WASPA

APPEALS PANEL REPORT

Date:	**23 May 2013**
Service Provider (SP):	**Buongiorno SA**
Complaint Numbers:	**11258; 11582; 11626; 13038 and 13039**
Code Version:	**10.0**
Clauses:	**11.2.2 and 11.2.3**

PART 1: PROCEDURAL ISSUES AND THE BROADER LEGAL LANDSCAPE

1. Introduction

1.1 Buongiorno South Africa (Pty) Ltd (hereafter the SP), which is the appellant in this matter, submitted two sets of appeal documents to this panel; one by its legal representative, a firm of attorneys; and one by the counsel appointed to represent the SP at a face-to-face hearing. Both these sets of documents are dated 22 August 2012. These documents address essentially the same issues and the arguments presented overlap significantly. These documents will not be reproduced in full in this report, but we will refer to parts of these documents and quote relevant passages out of these documents where required.

The SP starts off its appeal with what the SP's appeal documents term

as the “legal position” or “legal landscape”. This part of the SP’s appeal contains the following arguments; firstly, why the SP is of the opinion that the actions of WASPA fall within the ambit of the Promotion of Administrative Justice Act (hereafter PAJA) or alternatively under the ambit of the principles of proper administrative procedure at common law; secondly, why the SP is of the opinion that the principle of “double jeopardy” does not find proper application (or is ignored) in the WASPA complaints adjudication process; and thirdly, why the SP has difficulty with the perceived inconsistency of WASPA adjudications.

We will deal with these three submissions made by the SP separately.

2. Promotion of Administrative Justice Act (PAJA); Administrative procedure at common law; Due process; Natural justice and the principle of *audi alteram partem*

2.1. The SP in essence avers that the determinations made by WASPA adjudicators and appeal panels are administrative action within the meaning of that phrase in the Constitution and in PAJA. This according to the SP, in short, makes the SP entitled to the procedural protection of PAJA, fair administrative action, due process and the principles of natural justice, most importantly, the *audi alteram partem* rule.

2.2. The SP in both the documents referred to above, and by way oral submissions presented by its legal counsel at a face-to-face hearing, put forward detailed arguments by way of: *(a)* an analysis of certain sections of PAJA; *(b)* an analysis of what “type” of organisation WASPA is; *(c)* an analysis of the question of whether WASPA’s determinations are “administrative action”; and *(d)* an analysis of a substantial number of court decisions which have dealt with the application of PAJA.

2.3. WASPA by way of submissions, both in writing and by way of oral submissions made at the hearing by its legal counsel, in turn argued that PAJA did not apply to WASPA determinations in contrast to the arguments made by the SP in context of *(a)* to *(d)* above.

2.4 The panel’s decision regarding the issues of Promotion of Administrative Justice Act (PAJA); Administrative procedure at common law; Due process; Natural justice and the principle of *audi alteram partem* follows:

2.4.1 As stated above, both the SP and WASPA by way of its legal representatives and

legal counsel (two senior counsel) forwarded substantial, very technical and legally complex arguments and submissions regarding the “legal landscape” in which WASPA operates, the manner in which the WASPA Code of Conduct fits within this legal landscape, and the status of the determinations made by adjudicators and appeal panels. This was done primarily by way of reference to a substantial number of court decisions.

2.4.2 What is evident is that there is substantial uncertainty regarding aspects raised by the SP in its analysis of WASPA as a body, its Code and its procedures, in an effort to ultimately arrive at a conclusion that PAJA applies to WASPA and its processes. The opposite point of view is similarly fraught with difficulty. There are numerous interpretational anomalies, philosophical slants and shifting paradigms evident from the court decisions relied on by both the SP and WASPA. The end result is that not even our learned judges seem to be able to agree on the application and interpretation of PAJA. It is the opinion of this panel that it would be presumptuous and unwise for this panel to endeavour to do what our wise judges, as well as the parties’ learned counsel, find difficult to agree on - find a definitive answer to the question of when and to whom PAJA applies or does not apply. We therefore do not see the sense in expressing our opinions on the legal correctness or soundness (or the opposite) of all the individual submissions raised by the parties and the decisions they rely on, in their efforts to convince us of one point of view or another. Doing so will create further uncertainty, and will not contribute in any positive way in solving the issues and problems faced by the industry, its members, WASPA and its complaints resolution - and adjudication processes. Consequently, this panel does not regard itself to be in a position to speak the “final” or “definitive” word on whether PAJA applies, and will we not mislead ourselves, the SP or WASPA into thinking that we are in a position to do so. We therefore do not base our findings on whether or not the SP is successful in this appeal on a finding of whether PAJA applies.

2.4.3 That being said - this panel does, however, believe that the principles of due process and natural justice - including the principle of *audi alteram partem*, are fundamental principles in our law that cannot be ignored. In order for WASPA and its complaints resolution and/or adjudication processes (including the Code) to be legitimate and fair, these fundamental principles must be observed as far as it is possible and reasonable.

2.4.4 In its appeal documents the SP quotes passages from a previous appeal panel decision, that of complaint 5564, as an indication that WASPA "determinations will be made under its code of conduct without regard to the broader legal landscape". It is important for that appeal panel decision to be placed in a proper context in order to gain a better understanding of what was said and why it was said. The interpretation the SP seems to attribute to the passages quoted in its documents is not entirely accurate, and not a fair reflection of the point of view the panel in complaint 5564 wanted to convey. The SP quoted the following passages from that decision:

> "…although the Code of Conduct exists within the broader context of the law, WASPA complaints are determined within the very narrow and strict context of the Code of Conduct. Emergency panels, adjudicators and this panel apply and base decisions on an industry Code of Conduct, which forms the very basis of the self-regulating industry in order to protect special and specific industry needs and principles (such as consumer confidence) to which every member of the industry have committed themselves. This panel does not agree with the SP that any of the SP's rights to either due process or natural justice mentioned in its grounds of appeal should be justified or defended with arguments based on the broader context of the law and peripheral legal arguments not specifically relevant to the breaches of the Code. The ground of appeal regarding the violation of the SP's rights to proper administrative procedure and due process are therefore not upheld." (SP's emphasis)

2.4.5 Complaint 5564 concerned an emergency panel procedure. In terms of the process that is followed, the SP was afforded the opportunity to respond, but did not do so, because it misunderstood communications from WASPA:

> "The procedures prescribed by the Code were followed correctly by WASPA, the Emergency panel and the adjudicator in our view. The Code is clear regarding the Emergency procedure. This procedure was followed correctly, and the SP's arguments in this regard appear to arise from its own incorrect understanding of its interaction with WASPA and an incorrect interpretation of the Code. (See in this regard WASPA email addressed to SP, dated 21 January 2009.)"

2.4.6 Members join WASPA voluntarily and subject themselves to the Code and its procedures. Members are aware of the objectives of WASPA and the provisions of the Code which endeavour to implement and give life to these objectives. In this regard the panel wishes to quote two further passages from appeal panel decision 5564 not referred to by the SP:

> "The primary objective of WASPA, the Code of Conduct (and Advertising Rules) and the WASPA adjudication process is without a doubt the protection of consumers of mobile services and the public in general, especially children".

And:

> "The panel also wishes to note that the Code and the Advertising Rules are voluntary self-regulatory procedures, agreed upon by all industry members and frequently consulted upon and amended where appropriate."

2.4.7 In our mind the panel in complaint 5564 wanted to convey the principle that the SP in that complaint "consented" to the procedure followed in the case of an emergency procedure - in terms of the Code - as WASPA membership includes a commitment to its objectives, awareness of the provisions of the Code and a willingness to abide by them. A member's failure to comply with provisions which govern a WASPA process cannot of itself amount to a failure of natural justice, or an infringement of the member's rights to due process. (See also appeal report 10443, which the SP itself refers to in its submissions where it was found that the principle of *audi alteram partem* had been sufficiently observed in the context of an emergency procedure).

2.4.8 In the adjudications which form the subject of this appeal, the adjudicator(s) found the SP to have breached provisions of the Code in addition to the clauses cited when the complaints were initially lodged.

2.4.9 As a consequence of having found the SP to have breached a number of these clauses (clauses which constitute rather serious breaches of the Code) the adjudicator(s) imposed harsh sanctions on the SP. The SP argues that it was not provided with an opportunity to respond to the adjudicators' allegations that it had breached these clauses, and that it suffered severe prejudice as a result. The SP consequently submits that its rights to due process, natural justice, particularly to

the principle of *audi alteram partem*, were infringed.

2.4.10 In terms of the WASPA Code of Conduct, members are provided with an opportunity to respond to an informal complaint or to remedy a possible breach before a complaint is escalated to formal adjudication. Thereafter a member has the opportunity to make submissions to an adjudicator before a final determination is made. The Code, in an obvious effort to entrench the very principles of due process and natural justice, provides for an appeal process in order to as far as possible ensure the fairness of a determination and to remedy any possible infringement of these rights.

2.4.11 The Code empowers adjudicators and even appeal panels to identify additional breaches of the Code apart from the breach(es) identified in the initial complaint. These empowering provisions make sense, considering that most complainants will be members of the public who will not necessarily have the intimate knowledge of the Code or the industry required to be able to identify all the possible breaches that can be associated with a particular service.

2.4.12 Adjudicators regularly identify additional breaches because they are empowered by the Code to do so.

2.4.13 While it is clear that WASPA, as a body, is in principle committed to the fundamental principles of due process and natural justice, reflected in the manner in which the complaints procedure is administered, and in the Code itself, a concern arises when adjudicators (and appeal panels) don't uniformly provide the member against which the complaint is lodged an opportunity to respond to, or to provide information regarding, these additional breaches identified by the adjudicator or the panel.

2.4.14 The Code unfortunately is silent in this regard, in that it does not oblige an adjudicator (or a panel) to provide the member with an opportunity to respond.

2.4.15 Further, arguing that members do not need an opportunity to respond before an adjudicator makes a final determination at the adjudication stage, since an opportunity to respond is provided for in the appeal stage, is not sound. Such reasoning not only strips the member of the second opportunity to state its case and have an unfair or incorrect determination remedied - as was envisaged by the Code, but it inadvertently also ignores the principles of due process and natural justice, particularly the principle of *audi alteram partem*.

2.4.16 It bears mention that adjudicators may hold the view that the principle of *audi alteram partem* should not necessarily apply where the breach is objectively so clear and definite that no response given can remedy such a breach. It can theoretically be argued that such an objectively clear breach obviates the application of the principle of *audi alteram partem*. Even if this view can be defended theoretically, this panel cannot accept such an approach, considering the context of the objectives of WASPA and the Code of Conduct. Even if just for the sake of being able to argue in mitigation of sanction, a member must be allowed to respond to additional breaches identified by the adjudicator before a final determination is made.

2.4.17 In the current instance, this panel finds that the SP was not provided with an opportunity to respond to the citation of a number of breaches not identified in the initial complaint, that it should have been provided with an opportunity to state its case (regardless of how clear or objective the adjudicator(s) considered the breaches to be), and that the SP's fundamental rights to due process and natural justice, particularly the principle of *audi alteram partem*, were not observed.

2.4.18 With good faith and fairness informing our decision, and with due consideration to the principle of "no difference", this panel upholds the SP's grounds of appeal that its fundamental rights to due process and natural justice, particularly the principle of *audi alteram partem* were not observed.

2.4.19 The SP's appeal is therefore successful and all the sanctions against the SP in all the complaints appealed against in this appeal are hereby set aside.

2.4.20 Even though the SP's appeal was successful on procedural grounds, this panel is aware that it is important for the SP and other members to have as much clarity as possible regarding the interpretation of the Code, and we will therefore endeavour to provide guidance on whether and why we are of the opinion that the SP did or did not commit the breaches as determined by the adjudicator(s). We do so in Part 2 of this report.

3. Double Jeopardy

3.1 The SP in its appeal documents points to the principle of "double jeopardy", and in

essence argues that it should not be sanctioned ("disciplined") numerous times for the same breach of the Code.

3.2 The principle of "double jeopardy" has been raised as a defence in a number of previous appeals. It is true, as the SP submits, that a number of complaints submitted against the same service, especially over a period of time, can lead to the so-called "duplication" of sanctions for what in fact was technically speaking only one breach of the Code. In this regard we refer to the appeal panel decision in the "Various TIMwe" appeal, decided May 2012, in which the panel made the follow remarks:

> "[we] have asked ourselves what this panel regards as the appropriate approach towards sanctioning in the event that multiple complaints are lodged at more or less the same time against the same service.
>
> The Code does not make specific provision for how the eventuality of numerous complaints being lodged against the same service should be administered by WASPA or what effect such an eventuality should have on sanctioning….
>
> Ideally as many complaints as possible lodged against the same service within a particular period of time should be considered together, by the same adjudicator. The number of complaints can then be viewed by the adjudicator as an aggravating circumstance in consideration of sanction, rather than numerous sanctions being imposed by two or more adjudicators for what is in essence the same breach. This according to the WASPA Secretariat, is done where possible, but is practically speaking very difficult to do and not only places an enormous administrative burden on the WASPA secretariat but it also has a substantial delaying effect on the adjudication of disputes. Complaints are administered, and assigned to adjudicators, on a case-by-case basis. It can surely not be expected of the WASPA secretariat to have the gift of foresight in order to know whether or when two or more complaints will be lodged against the same service in a certain period of time. The Secretariat does not have the administrative capacity to hold back complaints for adjudication in order to assign complaints to the same adjudicator should such a situation possibly present itself. The delay in the adjudication of complaints generally, but especially where the adjudication of a complaint is

urgent (for example, where serious breaches of the Code are committed) in any event makes the bundling together of complaints for adjudication a very difficult thing to do…."

And:

"Our answer to the tricky question posed by this appeal as stated in 3.5.1 above is that complaints lodged against the same service should ideally be considered together, by the same adjudicator, which could then view the number of complaints as an aggravating circumstance in consideration of sanction. The strict proviso to this principle that this is not a right in terms of the Code on which members can insist, however, applies. Practical circumstance and industry needs do not allow for this practice to be applied on a consistent basis and we therefore categorically state that our view in this regard does not create a separate or new ground of appeal." With this sentiment this panel agrees.

And:

"… the duplication of sanctions for what were essentially the same breaches of the Code in relation to the same service has in this specific case amounted to the SP having been unfairly prejudiced to a significant extent."

3.3 How to deal with multiple complaints dealing with the same service and the same breach is truly a vexing question and unfortunately one to which there is no clear or ideal answer. The SP's legal counsel admitted as much at the face-to-face hearing. Ideally, as was stated by the panel quoted above, "as many complaints as possible lodged against the same service within a particular period of time should be considered together, by the same adjudicator. The number of complaints can then be viewed by the adjudicator as an aggravating circumstance in consideration of sanction, rather than numerous sanctions being imposed by two or more adjudicators for what is in essence the same breach." There should therefore be only one sanction per breach (offence). Adjudicators should, where possible, review the timelines for complaints relating to the breach under consideration, and if there is an overlap, the complaints which overlap should in theory be considered the same breach. The number of complaints can then be considered only in so far as it may be an aggravating factor in determining the severity of the sanction.

3.4 The WASPA secretariat has on numerous occasions confirmed that they do their utmost to assign complaints regarding the same service and breach to the same adjudicator. This is, as was mentioned by the panel quoted above, not always possible practically speaking, and there is no quick fix answer or ideal solution to the problem. The finger can also not be pointed at WASPA or its processes alone – members should also shoulder some of the responsibility for being willing to bill consumers over long periods of time, earning potentially huge revenues, in terms of services which are in breach of the Code.

3.5 All involved should do their best to as far as possible avoid such a situation – in this regard members can, for example, immediately point out to adjudicators that a complaint has already been lodged or a sanction has already been issued in terms of the same service, when responding to a complaint referred to formal adjudication.

3.6 Although we agree with the SP and although it is generally accepted that only one sanction should be issued per breach, even if cited in numerous complaints, we would like to warn members to be careful of their interpretation of what they themselves, like the SP in this appeal, regard to be “essentially” or “substantively” the same service. Services with the same name, look and feel, of which for example, the subscribing method, content or detail of information provided differ - even if only slightly but in an important respect, cannot always be regarded as “the same service”.

4. Inconsistency of WASPA Adjudications

4.1 The SP submits that WASPA adjudicators are not consistent in their decision making, and that this creates uncertainty in the industry, as it is essentially unfair to members who follow certain adjudications only to later be found to be in breach of the same offence for different reasons.

4.2 This panel cannot deny that inconsistent decisions are made on occasion. It would be foolish and unrealistic not to admit that it happens. The SP is correct that conflicting adjudications lead to uncertainty and unfairness, which is exactly the opposite of what WASPA and the adjudicators endeavor to achieve. It is, however, a matter of context and can it surely not be said, and is it patently untrue, that

uncertainty and unfairness is the norm with regards to WASPA adjudications.

4.3 WASPA and its pool of adjudicators go to great lengths to ensure, as far as it is reasonably possible, that the decisions reached are correct, consistent and fair.

4.4 Mechanisms such as adjudicators' workshops, a searchable database of reports issued, adjudicators' guides, appeal panels and the appointment of highly skilled and competent individuals to its pool of adjudicators, all contribute to the effort to make adjudicators decisions as consistent and as fair as possible.

4.5 This panel is of the view, albeit subjectively so, that WASPA adjudication determinations are mostly fair and consistent, considering the complexity, dynamic nature and constant fluency of the industry in which it operates.

4.6 The Code is in a constant process of evolution and refinement, and new and improved industry norms and standards emerge seemingly on a daily basis, to which not only the members but also the adjudicators must adapt.

4.7 Every individual complaint must be considered in the context of the specific facts and circumstances of that particular complaint, and one must guard against oversimplification and generalization in reaching a conclusion that determinations dealing with perceived identical breaches are genuinely inconsistent.

4.8 In any event – expecting all adjudicators to always interpret and view the Code and possible breaches of the Code correctly and the same in all respects is as unrealistic as to expect all judges and all lawyers to always agree on everything. The law is in its very nature uncertain, subjective and hardly ever certain. To this any legal representative or legal counsel can surely attest.

4.9 This panel can assure the SP (and other members of WASPA) that all adjudicators and appeal panels have as their goal the rendering of clear and consistent determinations informed by the principles of rationality and fairness.

PART 2: THE APPEAL ON ITS MERITS

5.1 The adjudications before this panel broadly involve two examples of the Service Provider's promotional material, collectively described as the 'Ballerina' cases (case

numbers 11258; 11582 and 11626), and the 'iPad' cases (numbers 13038 and 13039).

5.2 The complaints in these cases all allege breaches of clause 11.2.2 of version 10 of the WASPA Code of Conduct, and with the exception of case number 11258, also allege breaches of clause 11.2.3.

> *11.2.2. 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 and may not be an entry into a competition or quiz.*
>
> *11.2.3. Notwithstanding the above clause, it is permissible for a customer to be included as a participant in a promotional draw or competition as an additional benefit to being a subscription service customer. In such a case, it must be clear to the customer that the promotional draw or competition is ancillary to the subscription service, and the process of joining the subscription service may not be disguised as an entry into a competition.*

5.3 Clauses 11.2.2 and 11.2.3 in Code version 10 have their origin in clauses 11.1.1, 11.1.2 and 11.1.4 in version 3.2 of the Code, in effect from 1 September 2005 to 20 April, 2006, which read:

> *11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services".*
>
> *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.*
>
> *11.1.3. [--]*
>
> *11.1.4. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.*

5.4 Applicable as from 25 August 2006 till 10 November, 2006, version 4.6 of the Code introduced an amendment to clause 11.1.2, by adding a second sentence; "*A request from a subscriber to join a subscription service may not be bundled with a*

request for a specific content item."

5.5 A final amendment added a second sentence to conclude clause 11.1.1 in version 7.0 of the Code, applicable from 25 March 2009 to 17 June 2009: "*This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.*"

5.6 Other than a later renumbering of the relevant provisions (for the purposes of this report) of the original clause 11.1 to 11.2, the final amendment to clause 11.1.2 was introduced in version 7.4 of the Code by introducing eleven words to conclude the provision; "… *and may not be an entry into competition or quiz*".

5.7 Reference to concern of the concept of 'bundled' offers is explained in the notes to version 7.4 of the Code, which states: "*WASPA has received a large number of complaints from consumers who claim to have been tricked into subscribing to services while entering competitions or quizzes. The modification to the above clause is intended to prohibit the practice of "bundling" competitions/quizzes and subscription services. Requiring a specific, separate request from a customer to be subscribed to a service prevents the automatic subscription to a service, when a customer intended only to participate in a quiz or competition.*"

5.8 In WASPA's later amendment of the Code to clarify its intention behind the amendment to clause 11.1.2, it introduced clause 11.2.3 in version 10 of the Code, with notes stating: "*This clause was introduced in version 10.0. The original intent of clause 11.2.2 was to prevent customers from being tricked into joining a subscription service when they thought they were entering a competition. However, it was not intended to prevent someone who has deliberately joined a subscription service from being included in a promotional draw. This clause is intended to clarify this.*"

5.9 The primary concern of WASPA in considering alleged breaches of clauses 11.2.2 and 11.2.3 is cited in the introduction to the Code, which states in clause 1.2. (Objectives of the Code of Conduct): "*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.*" (Our emphasis).

5.10 This intention is given effect in clauses 4.1.1 and 4.1.2 of the Code: "*4.1.1.*

Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers. 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."

5.11 A useful two-step enquiry to determine the so-called 'bundling' complaint was suggested by the Adjudicator in his or her Report to complaint 11862, the conclusion of which is cited with approval by the SP in this matter, to determine whether a breach of clause 11.2.2 has occurred. The Adjudicator says, in paragraph 14.4 of that Report: "*In considering whether subscription would be an independent transaction made with the requisite intention in a case where a competition or promotional draw is offered as an additional benefit to being a subscriber to the service, an adjudicator is required to decide whether: 14.4.1. it would be clear to that customer that the promotion draw or competition is "ancillary" to the subscription service, and 14.4.2. (whether) the subscription process has or has not been disguised as an entry into a competition.*"

5.12 On the first enquiry, regarding whether a promotional draw is 'ancillary', it is useful to consider the meaning of this term. We annex to this report the leading information from the top five results to a Google search for the query 'Dictionary ancillary'. In our understanding, the word 'ancillary' clearly means something that is 'in support of, rather than, the main thing'.

5.13 In the context of a promotional draw which forms a part of a subscription service extended by a Service Provider and which is subject to clauses 11.2.2 and 11.2.3 of the Code, it must be accepted that the term 'ancillary' implies that a potential customer must be enticed firstly with the contents of the subscription service, sweetened secondly by the promotional draw.

5.14 This is necessarily an objective enquiry considering the presentation of the offer, and which precedes the question of the potential customer's subjective 'intent' to sign up for the subscription service.

5.15 In other words, even if the potential customer has formally indicated consent by complying with an acceptable opt-in sign-up procedure, a breach of clauses 11.2.2 and 11.2.3 is possible where the presentation of the offer does not clearly indicate

that the promotional draw is ancillary to the subscription service offering.

5.16 Stated differently, a legally-compliant sign-up process does not of itself preclude a breach of clauses 11.2.2 and 11.2.3 of the Code, on the grounds that the promotional draw is not ancillary to the subscription service.

5.17 With regard to the cases under consideration in this appeal, and having regard to the application of the term 'ancillary' in accordance with the definitions cited above, a fair assessment of the SP's promotional material will reveal that in none of the instances of the offers presented can the promotional draws be considered to be ancillary to the subscription service; if anything, the converse applies.

5.18 On that basis, had the SP's appeal not been upheld on grounds of the '*audi alterem partem*' principle, its arguments against the alleged breach of clauses 11.2.2 and 11.2.3 would not have succeeded.

5.19 Considering the critical element of the potential customer's consent in concluding a legally binding sign-up process for a subscription service, this panel notes the deliberations of the appeal panel in case numbers 16319, 16333, 16668 and 16735.

5.20 The panel in that matter considered whether consent for a Service Provider to use private information has been adequately provided by a potential customer. The panel noted (at page 12 of the report) that the Code does not "… *define "consent" or set clear parameters for this concept*," which "… *begs the question what consumers are consenting to when they click through these pages…,* ". The panel continues: "*To answer this question we considered the nature of consent. Current legislation is not helpful but the Protection of Personal Information Bill which is currently making its way through the legislative process and is expected to be passed into law in the coming months defines consent as follows: "consent" means any voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information*." (Our emphasis).

5.21 In that appeal, the panel continues (at page 13) "*Returning to consent, our concern is that, while the terms and conditions provide for a consent and that consent is imputed to the consumer [using] accepted legal principles such as the doctrine of quasi mutual assent, the form of consent obtained is flawed. Given the emphasis that concerns us, we find that the consent [the Service Provider] seeks through its terms and conditions in use in these campaigns was, in all probability, not specific*

or informed."

5.22 The panel in that appeal found that, despite the fact that a potential customer signaled ostensible consent by clicking an "I agree" radio button which was qualified by fine print Terms and Conditions, the fact that the Terms and Conditions contained provisions which the promotional material clearly didn't give the customer reason to anticipate, meant that a voluntary, specific and informed expression of will was not provided.

5.23 The principle being contemplated here is that, irrespective of whether there is an ostensible indication of a potential customer's intent as required in clause 11.2.2 of the Code, that intent must be tested in the context of whether the promotional material was disguised as an entry into a competition, and in that case, whether that inaccuracy, ambiguity, exaggeration or omission is sufficient to render the ostensible consent or "intention" fatally flawed.

5.24 This panel makes no finding on this aspect in the current matters, but cautions the SP that each enquiry of this nature in future will of necessity have to be on a case-by-case basis with regard to the presentation of the promotional material as a whole, and that no firm rule can be postulated to definitively indicate whether that promotional material is in breach of clauses 11.2.2 and 11.2.3.

5.25 It can be mooted however that a good indicator of a potential breach would be where promotional material predominantly presents information about the "ancillary" offer, and where the information concerning the subscription service is far less prominent.

6. Findings and Sanctions

6.1 Summarising the conclusions of this panel:

6.1.1 We do not base our findings on whether or not the SP is successful in this appeal on a finding of whether PAJA applies;

6.1.2 We uphold the SP's grounds of appeal that its fundamental rights to due process and natural justice, particularly the principle of *audi alteram partem* were not observed;

6.1.3 With the exception of complaint 11258 - in regard to which the complaint did not cite a breach of clause 11.2.3 of the Code, on the SP's arguments regarding it's "Loyalty/Rewards" campaign, we find that the promotional material featuring the 'Ballerina' quiz and the 'iPad' offer was not ancillary to the primary offer (the subscription service), and we find the SP to have breached the provisions of clause 11.2.2 and 11.2.3;

6.1.4 This panel does not make finding on whether or not the Terms and Conditions associated with SP's offers in the complaints under consideration are sufficient to ensure that a person agreeing to them signals sufficient assent. Given however this panel's finding in paragraph 6.1.3 above, there is a real concern that the form of consent obtained may be flawed, as the Terms and Conditions contained provisions which the promotional material clearly didn't give the customer reason to anticipate, with the result that a voluntary, specific and informed expression of will may be absent;

6.1.5 The SP's appeal is successful, and all sanctions against the SP in the complaints appealed against are hereby set aside; and

6.1.6 Owing to the finding in paragraph 6.1.3 and the concerns raised in paragraph 6.1.4, the costs of the appeal are shared, with the result that the SP is entitled to the refund of 50% of the Appeal Fee paid by it.

6.2 Notes to WASPA:

6.2.1 In order to give proper effect to the 'audi' principle, this panel proposes that WASPA considers amendments to the Code of Conduct that would obligate any adjudicator or appeals panel who, in adjudicating a complaint or an appeal, cite additional provisions of the Code, to provide such members a reasonable opportunity to respond to the new provisions cited;

6.2.2 The potential for the principle of double jeopardy to weigh unfairly on WASPA members in the adjudication of complaints against them is a valid concern. This panel proposes that WASPA considers introducing safeguards in its process of raising complaints that will have the effect of mitigating against that threat; and

6.2.3 This panel proposes that WASPA considers a re-postulation of clauses 11.2.2 and 11.2.3 to group the terms ‘competitions’, ‘quizzes’ and ‘promotional draws’ (and possibly including ‘a specific content item’) as non-exclusive examples of the term ‘ancillary offers’, appropriately distinguished from the subscription service.

ANNEXURE "A"

Leading Google results for the Search Term "Dictionary Ancillary" on 2 April, 2013
(Search query: https://www.google.co.za/search?q=dictionary+ancillary)

1. Dictionary.com
URL: http://dictionary.reference.com/browse/ancillary
Output text: an·cil·lar·y [an-suh-ler-ee or, esp. British, an-sil-uh-ree] Show IPA adjective, noun, plural an·cil·lar·ies.
adjective
1. subordinate; subsidiary.
2. auxiliary; assisting.
noun
3. something that serves in an ancillary capacity: Slides, records, and other ancillaries can be used with the basic textbook.
Origin:
1660–70; < Latin ancill (a) (see ancilla) + -ary; compare Latin ancillāris having the status of a female slave, with -āris -ar

2. The Free Dictionary by Farlex
URL: http://www.thefreedictionary.com/ancillary
Output Text: an·cil·lar·y (ns-lr)
adj.
1. Of secondary importance: "For Degas, sculpture was never more than ancillary to his painting" (Herbert Read).
2. Auxiliary; helping: an ancillary pump.
n. pl. an·cil·lar·ies
1. Something, such as a workbook, that is subordinate to something else, such as a textbook.
2. Archaic A servant.
[From Latin ancilla, maidservant, feminine diminutive of anculus, servant; see kwel- in Indo-European roots.]

3. Oxford Dictionaries
URL: http://oxforddictionaries.com/definition/english/ancillary
Output Text: Definition of ancillary
Adjective
providing necessary support to the primary activities or operation of an organization, system, etc.:
ancillary staff
in addition to something else, but not as important: *paragraph 19 was merely ancillary to paragraph 16*
noun (plural ancillaries)
a person whose work provides necessary support to the primary activities of an organization, system, etc.:
the employment of specialist teachers and ancillaries

ANNEXURE "A" (Continued)

something which functions in a supplementary or supporting role:
undergraduate courses of three main subjects with related ancillaries

the system measures engine power at the flywheel with all ancillaries (fan, standard exhaust, etc.) connected

Origin: Mid-17th century: from Latin ancillaris, from ancilla 'maidservant'

4. Merriam-Webster

URL: http://www.merriam-webster.com/dictionary/ancillary

Output Text: an·cil·lary

adjective \ˈan(t)-sə-ˌler-ē, -ˌle-rē, especially British an-ˈsi-lə-rē\

Definition of ANCILLARY

1: subordinate, subsidiary <the main factory and its ancillary plants>

2: auxiliary, supplementary <the need for ancillary evidence>

— ancillary noun

See ancillary defined for English-language learners »

Examples of ANCILLARY:

The company hopes to boost its sales by releasing ancillary products.

The lockout rocked the NHL, but among the ancillary benefits has been the emergence of young players who apprenticed for an additional season in the minors … —Michael Farber, Sports Illustrated, 21 Nov. 2005

Origin of ANCILLARY

(see ancilla) First Known Use: 1667

5. Cambridge Dictionaries Online

URL: http://dictionary.cambridge.org/dictionary/british/ancillary

Output Text: ancillary

Adjective

/ænˈsɪl.ər.i/ US /ˈæn.sə.ler.i/

Definition: providing support or help:

ancillary staff/workers

an ancillary role

Campaigning to change government policy is ancillary to the charity's direct relief work.