

REPORT OF THE APPEALS PANEL

Date: 10 December 2009

Appellant: NGN Telecoms (Pty) Ltd

Complaint Number: 3812

Code Version: 3.1 and 5.3

1 INTRODUCTION TO THIS APPEAL

- 1.1 This appeal concerns 2 issues. The second issue is somewhat vexed, since the complaint and adjudication turned on whether or not a particular "competition service" should have resulted in the award of a prize or refund to entrants of their entry fee. This was understood to be the crux of the matter at the time, given that when the "competition service" was launched, the particular provision of the Code which later rendered it inappropriate, was not in force.
- 1.2 In considering the facts placed before the adjudicator, the adjudication itself, and the subsequent appeal, it has become clear to the appeals panel that the real issues for determination are (i) what liability an SP has or should have under the Code for the actions or omissions of an IP supplying services to it and/or its customers; and (ii) whether or not the application of a part of a WASPA Code provision and not the whole constitutes compliance with that provision.
- 1.3 The result then is whether in the circumstances, the sanction applied was adequate or relevant.
- 1.4 The appellant has made much of the confidentiality of certain documents submitted in support of its appeal. The panel does not intend to disclose the contents or nature of such documents, other than to say that in considering them, the panel was of the view (strongly held) that the interpretation of them by the appellant's legal advisor was selective, and the panel takes a dim view of this approach which at worst, amounts to a misrepresentation. The documents themselves evidence no more than a commercial relationship between the IP and SP and are irrelevant to our consideration of the issues, as we will explain below.

2 RELEVANT INFORMATION

- 2.1 *WASPA and the public interest*

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- 2.1.1 We often mention the public interest in our findings. This is because we consider this to be an overriding and significant factor when applying the Code. WASPA is required to take the public interest into account when considering any complaint.
- 2.1.2 The General provisions of the Code have application in all cases in relation to matters dealt with by WASPA. In both versions of the Code cited in this finding, the relevant sections are substantially the same.
- 2.1.3 Section 3.1.1 provides that: "Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA." Section 3.1.2 provides that "Members are committed to lawful conduct at all times."
- 2.1.4 These general rules should always be uppermost in the minds of members when checking that a service complies with the Code or that its termination is in accordance with the principles behind the provisions, namely the protection of the consumer.
- 2.2 *The relationship between SPs and IPs under the Code*
- 2.2.1 WASPA is clearly not concerned with matters that fall outside its jurisdiction. The commercial contracts between parties are one such matter. While WASPA will and does recommend that parties formalise their relationships in writing for their own protection and to clarify and concretise their respective rights and obligations, WASPA has no interest in the terms of these arrangements. Even if the arrangements do not reflect the requirements of the Code, WASPA cannot direct any changes to be made.
- 2.2.2 What WASPA can and will do, and what the appeals panel will do in consequence, is determine and then enforce the provisions of the Code. The enforcement of the Code will operate to require the parties to take certain actions regardless of the commercial undertakings between them.
- 2.2.3 The definition of "information provider" in the Code (all relevant versions) states that this is "any person on whose behalf a wireless application service provider may provide a service, and includes message originators" A "wireless application service provider" is "any person engaged in the provision of a mobile service, including premium-rated services, who signs a WASP contract with a network operator for bearer services enabling the provision of such services."
- 2.2.4 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"

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- 2.2.5 In this appeal, the SP is actually Mira Networks (Pty) Ltd, and the IP is the appellant. The SP did not submit a response to the complaint as it passed responsibility for this to the IP, who accepted it. No finding was accordingly made against the SP by the adjudicator even though it is the panel's view that this might have produced a better outcome. The appeal by the IP considers that it is the SP who was ultimately responsible under the Code, for the infraction (subject to what we say below on later statements and actions by the IP). We have referred to NGN Telecoms (Pty) Ltd (the appellant) as the IP in this document, for convenience and in order to confirm the roles of the relevant parties.
- 2.2.6 The IP submitted to the jurisdiction of WASPA at the time it responded to the complaints, and at the time it lodged its appeal although it was not, at all relevant times, itself an affiliated member of WASPA. The IP has, however, been a member of WASPA since February 2007.
- 2.2.7 WASPA has as a matter of fact, jurisdiction in relation to any service which can be termed a 'wireless application service' where its members are involved in a complaint, or where its members have responsibility for the actions of third parties who may be involved in a complaint. WASPA is required to take the public interest into account when considering any complaint.
- 2.2.8 The SP was a member of WASPA at all times. The principal obligation to comply with the Code and to ensure that the IP complies, rests with the SP.
- 2.2.9 However, given that the IP has conceded jurisdiction and corresponded in all cases directly with WASPA, and in the light of the IP's response to the complaint (cited below), it is clear that the IP regards itself as having been in control of the services, and importantly, as having been advised of and aware of the requirements of the Code. It would be sensible from a commercial point of view that the IP was required to be familiar with the Code by the SP.

3 BASIS OF THE COMPLAINTS

3.1 *The service complained of*

- 3.1.1 As set out in the adjudication, the complainant entered an SMS competition on 17 April 2005 by texting a word to a short code, at a cost of R7,50. Some 17 months later the complainant sent a further entry to the same number, at the same cost. The competition rules had stated (or so we are told as they were not included in the

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documents provided for the appeal) that the 300,000th entrant would win a motor vehicle.

3.1.2 The complainant queried the low number of entries after the lengthy period of time that the competition had run, to be advised that the competition had in fact been terminated some months earlier because of a change in the WASPA Code of Conduct which had rendered the competition rules non-compliant.

3.1.3 It appears to be common cause that:

3.1.3.1 the service offered was a "competition service" under the Code, regardless of the version applicable at the time;

3.1.3.2 some 9,000 further entries were sent to the short code used by the competition after it was actually closed;

3.1.3.3 no public announcement of the closure of the competition was made at any stage, but promotional material and advertising were simply withdrawn;

3.1.3.4 no message was returned to potential entrants if they did text the short code after termination of the competition, to advise them that the competition had terminated; and

3.1.3.5 the cellular accounts of "entrants" texting the short code reflected a charge of R7,50 as if to confirm entry into the competition at the relevant entry fee.

3.1.4 In fact, as the IP points out in its response to the Secretariat, "as soon as the regulations and guidelines were published, this promotion was stopped! No further marketing or promotion was undertaken as the promotion was suddenly deemed illegal". Since the promotion of the number had stopped, no thought or urgency was given to discontinuing the mechanism behind the number which provided the response sms. In any event, an sms sender would be billed the same as if they had continued to send to that number even if the mechanism had been discontinued. Reimbursing users would require the co-operation of all the cellular networks and access to data years old. We have been advised that this has not [been] done in the past and they will not or cannot do it now. Regarding draw of the vehicle, the rules of the promotion stated that the draw will be done once the required number of entries has been achieved, and whilst this is no longer legal, it was at the time of the promo as was the discontinuation of the promo without a draw at that time. I must stress however that although you might not get a response, any sms delivered to that number irrespective of the keyword or what is actually monitoring the number or keyword are billed at R7,50.

3.1.5 We have repeated the entire response as it is this which is most relevant in our view, to our finding.

3.2 *The Code*

3.2.1 The adjudicator considered sections 3.1 and 9.3 of the Code, versions 3.1 and 5.7, being the versions in place at the time the competition service began and at the time it was terminated. The adjudicator also considered version 4.8 of the Code, as being

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applicable on the date on which the IP became a direct member of WASPA.

3.2.2 These sections deal with the public interest, professional and lawful conduct, and competition services.

3.2.3 In relation to competition services, however these are defined, the Code requires a specific closing date, except where there are instant prizewinners. An insufficient number of entries or entries of inadequate quality are not acceptable reasons for changing the closing date of a competition or withholding prizes. Prizes must be awarded within 28 days of the closing date, unless a longer period is clearly stated in the promotional material. Once the closing date for a competition is reached, the advertised prizes must be awarded, notwithstanding the number of entries. All correct entries must have the same chance of winning.

4 THE SP'S RESPONSE

4.1 As mentioned above, the SP did not respond to the complaint nor was a finding made against it by the adjudicator.

4.2 The IP's response to the complaint has been quoted almost in full in section 3 above.

4.3 In essence the IP considered that it was obliged to terminate the competition service because of a change in the Code which rendered the service unlawful. It did not however, consider it necessary to take further action than merely to terminate the *advertising* of the service.

5 DECISIONS OF THE ADJUDICATOR

5.1 Findings on Complaints

5.1.1 The adjudicator accepted that the SP was not liable for the infractions of the IP, given that the SP was not actually running the service but merely providing the short code. The adjudicator stated specifically that Mira Networks is not regarded as bearing any culpability in this matter. The citation of Mira Networks in this Adjudication should in no manner be construed as indicating any finding against them.

5.1.2 The adjudicator went further to consider how jurisdiction might be founded in respect of the IP, and determined that the SP had a commercial arrangement with the IP, also having reference to various precedents. Furthermore, the adjudicator found that it could impose a sanction directly on the SP [meaning NGN Telecoms (Pty) Ltd] (acting as an IP as it then was) or can order that Mira Networks enforce such sanction failing which it will be required to terminate service provision to the SP; and in respect of the period subsequent to 26 February 2007 any applicable sanction can be applied directly to the SP [meaning NGN Telecoms (Pty) Ltd] as a WASPA Member in its own right.

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- 5.1.3 The adjudicator in this case did not accept that the IP's failure to close the line (so as to prevent ongoing billing of prospective entrants when they texted the short code) was an "oversight" since the adjudicator considered that the IP had continued to benefit financially from the revenue-sharing arrangements in place between SPs and IPs on services of this sort. By virtue of continuing to receive this benefit, the adjudicator considered that the IP should have been aware that the line was still open and "the failure to close the line for a period of close to two years cannot be characterised as an oversight"
- 5.1.4 The adjudicator did not accept that the draw should not have taken place because the reason for terminating the competition was not the reason given in the rules (namely the service terminated because of a change in the Code, not because 300,000 entries had been received).
- 5.1.5 The adjudicator found the IP guilty of breaching sections 3.1.1 and 3.1.2 of the Code, being serious breaches because of the inequity of their enrichment at the expense of consumers entering into a competition in good faith, "believing that in doing so they stood a chance to win a prize"
- 5.2 *Sanctions*
- 5.2.1 After taking into account the prior record of the IP (referred to as the SP in the sanctions), the IP was nonetheless found to have breached section 3.1 of the Code in its capacity as IP using the services of a WASPA member and as a WASPA member in its own right.
- 5.2.2 The IP was ordered to proceed to either reimburse all entrants of the competition alternatively, to proceed to hold a competition draw within thirty (30) business days of the date of the adjudication. The IP's membership (as SP) was suspended pending compliance and the IP was ordered to pay a fine of R75,000 within fifteen (15) days of the date of the adjudication.
- 5.2.3 These sanctions were to be suspended on the lodging of an appeal in respect of the adjudication within the timeframes applicable.
- 5.2.4 We note at this point that the IP did not in fact submit an appeal within the relevant timeframes, but assume that the sanction was intended to be suspended nonetheless as we have not seen correspondence to the contrary.

6 GROUNDS OF APPEAL

- 6.1 The IP's appeal takes the form of a "review" of the adjudicator's decision and sanction and we assume what is meant is that the finding is appealed in terms of the Code, which provides for a mix of the two forms of process.

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6.2 *The competition*

- 6.2.1 The IP's legal representative argued that the promotion was started before guidelines and rules for such promotions had been contemplated. Competition without specific closing dates, but relying on a minimum number of entries were common at that time and this was one of many at that time. The terms and conditions of the promotion were clear and complied with all existing requirements for promotions of such a nature at the time it was being run.
- 6.2.2 The appeal further states, "As soon as the regulations and guidelines were published, the promotion was stopped and no further marketing or promotion was undertaken. Enclosed herewith as Annexure A is the count of entries which shows a rapid decline of entrants after the cessation of promotion of the competition. Although all advertising and promotion of the competition was halted, on the advice of Mira Networks the keyword was left in place in that no official ruling was made with regard to the competition." We note that the IP does not deny that entries were nonetheless still made on the same competition short code, after the termination of the competition by the IP.

6.3 *Points in limine*

- 6.3.1 We presume this section of the appeal is intended to contain points in addition to those made in relation to the competition. This section refers almost entirely to the relationship between the IP and SP and states that at all material times NGN was not a member of WASPA.
- 6.3.2 Accordingly the argument suggests that Mira Networks was a beneficiary of the competition entry fee, and that it relied on Mira Networks to direct the manner in which it was required to promote the services in order that it did so in accordance with Mira's regulatory environment. As pointed out by the adjudicator, the members are accountable to WASPA for rendering of services to customers in accordance with the code. Accordingly Mira should have ensured that the Code of Conduct was upheld in terms of its contractual and business relationship established with NGN. In this regard, we refer to Section 3.9 of the Code of Conduct which reads as follows "Members must suspend or terminate the services of any information provider that provides a service in contravention of this code of conduct." The aforesaid wording confirms that it would [be] the obligation of the member to ensure that its contracting parties adhere to the code of conduct in that WASPA itself cannot enforce the code on parties who are not members. For this very reason, Mira Networks should have responded to NGN's numerous request for direction as to the manner in which to deal with the situation. Notwithstanding that the code of conduct may provide for applicability to non-members, it is not a regulation enacted by the legislature nor by any official judiciary body. Accordingly it is not a law by which parties can be bound unless by agreement to that effect, such as voluntary membership.
- 6.3.3 We take note of these views, even though they are somewhat contradictory particularly when seen against the response of the IP to the complaint. We note too that the IP has not quoted from contractual arrangements in place with the SP in relation to its own obligations to comply with the Code, which we assume will have required compliance as is foreseen under section 3.9.1. We are obviously not aware of any communications between SP and IP but to the extent that the SP was bound by any contractual obligations to

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the IP, the IP will no doubt have contractual remedies available to it outside this appeal.

6.4 *Response to report*

6.4.1 The further points raised in the appeal set out additional facts pertinent to the way in which the IP dealt with the complaint. These consist largely in confirmation that the IP contacted WASPA directly to establish how it should deal with the competition subsequent to the changes alleged to the Code. We note this also tends to dilute the argument that the IP did not regard the Code as binding on it.

6.4.2 The IP's legal representative then argues that WASPA ought to have assisted parties in granting an interim solution to existing competitions. In terms of the theories of laws of interpretation, laws should not have retrospective application so as to prejudice parties for actions which were lawful at the time at which they were effected. In this regard, a mechanism should have been employed in order to come to the assistance of those competitions which were contrary to the provisions of a newly implemented code. The panel queries why, if the IP does not recognise the jurisdiction of WASPA and the application of the Code, the IP thought it necessary to approach WASPA for assistance at the time.

6.4.3 The IP continues to confirm that it was and still is willing to reimburse entrants to the competition. The panel notes that this is without reference to a time or date, or number of entrants to be reimbursed, but nonetheless notes the tender, also suggesting that the IP did in any event consider itself to be bound by the Code despite the continued protestations in this section by the IP's legal representative, seemingly at odds with their own contentions that NGN was not a member of WASPA at all relevant times to the complaint. The panel is unclear why reimbursement would be difficult through the networks as it is usually a business and legal requirement to retain records of this sort for a reasonably lengthy period.

6.4.4 Although the panel has recorded above that WASPA can have no jurisdiction over the contractual arrangements of the parties and we would have thought them largely irrelevant to the appeal (since the IP appears to wish to dispute the role WASPA has to play in any event), we have noted the sections quoted by the IP's legal representative purporting to reflect the position between the parties under their contract in support of the IP's failure to act. As the IP has itself quoted from its contract, the panel has also noted the obligations on the IP under the same contract, at clause 6(b), to comply with all laws, regulations, directions and codes of practice promulgated by competent government authorities in relation to the services. To the extent that the IP intends to rely on the clause quoted by its legal representative to evidence the obligations of the SP, we note that the same clause applies in the same way to the IP. We note and quote

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the provisions of clause 6(b)(vi) as well, which states that the IP shall be responsible for the provision of all first line support to end users. This suggests to us that the IP was in fact required to look after the interests of the customers that it shared with the SP.

6.4.5 The IP's appeal goes on to note that as soon as the regulations and guidelines were published, NGN ceased all further marketing of the promotion. The IP also states that as soon as becoming aware of the enactment of the rules relating to the competition, it ceased to promote the competition notwithstanding that it was not at that time a member of WASPA and on that basis not even bound by the terms and conditions of the code of conduct. Again the panel must note that it is confused as to the IP's position. Why was the competition terminated if not because of the rules applied by WASPA which the IP acknowledges applied to all similar competitions including its own? If it was terminated for this reason, then the IP must have accepted that the Code applied to it regardless of its membership of WASPA, either by virtue of its status as IP, or because of its relationship with the SP under contract. Either way, the point would appear to be moot if the competition was terminated in consequence of a change in WASPA rules.

6.4.6 As to the revenue derived from the competition after termination, we note that the IP contends that it was not aware of the amount or the split of revenue, since the SP failed to provide it with relevant information under their contract. This is relevant to the appeal only insofar as the sanction applied by the adjudicator was applied because of the unjust enrichment of the IP perceived by the adjudicator following termination of the competition. It is not clear from the IP's appeal whether or not the offer to reimburse entrants (repeated at this stage) is therefore an offer to reimburse all entrants even prior to termination, or only those who entered the competition after its termination in which case the IP seems to argue it received no benefit in any event as the SP failed to pay over funds to it (if we understand point 14.13 of the appeal, correctly).

6.4.7 We also fail to understand the point made at 14.19 that the IP intended to give away the prize when it was legitimate. We assume this does not mean that the IP will give away the prize now to those people who entered the competition.

6.5 *Mitigating factors*

6.5.1 In the circumstances the IP's legal representative argues, the sanction is not reasonable and asks for the decision to be set aside. We assume that this means that although some sanction is reasonable, it should be reduced in this would mean however that the principal decision stands. Again we are unsure as to the meaning of the appeal in this regard.

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- 6.5.2 Specifically in mitigation the IP raises the fact that it has not received similar complaints or complaints at all in the past.
- 6.5.3 The IP offers to reimburse all entrants to the competition in any way that WASPA may suggest, but asks for the fine to be waived. This is because:
- 6.5.3.1 This is the first complaint against it;
- 6.5.3.2 NGN did not act with culpability in that it immediately ceased with the promotion of the competition upon becoming aware of the regulations enacted by WASPA;
- 6.5.3.3 NGN at all times relied on Mira Networks to ensure that their business interactions (including the competition) were conducted in accordance with the regulatory environment (we find this hard to believe!);
- 6.5.3.4 NGN was not a member of WASPA until February 2007 and in effect was not bound by the Code of conduct [sic] but rather Mira, as the acting member should have been requested to comply with the code by means of directing NGN to comply thereto;
- 6.5.3.5 NGN has at all times been cooperative and made numerous attempts to request WASPA to assist it in disposing of this matter in the correct manner by means of employing a mechanism as advised by WASPA; and
- 6.5.3.6 NGN's share in the revenue was an insignificant portion in comparison to that of the other participating members.
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7 FINDINGS OF APPEALS PANEL

- 7.1 In the circumstances, the appeals panel considers that both the IP and SP failed in their obligations to uphold the Code. In relation to the first issue identified in the introduction to this appeal, the panel finds that both should have shared in the sanction.
- 7.1.1 The panel notes that the IP's legal representative does not regard the Code as having any legal effect on non-members. Presumably this is not as much of an issue for the IP itself, since it confirmed having terminated the service in accordance with the requirements of the Code at the relevant time, and clearly regarded itself as being bound by the requirements of the Code prior to, during and subsequent to the termination of the competition service it was running, as evidenced by its response to the complaint.
- 7.1.2 Given that the IP has accepted liability (even on the IP's legal representative's version) and continues to do so even in the appeal at least for part of the sanction, and given too, the contradictions in

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arguments raised by the IP in its appeal as to whether or not it considered the Code to apply to it and how it should act or have acted, the panel finds that the IP is liable under the Code.

- 7.1.3 The SP's liability has to some degree therefore been taken on by the IP, although in our view this was not necessary as the WASPA Code clearly sets out the SP's role. However, the IP continues of course, to have recourse against the SP in terms of its contractual arrangements with the SP, to the extent that the IP considers that the SP should have done or not done certain things. In this regard we refer the IP to its own statements in mitigation in the appeal.
- 7.2 In relation to the competition itself and so to the second issue identified in the introduction to this appeal finding, the panel notes the contradictory position adopted throughout the IP's appeal by its legal representative as to whether and how the Code might apply to it. Nonetheless our findings are that the IP was in fact running a competition service which was governed by the Code, and the Code required compliance even under the earlier version applicable, with certain rules regarding the award of prizes and the time of validity:
- 7.2.1 The panel notes the description of the competition variously as a 'promotion' and a 'competition'. Clearly the competition was a 'competition service' as defined under the Code. The only matter of relevance in our view is that the IP is liable in terms of the Code to run a competition according to the rules.
- 7.2.2 As the competition was in fact a competition service, terminating only the advertising of the service without terminating the short code or advising entrants and prospective entrants of the termination constitutes a breach of the Code in that the IP failed to properly or adequately comply with the requirements of the Code. By continuing to allow texting to the short code which meant that the network would continue to bill consumers for each message sent, the IP maintained the perception that the competition was still running – the absence of advertising does not mean of itself that the competition is not open for entries, particularly if entries are still accepted to the short code and the entrance 'fee' or cost of the SMS is still deducted. In the absence of a correction or public announcement or notice to entrants, the IP failed to comply with the Code by continuing to operate a type of competition service that was in contradiction of the Code.
- 7.2.3 To the extent that the IP will argue or has argued that this was the responsibility of the SP in terms of its contractual arrangement with the SP, the IP is at liberty to enforce the relevant provisions of the contract which the IP places so much store in, in its appeal.

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- 7.2.4 The panel wishes to note that although the IP accepts that the competition was not compliant with the Code by implication ĩ since it terminated it ĩ it seems to want to rely on the absence of an ĩofficial rulingĒ for leaving the short code and keyword in place, accepting entries and enabling the network to continue billing consumers. We find this quite unacceptable as a ground of defence. Surely even if a murder has not been pronounced upon by a court, it is still a murder?
- 7.2.5 Finally, the IP has tendered at least 3 times to reimburse entrants to the competition. It does not specify that this tender is limited in any way (by time or number of entries). The IP does not tender to award the prize but seeks to have the fine imposed by the adjudicator lifted.
- 7.3 The panel finds:
- 7.3.1 The IP is accordingly by its own acts and admissions, liable for breach of the Code specifically in relation to sections 3.1 and 9 in relation to competition services, their validity and their term. Despite having terminated the advertising of the service, the IP failed to take all reasonable steps to notify potential entrants that the service itself was terminated and failed to terminate the operation of the key word. The operation of the keyword and short code gave the impression (reasonable in our view) that the competition was still open for entries. The charging of the amount of R7,50 per entry entrenched this perception.
- 7.3.2 For practical reasons a refund at this time may have little merit, although were this finding to have been made at the time of the adjudication, a refund could in our view have been made with the assistance of the cellular operator and we understand that this has in fact taken place before with relatively little difficulty. We do not consider the refund option to be as impossible as the IP would suggest. However, in the interests of giving the IP the benefit of the doubt, we consider that the ĩrefund amountĒ should form part of the sanction and have taken this into account in reviewing the sanction.
- 7.3.3 The panel finds that it is appropriate to impose a sanction against the IP, and that the appropriate sanction at this time is a fine. The panel has taken the mitigating circumstances into account and has taken into account the revenue the IP has stated to have derived from the competition service. Accordingly the panel reduces the fine to the amount of R50,000. The reduction in the fine should in no way be construed as acceptance of the IPĒs argument either as to its culpability or the role of the SP. The fine is in our considered opinion, appropriate for the failure of the IP to ĩ if it accepted that the competition service was in breach of the Code ĩ take all such actions open to it as would be reasonable in the circumstances.

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- 7.3.4 The IP is directed to refund the complainant without delay, directly to the complainant's bank account of choice together with interest at the rate prevailing at the relevant time for interest on overdraft accounts held with Standard Bank, from date of the entry to date of this adjudication, and to confirm to WASPA that this has been done.
- 7.3.5 The IP has a contractual relationship with the SP in terms of which it can enforce contractual remedies. It is open to the IP to take steps against the SP to the extent that it believes the SP is in breach of its contractual arrangements or is liable for any sanctions imposed by WASPA. The panel notes in the strongest terms that the only reason in this case for finding that the IP and not the SP or both parties should be liable for the sanction is that the IP appears to have assumed liability on the SP's behalf. It remains for the IP to pursue the SP under its contractual arrangements. In all other cases, the panel would find and would recommend liability follow the SP.
- 7.3.6 In closing, the panel notes that harm has been done to those entrants who paid their money in good faith and entered a competition whether before or after the termination of the advertising of that competition. The passage of time has however, meant that to rectify the prejudice at this stage may cause additional prejudice to other parties including the IP which is not necessarily outweighed by that rectification (which would include amongst other things, reimbursing all entrants). This finding does not condone any of the arguments raised by the IP (as this was not in fact one of them), nor does it condone the behaviour of the IP or SP or suggest that in other circumstances a different finding would not be made.
- 7.3.7 The appeal fee is not refundable.
- 7.3.8 The panel recommends that WASPA give consideration to the impact of a transition between versions of the Code on potential complainants whose complaint could have initially entitled them to a refund under the previous version of the Code, which is made difficult by the application of later versions, and vice versa.