

**WASPA appeals panel
Complaint 6678**

REPORT OF THE APPEALS PANEL

Date: November 2010
Appellant: Mobimex (IP)
Complaint Numbers: 6678
Applicable versions: Code of Conduct v7.0

1 BACKGROUND TO THE APPEAL

- 1.1 The IP is appealing the adjudication in complaint 6678, in terms of which various sanctions were imposed upon it as a result of breaches of sections 11.1.2, 3.1.1, 4.1.1 and 4.1.2 of Version 7.0 of the WASPA Code of Conduct (“the Code”).
- 1.2 The appeals must be seen in the context of a number of appeals which have been raised against the IP in respect of its subscription services. The IP has also appealed the adjudications in respect of complaints 5696, 6303, 6671, 6759, 6928, 7081 7285, 7314 and 7424.
- 1.3 In the instant matter the complaint was lodged with respect to the IP’s South African Erotik Portal service.
- 1.4 The IP is currently suspended as per the order of a WASPA Emergency Panel delivered on 3 December 2009.
- 1.5 Note: although the adjudicator has referred to Mobimex as the SP the Panel prefers the more correct description of IP and this description has been used in this appeal document.
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2 THE APPLICATION OF THE CODE AND AD RULES

The Code, v7.0

- 2.1 The following provisions were considered:
- 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.
- 4.1.1. Members are committed to honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

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4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

11.1.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item.

3 COMPLAINT AND DECISION OF THE ADJUDICATOR

- 3.1 The original complaint was an unsubscribe request (logged on 15 April 2009) and escalated into a formal complaint on 1 June 2009. The complainant denied having subscribed to the service and requested a full refund of charges together with an explanation as to how he was subscribed in the first place.
- 3.2 The IP initially responded that the complainant had subscribed on 9 April 2009 and that no refund was being offered as a result of the complainant having downloaded content.
- 3.3 The complainant reiterated the request for a refund, an explanation and requested an assurance that he would not be subscribed again. In support of his assertion that he had not subscribed to the service he noted that:
- 3.3.1 He was abroad in the USA on 9 April 2009;
- 3.3.2 The IP has informed him that its records indicated that he had used a Samsung phone to subscribe: he denied owing such a phone;
- 3.3.3 He had not received any SMS stating that he needed to reply YES in order to confirm his subscription;
- 3.3.4 He acknowledged that he had received messages with ringtones and pornographic content to his phone and regarded these as being offensive as also spam;
- 3.3.5 He had not received “proper proof” of subscription; and
- 3.3.6 His cell phone bill indicated that he had not made any data or SMS charges between 4 April and 2 May 2009.
- 3.4 The IP tabled its formal response on 4 June 2010 containing the following submissions:
- 3.4.1 The relevant number had opted in not once but twice – on 13 and 15 April respectively thereby creating two subscriptions
- 3.5 The complainant repeated his denial of using the service and also indicated that he had never own the handset model specified by the IP.

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- 3.6 The subscription activation process followed was explained by the IP as follows:
- 3.6.1 The complainant had clicked on a banner ad published on a third party WAP site (advertising, apparently, “*100% Naughty Vids - Download Here!*”) after which he had arrived at a landing page with subscription terms and conditions which had been accepted on entry to the WAP portal.
- 3.6.2 A free welcome message was sent to the consumer.
- 3.6.3 After this message had been sent content downloads were made.
- 3.7 In attempting to discover the facts of the matter the adjudicator made a number of requests for further information, including that the IP provide copies of all advertisements and pages accessed by the consumer and terms and conditions applicable thereto.
- 3.8 A copy the landing page allegedly accessed by the user in this matter is reproduced as Annexure to this document. At this stage the Panel wishes to refer to this landing page and to note in particular the pricing information set out which refers both subscription and per item costs
- 3.9 This pricing information is repeated in the terms and conditions applicable to the service as provided by the IP.
- 3.10 The adjudicator made the following findings:
- 3.10.1 The subscription process employed by the IP was such that a consumer would not necessarily have the requisite intention to subscribe when subscribing to the service. This was a breach of section 11.1.2 of the Code.
- “The Code is clear: for a consumer to become subscribed to a service the consumer must have the specific intention of subscribing to a service and must not be intending to do anything else other than subscribe to a service at the time he or she is so subscribed.
- In response to the complaint by a consumer that he had not subscribed to the SP’s services, the SP stated that the consumer had *“clicked on banner ad published in a third-party WAP site. The user has come on the Landing Page with the subscription terms and conditions and accepted them when accessed the WAP portal”*. This sentence can be reduced to the following steps that the SP alleges the consumer to have taken:
1. the consumer clicked on a banner ad;
 2. the consumer arrived at a landing page with subscription terms and conditions; and
 3. the consumer accepted the terms and conditions when accessing the WAP portal.

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The copy of the landing page produced by the SP does not correlate with its version of the subscription process it alleges the consumer would have followed. In particular, the landing page does not contain any terms and conditions and does not afford a consumer the ability to accept any terms and conditions. The landing page appears to be a further advertisement for the services and does not have the appearance of a transaction page. The only button available to the consumer is a button headed "Enter here". Unless there are other indications of an intention to transact, an invitation to "Enter" a site is considerably different from an invitation to transact on a site. It appears from the process description and the evidence put up by the SP that the subscription transaction mechanism is activated by clicking on a button that appears to be a navigation button rather than a transaction button. A reasonable consumer would not be intending to transact by clicking on that button and the method by which consumers were subscribed to the SP's service breaches section 11.1.2 of the Code of Conduct."

- 3.10.2 That the breach of section 11.1.2 was such that a finding that the IP had further breached section 3.1.1, 4.1.1 and 4.1.2 was warranted.
- 3.11 The adjudicator then stipulated a set of sanctions applicable to the IP as also a set of sanctions intended to apply to the SP in the event that the IP did not comply with the sanctions applied to it within five days of date of delivery of the report.

"The breaches by the SP go to the heart of the Code and undermine the reputation of the wireless application services industry as a whole. In considering an appropriate sanction to be applied in this matter I have also had regard for previous breaches of the Code upheld against the SP including in complaints 5696 and 5954 where similar breaches of the Code were upheld against the SP. I have noted that the date on which the adjudication reports in the aforementioned matters was delivered is after the date on which the present complaint arose, however the facts of those complaints indicate that the SP has repeatedly breached the Code in a very serious manner.

I therefore have imposed the sanctions that follow in paragraphs 1 to X below. For the purposes of paragraphs 1.3 and 2 below, a "related entity" shall be any entity in which any of the beneficial ownership of such entity is held directly or indirectly by any of the owners of the SP or which has one or more directors, members or senior executives in common with the SP.

1. The SP is directed to:

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1.1 immediately suspend all of its subscription services offered in South Africa and all billing for any such services;

1.2 pay over to WASPA a fine of R350 000 within 5 days of the delivery of this report; and

1.3 pay to the consumer compensation in the amount of R1 000 into a bank account within 5 days of the consumer furnishing the SP with details of its nominated bank account;

failing which the SP's and any related entity's memberships of WASPA shall be suspended and all relevant cellular network operators shall be requested to bar the SP's and any related entity's access to its billing platforms and services as contemplated by the provisions of section 13.4.3(d) of the Code for a period of 180 days or until such time as the fines imposed in paragraphs 1.2 and 1.3 above have been paid in full, whichever period is the longer.

2. All other WASPA members providing any subscription services to, for, on behalf of or in conjunction with Mobimex or any related entity are directed that pending receipt in full by WASPA of the penalty provided for in paragraph 1.2 above, they shall:

2.1 withhold any payments currently or at any time becoming due by it to Mobimex or any related entity as contemplated by the provisions of section 13.4.1(i) of the Code;

2.2 preserve and retain all revenue paid to it by any cellular network operator in respect of any service offered by Mobimex or any related entity and to refrain from dissipating such revenue in any way other than as contemplated by the provisions of paragraph 2.4 below;

2.3 furnish WASPA with monthly statements of account ("the statements") detailing all revenue received by the member that is to be paid over to Mobimex or any related entity;

2.4 pay over to WASPA such portions of the revenue due to the SP or any related entity as WASPA may direct until such time as the fine provided for in paragraph 1.2 has been paid in full.

3. In terms of section 13.4.2 of the Code, the sanctions contained in paragraphs 1 and 2 above may not be suspended pending any appeal that may be instituted in this matter but shall become effective immediately on the publication of this report. In the event that any appeal lodged is substantially successful, then any fine paid by the SP in terms of paragraph 1.2 shall be refunded to the SP subject to any remaining sanctions or revised fine that the Appeals Panel may determine appropriate."

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4 GROUND OF APPEAL - IP

- 4.1 The IP filed an initial appeal notice which was later supplemented by a further set of submissions prepared with the assistance of its attorneys.
- 4.2 The submissions raised in the initial appeal notice can be summarised as follows:
- 4.2.1 The decision in complaint 6303 relates to the same service as that which was the subject of a similar adverse adjudication in respect of complaint 6678 – as such the complaints should have be consolidated.
- 4.2.2 The logs submitted were correct. There exists “a common element of denial when the consumer is reminded that they were billed for accessing content from a mobile service” which the adjudicator should have taken into account.
- 4.2.3 The IP’s subscription model is compliant with the Code.
- “A Mobimex confirmation page was presented, displaying clear pricing directly below the opt-in button, whilst also displaying frequency, opt-out information and customer service details, as required by the WASPA COC. Other facts remain that concrete records processed directly from the system (and verified by our respective aggregator) show the use of subscription services and downloading of material. Content was downloaded whilst specific notifications (such as welcome sms and spend alerts) were sent with the objective of informing the customer and meeting WASPA requirements (all shown in detailed logs).”
- 4.2.4 The adverse adjudication was based largely on the appearance of the IP’s subscription confirmation page appearance. The adjudicator erred in finding that the landing page does not contain any terms and conditions and that the landing page appears to be a further advertisement for the services and does not have the appearance of a transaction page.
- “Once again, it must be noted that the landing page demonstrates clear terms and conditions which I have highlighted by pasting below:
- “We provide pics, videos and games for our members. Subscription service at only R15 per 3 days. Text STOP to 39215 to unsubscribe or send mail to help@gsm.vc. For help write to help@gsm.vc. Wallpapers and screensavers cost just R5 each, Videos R10, Mobile Games R45. 150 Credits equals R15. Additional bearer charges may apply. Service provided by Mobimex.”
- 4.2.5 The IP had obtained legal advice which concluded that the terms and conditions on the landing page set out all information required by the Code. There are no specific guidelines in the Code as regards

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the appearance of a “confirmation page” nor are there any guidelines as to the words which can be used to confirm a subscription.

“The word “Enter” used on this page refers to entering the subscription service, which is again verified in the terms and conditions.”

4.2.6 The IP has not attempted to evade the Code nor held the intent to deceive its customers.

4.2.7 The subscription activation process employed was such that consumers subscribing would have the specific intent to subscribe to the service in compliance with section 11.1.2 of the Code.

4.2.8 The IP was willing to refund any user that felt that they had not received value for their money from its services and was accordingly prepared to offer the complainant a refund.

4.3 The IP’s attorneys raised a further set of submissions in a supplementary notice. The IP sought condonation in respect of the late filing of this supplementary notice and the Panel sees no prejudice in granting same.

4.4 An independent transaction:

4.4.1 The IP asserted that its subscription service was indeed compliant with section 11.1.2, arguing that:

4.4.1.1 All required terms and conditions for subscription services are provided to the consumer prior to subscription taking place;

4.4.1.2 The IP had inadvertently failed to provide the adjudicator with an additional confirmation page which was placed between the confirmation page and the WAP site and which was active at the time at which the complainant was subscribed to the subscription service as well as complete logs showing the interaction between the IP and the consumer. The IP indicated that this was due to the actions of its Marketing Director at the time and that they had taken steps to address this. The failure was therefore “beyond [the IP’s] control” and, it is argued, it is “now incumbent of [sic] WASPA to take the correct information, which has now been submitted and which materially changes the basis on which the Adjudicator reached his initial decision”.

4.4.1.3 As a result there was a specific confirmation request which “is not bundled with any other request (such as the purchasing of content) and constitutes a separate and distinct transaction.

4.4.1.4 Further, the finding by the adjudicator that the “subscription transaction mechanism is activated by clicking on a button that appears to be a navigation button rather than a transaction button” is “unfounded”. This is because a consumer would

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thereafter be forwarded to the additional confirmation page “which would have made it absolutely clear and explicit that a transaction for a subscription service was being undertaken”.

- 4.4.2 The IP then provided its subscription activation process and concluded that “the subscription activation process in respect of the [subscription service] conforms, and has conformed at all relevant times”, with the provisions of the Code. The activation process ensures that the customer is aware that the [subscription service] is a subscription service and that the customer concludes a clearly independent transaction when joining the [subscription service]. As such, it is submitted that the Adjudicator erred in finding that the provisions of the Code had been breached and the decision should be reversed”.

(IP’s emphasis)

- 4.5 The IP made a number of further submissions with regard to the sanction imposed by the Adjudicator and also set a number of steps which it had taken to address any deficiencies which might exist in its compliance processes.
- 4.6 Given the Finding set out below the Panel does not believe it necessary to detail these submissions.

5 FINDINGS OF APPEALS PANEL

- 5.1 The Panel has decided to exercise its discretion to consider new material introduced at the appeals stage in favour of the IP and has accordingly considered the impact of the additional confirmation page on the extent to which the IP’s subscription activation process complies with the Code.
- 5.1.1 As an aside the Panel notes that it is strange that this additional confirmation page was not produced or alluded to in the initial appeal notice.
- 5.2 The Panel has elected to exercise its discretion to condone the late filling of additional appeal submissions by the IP.
- 5.3 The submission of the IP regarding the consolidation of this matter with complaint 6303 is correct. Given that both matters have been appealed the Panel will continue to treat them as independent complaints but will take into account the similarity of the complaints (and others) in considering any applicable sanction.
- 5.4 The Panel does not believe that it is correct to state that the adjudicator erred in making a finding based on the material placed before him or her on the basis that there is certain material which the IP failed to submit. The contentions by the IP in this regard are risible.

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5.5 The Panel cannot automatically entertain the introduction of new material at the appeals stage. In this regard we refer to the Appeal in respect of complaint 350 at paragraph 5.6.1 ff:

“5.6.1 The SP failed to respond adequately to the complaint at the relevant time which was the time which is most important from the point of view of putting all relevant facts before the Board, ensuring the adjudicator has all the right information, and arguing for the least (if any) sanction in the result. The failure of the SP to take adequate action at the appropriate time leaves WASPA in the position where it must make the best of the information to hand, and must make a finding accordingly.

The SP fails to take account of the key issues arising as a result of the complaint. In the panel’s view, these are:

- The fact that the Code applies to all WASPS with the blessing of the mobile networks, and WASPs are obliged, in turn to ensure that their IPs are familiar with and compliant with the Code (we have quoted the relevant sections of the Code in full above)
- Complainants, whoever they might be, are fully entitled to put the facts as they see them before WASPA and to request an investigation – that is the purpose of forwarding the complaint to an SP and/or IP as was the case here. At that point the SP and/or IP is offered the opportunity to respond in full. The entire matter is then passed to an adjudicator for a finding. There is no onus on a complainant (many of whom are members of the public and quite uninformed about legal matters or the working of technology) to substantiate or prove anything other than receipt of an offending message
- An appeal is not a forum to air grievances with the world at large – it is a formal opportunity to list in detail, what it is about the adjudication that is not appropriate or that is incorrect. It is not an opportunity to set the record straight when this could and should have been done at the complaint stage. It is also not an opportunity to raise new facts.”

(our emphasis)

5.6 Nevertheless the Panel is also mindful of the adjudication in Appeal 610 where, at paragraph 1.2, the Panel indicated that it has a discretion based on equity with regard to the admission of new material at the appeal stage:

“For the sake of the participants in this matter and readers in general, we record that the WASPA complaints procedure is a combination of review and appeal procedures. While it is not the role of the appeals panel to start the enquiry anew, but rather to review the facts which are brought before it by the WASPA Secretariat, the panel may request

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ancillary information to support substantive issues and / or look wider than the original adjudication in the interests of equity.”

- 5.7 Furthermore, section 13.6.5 of the Code enjoins an appeals panel to “consider the evidence provided to the adjudicator, the adjudicator’s decision and any additional information provided by the service provider”.
- 5.8 In exercising this discretion the Panel should be aware of the fact that no further right of review or appeal lies against its decision.
- 5.9 Thus stated the exercise of this discretion will generally, but not always, favour the inclusion of the new material presented.
- 5.10 The Panel also believes that it should consider whether allowing the introduction of the new material would prejudice any other party. In this matter and given the findings made below, this does not appear to be the case.
- 5.11 The Panel has therefore considered the additional material presented in the form of the additional confirmation page and makes the following findings:
- 5.11.1 It is accepted that the insertion of the additional confirmation page into the subscription activation process should make it clearer to consumers that by clicking on the confirm button they will be subscribing to a service.
- 5.11.2 As set out in paragraph 14.1 of the appeal notice it appears that the real intention behind the additional confirmation page was to ensure compliance with section 6.2.12 of the Code which requires that transactions billed at R10 or more must include specific confirmation from the customer and keep a record of such confirmation. It is therefore not correct to position the page as being a subscription confirmation page and it appears more to be a consequence of compliance with section 6.2.12 than a conscious effort to comply with section 11.1.2.
- 5.11.3 The Panel is of the view that it would be appropriate to review the subscription activation process (as presented in the appeal notice) and subscription service generally as against the requirements of the Code in its entirety. This is a factual enquiry undertaken by the Panel on the basis of the material supplied by the IP on appeal as enjoined by section 13.6.5 of the Code. The Panel is aware that ideally the matter should be referred back to the adjudicator for reconsideration but there is no allowance for such a process in the Code and the Panel, by accepting the new material which the IP has submitted, is perforce required to act in this regard as a body of first instance.
- 5.11.4 Section 11.1.1 of the Code requires that promotional material for subscription services must “prominently and explicitly identify” the services as “subscription services”. This includes any promotional

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material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material”.

- 5.11.5 The Panel is of the view that Annexure B as provided in the appeal notice is promotional material within the meaning of section 11.1.1 and that it does not prominently and explicitly identify the services offered as subscription services.
- 5.11.5.1 The advertisement would be viewed on a mobile phone. The first thing a viewer would see would be the word “Welcome” under which is a graphic intimation of the content on offer and the name of the service.
- 5.11.5.2 Immediately under this appears “GET ALL THE ADULT CONTENT YOU WANT 18+ ONLY”.
- 5.11.5.3 Immediately thereunder is the “Enter here” button.
- 5.11.5.4 Thereafter there is an amount of white space under which appear the terms and conditions. The term “Subscription services” is a part of these. Depending on the handset on which the advertisement is being viewed a user is likely to have to scroll down to view this.
- 5.11.5.5 The Panel is satisfied that the identification of the service as being of a subscription nature is neither prominent nor explicit. The IP’s contention that the service is “clearly” identified as a subscription service is rejected.
- 5.11.6 Notwithstanding the fact that it has not been touched upon by the adjudicator in the adjudication under appeal, the Panel believes that the crux of this matter relates to the pricing information available on the landing page and additional confirmation page and the business model employed by the IP.
- 5.11.6.1 The pricing information set out on the landing page and replicated in the separate terms and conditions states:
“Subscriptions services at only R15 per 3 days....Wallpapers and Screensavers cost just R5 each. Videos R10, Mobile Games, R45. 150 credits equals R15.”
- 5.11.6.2 Bearing in mind the finding made above that the subscription nature of the service is neither prominent or explicit the Panel is of the view that a reasonable user would not, on the basis of the landing page, be clear as to whether they were purchasing individual content items or entering into a subscription service. Why are individual content item prices listed if these are not available? Surely it cannot be intended that these per item prices would be in addition to the subscription charge?

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- 5.11.6.3 This confusion is compounded by the additional confirmation page which, while stating that the service is a subscription service, nevertheless is, by the IP's own admission, intended to be a page indicating confirmation in respect of a specific transaction.
- 5.11.6.4 One particular observation reinforces the Panel's view that the heart of the problem with the IP's service lay with the combination of two different models – subscription and pay-per-view – both available through the same landing page:
- 5.11.6.4.1 It is likewise evident from such logs that the user in this matter only viewed or downloaded content on 9 April 2009, the date on which the subscription was affected. This is entirely consistent with a user who believes they are transacting on a per item basis and not on a subscription basis.
- 5.11.6.5 The Panel is accordingly of the view that the pricing for the service is misleading and that this in conjunction with the breach of section 11.1.1 noted above will prejudice consumers and lead to confusion and complaints to WASPA.
- 5.11.6.6 The Panel therefore finds that the service provided by the IP is in breach of sections 4.1.1 and 6.2.4 of the Code.
- 5.11.7 It is implicit in the findings made immediately above that consumers accessing the services provided by the IP did not necessarily enter the Erotik Portal with the intention of subscribing to a service. This is notwithstanding the additional confirmation page upon which the IP has placed so much reliance in this appeal.
- 5.11.7.1 While the Panel accepts, as noted above, that the wording of the additional confirmation page indicates that the service is a subscription service, the Panel takes the view that this of itself is not sufficient to counter the confusion engendered by the breaches of section 4.1.1, 6.2.4 and 11.1.1.
- 5.11.8 The IP in its appeal has at all times positioned the service as a subscription service only, but this simply does not reflect the reality that both a subscription and a pay-per-view model were being employed and the IP has singularly failed to deal with this aspect in its appeal.
- 5.11.9 On its own version the IP acknowledges that a consumer could be entering the portal so as either download or view certain items or to subscribe to a service. Nevertheless it appears that the practise of the IP was to treat all users who entered the portal as having subscribed to the service.

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- 5.11.10 The finding of a breach of section 11.1.2 of the Code is accordingly confirmed.
- 5.12 It is the view of the Panel that such conduct falls below the standards set out in section 3.1.1 and 4.1.2 of the Code and the adjudicator's findings that the IP had breached these sections is accordingly confirmed.
- 5.13 Given the finding made above with regard to the breaches of the Code it is the intention of the Panel to substitute in its entirety the decision and sanction imposed by the Adjudicator. It is accordingly not necessary to consider the arguments raised by the IP relating to the legitimacy of the sanction (those relating to mitigation will be separately considered below).
- 5.14 The Panel nevertheless wishes to confirm that
- 5.14.1 The imposition by the adjudicator of substantially the same sanctions in respect of a number of complaints involving the IP was not correct.
- 5.14.2 The adjudicator's use of other complaints which had not been finalised at the time that complaint 6678 was lodged in aggravation of sanction is not correct.
- 5.14.3 The Panel is accordingly in substantial agreement with the submissions raised in section 15 of the additional representations submitted.
- 5.15 The Panel is aware that the IP has not made any specific representations in respect of its compliance with sections 6.2.4 and 11.1.1 but is of the view that:
- 5.15.1.1 The IP has made representations regarding its entire subscription process which has included representations that clearly lay out its position as regards sections 6.2.4 and 11.1.1.
- 5.15.1.2 The IP has explicitly averred that its subscription process is compliant with the Code.
- 5.15.1.3 The breaches are clearly evident from the material supplied by the IP both in response to the original complaint and the notice of appeal.
- 5.15.1.4 The Panel is unable to envisage any argument which the IP could bring to bear which would alter the evidence reflected in the material it has provided.
- 5.15.1.5 The Panel is not empowered by the Code to seek further information or representations from the Appellant, notwithstanding this Panel's finding that it is obliged to accept new material submitted as part of an appeal. The Panel is rather enjoined by the Code to decide whether, on the basis of

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the evidence presented, there has, in fact, been a breach of the Code.

- 5.16 As regards the sanction imposed by the adjudicator the Panel has already noted its agreement with the submissions made by the IP in this regard. It appears therefore that the Panel should vary the decision and the sanction imposed by the adjudicator to reflect its findings above.
- 5.17 In considering a more appropriate sanction to impose, the Panel had regard to:
- 5.17.1 The lengthy period of suspension endured by the IP and the financial consequences thereof;
- 5.17.2 The errors committed by the adjudicator in having regard to complaints not yet finalised in aggravation of sentence;
- 5.17.3 The errors committed by the adjudicator in not consolidating substantially similar complaints relating to substantially similar services and breaches;
- 5.17.4 The prior record of the IP;
- 5.17.5 The undoubted seriousness of the offence and the apparent disingenuousness of the IP in positioning the service solely as a subscription service in its dealings with WASPA; and
- 5.17.6 The steps taken by the IP to remedy deficiencies in its compliance and in its internal processes and the lengths which it has gone to to engage with WASPA.
- 5.18 The decision of the Adjudicator is substituted with the following:
- 5.18.1 The IP is found to have breached sections 3.1.1, 4.1.1, 4.1.2, 6.2.4, 11.1.1 and 11.1.2 of the Code. The following sanctions are imposed:
- 5.18.1.1 The IP is required to compensate the complainant in full in respect of all charges arising from the interaction of the complainant's daughter with the IP.
- 5.18.1.2 Payment of a fine of R30 000 in respect of the breaches of section 3.1.1, 4.1.1, 4.1.2, 6.2.4, 11.1.1 and 11.1.2. This sanction is consolidated with the sanction imposed for the same breaches in respect of complaints 5696, 6303, 6671, 6719, 6759, 6928 and 7081.
- 5.19 The Adjudicator had ordered the immediate suspension of all subscription services offered by the IP in South Africa, thereby confirming the suspension which had been put in place on 3 December 2009 by a WASPA Emergency Panel. For the avoidance of doubt the Panel wishes to clarify that this suspension is now lifted.
- 5.20 The IP has asserted that the appeal fee paid by it should be returned due to the "strong merits" of the appeal. The failure of the IP to present all


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relevant material during the adjudication process is its own, as are its internal difficulties with its staff. Further the Panel has noted above the incorrect positioning of the service by the IP as being exclusively a subscription service.

- 5.21 On this basis the Panel holds that the appeal fee of the IP is not refundable.

Annexure A

Welcome



**GET ALL THE ADULT
CONTENT YOU WANT
RIGHT HERE! 18+
ONLY!**

[Enter here](#)

We provide pics, videos and
games for members.
Subscription services at only
R15 per 3 days. Text STOP
to 39215 to unsubscribe or
send mail to help@gsm.vc.
For HELP write to
help@gsm.vc. Wallpapers
and Screensavers cost just
R5 each, Videos R10,
Mobile Games R45. 150
credits equals R15.
Additional bearer charges
may apply.
Service provided by
Mobimez.