

## REPORT OF THE APPEALS PANEL

**Date:** 04 January 2011  
**Appellants:** Opera Telecom (Pty) Ltd (SP) and Mobimedia (Pty) Ltd (IP)  
**Complaint Number:** 7103, 7104 and 7105.  
**Code version:** 7.4

### 1 INTRODUCTION AND BACKGROUND TO THIS APPEAL

#### 1.1 *Introduction to this appeal*

1.1.1 This appeal concerns the adjudication of three complaints, numbers 7103, 7104 and 7105.

1.1.2 Opera Telecom (Pty) Ltd. the Service Provider (SP) and Mobimedia (Pty) Ltd. the Information Provider (IP) have lodged a joint appeal against the findings and the sanctions of the adjudicator in all three cases.

#### 1.2 *Background to this appeal*

1.2.1 The three complaints were lodged by a member of the press on 21 July 2009. The extracts below have been copied verbatim from the complaint forms:

1.2.1.1 Complaint 7103:

1.2.1.2 Section of Code of Conduct breached: "LOTTERIES ACT. SEC 54".

1.2.1.3 Detailed description of the complaint: "DUE TO PREMIUM RATED CODE SMS USED AND AVUSA (THE TIMES NEWSPAPER) PROMOTING NOTHING. WASPA RULE? CASH PRIZE OFFERED".

1.2.1.4 Complaint 7104:

1.2.1.5 Section of Code of Conduct breached: "WASPA RULE NOT TO PROMOTE POSSIBLE ILLEGAL LOTTERIES".

1.2.1.6 Detailed description of the complaint: "PREMIUM RATES SMS IS USED. PRIZE IS NOT A PRODUCT OF THE NEWSPAPER. THIS CONTRAVENES SECTION 54 OF THE LOT. ACT."

1.2.1.7 Complaint 7105:

1.2.1.8 Section of Code of Conduct breached: "LOTTERIES ACT. WARNING AS ISSUED BY WASPA".

1.2.1.9 Detailed description of the complaint: "NOTHING IS PROMOTED. AVUSA DOES NOT MANUFACTURE BLACKBERRIES OR SUNGLASSES. PREMIUM SMS CODE USED. THUS ILLEGAL LOTTERY".

1.2.2 In summary, all three complaints cite the Lotteries Act, 57 of 1997 (the Act), as the basis for the alleged breach of the WASPA Code of Conduct (Code). The details provided for each complaint relate to

provisions of the Act, a 'WASPA Rule' and a 'warning issued by WASPA'.

1.2.3 The connection between the complaints which cite possible contraventions of the Act and a breach of the Code is made through section 3 of the Code, specifically, section 3.1, professional and lawful conduct. The rationale being, that because the law was contravened, the Code was breached. The question arising is, does WASPA have the competence to make a finding regarding a transgression of a law? If not, there will be no breach of the Code in this case, on this basis.

### 1.3 *Importance of this appeal*

1.3.1 This appeal is set against the background of legal activity relating to the Act and several precedent setting actions heard by the Supreme Court of Appeal (SCA),<sup>i</sup> which form the basis for the adjudicator's findings.

1.3.2 The adjudicator also relied upon WASPA complaints precedent<sup>ii</sup>, supporting his finding that "due to the affirmative nature of the ... obligation in clause 3.1.2 of the WASPA Code of Conduct and the compelling prima facie indication of a breach of the Lotteries Act .... there was a breach of clause 3.1.2 of the WASPA Code of Conduct"<sup>iii</sup>.

1.3.3 These complaints and the resulting appeal, raise for the first time at WASPA appeal panel level, (i) the question of WASPA's jurisdiction and its competence to pronounce on matters regulated by statute, (ii) the import of the general provisions of section 3 the Code, (iii) the nexus between (i) and (ii), and (iv) the force and effect of WASPA 'rules' and 'warnings'.

### 1.4 *Findings and decision of the adjudicator*

1.4.1 The adjudicator finds that the SP and IP have contravened a law by conducting illegal lotteries as defined in the Act, and having done so, finds them in breach of section 3.1.2 of the Code which requires "lawful conduct at all times"<sup>iv</sup>.

1.4.2 As a final comment<sup>v</sup> in his report, the adjudicator states that "... WASPA has a duty to uphold the laws of South Africa".

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## 2 **ISSUES RAISED AND THE PANELS APPROACH TO THIS APPEAL**

2.1 The adjudicator argues that the SP and IP contravened the law and this in turn, amounts to a breach of the Code. It is a logical argument, based on an, if this ..., then that ... approach. It is an argument that can be countered by removing the connection, meaning that if the law was not contravened, or, if WASPA is not competent to pronounce on matters of law, that the Code cannot be said to have been breached.

- 2.2 As no other breaches of the Code were cited by the complainant or raised by the adjudicator, the panel will confine itself to the narrow ambit of the complaint and the issue of whether a finding in law can constitute a breach of the Code as argued by the adjudicator.
- 2.3 It follows from 2.1 above, that if the panel finds WASPA lacks the jurisdiction (competence) to pronounce on matters of law, there will be no breach of the Code on the basis argued by the adjudicator.
- 2.4 The approach taken below by the appeal panel in consideration of this appeal is as follows:
- 2.4.1 Firstly, to consider the purpose and vision of WASPA. (Section 3 of this report).
- 2.4.2 Secondly, to consider the letter from WASPA Mancom addressed to adjudicators and the appeals panel. (Section 4 of this report).
- 2.4.3 Thirdly, to consider the content and import of the general provisions of section 3 the Code. (Section 5 of this report).
- 2.4.4 Fourthly, to consider the meaning and force of a WASPA 'rule' and a WASPA 'warning' (Section 6 of this report).
- 2.4.5 Finally, to arrive at a finding. (Section 7 of this report).

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### 3 PURPOSE AND VISION OF WASPA

#### 3.1 *Statements from the WASPA Website*

- 3.1.1 In order to “uphold public perception of the mobile service industry and to protect against bad practices..., it was decided that a strong industry body was needed, with an appropriate Code of Conduct, representing the interests of its members and consumers, by enforcing the good practices established by this Code”.
- 3.1.2 WASPA was formed in 2004 as a “voluntary self-regulatory body with a remit of representing and self-regulating mobile-based value added services providers, otherwise known as WASPs”.
- 3.1.3 WASPA’s Code of Conduct and Advertising Rules were developed and implemented in 2005. “It has developed a complaints handling process to enforce these rules... ”.
- 3.1.4 “Complaints are handled by an independent secretariat who process complaints using a mandated civil procedure scheme, while some 13 independent ICT lawyers and a 3-person appeals panel of ICT lawyers adjudicate the complaints lodged with the secretariat.
- 3.1.5 “These lawyers may adjudicate on any matter related to the WASPA Code of Conduct where a complaint has been lodged”.

#### 3.2 *WASPA’s Mission Statement*

3.2.1 WASPA’s mission is “to provide a non-profit forum in which members can address issues of common interest and interface with industry stakeholders, network operators, government and regulatory organisations, both locally and internationally so that end-users receive world-class service and industry participants earn a fair return on their investments”.

3.3 *WASPA’s Mission and Success Factors*

3.3.1 WASPA’s mission and success factors are stated as, among others, to:

3.3.1.1 “Be a source and repository of relevant information for its members;

3.3.1.2 Promote ethical and sound business practices amongst its members; and

3.3.1.3 Provide guidance from time to time on any regulatory issues that may affect WASPA and its members.

3.4 *International Audiotext Regulators Association*

3.4.1 WASPA is a member of the International Audiotext Regulators Association (IARN). Relevant statements from the IARN website<sup>vi</sup> and the IARN Handbook<sup>vii</sup>, include the following:

3.4.1.1 IARN’s main objectives are to encourage exchanges of information and to “provide general knowledge of the regulation of the audiotex industry and the way regulation is approached in the member countries”.

3.4.1.2 IARN plays an important role to ensure that the development of phone-paid services within the European Union (and beyond) “goes hand-in-hand with effective consumer protection”.

3.4.1.3 “The need for regulation is determined not just by the existence of consumer harm, but also the conditions of the market in which it takes place. If a market has characteristics so that companies can deal effectively with consumer harm, and have incentives to do so, then there is little case for an external regulatory framework”.

3.4.1.4 IARN’s Different Models for Regulation

3.4.1.4.1 All IARN member countries “think it is essential to have an organization to ensure protection for consumers of Phone-paid Services, which carries out its work with independence and transparency”.

3.4.1.4.2 Whilst each country within IARN has its own regulatory model, the existing models can be grouped into three categories; government regulation, co-regulation and self-regulation.

3.4.1.4.2.1 Self-regulation

3.4.1.4.2.1.1 “Self-regulation ... [is] ... where there is no specific requirement for Phone-based payment regulation in law. Instead the Phone-paid Services sector of that

country sets policy, administers and funds its own regulatory organisation without participation from the government. This organisation may involve representation from each part of the sector. It sets specific provisions out in a Code of Practice, which is agreed by the industry but does not require approval from the government. Whilst there may be general articles of law which govern the practices of Phone-paid services and service providers, there is no definite legal backstop to act as the ultimate guarantor of enforcement”.

3.4.1.4.2.1.2

“In a market where businesses recognize that their future existence depends on their relationship with their customers and society at large, rather than just their shareholders, and where businesses collectively acknowledge the need to reduce consumer harm and promote consumer trust, then self-regulation is more likely to be effective. Because there is no need for specific legislation to underpin it, it is also likely that a self-regulatory model can be established quickly in comparison to other models”.

3.4.1.4.2.1.3

“However effective self-regulation arises from a cohesive, active sector, where businesses are prepared to commit resources to fund good regulation, consult with stakeholders, and monitor how effective the regulation is. In a market where service providers do not communicate with each other and/or have less resource to commit, self-regulation may not prove an adequate solution”.

3.4.1.4.2.1.4

In addition self-regulation will be ineffective in a market where “rogue” service providers refuse to sign up to regulatory principles. Countries with an emerging Phone-paid Services market will wish to ensure their premium rate providers have the necessary cohesion and resources, and appropriate sanctions, when considering self-regulation”.

3.4.1.4.2.1.5

“IARN would advise countries with emerging Phone-paid Service markets to consider each of the categories above, before deciding on a model for regulation which is appropriate to their legal framework, public expectations, commercial practices, and levels of consumer risk arising from Phone-paid Services”.

3.4.1.4.3

IARN considers six key principles necessary to ensure consumer confidence in self regulation models; legality,

decency, fair promotion, pricing clarity, fair operation and content, privacy and unsolicited communication.

3.4.1.4.3.1

Legality

3.4.1.4.3.1.1

“Phone-paid Services and their promotional material must comply with the law, both national and European where appropriate. Promotions and services must not facilitate or encourage anything which is in any way unlawful”.

3.4.1.4.3.2

Investigations, adjudications and sanctions

3.4.1.4.3.2.1

“In order to ensure that the relevant law or Code of Practice is respected by those providing Phone-paid Services in any country, that country’s regulator should have the capacity and capability to:

- Accept and process consumer complaints;
- Monitor all types of Phone-paid Services to ensure compliance;
- Investigate alleged consumer harm;
- Independently judge whether the rules have been broken;
- Impose appropriate sanctions to deter repeat offences, and;
- Appropriately and proactively engage with providers of Phone-paid Services”.

3.5

*Statements from the WASPA Code of Conduct*

3.5.1

Section 1. Introduction - This document is a code of practice governing the members of the South African Wireless Application Service Providers’ Association (WASPA). It is binding on all members and contains accepted procedures to be followed in the event of a complaint lodged against any WASPA member.

3.5.2

Section 1.1. About WASPA - WASPA is an independent, non-profit organisation representing the interests of organisations providing mobile application services in South Africa. The Association aims to provide a neutral forum for members to address issues of common interest and interact with industry stakeholders, network operators and government bodies.

Membership of WASPA is voluntary. All members are required to accept the WASPA Code of Conduct and related procedures as binding.

3.5.3

Section 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. The Code aims to equip customers and consumers with a mechanism for addressing any concerns or complaints relating to services provided by WASPA members, and a framework for impartial, fair and consistent evaluation and response to any complaints made.

- 3.5.4 Section 1.7. Disclaimer - This Code of Conduct does not constitute legal advice, nor is it warranted as legal advice. All members are strongly advised to seek proper legal counsel.
- 3.5.5 Section 3. General provisions - Section 3.1 - Professional and lawful conduct and section 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.
- 3.5.6 Section 3.1.2. - Members are committed to lawful conduct at all times.
- 3.6 *Status of WASPA viz-a-viz the South Africa legal and regulatory framework<sup>viii</sup>*
  - 3.6.1 The Constitution of South Africa 1996. Chapter 8 – Courts and administration of justice.
    - 3.6.1.1 Section 165. Judicial authority - (1) - The judicial authority of the Republic is vested in the courts.
      - 3.6.1.1.1 (2) - The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
      - 3.6.1.1.2 (3) No person or organ of state may interfere with the functioning of the courts.
      - 3.6.1.1.3 (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
      - 3.6.1.1.4 (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.
    - 3.6.1.2 Section 166. Judicial system - The courts are:
      - 3.6.1.2.1 (a) the Constitutional Court;
      - 3.6.1.2.2 (b) the Supreme Court of Appeal;
      - 3.6.1.2.3 (c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from high courts
      - 3.6.1.2.4 (d) the Magistrates' Courts; and
      - 3.6.1.2.5 (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.
    - 3.6.1.3 Section 171. Court Procedures - All courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation.

#### **4 LETTER FROM WASPA MANCOM ADDRESSED TO ADJUDICATORS AND THE APPEALS PANEL**

- 4.1 A letter dated 01 June 2010 from the WASPA Mancom addressed to 'adjudicators', was provided to the appeal panel together with all the material relating to appeals 7103, 7104 and 7105. The content of the letter confirms WASPA Mancom's position as follows:
- 4.1.1 WASPA Mancom and the members of the WASPA Code Committee agree that it is not WASPA's responsibility to rule on the law.
- 4.1.2 It was never the intention of the WASPA Code of Conduct to rule on law.
- 4.1.3 It would be irresponsible, not to hold members to legal activities, but WASPA does not believe it has the right, the capacity or the competency to rule on issues of law.
- 4.1.4 The latest draft version of the Code includes an amendment with respect to how Adjudicators should deal with the question of the legality of services, in essence, meaning that once a competent body has made a finding in law, WASPA adjudicators may rely on the findings.
- 4.1.5 Accordingly, and based on a concern that WASPA may have exceeded its mandate by making a ruling on the legality of the service, the appeals panel is 'instructed' take the intent of the amendment under consideration in their deliberations.
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#### **5 CONTENT AND IMPORT OF THE GENERAL PROVISIONS OF SECTION 3 OF THE CODE AND WASPA TERMS OF REFERENCE**

- 5.1 The general provisions of the Code include, professional and lawful conduct, freedom of expression, service levels, intellectual property, content control, data protection, decency, number re-use, information providers, nominated representatives, provision of numbering information, employee awareness, alterations and WASPA identity.
- 5.2 In the findings section of this report, we discuss how this content confirms WASPA's commitment to self-regulation, as opposed to enforcing statutes of more general application, which will be enforced by other public bodies including the courts.
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#### **6 CONSIDER THE MEANING AND FORCE OF A WASPA 'RULE' AND A WASPA 'WARNING'**

- 6.1 The terminology 'rule' and 'warning' were used by the complainant. The only WASPA 'rules' that this panel are aware of are the Code itself and the WASPA 'Advertising Rules', previously called "Guidelines' and which nomenclature was rectified due to it being incorrect and confusing, as



'guidelines' are optional and discretionary, there merely to indicate a sensible approach to something, as opposed to 'rules', which are mandatory. Nevertheless, this is not these 'rules' to which the complainant refers.

6.2 It is evident from Annexure B and C of the adjudicator's report that the references to 'rule' and 'warning' refer to what is more commonly called a 'WASPA Advisory'<sup>ix</sup> or 'Notice'.

6.2.1.1 Annexure B – [WASPA] Notice regarding Premium Rated SMS Competitions. Dated 04 December 2008

6.2.1.1.1 This 'notice' from the WASPA Mancom to its members states:

6.2.1.1.2 "The Supreme Court of Appeals this week ruled in favour of the National Lotteries Board in its case against the "Winikhaya" competition.

Winikhaya primarily uses premium rated SMSs as the entry mechanism for the competition.

A copy of the judgement is attached for your attention.

While we are in discussions with some of the role players in respect of the short & long-term implications of the judgment, WASPA in the interim wishes to advise its members to immediately exercise caution in respect of both current and planned future competitions that may be affected by this judgement.

As there are many permutations of competitions, WASPA cannot at this stage give specific advice as to the current legality of specific competitions. WASPA does however note the finding by the Supreme Court of Appeal that the "Winikhaya" competition is NOT a promotional competition, which may be an issue of significance for WASPA members.

All members who are engaged in competitions are thus strongly urged to immediately consult their legal advisors to determine the legality of competitions they run or facilitate. Please also consult the Lotteries Act as amended and associated regulations (attached).

Further, if you are aggregating on behalf of others, you are strongly advised to immediately send a copy of the judgement to them and to also advise them to immediately consult their legal advisors.

WASPA notes the stated intention of the beneficiaries of the "Winikhaya" competition to challenge certain issues regarding this judgement with the Constitutional Court. We will update you as the events unfold".

6.2.1.2 Annexure C – [WASPA] Lotteries Board and SMS Competition Update. Dated 26 November 2009

6.2.1.2.1 This 'update' from WASPA addressed to its members states:

6.2.1.2.2 "We wish we (Sic) bring to your attention again issues surrounding using PSMS for entering competitions. Please see attached a letter being sent by the Lotteries Board to some WASPs in this respect.

To summarise the issues around competitions referred to in the attached NLB letter:

If there is no company being promoted in a competition advertisement and the competition is simply based on an advertisement to win, for example, a car or cash, and the competition uses PSMS for entry, then the competition would probably be considered an illegal competition by the NLB and possibly be subject to criminal sanctions.

If a competition is specifically to promote a specific brand or company and the competition is incidental to this, then you can ONLY charge standard rate for the competition entry. In other words, neither the promoter nor the WASP/IP cannot (Sic) make any profit (that is, any revenue share) from the competition entry. To be clear, in the NLB's opinion, you may not use any PSMS rate bands for entering promotional competitions. Anyone contravening this rule may possibly be subject to criminal sanctions.

WASPAs Code of Conduct Competition rules are also in effect.

Note that this reminder from WASPA is not legal advice. As before, all parties are (Sic) strongly advised to contact an attorney and the NLB before devising a and (Sic) launching any competitions. You should also forward the contents of this email to your clients who may have queries regarding SMS-based competitions".

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## 7 FINDINGS AND DECISION OF THE APPEALS PANEL

### 7.1 *Findings of the appeals panel*

#### 7.1.1 WASPA's competence to pronounce on matters of law

7.1.1.1 Section 165 the Constitution of South Africa, 1996, provides that judicial authority shall be vested in the courts, which are independent and subject only to the Constitution and the law,

and that no person, including an association like WASPA, may interfere with the functioning of the courts. 'Interfere', in the view of the panel, would include usurping of the power of the courts by pronouncing on matters of law.

7.1.1.2 Section 166 of the Constitution provides for various courts as part of the judicial system, recognising also special courts, which might be recognised in terms of an Act of Parliament. Further sections detail the powers of the courts and appointment and powers of its functionaries and judicial officers. WASPA is not a creature of statute. Its constitution, complaint and appeal procedures do not constitute a court or legal process. WASPA's adjudicator's are not judicial officers in terms of the Constitution. WASPA adjudicators are not competent to pronounce on law, any attempt to do so, is quite simply, beyond the scope of WASPA's powers (*ultra vires*).

7.1.1.3 Given the finding in 7.1.1.2 and following the logic outlined in 2.1 of this report, the panel finds that the adjudicator's decision and sanctions are *ultra vires* and without any force or effect.

7.1.2 Purpose and vision of WASPA

7.1.2.1 As a result of examining statements made by WASPA on its website, its membership to IARN, the provisions of the WASPA Code of Conduct as well as the Code's terms of reference (section 5.2 of this report), it is clear to the panel that WASPA as an industry body, has no intent whatsoever of usurping the role of the courts.

7.1.2.2 WASPA describes itself as a self-regulating industry body, which exists to represent the interests of members and consumers by enforcing good practices in terms of its Code, and by implementing a process to enforce the rules set out in the Code. WASPA is not intended to act as a watchdog or enforcer of statute.

7.1.2.3 The description of the WASPA complaints process mentions only 'ICT lawyers', not judges or magistrates, and the WASPA Secretariat, not courts, mandated to process and adjudicate complaints. The process and scope are specifically limited to matters relating to the Code of Conduct, not matters of law.

7.1.2.4 WASPA's mission statement and success factors record it as a source and repository of relevant information, amongst other things, to promote ethical and sound business practices and provide guidance on regulatory issues.

7.1.2.5 As a member of IARN, WASPA inherits IARN's objectives, including the objective of providing general knowledge of

industry specific regulation with a focus on effective consumer protection. WASPA, like IARN, recognises that there is an alternative to government regulation (legislation) and co-regulation (regulation with government), in the form of self-regulation. This is the model adopted by WASPA. Self-regulation means that it manages itself through applying a Code as opposed to applying statutes with the approval or backing of government.

7.1.2.6 Of course, any self-regulated South African association is itself subject to the Constitution and other laws. As such, WASPA's constitution and Code reflect the six key principles adopted by IARN, and are consistent with the Constitution (legality, decency, fair promotion, pricing clarity, fair operation and content, privacy and unsolicited communication).

7.1.2.7 The Code records that it aims to equip customers and consumers with a mechanism and framework for impartial, fair and consistent evaluation of complaints. It states specifically, that it does not constitute legal advice, nor is it warranted as legal advice.

7.1.2.8 It is the view of this panel that the adjudicator erred by not confining his adjudication to the scope of the WASPA Code of Conduct, which the panel believes was possible, by applying alternative provisions of the Code, such as for example, section 9, relating to competitions and the provision of information. It is clear to the panel from the evidence provided to it, that the appellants were engaged with the Lotteries Board on matters related to this complaint at the time of adjudication. This itself, should have been a 'red flag' to the adjudicator not to pre-empt or usurp any decision by the Board. We deal below with the actual breaches of the Code which, if the adjudicator had done likewise, would have rendered a competent and altogether different result.

7.1.3 Letter from WASPA Mancom addressed to adjudicators and the appeals panel

7.1.3.1 The panel acknowledges receipt of this letter and has in fact taken note of its content, most specifically, Mancom's concern, at the effect that such an adjudication might have on WASPA, its position and standing.

7.1.3.2 The panel respectfully records that it would in any event, have arrived at the same findings. WASPA's website, mission statement, success factors, membership of the IARN and its status as an association outside of the legal system, confirm

WASPA's lack of desire or competence to pronounce on matters of law.

7.1.4 Content and import of the general provisions of section 3 of the Code, specifically 3.1.2.

7.1.4.1 The panel is of the view that the general provisions of the Code, which include members to be committed to lawful conduct at all times, exist to set the tone for the detailed provisions of the Code. These are overarching statements, aligned to the Constitution<sup>x</sup> (including lawfulness, honesty, protection of rights and freedoms, accountability etc., and are to be seen as part of a broader interpretive approach to the Code, as opposed to a requirement for WASPA to apply the law or to treat law as part of its Code. It may well be true that the 'affirmative nature' of the obligation in clause 3.1.2 results in a breach of the Code, but it is nevertheless *ultra vires* for the adjudicator to make a finding of law.

7.1.4.2 For the sake of completeness, and in the context of codes of conduct and governance codes, we mention a similar provision in the King III Code of Governance Principles for South Africa<sup>xi</sup>, where principal 6.1 requires the "board to ensure that the company complies with applicable laws". Because King III applies to all organisations including WASPA and its members, it is useful to note its risk-based approach based on adoption or rejection of the principles and an 'apply or explain' approach. We mention this as it has reference to section 7.1.5 of this report and also to illustrate that a statement of this nature is not necessarily an empowering provision to pronounce on law but is a position statement in respect of governance.

7.1.5 Meaning and force of a WASPA 'rule' and a WASPA 'warning'

7.1.5.1 The terms of references in section 14 of version 7.4 of the WASPA Code of Conduct, consistently use the following terminology, 'code of conduct' 'guidelines' and 'self-regulation'.

7.1.5.1.1 A code of conduct, is a set of rules outlining the responsibilities of, or proper practices for an individual or organisation. Rules are by definition, mandatory. Examples are the WASPA Code and the Advertising Rules.

7.1.5.1.2 A guideline, suggests a sensible approach to something, often providing steps or processes which are aimed at achieving some consistent outcome. A guideline is never mandatory.

- 7.1.5.1.3 Self-regulation is discussed under 3.4.1.4.2.1 above. It is based on voluntary participation.
- 7.1.5.2 At section 6 of this report, the panel considers a 'WASPA Advisory' and a 'WASPA Notice'. It is clear to the panel from the content and the language used, that both these forms of communication with members are advisory and informative, fulfilling the stated intentions of WASPA to be a source of relevant information, promoting ethical and sound business practices and providing guidance on regulatory issues that may affect its members. In the view of the panel these communications are to be considered as guidelines. Discretionary, not mandatory.
- 7.1.5.3 The content of the first communication (Annexure B at 6.2.1.1 of this report), provides information relating to a Supreme Court of Appeal decision, which 'may' impact on WASP services. Language used, includes "[WASPA] wishes to advise its members to immediately exercise caution ...", "WASPA cannot at this stage give specific advice as to the currently legality of specific competitions ...". "[The Court's finding] may be an issue of significance for WASPA members ...", "... members who are engaged in competitions are thus strongly urged to immediately consult the legal advisers to determine the legality of competitions ...", " if you are aggregating on behalf of others, you are strongly advised to immediately send a copy of the judgement to them.." and "... we will update you as the events unfold".
- 7.1.5.4 In light of the discretionary nature of this advice and WASPA 'strongly urging' its members to consult legal advisers, it is clear to the panel that WASPA itself will not invoke the law. By extension, a WASPA adjudicator cannot invoke the law to determine a breach of the Code.
- 7.1.5.5 The content of the second communication (Annexure C at 6.2.1.2 of this report), provides an update on the matter and refers to a letter sent by the Lotteries Board to certain WASPA members.
- 7.1.5.6 Once again, the content is informative and the language advisory. Once again, WASPA avoids invoking the law, and merely draws attention to issues that "... may possibly be subject to criminal sanctions". Again, WASPs are warned that this communication is "not legal advice", and as before, parties are "strongly advised to contact an attorney".
- 7.1.5.7 This communication states also, that "WASPA's Code of Conduct Competition Rules are also in effect".
- 7.1.5.8 Again, the panel finds that it is not possible to breach these so-called 'rules' or 'warnings', because they are merely

advisory communications and guidelines. It should be noted that choosing to ignore a guideline is not without risk, rather, it is part of an organisation's risk assessment and appetite for risk. (Refer to our comments on the King III Report's 'apply or explain' approach).

7.1.5.9 The panel is of the view that the appellants considered both the Code and the WASPA advisories (guidelines) and in accordance with their appetite for risk, chose to proceed with the competitions, which they were perfectly entitled to do, so long as they were able to accept the risk relating to a contravention of the Lotteries Act and the National Lotteries Board's authority to enforce the law in addition to any possible breach of the Code to be enforced by WASPA.

7.1.6 *WASPA Code of Conduct Appeal Process*

7.1.6.1 In summary, based on WASPA's lack of competence to pronounce on law, the panel finds that the adjudicator's findings and sanctions are *ultra vires*, with the result that the findings are *void, ab initio* and the sanctions unenforceable.

7.1.6.2 However, the panel is of the view that the appellants' services and advertisements did in fact breach the Code. By way of example, we include below an extract from the competition in complaint 7104 (on examination the advertisements for 7103 1nd 7105 are equally flawed):

**□ FIVE My Weekend readers can each win a double ticket to the 7.30pm show of *Alice in Wonderland* on Friday.**  
To enter, SMS the word ALICE to 40881. Entries close on Monday at noon and the winners will be notified telephonically later that day. SMSEs cost R3 each, free minutes do not apply and errors will be billed.



7.1.6.3 Had the adjudicator applied the provisions of section 9 of the Code relating to competitions, the panel believes that the SP and IP, in all three complaints, would have been found in breach of the Code.

7.1.6.4 Sections 13.6.5 and following of the WASPA Code deal with the appeals process and the power of the appeals panel. The panel is confident that it has properly considered section

13.6.5 (evidence provided to the adjudicator, the adjudicator's decision and any additional information provided by the service provider). The panel is however, not confident that the Code enables it to go further and find or sanction any breach not raised or considered by the complainant or the adjudicator. We interpret section 13.6.6 – "On the basis of the evidence presented, the panel will decide whether there has, in fact, been a breach of the Code" restrictively, to mean only the breach(es) identified in the complaint or considered by the adjudicator.

7.1.6.5 The panel is nevertheless of the view that several of the provisions of section 9 of the Code were in fact breached in all three complaints. By way of example, 9.1.1 (cost for user to obtain a prize), 9.1.2 (details of how the competition operates), 9.1.4 (information likely to affect the decision to participate) and 9.1.6 (competitions services and promotional material must not use words such as 'win' or 'prize' to describe items intended to be offered to all or a substantial majority of the participants). No hyperlinks to terms and conditions to the required information appear on the materials provided, which if provided might have indicated compliance with the section 9 requirements. We mention this purely for the record. The adjudicator was competent to have made this finding and should have done so, regardless of the fact that the initial complaints did not themselves refer to the Code or to section 9.

7.1.7 SP and IP's appeal documentation

7.1.7.1 The SP and IP in this matter have each been represented by a different firm of attorneys, who provided on behalf of the appellants, lengthy documents as grounds for appeal/review based on alleged flawed decision making, incorrect findings on the merits and grossly unreasonable sanctions.

7.1.7.2 As this appeal document responds to the *ultra vires* findings and sanctions of the adjudicator, there is no need to set out the appeal documentation in detail..

7.1.7.3 The panel would like to state for the record that legal arguments such as those presented by the appellant's legal representatives, based on administrative justice<sup>xii</sup> and arguments based on case law are not relevant to the self-regulatory application of the WASPA Code of Conduct. This follows logically from the panel's reasoning in this case, that if WASPA is not competent to pronounce on law, legal precedent is not appropriate to WASPA adjudications. (Appeal 6858/6879 covers the panel's position on this point in detail).



## 7.2 *Decision of the appeal panel*

7.2.1 The findings and sanctions of the adjudicator as reported in all three cases are *ultra vires*. No sanctions are imposed for a breach of section 3.1.2 of the Code.

7.2.2 The appellant is advised that although no finding can be made at this stage in relation to a breach of section 9, it is the view of the panel that this would have been a proper outcome. Had the adjudicator dealt with the Code, we have no doubt that a sanction would have been applied and we would, in these circumstances, have upheld it. The appellant is cautioned to uphold the Code, and have regard to the guidelines published by WASPA from time to time.

7.2.3 The appeal fee in an amount of R10 000 is to be refunded.

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<sup>i</sup> FirstRand Bank vs National Lotteries Board [2008] 3 All SA 121 (SCA) and national Lotteries Board vs Bruss NO and others [2009] 2 All SA 164 (SCA).

<sup>ii</sup> Complaint 0067.

<sup>iii</sup> This refers to complaint 33, where the adjudicator in that matter “ *noted that neither he nor the WASPA Secretariat is a Court of Law. As such the WASPA Adjudicator cannot make a finding that [a] competition conducted by the IP is being conducted in contravention of the Lotteries Act or in contravention of the Consumer Affairs Act (in respect of General Notice 303 of 2005). As contraventions of the Lotteries Act and the Consumer Affairs Act are criminal offences, making a finding of contravention of such legislation will [sic] require a trial to be held in accordance with South African criminal law*”.

<sup>iv</sup> The panel notes that this was not the basis of the adjudicator’s finding in complaint 33, where the adjudicator, specifically noted WASPA’s lack of competence to make a finding in criminal law, with the obvious result that non-compliance with law did not become the nexus for the breach of clause 3.1.2 of the Code.

<sup>v</sup> Clause 52

<sup>vi</sup> <http://www.iarn.org>

<sup>vii</sup> [http://www.iarn.org/documents/iarn\\_handbook.pdf](http://www.iarn.org/documents/iarn_handbook.pdf)

<sup>viii</sup> There is no doubt that the WASPA adjudication process does not constitute a court of law, nor that its adjudicators are judges. We have added sections from the Constitution for the benefit of non-legal readers, as these so clearly illustrate the difference between courts of law and other para-legal processes and procedures, such as WASPA’s self-regulatory adjudications.

<sup>ix</sup> The panel agrees with the adjudicator’s finding in complaint 2, that “*WASPA advisories have no binding effect*”.

<sup>x</sup> Section 39(2) – Interpretation.

<sup>xi</sup> The King III Report and Code on Governance for South Africa came into force and effect in April 2010, and applies to all organisations large and small, and in the public and private sector.

<sup>xii</sup> The panel agrees with the adjudicator’s findings in complaint 5, which records in detail WASPA’s position viz-a-viz the Promotion of Administrative Justice Act.