



## REPORT OF THE ADJUDICATOR

<b>WASPA Member (SP):</b>	<b>iTouch</b>
<b>Information Provider (IP): (if applicable)</b>	<b>n/a</b>
<b>Service Type:</b>	<b>Sundry</b>
<b>Complainant:</b>	<b>WASPA Secretariat</b>
<b>Complaint Number:</b>	<b>4929, 4930 &amp; 4931</b>
<b>Code version:</b>	<b>Code v6.2 and Ad Rules v3.2</b>
<b>Date of Report:</b>	<b>10 December 2008</b>

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### Complaint

1. On the 30<sup>th</sup> of September 2008 the WASPA Secretariat lodged three complaints against the SP on the basis that the SP had not complied with sanctions imposed upon it by independent adjudicators in complaint numbers 3349, 3581 and 3673.
2. These new complaints will be referred to as numbers 4929, 4930 and 4931, and are reproduced below.

### Complaint 4929

3. The text of the complaint is as follows:

Complainant : WASPA

Email : complaints@waspa.org.za

Referred : n/a

Date : 2008-09-30

Wasp\_Service : iTouch

Description : Failure to comply with the sanctions for complaint 3349. (See clause 13.3.6 of the WASPA Code.)

Requests for the SP to confirm compliance with the sanctions for complaint #3349 were sent on 2008-07-08 and again on 2008-08-22, but the SP has failed to respond.

This SP has a history of failing to comply with sanctions.

Status : Formal complaint

4. The following sanction was imposed by the independent adjudicator in complaint 3349:

The SP is fined the sum of R5 000, 00 payable to the WASPA Secretariat within five (5) days of notification hereof.

The SP is further ordered to ensure that the Complainant is not made subject to any similar breaches of the WASPA Code of Conduct for which it (SP) is liable and is strongly advised to remove the Complainant from any mailing lists which might be construed as giving future rise to a similar Complaint. The SP is further ordered to identify the sender of the message and inform the Complainant accordingly.

#### Complaint 4930

5. The text of the complaint is as follows:

Complainant : WASPA

Email : complaints@waspa.org.za

Referred : n/a

Date : 2008-09-30

Wasp\_Service : iTouch

Description : Failure to comply with the sanctions for complaint 3581. (See clause 13.3.6 of the WASPA Code.)

Requests for the SP to confirm compliance with the sanctions for complaint #3581 were sent on 2008-07-08 and again on 2008-08-22, but the SP has failed to respond.

This SP has a history of failing to comply with sanctions.

Status : Formal complaint

6. The following sanction was imposed by the independent adjudicator in complaint 3581:

The SP is fined the sum of R7 500, 00 payable to the WASPA Secretariat within five (5) days of notification hereof.

The SP is further ordered to ensure that the Complainant is not made subject to any similar breaches of the WASPA Code of Conduct for which it (SP) is

liable and is strongly advised to remove the Complainant from any mailing lists which might be construed as giving future rise to a similar Complaint. The SP is further ordered to provide the Complainant with details of where the messages originated from.

### Complaint 4931

7. The text of the complaint is as follows:

Complainant : WASPA

Email : complaints@waspa.org.za

Referred : n/a

Date : 2008-09-30

Wasp\_Service : iTouch

Description : Failure to comply with the sanctions for complaint 3673. (See clause 13.3.6 of the WASPA Code.)

Requests for the SP to confirm compliance with the sanctions for complaint #3673 were sent on 2008-07-08 and again on 2008-08-22, but the SP has failed to respond.

This SP has a history of failing to comply with sanctions.

Status : Formal complaint

8. The following sanction was imposed by the independent adjudicator in complaint 3673:

The SP is hereby ordered to remove the advert from any future flighting schedules until the T&C text font and surrounding images are amended to comply with the Advertising Rules.

The SP is also fined R10 000.00.

### **Response**

9. In all three complaints the SP was sent notification of the complaint and request for a response on the same day that it was lodged, the 30<sup>th</sup> of September 2008. In all three instances the SP was also sent a second notice requesting a response to the complaints on the 9<sup>th</sup> of October 2008.

10. In the case of complaint 4931 the SP sent a rather cryptic email response on the 7<sup>th</sup> of October 2008 to the effect that it did not have a telephone number for the complaint in question. Other than this response, there was no feedback whatever from the SP.

11. I requested further information from the WASPA Secretariat on the extent to which the SP had complied with the sanctions imposed in the respective original complaints. The position can be broken down into three aspects:
- 11.1. The SP has paid the fines imposed in respect of complaints 3349 and 3673, but has not paid the fine in respect of complaint 3581, an amount of R7 500. This amount was to have been paid within five days of the publication of the report, which was published on the 3<sup>rd</sup> of May 2008.
  - 11.2. WASPA has been unable to determine whether the SP has complied with sanctions other than fines for any of the original complaints, as the SP simply does not respond to requests for this information.
  - 11.3. The WASPA Secretariat has to follow up vigorously with the SP some time after fines are imposed to effect payment of such fines. While the SP apparently always pays fines eventually, the WASPA Secretariat is of the view that it should not be necessary for it to follow up in this way.
12. As the SP has rendered no response, and as there is no question as to the credibility of the WASPA Secretariat's submissions, I have no option but to proceed on the basis of such submissions alone.
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### **Portion of the Code Considered**

13. The following section of the WASPA Code of Conduct are relevant:

#### **3. General provisions**

##### **3.1. Professional and lawful conduct**

3.1.1. 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.

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#### **13. Complaints procedure**

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##### **13.3. Formal complaint procedure**

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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.

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### **Decision**

14. I will dispense with the question of the unpaid fine immediately: this is clearly an infringement of section 13.3.16 of the Code of Conduct.
15. As far as the failure by the SP to respond to requests for confirmation that sanctions other than fines have been complied with, it is important to look at these sanctions themselves. Complaints 3349 and 3581 require the SP to advise the *Complainant*

of the identity of the sender of unsolicited messages, while 3673 required that the SP withdraw a certain advertisement until it had made it compliant with the WASPA Advertising Rules. The adjudicator does not make it peremptory that the WASPA Secretariat be informed. If the Secretariat had gauged independently that the SP had not complied with these sanctions, then such non-compliance would constitute a breach of section 13.3.16 of the Code of Conduct. Merely failing to report back where to do so is not a formal requirement of the sanction however does not constitute such a breach.

16. Having said that, the SP's consistent failure to respond to repeated requests for information does constitute an infringement of section 3.1.1 in that professional conduct is expected of members of WASPA.
17. Finally, it is clear that the SP has fallen into a pattern of late compliance with adjudicator's sanctions. Such a *pattern* is not itself an infringement of the Code of Conduct, except insofar as it breaches section 3.1.1 thereof. The non-compliance with each individual sanction however is a breach of section 13.1.16. The best approach for the WASPA Secretariat to take when such a pattern develops is to enforce sanctions strictly, and if payment of fines is not received within the time specified in the adjudicator's report, to lodge a complaint against the SP involved.
18. Insofar as sanctions other than fines are concerned, where these involve the SP or IP taking some action, in that event the Secretariat should either request that the WASPA Management Committee should issue an advisory note to the adjudicators requesting them to consider making it obligatory for the SP/IP to report back to the Secretariat, or the Secretariat could follow-up with the Complainant.

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## Sanction

19. WASPA is a body set up by the industry to self-regulate, as an alternative to having government regulation imposed upon the industry. It is thus critical that WASPA operate effectively and such effectiveness includes having all sanctions imposed by adjudicators complied with.
20. As a result of this imperative and the long period for which this fine imposed in complaint 3581 has been outstanding, I am imposing on the SP for non-payment of the fine a further fine of three times the original -- that is a fine of R22 500. The original fine of R7 500 is still payable. Both fines are to be paid to the WASPA Secretariat within 5 working days of the SP being notified of the contents of this report.
21. Should the fines not have been paid within this time, the SP shall be suspended from membership of WASPA until such time as they are paid.
22. The SP is issued with a formal reprimand for its infringement of section 3.1.1 of the WASPA Code of Conduct.

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