and 4336 involve the same SP, but a different IP, against whom the adjudicator issued a formal reprimand in connection with subscription services. The panel does not consider these cases similar to the one under appeal.</p> <p>The adjudicator directed that the R100,000.00 fine was not capable of suspension pending appeal and must</p>
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			<p>be paid directly to WASPA.</p> <p>The panel accepts that the SP did not receive an invoice for this amount, and in the light of WASPA not pursuing payment, will not see this non-payment as a further breach of the code as envisaged under section 13.3.16.</p> <p>The panel is also of the opinion that fines are subject to suspension pending appeal.</p> <p>The other sanctions, quantum of fines, and the parties to whom they are directed will be dealt with below, under the panel findings.</p>
<p>V. Further submissions on complaints procedure and sanctions</p> <p>A. IP's appeal</p>	<p>On 10 and 29 December, when the SP submitted appeal information, it understood that the IP would do likewise, as entitled.</p> <p>The SP contacted the IP and understood that a notice of appeal was submitted to WASPA, on 10 December 2009, by a legal firm, acting on of the IP.</p> <p>The IP legal firm's correspondence, attached, confirms this.</p> <p>The legal firm claims to represent the SP also, which contention is denied by the SP.</p> <p>The IP advised the SP that due to lack of response from WASPA, no additional information was provided as envisaged under section 13.6.2 of the Code.</p>	<p>13.6.2. Once the secretariat has been notified that a member wishes to appeal a decision, that member has ten working days to supply the secretariat with any additional information it deems relevant to the complaint.</p>	<p>The panel does not see the relevance of the assumption that the IP also would appeal.</p> <p>The SP has exercised its right to appeal in terms of the Code.</p> <p>The IP chose to withdraw from the South African market. The IP escapes the enforcement of sanction, because of international jurisdictional issues.</p> <p>The involvement of the IP's legal firm becomes irrelevant. The panel accepts the firm does not act for the SP.</p> <p>The panel will treat the SP as a member of WASPA in the light of its involvement in this complaint, and give due</p>

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	<p>At some “intervening period”, the IP informed WASPA that it was ceasing all services in South Africa and WASPA enabled the IP to cease membership.</p>		<p>consideration to its appeal documentation.</p>
<p>B. Sanctions imposed on the SP</p>	<p>SP has already provided commentary on the sanctions in its letter of 29 December 2009.</p> <p>IP was an affiliate member of WASPA, and therefore directly bound by the Code.</p> <p>It is not true to suggest that the IP had no prior exposure to the Code, or, that the SP was bound to educate the IP.</p> <p>SP would no longer provide services to the IP, because it had terminated its WASPA membership.</p> <p>WASPA states on its website that wireless application service providers are in terms of chapter 11 of ECT “<i>considered to be providing an information system service and may therefore incur liability for their own and third party content they provide</i>”.</p> <p><i>Wasps cannot escape liability for their own original content, but where they act as a content aggregator or communication gateway providers they can avoid liability if they act in accordance with Chapter 11 of the ECT Act. The Minister’s recognition of WASPA as an industry body, as described in section 71 will allow WASPA members to enjoy the benefits afforded by the Act</i>”.</p>	<p>Chapter XI of ECT provides for the limitation of liability of service providers which are defined as “any person providing information system services”.</p> <p>Section 71, dealing with the recognition of a representative body provides in 71 (1) that the Minister may, on application by an industry representative body for service providers by notice in the Gazette, recognise such body for purposes of section 72 on certain conditions.</p> <p>Section 72 provides that the limitations on liability established by this Chapter apply to a service provider only if the service provider is a member of the representative body referred to in section 71 and the service provider has adopted and implemented the official code of conduct of that representative body.</p> <p>73. (1) provides that a service provider is not liable for providing access to or for operating facilities for information systems or transmitting, routing or storage of data messages via an information system under its control, as long as the service provider does not initiate the transmission, select the addressee, performs the functions in an automatic, technical manner without selection</p>	<p>With regard to the SP’s contention relating to the ECT Act, the simple fact of the matter is that the Minister of the Department of Communications has not yet recognised WASPA as a representative body. The result is that WASPs do not yet enjoy any limitation of liability as service providers.</p> <p>The SP’s contentions relating to the “guidelines for the recognition of industry representative bodies of information system service providers” are equally irrelevant.</p>

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	<p>The SP is a mere conduit under section 73 of the ECT act and fulfils the criteria detailed in section 72 of the Act.</p> <p>As a ?, and by adopting and implementing the Code, the SP is afforded the specific protection detailed in section 73 (1) of ECT.</p> <p>Since WASPA's Code is approved in terms of the ECT Act, it follows that the SP is exempt from liability for breach of the Code by any other WASPA member.</p> <p>Section 78 of the ECT Act states that there is no general requirement on SP's to monitor the data it transmits for its customers or whether its customers are transgressing the law.</p> <p>Regulations entitled "guidelines for the recognition of industry representative bodies of information system service providers", published in terms of chapter 11 of the ECT Act with the aim of assisting bodies like WASPA on the minimum requirements for their existence, recognises that such bodies must not adversely affect the economic viability of service providers.</p> <p>Under the disciplinary procedure, which the guidelines recommend, the sanctions do not include the levying of financial fines.</p>	<p>of the data, and does not modify the data contained in the transmission.</p>	
<p>Attachment is to the SP's appeal document</p>	<p>Copy of email dated 10 December 2009, sent from Itzeck Incorporated to WASPA provided by SP.</p>		

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	<p>There is an attachment, but no content to the body of the e-mail.</p> <p>Notice is provided that Itzeck Inc. does not accept service of documents by -mail or electronic means.</p>		
	<p>Attachment to Itzeck Inc's. email above claims that the Firm acts on instructions of SP and IP.</p> <p>Notification of intention to appeal the decision and sanctions imposed by the adjudicator.</p> <p>Request for requisite procedure for payment of the appeal free.</p> <p>Confirmation that the appeal has been received and lodged timeously.</p> <p>Request for advice on how the upcoming festive season would affect interpretation and calculation of the ten working days required to submit the appeal.</p> <p>Reservation of client's rights.</p>		<p>The IP was afforded the appeal rights detailed in 13.6.1 and 13.6.2 of the Code, but waived these and withdrew from the SA market.</p> <p>The panel accepts that Itzeck Inc. did not act, for the SP. The Firms involvement in this matter is irrelevant to this appeal unless they intend to satisfy the findings made against the IP.</p>

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5 FINDINGS AND DECISION OF THE APPEAL PANEL

5.1 *Findings of the appeal panel*

5.1.1 There is no dispute regarding the sections of the Code breached initially, nor the fact that section 11.1.2 continued to be breached to a lesser extent, two months after the initial complaint.

5.1.2 The IP has withdrawn from the South African market and effectively escapes the enforceability of sanction. To the extent that the SP and IP had any agreement between them, there is no reason why that agreement could not have provided for recompense or remedy in this event as well – the foreign character of the IP being an obvious factor in the relationship and therefore an obvious risk.

5.1.3 The questions to be decided by this panel are: (i) the liability of the SP and (ii) the appropriateness of the sanctions imposed. The latter is dealt with in the panel's decision at section 5.2, below.

5.1.4 *The relationship between a SP and an IP*

5.1.5 The relationship between a SP and an IP is not new in relation to wireless application services. A SP who has the primary contracting relationship with a mobile network operator, will frequently engage an IP to provide content for transmission over the network.

5.1.6 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.*"

5.1.7 Section 3.9.1 of the Code 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*".

5.1.8 The SP is a member of WASPA. Even where the IP becomes a member of WASPA, the SP does not escape and cannot delegate accountability. The obligation to comply with the Code and to ensure that the IP also complies, rests with the SP.

5.2 *Decision of the appeal panel*

**WASPA appeals panel
Complaint 6219**

- 5.2.1 The sanctions imposed by the adjudicator are replaced with following on the basis of the specific facts and careful consideration of the weight of liability and the SP's good faith attempts to remedy:
- 5.2.1.1 All monies retained by the SP, which were due to the IP from the service, are to be paid to WASPA as a fine for breach of the code by the IP since the IP abandoned any appeal and left the country, thereby arguably abandoning any claim to revenue it earned (in breach of the Code) whilst operating in South Africa.
- 5.2.1.2 The SP is directed to provide WASPA with records of revenue from the service due to IP.
- 5.2.1.3 Any monies owing to the network must be paid if they have not already been paid.
- 5.2.1.4 None of the other sanctions of the adjudicator are relevant or need enforcement.
- 5.2.1.5 The fine is reduced to R50,000.00 payable by the SP in relation to breaches of the Code by the IP, for which the SP remains liable. We have decided that the fine should be reduced not because we do not regard the breaches as serious, but because the other findings made against the SP were in fact not relevant to the determination in this case. The breach of section 11.1.2 which continued (separate request for content) is sufficiently serious to warrant a fine, but not, in our view, on these facts, of the amount imposed by the adjudicator.
- 5.3 The appeal fee is not refundable.