REPORT OF THE APPEALS PANEL

Date:	6 December 2010
Appellants:	Clarion Marketing SA (Pty) Ltd (IP) and Opera Telecom (Pty) Ltd (SP)
Complaint Number:	6858/6879
Code version:	7.0
Ad Rules :	2.3

1 INTRODUCTION TO THIS APPEAL

1.1 The appeals have been grouped together by agreement between WASPA, the panel and the appellants, as they concern complaints by the Media Monitor regarding the same advertisements and the same SP and IP. Accordingly references to the SP include the IP except where otherwise specified.

1.2 This report summarises the written appeals and includes notes from a face to face hearing held on 15 November 2010, and records the panelôs findings as a result.

1.3 The appellants were each represented by a different firm of attorneys. They relied on case law and academic theory in appealing the adverse finding against their clientsôby the adjudicator, and the sanctions imposed on them. The panel notes at the outset that although these arguments have been taken into account, they have been balanced against the principles that characterise the Code and WASPA, namely fairness and openness, and the need to promote consumer interests whilst supporting the commercial endeavours of WASPA members. The voluntary commitment by its members to a code of conduct and the nature of WASPA as a self-regulating body weighs heavily in our findings in this report for the reasons set out below.

1.4 Importantly, this report considers only v7.0 of the Code. The panel have not considered this version against or in terms of any future versions of the Code in order to determine the meaning or likely meaning of any clauses at the time when v7.0 was in force.

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2 THE HISTORY OF THE MATTER

2.1 *The service complained of*

2.1.1 A complaint was lodged by the Media Monitor on 22 June 2009 regarding scratch cards which were included in various magazines which the Monitor described as ñ*making use of a competition in order to*

*sell a subscription service*ò The Monitor noted a breach of clause 11.1.2 of the Code but referred to v7.4.

2.1.2 At this point we note the following:

2.1.2.1 As we mention in the introduction, the correct version at the time was in fact v7.0 and this is the version we will apply. To the extent that the application of the incorrect version of the Code has influenced any aspect of the matter, we have taken this into account in our findings. For the purposes of this report and our finding, the panel agrees that v7.4 should not have been applied retrospectively.

2.1.2.2 We have not included the scratch card or terms with this report. The panel has examined the documents and will describe our findings in full below.

2.1.3 On 29 and 30 June and 2 and 3 July 2009 both parties submitted various responses to the complaint, stating, in summary, that:

2.1.3.1 ñ*the request to join the subscription service is not an entry into a competition or quiz, simply because the awards are pre-allocated when the cards are printed. The request is to join a mobile content club, for which there is a Trade Promotion, with awards attached*ò;

2.1.3.2 they had already paid for significant numbers of cards and publications that had by then already been printed, and that cards would be entering the market because they had already been booked as part of publications to be circulated after the date of the complaint (actual dates for print deadlines were given); and

2.1.3.3 the cards had been in circulation since October 2008 and only 3 complaints had been received, 2 of which had been from the Monitor (the genesis of this appeal), and the third of which had emanated from a consumer who had not in fact used the service. We note here the identity of the complainant as the Monitor only for completeness and not because we attach any particular importance to this.

2.1.4 An emergency panel hearing was nonetheless scheduled within a week of the complaint having been made and after receiving the response from the parties, in terms of section 13.7 of the Code. Notice of the hearing was sent to the parties on 3 July 2009 by email.

2.2 *The emergency panel hearing*

2.2.1 The emergency panel considered both v7.0 and v7.4 of the Code, and v2.3 of the Advertising Rules (Rules). This panel agreed to apply only v7.0 of the Code.

2.2.2 The emergency panelôs findings were substantially the same for both complaints 6858 and 6879 and we have summarised them here:

2.2.2.1 There was prima facie evidence of a breach of sections 11.1.1 and 11.1.2 of the Code;

2.2.2.2 The breaches of section 11 were of such a nature as to imply prima facie breaches of sections 4.1.1 and 4.1.2 of the Code specifically in relation to pricing; and

2.2.2.3 In addition, there were prima facie breaches of chapter 8 of the Rules and section 9.1 of the Code.

2.2.3 The emergency panel made the following orders:

2.2.3.1 The SP should ensure that none of the promotional material that was the subject of the complaints should be distributed to the public after the date of the ruling;

2.2.3.2 The SP should take active steps to retrieve copies of the promotional material from any intermediaries to which it has already been sent and to prevent further promotional material from entering the public domain;

2.2.3.3 The SP should suspend the mechanism of entering competitions and subscribing to services advertised in the promotional materials immediately, pending formal review of the complaint;

2.2.3.4 The SP was prohibited from initiating any new subscriptions in response to the promotions, pending formal review;

2.2.3.5 The SP was prohibited from levying any further charges on customers who had already subscribed pending formal review; and

2.2.3.6 A SMS notice was to be issued to all competition entrants at the SPôs cost, to inform them that the competition had been suspended by WASPA and that they could keep their entry to the competition, pending the outcome of the formal complaints procedure, or obtain a refund of their subscription fee.

2.2.4 The emergency panel requested that the adjudication of the complaints be expedited.

2.2.5 The SP was notified of the emergency panelôs findings on 3 July 2009, and by 6 July they had replied to WASPA giving WASPA an update on what steps they had already taken to comply.

2.3 *The Code provisions considered by the emergency panel*

2.3.1 The wording of 11.1.2 in v7.0 was ñ*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*ò

2.3.2 The other provisions of the Code considered to have been breached by the emergency panel pertained to provision of information to customers (section 4.1.1 and 4.1.2), provision of information (section 9.1), and manner of subscription (section 11.1.1 and 11.1.2). The provisions of the Rules at Chapter 8 concerned below-the-line marketing and promotional material.

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3 DECISIONS OF THE ADJUDICATOR

3.1 *Findings on Complaints*

3.1.1 The adjudicator prefaced the report as follows, ñ*Having taken all the information produced into account, the decisions I have reached are now set forth below. In reaching these decisions I have considered not only the arguments made by the IP and SP but also other information placed before me which has been admitted by either the SP or the IP or which was submitted by the Monitor and not disputed by either the SP or IP in response to the complaint or Emergency Notice"*.

3.1.2 The adjudicator did not request further information from the parties, but between the emergency panel finding on 3 July 2009 and the date of adjudication on 10 September 2009, the parties made additional submissions dated 6 and 8 July, 13 and 14 July 2009, and some undated submissions were also made available to the adjudicator and to the panel. The adjudicator considered each submission and whether or not it was made by the IP or SP, in making the finding.

3.1.3 The adjudicator found that sections 6.2.5, 11.1.2 and 11.2.2 of the Code and sections 8.2.2 and 8.2.2.2 of the Rules had been breached:

3.1.3.1 In making a finding in relation to section 11.1.2, the adjudicator relied on an interpretation of v7.4, suggesting that it must have been the intention of WASPA to include competitions and promotions within the ambit of section 11.1.2 even in v7.0 although the adjudicator concludes by finding the first part of the section sufficient to determine a breach in that the subscription request transaction was not, in the adjudicatorôs view, an ñ*independent transaction*ò and was ñ*wholly dependant on a consumer submitting a request or claim for a prize*ò

3.1.3.2 The adjudicator did, however, find that the parties were in breach of sections of the Rules that had not been identified by the emergency panel and notes ñ*it is not a necessary precursor to a finding of breach of the Advertising Rules that the specific sub-*

*sections of the Rules which may have been breached are put to an advertiser nor is there anything in the Code which prohibits an adjudicator from considering any breach of the Code or the Advertising Rules which might be apparent ex facie the advertisement itself*ò relying on section 13.3.8 of the Code. Specifically, the parties were found by the adjudicator to have breached sections 8.2.2 and 8.2.2.2 which state the following:

"8.2.2: Formatting of Cost Text

*The size of the text showing the cost of access must be in **11 point font size**. This is 11 point Arial Font. The access cost text must be in a non-serif font, preferably "Arial" font. All access cost information must be placed horizontally….*

8.2.2.2: Position Of The Text Showing Access Cost and T&C

*For each unique access number, the full and final cost of the access must be displayed **immediately** below, or above, or adjacent to the unique access number in a non-serif font. This T&C text must be placed close as possible to the unique access number. If multiple offers are made on the same advertisement and the cost and T&C differ with each offering, each offering must show the cost and T&C separately and clearly. If the access number has the ability to be torn off or detached from the promotional text and used independently, pricing information must also be displayed on both the remaining and detachable portions*.ò

3.1.3.3 The adjudicator found in relation to 6.2.5 that this was a premium-rated service and therefore that pricing should be easily and clearly visible in or with all instances of the number and in all advertisements and in this case ñ*it was not easily and clearly visible and was contained in the fine print only"*.

3.1.3.4 The adjudicator considered it necessary to apply section 11.2.2 in relation to reminders to subscribers, specifically requiring SPs to send reminder messages monthly in a particular format. The adjudicator spent some time on analysis of the wording of the message that was actually sent by the SP which read ñ*Welcome to Moby Planet! U r subbed 2 Moby Club. Help xxxx. Opt out? SMS STOP to xxxx. Cost R14/2 days. SP: Opera*.ò

3.1.3.5 The adjudicator did not uphold the emergency panel findings in relation to a breach of sections 4.1.1, 4.1.2 or 9.1.

3.2 *Sanctions*

3.2.1 In imposing sanctions the adjudicator took account of 7 other complaints in which the SP had previously been cited (4112, 4148, 4149, 4190, 4712, 4782, and 4783). The sanctions in each of these matters was recorded as being, on average, R10,000. The adjudicator noted that the complaint in each case related to pricing

and concluded that the SP ñ*continued to take inadequate steps to ensure that its clients are made aware of the provisions of the Code. This has the potential to cause substantial harm to both consumers and the Wireless Application Services industry as a whole*ò.

3.2.2 In making an order, the adjudicator found that ñ*in light of the previous breaches upheld, the severity of the breaches in the present matter, and the scale of the distribution of the scratch cards, I do not regard a lenient sanction as being justified in the present matter*é ò and imposed the sanctions which are repeated in **Appendix A,** because of their length and complexity.

3.3 *Post-adjudication*

3.3.1 The appeals were submitted to WASPA in October 2009.

3.3.2 Following the submission of the appeals by the SP and IP, the appellants also submitted further emails to WASPA in January and February 2010.

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4 GROUNDS OF APPEAL

4.1 An appeal was filed by each of the SP and IP independently. Both parties requested a face to face hearing in relation to their appeals, and the hearings were held at the same time as the parties advanced similar or the same arguments on many points, and where they did not, each party was given an opportunity to put their points separately. We have noted the additional points raised atthe hearing in the summary below. We have considered each and every argument raised in both the hearings and in both written submissions, and all the correspondence.

4.2 Dealing first with the SPôs appeal:

4.2.1 It is common cause that correspondence passed between the parties between the date of the complaint and the date of the adjudication. We have referred to this above. The SP claimed that it was not notified of the holding of an emergency panel hearing and not given an opportunity to attend. Alternatively, that it was not made aware of the charges against it. We have followed the headings used by the SP in its appeal, below.

4.2.2 First ground of review:

4.2.2.1 WASPA is bound to follow proper and appropriate administrative procedures although it is not bound by the Promotion of Administrative Justice Act (PAJA). (WASPA nevertheless does use PAJA as a benchmark for its proceedings which are incorporated into the Code). WASPA should abide by the standards set in the Bill of Rights and PAJA. In particular, persons accused of breaching the Code and who face sanctions should be afforded the same rights as

accused persons under the Bill of Rights, and so informed of charges with sufficient detail to answer them, this is fundamental natural justice. WASPA and the adjudicators are bound by the common law to follow proper and appropriate administrative procedures and decisions are reviewable by a court.

4.2.2.2 The parties referred to the ñJockey Clubò case and argued that on the basis of the findings in that matter, associations like WASPA that can impose penalties must follow the *audi alteram partem* rule, and allow parties likely to be affected an opportunity to respond to the charges against them.

4.2.3 Failure of the emergency panel to follow proper administrative procedures:

4.2.3.1 The complaint referred to a breach of only section 11.1.2 of the Code and although the emergency panel had, in the view of the SP, ñ*ample opportunity*ò to request representations on further possible breaches of the Code, the emergency panel made a prima facie finding of other breaches (sections 4.1.1 and 4.1.2, 9.1, 11.1.1, 11.1.2 and chapter 8 of the Rules).

4.2.3.2 No notice was given to the parties (the SP and IP) of the emergency procedure and they were not given opportunity to make representations. No reasons were given by WASPA for their decision to invoke this procedure at the time. There was sufficient time between the complaint and emergency panel hearing to request further information from the parties.

4.2.4 Failure of the adjudicator to follow proper administrative procedure:

4.2.4.1 This, the SP argued, was the case in relation to findings on below-the-line advertising (sections 8.2.2 and 8.2.2.2 of the Rules), deceptive advertising (section 6.2.5), subscription service (section 11.1.2), and the reminder message (section 11.2.2).

4.2.4.2 We have dealt with these matters in section 3 above ï in the main, the parties argued that if the adjudicator exercises discretion to include more charges then he or she must also request a response to the charges from the affected parties.

4.2.5 Second ground of appeal/review ï incorrect finding on the merits:

4.2.5.1 The SP argued that the findings on sections 6.2.5 and 11.2.2 of the Code and sections 8.2.2 and 8.2.2.2 of the Rules were so procedurally flawed that they should be set aside without reference to the merits. However, in relation to section 6.2.5 the SP nonetheless argued (on the merits) that the service is patently a ñ*subscription service*ò because of use of the word

ñ*club*ò and ñ*join*ò and they mention that a subscription ñ*fee*ò will be charged, on the face of the card. The words ñ*this is a subscription service*ò also appear on the top left on the front of the card. The SP argues further that in the circumstances, ñ*no consumer could reasonably have been deceived*ò. (The panel notes that section 6.2.5 in fact relates to pricing for services which are not specifically subscription services, so this line of argument does not appear to be relevant here in any event).

4.2.5.2 On 11.1.2 the SP finds that the adjudicator wrongly applied v7.4 to interpret the meaning of the section in v7.0 of the Code ï we have discussed this in section 3 above. Furthermore the SP notes that the adjudicator mistook the welcome message for the reminder message and so incorrectly applied section 11.2.2. Finally, the SP argued that ñ*the action of claiming the award was voluntary and that by sending the request the consumer was not accepting "both the terms of the subscription service as well as the terms and conditions of which prizes are awarded", as stated by the adjudicator. The consumer could simply ignore the second message and not post the claim form.*ò

4.2.6 Third ground of appeal/review ï sanctions:

4.2.6.1 The SP motivates for no fine at all on the grounds outlined above, failing which, moderated or suspended fines. For this contention they rely on the fact that the adjudicator did not mention when sanctions were imposed in the other matters referred to, and in fact they were imposed in 2008 and not in 2009, as suggested by the adjudicator. In addition, sanctions in all but one matter were suspended (only 1 required payment of a fine) and the suspension periods have now expired without repeat offences. Furthermore the SP noted that 4782/3 are the same complaint or service, and that none of the matters cited concern subscription services.

4.2.6.2 Noting that the fines imposed by the adjudicator are in fact 10 times the sum of any previous fine, the SP also argued that the adjudicator ought to have taken into account the costs that the SP and IP incurred in complying with the emergency panel findings, and the effect of the suspension of distribution of scratch cards which had already been printed. In comparing these contraventions to the instant matter and to similar contraventions in complaint 7502 (in respect of a different SP and IP) in which the sanction was a fine of R10,000, the SP argued there was no justification in the sum of fines imposed on it by the adjudicator, and it is ñ*grossly unreasonable*ò.

4.2.6.3 During the hearing the parties raised the Conventional Penalties Act in support of their argument that the penalty

should be proportionate to the harm suffered (and again referred to case law). Their contention being, that if this matter were to be taken on review, the penalties would not be likely to be upheld by a court.

4.3 Turning to the IPôs appeal:

4.3.1 Introduction:

The IP ñjoined issueò with the SP on its grounds of appeal, and in addition, referred to section 13.6.5 of the Code and required the panel ñ*to consider the evidence that was provided to the adjudicator, the adjudicator's decision and "any additional information" provided by the SP*ò. The IP required the panel to read the appeal in conjunction with submissions and information already provided to the adjudicator. Presumably the panel should also take account of the information presented in addition at the hearing, which in fact, we have done. The IP regards v7.0 of the Code as the relevant version.

4.3.2 The adjudicatorôs findings in respect of section 11.1.2 of the Code:

The adjudicator incorrectly relied on v7.4 in interpreting section 11.1.2 in v7.0. Nonetheless, having examined the ordinary meaning of the words ñindependentò and ñtransactionò, the IP considers that what section 11.1.2 of the Code means is that ñ*the subscription service offered by an IP should not be contingent upon another service or transaction being concluded by the customer. An example of this would be a subscription service offered in conjunction with membership to a gym*ò. In the present instance, argues the IP, ñ*there is no other transaction that is offered in conjunction with the subscription service offered by the IP. On the contrary, there is only one subscription service offered by the IP and that service is promoted by means of a trade promotion which significantly does not require a customer to make any payment*.ò The IP accepts an ñinterrelationshipò between the service offered and states that the competition advertised amounted to the trade promotion, but the IP does not accept that this is what is contemplated in 11.1.2 of the Code.

4.3.3 The adjudicatorôs findings in respect of sections 6.2.5 of the Code and ósectionô8 of WASPAôs advertising rules:

4.3.3.1 The adjudicator failed to give the IP or the SP an opportunity to make submissions and/or furnish information in relation to alleged breaches of these sections, and these sections were not alleged in the initial complaint notification or emergency procedure. In relation to ósectionô 8 of the Rules, despite request, ñ*no attempt was made by either WASPA or the adjudicator to furnish the detail required by the IP*.ò In this, the adjudicator missed the point according to the IP because ñ*the principles of natural justice which are quite clearly enshrined in the code*ò

demand that an opportunity be given to an IP or SP against whom a complaint in relation to a breach is lodged, to be heard. If the adjudicator decides that another section should apply then the IP and SP should be notified and their submissions obtained before concluding that there has been a breach.

4.3.3.2 The adjudicatorôs reliance on 13.3.8 of the Code is ñ*misplaced*ò because the discretion is granted in relation to whether to consider additional breaches, not whether to ask for a response, which the IP contends is required or else we fly ñ*in the face of our constitutional rights to just administrative action*ò. In the result, the findings of breach of section 6.2.5 of the Code and ósectionô 8 of the Rules is tainted by a procedural irregularity and subject to be set aside.

4.3.4 The adjudicatorôs findings in respect of section 11.2.2 of the Code:

The finding that the reminder message sent by the IP did not conform to this section was flawed because it was a welcome message, therefore this section cannot be applied. In any event the message was not misleading and the adjudicatorôs conclusions regarding the ñopt outòwording were unrealistic.

4.3.5 The sanctions imposed by the adjudicator:

The submissions by the IP were framed in the alternative. The sanctions were premised on a finding by the adjudicator that the breaches were severe, evidence of previous complaints against the SP, and the scale of distribution of the scratch cards. The IP addressed each one of these in the appeal: (i) findings against the SP should not have been taken into account in determining the IPôs liability and in fact the IP has not previously had a complaint upheld against it by WASPA and it was not acting in mala fides or in wilful breach; (ii) 2 of the 3 breaches may be construed as breaches relating to form rather than substance and cannot be regarded as severe, and in fact there has not been a flood of complaints against the IP; and (iii) it is unclear why the scale of distribution of the cards was a factor in imposing sanctions, and if this was taken into account it should be weighed against the losses (which are quantified in the appeal) suffered by the IP in suspending billing, wasted printing and distribution costs, and promoting its services.

4.3.6 General:

The panel should take the following factors into account, says the IP:

4.3.6.1.1 The IPôs response to the emergency panelôs findings which was immediate and co-operative;

4.3.6.1.2 The penalty on the SP which has a knock-on effect on the IP, particularly in relation to refunds, and the fact that the sanction on the IP ignores the previous findings against the SP;

4.3.6.1.3 The sanctions are not consistent with other similar complaints (and they cite 6240) and are disproportionately excessive in the circumstances;

4.3.6.1.4 A fine, if any, should not exceed R100,000, which could be coupled with a formal reprimand and recordal that the subscription service has been terminated and billing in respect of it has ceased.

4.3.6.1.5 The panel should not ñre-determineò the merits at the appeals stage and should not re-assess the facts even if the adjudicator made errors of fact.

4.3.6.1.6 The role of the adjudicator should be clarified in relation to determining breaches. Although members of the public need not bear an onus to cite specific sections of the Code (for obvious reasons), the Monitor ought to cite sections properly so as to identify the breach. There may well be situations where the IP and SP do not know where their lack of compliance is (which part of the Code). If the adjudicator believes additional breaches have taken place then the proper course of action is to refer those breaches to the SP and IP for a response.

4.3.6.1.7 Although the appeal process does constitute an opportunity to be heard it is not adequate in the circumstances to meet the yardstick of the *audi alteram partem* rule.

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5 FINDINGS OF APPEALS PANEL

5.1 Arguments that the SP and IP were not heard and other administrative law points:

Emergency panel

5.1.1 The number of pieces of correspondence which passed between the parties suggests that the SP and IP have in fact been heard. They have had all the opportunities offered under the Code to present their case and on several occasions (notably prior to the emergency panel hearing and prior to the adjudication) submitted additional arguments and information to WASPA which was accepted and provided to the emergency panel, adjudicator or appeals panel, as

the case may be. The appeals process has allowed an additional opportunity to be heard in the form of the hearings, when new or different arguments were introduced.

5.1.2 Whilst the panel acknowledges, accepts, and apologises on behalf of WASPA for the regrettable delay in passing this matter down the change of process, it has not been argued and we trust it is not in fact the case, that further financial prejudice has resulted. In any event, this delay has been factored into our findings.

5.1.3 To the extent that the parties consider that they did not have an opportunity to be heard before the emergency panel, this would be highly irregular in instances where matters are of such a nature as to be characterised (in terms of the Code) as ñemergenciesò In fact, were this principle to be extrapolated into other areas, regulatory authorities such as ICASA would have no power to shut down persons creating interference on networks by the deliberate misuse of frequencies until they had heard why this was the case, presumably on reasonable notice ï by which time the damage to services relying on those frequencies would have been done. Similarly, driving under the influence would not need to result in imprisonment until such time as the drunk driver had been given an opportunity to sober up and explain him or herself. Both the IP and SP were in fact notified of the hearing.

5.1.4 Emergency hearings are provided for in the Code and invoked in the interests of protecting the consumer from potential or actual harm, which is, in general, the purpose of the Code. We are advised by Mancom that in other cases, an emergency panel hearing has not been held where the parties have given undertakings in relation to the services complained of. In addition, we note that the WASPA Secretariat responded fully to the request for information about why an emergency panel hearing might be convened, immediately after the findings had been conveyed to the SP, and in response to their request.

5.1.5 The panel notes that ó*emergency*ôis generally defined as a serious event or situation that *requires immediate action* to be dealt with, its very nature precluding interceding debate.

Bill of Rights

5.1.6 As regards arguments relying on the Bill of Rights, the panel is sure that the representatives of both SP and IP are familiar with the provisions of section 36 of the Bill of Rights (*limitation of rights*) which provides that rights may be limited (with exceptions) ñ*to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including (i) the nature of the right; (ii) the importance of the purpose of the limitation; (iii) the nature and extent of the*

*limitation; (iv) the relation between the limitation and its purpose; and (v) less restrictive means to achieve the purpose*ò

5.1.7 In our view the nature of both WASPA and the Code renders the matter unlikely to be adjudged in terms of the Constitution but if one is going to rely on the Constitution then it is only right to refer to all applicable provisions. Given the apprehension of harm in this case which must have, at the time, been sufficient to warrant the holding of an emergency panel hearing, we believe that if it were necessary to make a finding on this, then we would also have to take the potential harm into account together with the goals of the Code, and conclude that limitations on the right to be heard were in the circumstances, justifiable. In coming to this conclusion we have also noted the circumstances in which and the reasons for invoking the emergency proceeding in other matters, and the fact that the emergency process is provided for under the Code and is therefore foreseen as a possible outcome of any complaint.

5.1.8 It is certainly the case that PAJA does not apply to WASPA as WASPA is not an administrative body as defined by PAJA. The SP accepts this point.

Case law

5.1.9 During the hearing the attorneys for both parties took the opportunity to discuss in more detail the Jockey Club cases, the SP having referred to the Forbes case[1] in its appeal. We note that the Naidoo case[2] could equally be relevant to this matter. In particular we have referred to the following passages of the judgements as being relevant, quoted in the same way as they were quoted to us both in writing and in the hearings, simply by reference to the cases:

5.1.9.1.1 ñIn my opinion it is doubtful whether the framers of the Constitution and the legislature in enacting PAJA intended to bring *such domestic tribunals* under its umbrella. *It may well be an aspect which needs to be dealt with in the future by the legislature*ò;

5.1.9.1.2 ñ*The requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth*. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, *one essential is that the person concerned should have a reasonable opportunity of presenting his case*ò; and

[1] Jockey Club of South Africa v Alan Forbes (SCA) (622/91) [1992] ZASCA 237; 1993 (1) SA 649 (AD); [1993] 1 All SA 494 (A).
[2] National Horse Racing Authority of South Africa v Naidoo and Another (AR 254/2008) [2009]; ZAKZHC 7; 2010 (3) SA 182 (N) 2009.

5.1.9.1.3 As the learned judge of appeal observed *the concept of the fundamental principles of justice as applicable to domestic tribunals is an elastic concept* and I would hasten to say that this would depend upon the nature of the hearing, the complexity or otherwise of the matters in dispute before the particular tribunal. *In these circumstances it seems to me taking the cue from counsel's submission in the* ***Turner*** *case, supra, that it would not be inappropriate to introduce a further ingredient into the fundamental principles of justice concept and that is one of* *rationality*. This would particularly be apposite in a complex case where a reviewing Court would be in exactly the same position to assess the objective evidence in the case and would be able to conclude that the decision made is rational in relation to the evidence laid before the tribunal. *In my opinion this would be a development of the common law which would be wholly in accordance with the values encompassed in the Bill of Rights*ò

5.1.9.2 Our reasons for including these passages are threefold:

5.1.9.2.1 First, and as indicated in our introduction to this report, WASPA is a voluntary organisation operating within a sector that has opted for self-regulation in relation to wireless services. It is relevant to note that WASPA may in fact render further regulation in this sector by law or other more formal interventions, unnecessary if it is successful in its endeavours ï which will no doubt be measured by the way in which its members indicate their willingness to comply with the provisions of the Code, and the number and severity of complaints. As a voluntary organisation it is not required to apply statutes, but adjudicators and appeals panellists are required to take account of the principles of equity in applying the provisions of the Code, to ensure that the consumer is protected and the consumerôs interests advanced.

5.1.9.2.2 Second, case law, whilst helpful in illustrating points that one might make to a court where consumers typically arenôt present individually but in a corporate capacity or representative capacity, complicate the WASPA adjudications and appeals process. We make this remark because in the interests of rendering efficient, accurate and quick findings and reports, having to have regard to case law is likely to serve to lengthen the process and increase the cost. Self regulation such as WASPA provides has the advantage of providing relatively fast relief and substantially lower cost to consumers than through the adversarial legal system. To return to and to rely on such a legal system, would defeat the purpose

and advantage of self regulation. It is nevertheless trite that self regulation in conflict with the Constitution will not succeed.

5.1.9.2.3 Third, to the extent that the appellants chose (or were advised) to rely on case law to illustrate a point, we caution against selectively quoting from cases which are not entirely on point, or relevant. In our view, the cases referred to in this matter are of little assistance based on the facts which also support a different outcome to that suggested by the SP and IP. Even if they were helpful, we do not intend to take account of case law here for the following reasons:

- The parties have submitted to a process envisaged by the Code. This does not prejudice the partiesô rights to proceed to court, however, they have obviously not yet exhausted the Code process (as required), and at the time the appeal was submitted, had not then exhausted the process. Suggesting that a review might be appropriate seems in the circumstances to be incautious, premature, and potentially damaging to the SP and IP.
- If we were to apply the case law cited or our own preferred case law, the likely costs to all concerned that creating this precedent would result in, are likely to be significant ï rendering the purpose of the Code and WASPA nugatory. Incorporating case law into the body of precedent that WASPA is required to rely on or have reference to has untold implications for the process, its members, and ultimately, for the consumer. The IP agreed that there is nothing specifically binding WASPA to apply case law.
- The Code is capable of quick and ready change to ensure that sections which members have noticed are not workable or are potentially unlawful are amended. To the extent that the SP or IP had at any time noticed that sections of the Code in relation to pricing fell into this category, they could have made an approach to WASPA.

The Code is a contract

5.1.10 The parties, and in particular the IP, argued that the Code is in effect a contract between the members of WASPA and WASPA itself, on

the basis of case law, and so as a result it is possible to apply (and they do) the provisions of the Conventional Penalties Act.

5.1.11 The panel does not believe it is possible to argue that both the principles of natural justice and contractual commercial principles apply to the Code, at the same time. Either the Code is a set of rules that govern those who accept them by becoming members of the organisation, or the Code is a contract, binding the parties to its terms and conditions. We do not support either interpretation and specifically for purposes of this clause 5.1.11, we do not agree that the Code is a contract.

5.2 Reliance on v7.4 of the Code:

As we have stated above, we consider only v7.0 to be applicable. As an aside, it would seem that the adjudicator did, in the final analysis, rely on v7.0 only, and applied the test of ñindependent transactionsò Please see below on our findings on section 11.1.2. Please note also that if, as argued by the SP and IP, the panel ought not to rely on v7.4 in interpreting v7.0, then we should not rely on v10.0, although the IP made reference to this version in interpreting the application of v7.0.

5.3 Breaches of the Code and Rules:

5.3.1 This is one of those matters which does not, unfortunately, allow for easy review. We are of the view that it is not sufficient that there be no bar to determining other breaches but that the adjudicator ought to be authorised to do so, under the Code. The panel is quite comfortable based on WASPA precedent and the provisions of the Code, that an adjudicator is authorised to consider additional information and indeed, required to ensure that unwary consumers are not exposed to conduct which breaches the ethical tenets of the Code. We are also sympathetic to the argument that a person should know the case they must meet.

5.3.2 In weighing up all the facts, however, in this case we find that an overriding consideration must be the requirement that members comply with the Code. This means that partial compliance cannot excuse non-compliance ï members must comply with all the sections, and should ensure that their agents and employees make themselves familiar with the relevant parts.

5.3.3 This also means that failure by WASPA to refer to a particular section of the Code in the course of conducting an emergency panel hearing does not and should not absolve a member of compliance with obligations which always existed. In this regard, Chapter 8 of the Rules refers specifically to below-the-line advertising, it is not a wide or amorphous group of rules. By analogy with another driving example, if a traffic officer fails to quote the section number when issuing a fine for speaking on a cellphone while driving but simply

states that the person was speaking on a cellphone while driving, this does not absolve the driver from culpability.

5.3.4 We accept on the basis of the arguments raised by the SP and IP and on the facts, that there was no breach of section 11.2.2. By extension there can have been no breach of sections 4.1.1 or 4.1.2, nor should there necessarily have been an extension of the breach from one section to another.

5.3.5 On the question of the breach of 6.2.5, however, the panelôs view is that the pricing was not in fact, clearly displayed, in that the pricing was to a large extent hidden by the ñbusy-nessòof the other text, and over-shadowed by the large picture of the car. Section 6.2.5 was therefore not adequately complied with in our view.

5.3.6 In closely examining the provisions of the ñpromotionò as it is termed by the IP and ñsubscriptionò as it is called by the SP, we canôt help but note that the most obvious part of the advertisement (as we call it) is the car. This aside, and noting all the references to clubs, joining and so on, the advertisement is entirely unclear on what services it is that are being subscribed to, how often and for how much. In response to a question at the hearing, we understand that the services are in general, ñmobile contentò This is not, however, clear from the advertisement other than by examining quite rigorously in our view, the terms and conditions which refer to a website, and then continuing to examine all the terms of that website. By comparison with other advertisements by the SP for mobile content, this one is relatively light on detail.

5.3.7 In addition, it would appear that payment was deducted from a subscriber at the same time as the welcome message was sent, and the subscriber was ñenteredòinto the competition. This indicates that this was the relevant time to determine the nature of the transaction.

5.3.8 In the view of the panel, sending a text message to the short code would have had 2 effects, both of which happened at the same time as a result of the text message. The first was that the person would have been subscribed to a ñmobile content serviceò offering unspecified things, costing R14 every 2 days, and of course a subscriber could have opted out in response to the welcome message or at any other time, we accept that. The second, however, is that the person would have been a candidate for an ñawardò There is no argument by either SP or IP that contradicts or denies this fact. The suggestion that a consumer could have simply chosen not to be part of the competition is disingenuous.

5.3.9 Therefore we find that the SP and by implication, the IP, are in breach of section 11.1.2. of the Code.

5.3.10 In examining the provisions of sections 8.2.2 and 8.2.2.2 of the Rules which we have stated in full in section 3 of this report, we find that there is a substantial difference between the conditions of each subsection. The parties have not suggested that there was compliance with these sub-sections, they have simply argued that there ought to be no ñdouble jeopardyò in finding them guilty of a breach of two subsections. Even though the Chapter could be numbered more clearly, it seems sufficiently clear to us that there are 2 related but different requirements here. It is not possible to assess the size of the font that was actually used, but in this regard, we rely on the findings of the adjudicator and find that there was a breach of both sections 8.2.2 and 8.2.2.2 of the Rules, and that there is no ódouble jeopardyô

5.4 Sanctions:

5.4.1 Both partiesô grounds of appeal relate to the size of the fines and nature of other penalties, at least in the alternative. Given our findings on breaches of sections 6.2.5 and 11.1.2 of the Code and sections 8.2.2. and 8.2.2.2 of the Rules, some adverse finding must be made against the SP and IP and some form of redress is appropriate.

5.4.2 The panel agrees that the fines imposed by the adjudicator are substantial and disproportionate in light of the breaches and out of step with the remedies imposed on members in other similar matters. As an aside, R10,000 was considered a large fine in 2008.

5.4.3 The panel has taken into account all arguments made by the IP in relation to the findings made against it and sanctions imposed on it by the adjudicator, regardless of its independence of the SP.

5.4.4 The panel has also considered the cost to the parties of complying with the emergency panel findings and orders.

5.4.5 The panel has taken into account the number of complaints that were actually made ï which is not to say we agree or accept that this number represents accurately or at all the total number of dissatisfied consumers, as we know that many consumers continue to be unaware of their right to redress under the Code, or simply donôt do anything about their complaints. We do not believe it is relevant to a finding of breach that no customers ñwere out of pocketò although it is relevant to a finding on sanction.

5.4.6 In all the circumstances, the panel makes the following order:

5.4.6.1 The sanctions ordered by the adjudicator which are set out in full in **Appendix A** are overturned;

5.4.6.2 The parties are referred to the provisions of the Rules and to section 6.2.5 of the Code and reminded that compliance is not a question of degree ï one either is or is not compliant;

5.4.6.3 The SP is fined R60,000; and

5.4.6.4 The IP is fined R50,000.

5.5 The fines should be paid to WASPA within 5 days of the publication of this report.

5.6 The appeal fees are not refundable.

APPENDIX A:

SANCTIONS IMPOSED IN ADJUDICATION OF COMPLAINTS 6858/6879

The SP is directed to immediately:

1.1 suspend all further billing for the services; and

1.2 pending full compliance by the SP with the sanctions contained in paragraph 3 below:
- (a) withhold payment of all amounts due by it to the IP as contemplated by the provisions of section 13.4.1(i) of the Code;
- (b) preserve and retain all revenue paid to it by any cellular network operator in respect of the services and to refrain from dissipating such revenue in any way;
- (c) send an SMS message to all subscribers to the affected services advising them as follows:
  ñThe [name of service] has been suspended due 2 breach of WASPA Code of Conduct. Further communications will follow. For help contact [telephone number of SP]ò; and
- (d) suspend all billing for the services.

2. The SP is further directed:

2.1 to furnish WASPA with monthly statements of account (ñthe statementsò) detailing all revenue either already received by the SP or that is to be paid over to the SP by any cellular network operator in respect of the services from their commencement date until their termination;

2.2 to deliver a written consent to WASPA within 7 days of the delivery of this adjudication report irrevocably authorizing WASPA to verify and audit the accuracy of the statements with the relevant network operators concerned and indemnifying WASPA against any and all claims for loss, costs and expenses that may be made against it by the IP, a network operator or any other person in this regard;

2.3 to send an SMS message to all subscribers to the affected services (including all subscribers whose subscriptions have been suspended) advising them that the subscription service has been terminated due to breach of WASPA Code of Conduct and advising subscribers of their right to claim a refund of all content subscription fees paid by contacting the SPôs help desk by 5pm on a date falling 30 days after the sending of such message or the first business day thereafter if that date falls on a weekend or public holiday;

2.4 following delivery of the SMS message provided for in paragraph 2.3, to terminate the content subscription service and all billing for the service;

2.5 as contemplated by the provisions of section 13.4.3(g) of the Code, to issue a blanket refund to all subscribers claiming a refund within the period mentioned in paragraph 2.3 above within 30 days of the expiry of such period provided that any amounts be refunded shall be paid:
- 2.5.1 firstly from any IP revenue share held by the SP in terms of paragraphs 1.2(a) and (b);

2.5.2 on exhaustion of the IP revenue share, from the SP revenue share; and

2.5.3 on exhaustion of the SP revenue share, from additional funds to be collected by the SP from the IP;

failing which the WASPA Secretariat shall direct all members to suspend all services to the IP and the amount to be refunded to any subscriber shall be pro-rated such that the amount shall bear the same proportion to the subscriber's refund entitlement as total available funds bear to total refund entitlements;

2.6 Within 30 days of the expiry of the 30 day refund period provided for in paragraph 2.5 above, to:

2.6.1 pay over or forfeit to WASPA an amount equal to:

(a) R200 000; or

(b) 100% of the SP revenue share generated by the service less VAT and less the total amount of blanket refunds paid out from the SP revenue share;

whichever amount is the greater failing which the SP's membership of WASPA shall be suspended until such time as the greater amount has been paid; and

2.6.2 pay over to WASPA a fine of:

(a) R400 000 to be collected from the IP; or

(b) 100% of the remaining IP revenue share generated by the service that is held or received by the SP, less:

(i) VAT (if applicable);

(ii) the total amount of any blanket refunds paid out from the IP revenue share; and

(iii) the actual cost price of any prizes purchased by the IP and which shall be or have been awarded to consumers as prizes in the competition;

whichever amount is the greater failing which the WASPA Secretariat shall direct all members to suspend the provision of all services to the IP and to refrain from the commencement of any new services to the IP until such time as the greater amount has been paid in full.

3. By 30 January 2010 the SP shall deliver a report to the WASPA Secretariat detailing the award of all prizes in the competition by the IP and the date on which each prize was received by or delivered to the winner thereof.

4. In terms of section 13.4.2 of the Code, the sanctions contained in paragraphs 1 and 3 above may not be suspended pending any appeal that may be instituted in this matter but shall be effective immediately on the publication of this report.