

## **REPORT OF THE ALTERNATIVE APPEALS PANEL**

**Date:** 25 February 2007  
**Service Provider (SP)** Cointel VAS (Pty) Ltd (Cointel)  
**Information Provider (IP)** Telerotica  
**Complainant:** Consumer  
**Complaint Numbers:** 0164  
**Code version:** v3.2

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### **1 INTRODUCTION TO THIS APPEAL**

- 1.1 This appeal concerns the adjudication of a complaint by a member of the public, against the Service Provider (SP), Cointel VAS (Pty) Limited (Cointel), a member of WASPA. The Information Provider (IP), Telerotica, was cited but has not responded to the complaint with the result that the SP is the Appellant in this matter.
- 1.2 The Report of the Adjudicator is dated 21 November 2006. The subject matter of the complaint relates to a possible breach of two of the provisions of the WASPA Code of Conduct (the Code), more specifically Section 11.1.7 dealing with subscription services and Section 5.2 dealing with unsolicited commercial communications, i.e. spam. The applicable version of the Code is Version 3.2 which was valid from 01 September 2005 to 20 April 2006.
- 1.3 The Appeals Panel have adopted an informal structure and the findings made are set out below as follows:
- Part 2: Summary of the complaint and the response;
  - Part 3: Summary of the relevant sections of the Code;
  - Part 4: Summary of the Adjudicator's decisions;
  - Part 5: The SP's grounds of appeal; and
  - Part 6: Findings of the appeals panel.
- 1.4 For the sake of the participants in this matter and readers in general, we record that it is not the role of the appeals panel to start the enquiry anew, but only to review the facts which are brought before it by the WASPA Secretariat.
- 1.4.1 One of the two provisions forming the subject matter of this complaint relates to an apparently unsolicited communication offering adult content. The Adjudicator accepted the SP's contention that the communication was not unsolicited due to a prior relationship with the complainant as per Section 5.2 of the Code. The appeals panel did

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however request the SP to provide proof of the prior relationship and have chosen to include the provisions of the Code which deal with unsolicited communications in this appeal in order to more fully illustrate the application of the Code and how it seeks to protect the public.

- 1.4 1. 1            In summary, the Code aims to confirm to a subscriber that they have in fact subscribed to a service, to require an advertiser of a subscription service to advertise the nature and price of that service, to allow a subscriber a means of unsubscribing, and to refrain from contacting persons who have not subscribed to a particular service.
- 1.5                In spite of the fact that it is not the role of the appeals panel to start the enquiry anew, the panel records that in coming to a decision in this appeal, the additional material provided by the SP for the purposes of this appeal was not only taken into account, but was in fact material to the findings as this additional material has shown how the SP came to subscribe the complainant by misconstruing the complainants use of the word “on”. Given the fact that this material was provided by the SP in line with the procedure of the Code, the panel has not acted *ultra vires*.
- 1.5                We record in addition that there is no right for a review of the appeals panel decision.

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**2        SUMMARY OF THE COMPLAINT AND THE RESPONSE**

2.1                *The Complaint*

2.1.1             The complaint was lodged by a member of the public and submitted to the WASPA Secretariat via the online web form on 08 February 2006.

2.1.2             The complaint was made against “*OtherID: 0839200132 and 0725918046 and 36116*”, subsequently identified as Cointel and <http://196.34.38.99/telerotica/default.aspx?eid=993619534969355>, being Telerotica.

2.1.3             The complaint provides as follows:

*“Code\_Breached: I do not want to receive ANY sms from these companies. They are also taking money for their service which I obviously did not want. They do not give me their contact details so that I can stop it. They did not read my responce on their first sms, in which I specifically sended them to hell and told them not to contact me again”;*

*“Detailed\_Description\_Complaint: I received a sms on monday 6 Feb 2006 about some sex service. I responded by sending a sms*

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*telling them not to ever contact me again. (my cell phone numbers are X and Y [changed to protect privacy of complainant]). They responded by thanking me for my response and started sms messages shortly after. When I respond to the code, i receive porn pictures, but no damn web page or e-mail to which I can cancell this rubbish. I contacted my service provider MTM and they reverred me to you as they could not help me. They did however tell me that i was paying for the sms services whether i wanted to or not. That to me is theft from the porn company sending me the sms. Please help me to stop any porn company from sending me a sms”;*

and furthermore, on 14 February 2006;

*“I would like to thank you for the attention given in this matter. I am still receiving daily porn messages. I would like you to inform the porn company that I would claim all money back that this has cost me as well as all my time spend to trace and complain about them. I will contact you again as soon as I receive my accounts”.*

2.2        *The Response*

2.2.1        The SP response was as follows:

*“In reply to complaint #0164:*

*Please be advised that the complainant has had a recent prior commercial relationship. Furthermore the client did not follow the correct process to de register that was available therefore the complainant kept receiving messages sent to her due to the tag words received by our systems”;* and

2.2.2        The SP provided the following logs:

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MO	MSISDN	MO Number	Message	Date/Time	SP Comments
	X	27839206138	Dante1252	4/12/2006 12:30	
	X	27839206138	Dante1243	4/12/2006 12:29	
	X	27839206138	Dante1238	4/12/2006 10:34	
	X	36116	□□□□if you ever dare sent that message to me again,you will have more hell <b>on</b> this earth than you can imagine. I pray that God gives each one of you a sickne	2/6/2006 10:39	Based on the word " <b>ON</b> " in her SMS she was subscribed to the Babes service
	X	36116	□□□□ss that will make you scream of pain every moment!	2/6/2006 10:39	
	X	27839200132	□□□□if you ever dare sent that message to me again,you will have more he <b>on</b> this earth than you can imagine. I pray that God gives each one of you a sickne	2/6/2006 10:38	
	X	27839200132	□□□□ss that will make you scream of pain every moment!	2/6/2006 10:38	

3 **SUMMARY OF THE RELEVANT SECTIONS OF THE CODE**

3.1 Section 1.2 of the Code provides that the primary objective of the WASPA Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services.

3.2 Two Sections of the Code are relevant to this appeal: Section 5 provides for commercial communications and Section 11 provides for subscription services. These will be dealt with in turn below.

3.3 Section 5.1 of the Code deals with sending commercial communications and provides that:

3.3.1. *5.1.1 All commercial messages must contain a valid originating number and/or the name or identifier of the message originator.*

*5.1.3. Where feasible, customers should be able to unsubscribe from any subscription service using no more than two words, one of which must be 'STOP'.*

3.3.2 Section 5.2 of the Code deals with the identification of spam (unsolicited commercial communications) as follows:

*5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:*

*(b) the message recipient has a direct and recent prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator.*

3.4 Section 11.1 provides for the manner of subscription as follows:

3.4.1 *11.1.1 Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services".*

*11.1.7. Once a customer has subscribed to subscription service, a notification message must be sent to the customer containing the following information:*

*(a) The cost of the subscription service and the frequency of the charges;*  
*(b) Clear and concise instructions for unsubscribing from the service;*

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(c) *The member's contact information.*

3.4.2 Section 11.2 provides for customer support as follows:

3.4.2.1 11.2.1 *Assistance, such as 'help' information, for subscription services must be easily available to customers, and must not be limited to a medium that the customer is unlikely to have access to.*

3.4.3 Section 11.3 of the Code provides for termination of a service as follows:

3.4.3.1 11.3.1. *Instructions on terminating a subscription service must be clear, easy to understand, and readily available.*

11.3.3. *Where feasible, customers should be able to unsubscribe from any subscription service using no more than two words, one of which must be 'STOP'.*

11.3.4. *Members must ensure that the termination mechanism is functional and accessible at all times.*

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#### 4 DECISION OF THE ADJUDICATOR

##### 4.1 *Adjudicator's Decision*

4.1.1 While noting that there was "some dispute" as to whether the complainant had subscribed to the service or not, the Adjudicator decided to accept the SP's version that the "consumer did in fact activate a subscription to the service" without calling for evidence of this prior relationship.

##### 4.2 *Adjudicator's Findings*

4.2.1 The Adjudicator found that it was "clear" from the message logs provided by the SP that the requests to unsubscribe would not have succeeded as they did not contain the keywords required to be automatically unsubscribed from the subscription.

4.2.2 The Adjudicator found that based on the logs provided by the SP, "no notice was given to the consumer on how to unsubscribe from the service".

4.2.3 The Adjudicator found further that the SP had not produced any evidence of sending any messages as required by Section 11.1.7 of the Code terminating subscription services.

4.2.4 The Adjudicator accordingly upheld the complaint of a breach of Section 11.1.7 of the Code.

##### 4.3 *Sanction*

- 4.3.1 The Adjudicator imposed a fine of R3 000 for breach of Section 11.1.7 of the WASPA Code of Conduct.

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**5 GROUNDS OF APPEAL**

- 5.1 On 12 December 2006 the SP lodged an appeal against the Adjudicator's decision stating that they had "omitted to send the Message Termination (MT) report which "clearly stated that the customer did receive information about the service and how to unsubscribe using various mediums as required in Section 11.1.7.
- 5.2 In support of the above statement, the SP provided the following MT logs:



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MSISDN	Message	Date/Time	From	Customer	SP Comments
X	Cell numbers of women open about wanting sex. No cash involved. Get their numbers. Make contact. Nationwide. Sms XXXSEND to 36116 @R5 or sms STOP to 0725918046.	2006/02/06 10:01:12	27839200132	Equipsecurities	
X	0B05040B8423F0003840101AE0601AE02056A 0045C60C033139362E33342E33382E39392F54 656C65726F746963612F64656661756C742E617 370783F4549443D393931393936343933393539 X 353136393338323533300010342303031000101	2006/02/06 10:40:05	27839209130	36116 Babes Subscription	Content Sent
X	Thanks you for your order. You will soon receive your first BABE pic. For support email care@telerotica.net or call 0822333332	2006/02/06 10:40:06	27839209130	36116 Babes Subscription	This was sent based on the MO to 36116 above where the keyword "ON" was picked up, we now have her as subscribed
X	Your message did not contain the correct keyword. Please check the example again and re-send. if u received a choice of keywords please send 1 keyword at a time	2006/02/06 10:40:10	27839200130	Paul Nogiera	These two was sent to her as replies to her MO's on the bulk above.
X	Your message did not contain the correct keyword. Please check the example again and re-send. if u received a choice of keywords please send 1 keyword at a time	2006/02/06 10:40:15	27839200130	Paul Nogiera	

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<p>More &amp; more horny nymphos across SA now use CHAT SERVICES to get the men THEY need. YOU score hot sex-no cash involved sms OK to 36185 @R5 or sms <b>STOP</b> 0725918046</p>	<p>2006/03/06 12:56:45</p>	<p>27839200132 equipsecurities</p>	<p>These are all the MT's (excluding the subscription content ones) that she received, it seems it was all via bulk SMS.</p>
<p>NEW SEXCHATTER SERVICE! 22 horny women (and more joining daily!) who want to meet men for FREE sex. Some with PICS!!! sms FUN to 36185 @ R5 or <b>STOP</b> 2 0725918046</p>	<p>2006/04/05 09:09:46</p>	<p>27839200132 equipsecurities</p>	
<p>Hi, its Tammi, u enjoy last night baby?? know I did let's do it again PLEEZE? T sms 'Tammi' to 36185 @ R5 or sms STOP 2 0725918046. 22 girls like T across SA!</p>	<p>2006/05/25 10:04:36</p>	<p>27839200132 equipsecurities</p>	
<p>View 120+ SEXY EscortSA babes on yr cell wherever/whenever, JUST R5. Read about+meet HORNY ladies that flirt&amp;POMPI! Sms WOW to 36185 @R5 or <b>STOP</b> 2 0725918046.</p>	<p>2006/06/28 09:55:53</p>	<p>27839200132 equipsecurities</p>	

**6 FINDINGS OF APPEALS PANEL**

6.1 The appeals panel has considered both aspects of the complaint, being (i) the unsolicited nature of the communication, and (ii) the requirements for subscription services. The panel's findings are as follows:

6.1.1 With regard to the communication from the SP being unsolicited, the panel finds that based on the logs provided by the SP in support of the appeal as well as the additional logs requested by the appeals panel (Annexure A, below), that there was in fact a prior relationship with the complainant. The panel records that neither the MT logs nor the logs showing the prior relationship were made available to the Adjudicator and would like to impress upon the SP the importance of providing the necessary information to WASPA timeously in order to avoid wasted costs and incorrect outcomes.

6.1.1.2 The panel wishes to qualify the statement in 6.1.1 above by recording that the "prior relationship" was with MSISDN number "X" according to the records of the SP. The logs show that the same MSISDN number received similar adult content in August 2005. It is unknown to the panel whether the user of MSISDN number "X" might have changed. This question goes beyond the scope of this appeal.

6.1.2 The panel finds that based on the prior relationship, the communication from the SP was not unsolicited and therefore not spam. The SP has not breached Section 5.2.1 (b) of the Code. This finding supports the Adjudicator's contention in 4.1.1 above.

6.1.3 The panel finds further that with regard to the requirements in respect of unsolicited communications, the SP has complied with the following Sections of the Code: 5.1.1 (provision of originating number) and 5.1.3 (ability to unsubscribe using the word "STOP").

6.1.3.2 This information supporting the finding above was made on the basis of the MT logs which were not made available to the Adjudicator. Neither was Section 5 of the Code dealt with by the Adjudicator. The panel records this merely for the sake of completeness.

6.2 With regard to the requirements for subscription services, the panel's findings are as follows:

6.2.1 The SP has breached the provisions of Sections 11.1.1 of the Code (the requirement for an explicit statement that the service is a subscription service). Nowhere in any of the logs provided does the SP state that the provision of adult material is a subscription service

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- 6.2.2 The SP has breached 2 of the 3 requirements of Sections 11.1.7 of the Code which provides for the requirements of a notification message following subscription containing (a) - cost and frequency, (b) clear and concise instructions for unsubscribing. The SP has complied only with (c) – member’s contact information.
- 6.2.2.1 The finding above is based on the MT logs which record the message following subscription as:” *Thanks you for your order. You will soon receive your first BABE pic.. For support email care@telerotica.net or call 0822333332*
- 6.2.3 The SP has complied with Section 11.2.1 of the Code dealing with the requirements for assistance (support as detailed in 6.2.2.1 above).
- 6.2.4 The SP has partly complied with Sections 11.3.1 (requirements for terminating a subscription service) by indicating “*sms STOP*” but neglects at any time to state that the service is a subscription service as required by Section 11.1.7. In the panel’s view, the instruction to “*sms STOP*” has no reference to subscription and is therefore meaningless resulting in a breach of Section 11.3.1 of the Code.
- 6.2.5 On the face of it, the SP has complied with Section 11.3.3 of the Code, our comments however in 6.2.4 above apply equally.
- 6.2.6 The panel finds that the SP has breached Section 11.3.4 of the Code which provides for ensuring the termination mechanism is functional and accessible at all times.
- 6.2.6.2 The panel wishes to record that its finding in 6.2.6 above is based on what appears to be a manipulation of the messaging system to operate for its benefit at the cost of the consumer. The SP acknowledges that its systems interpreted the word “*on*” in the complainants message “...*hell on earth...*” as the complainant subscribing to the service, and responded with “*Thanks for your order*”. This method of subscribing consumers to a service flies in the face of the WASPA Code which aims to protect consumer and maintain standards for the Wireless sector.
- 6.2.6.3 The panel strongly encourages members of WASPA to apply the same standards of technical proficiency and duty of care to consumers as they would to their own affairs. It is the view of the panel that to bind an unwilling consumer to a subscription agreement based on the facts detailed in 6.2.6.1 above goes to the heart of contract law and negates consensus. If precise words are needed to terminate a subscription, precise words are needed to commence subscription. The double standards used by the SP for commencing and terminating a subscription are strongly

frowned upon by the panel and wholly at odds with the spirit of the Code of Conduct of WASPA.

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**7 DECISION OF THE APPEALS PANEL**

**7.1 *Appeal Panel's Decision Regarding Unsolicited Communication***

7.1.1 While the Adjudicator made no findings on Section 5.2 of the Code, the panel's investigation supports the fact that there was a prior relationship. The SP did not breach the provisions of the Code dealing with unsolicited commercial communications (spam).

7.1.2 While the panel's investigation shows that the Adjudicator was incorrect in his decision to accept the SP's version that the "consumer did in fact activate a subscription", this error was the result of the MT logs not being made available by the SP to the Adjudicator.

7.1.3 The panel censures the SP for not providing the Adjudicator with relevant information.

**7.2 *Appeal Panel's Decision Regarding Subscription Services***

7.2.1 The SP has breached the following provisions of the WASPA Code of Conduct: Section 11.1.1, Section 11.1.7, Section 11.3.1 and Section 11.3.4.

7.3 The following order is made:

6.2.1 The sanction of a fine of R3 000 imposed on the SP by the Adjudicator for a breach of Section 11.1.7 is upheld;

6.2.2 A new sanction in the form of a fine is imposed on the SP for the breach of Section 11.1.1, Section 11.3.1 and Section 11.3.4; and

6.2.3 The SP is directed to pay a fine of R10 000 to WASPA for the breach of Section 11.1.1, Section 11.3.1 and Section 11.3.4 of the Code within 5 working days of notification of this appeal.

6.2.4 The appeal fee in an amount of R10 000 is not to be refunded by WASPA to the Appellant.

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ANNEXURE A  
LOGS PROVIDED BY SP TO PROVE PRIOR RELATIONSHIP DURING 2005

MSISDN	MO Number	Message	Date/Time	SP Comments
X	36116	SHE	2005/08/21 21:10:34	
X	34924	SHE	2005/08/21 21:09:00	

MSISDN	Message	Date/Time	Sent From	Customer
X	NEW from 36116 @R5. Names & numbers of nymphos now available by sms. Choose one or more in your area from our sms database U PAY THEM NOTHING. Sms GO to 36116.	2005/12/28 11:16:45	27839200130	Paul Nogueira
X	sms XXXDIARIES to 36116 for sex diaries, sex confessions and contact numbers OR sms SEXPOT to 36116 for a pomp close to where you are.	2005/08/21 21:10:50	27839200130	Paul Nogueira
X	Verkies jy dit verniet?Jagse huisvroue soek seksuele plesier No strings attached enige ouderdom area ras GEEN koste.sms GO na 36116 vir onmiddellike toegang.	2005/08/21 21:10:49	27839200130	Paul Nogueira
X	This keyword is only available via the short code 36116 @R5	2005/08/21 21:09:08	27839208139	