Report of the Appeals Panel

Complaint number	#58648
Cited WASPA members	Baseplay Limited (Membership no. 1795)
Notifiable WASPA members	Basebone Pty Ltd (Membership no. 1344)
Appeal lodged by	Baseplay Limited
Type of appeal	Face-to-face appeal
Scope of appeal	[X] Review of the adjudicator's decision [X] Review of the sanctions imposed by the adjudicator
Applicable version of the Code	v17.4; 17.6
Clauses considered by the panel	4.9(c), 5.1, 5.4, 5.5, 5.6A, 5.7, 5.8, 5.11, 12.1, 12.2, 12.4, 12.5, 15.9A, 15.17 and 15.18
Related complaints considered	53300, 58765
Amended sanctions	Member fined the following amounts: a) R 20 000.00 for breach of clause 4.9(c); b) R 20 000.00 for breach of clause 5.4; c) R 20 000.00 for breach of clause 5.5; d) R 5 000.00 for breach of clause 5.7; and e) R 5 000.00 for breach of clause 15.9A.
Appeal fee	Partial refund
Is this report notable?	*Yes*
Summary of notability	• Vexatious proceedings • Defamatory statements

	• Citation of additional clauses after a complaint was lodged • Contradictory findings by different adjudicators • Uncertainty/ambiguity in certain provisions of the Code • Irregular/incomplete testing practices

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Initial complaint

1. The WASPA Compliance Department (''Complainant'') lodged a complaint against the WASPA Member, Baseplay Limited (referred to as the ''Appellant'' in this report), which related to the promotion and subscription flow for the Baseplay Games subscription service and which in the view of the Complainant was in breach of various clauses of the WASPA Code of Conduct (''Code'').

2. The complaint was initially referred to an emergency hearing, but this was subsequently cancelled after the Appellant stopped the relevant advertising and suspended the promotional campaigns in question. The complaint then proceeded as a formal complaint and was referred to an independent adjudicator for adjudication.

3. The Complainant presented the results from two separate manual tests conducted by one of their testers on 12 April 2023. One test was conducted on the MTN network, the results of which were set out in the Complainant's complaint submissions, marked Annexure A (''first test''); and the other on the Cell C network, the results of which are set out in the Complainant's complaint submissions, marked Annexure B (''second test'').

4. The Complainant provided screenshots of the various banner adverts, pop-up notifications and web pages used in the promotional campaigns from both tests, as well as a video recording of the second test conducted by the tester on the Cell C network.

5. The Complainant alleged that the Appellant had breached clauses 4.9(c), 5.1, 5.4, 5.5, 5.6A, 5.11, 12.1, 12.2, 12.4, 12.5, 15.9A, 15.17 and 15.18 of the Code.

6. In their initial response to the complaint, the Appellant admitted that they had breached clause 4.9(c) of the Code, but refuted that they had breached any of the other clauses cited by the Complainant in their complaint.

7. The parties were given an opportunity to make supplementary submissions in accordance with the provisions of the Code before the complaint was referred to an independent adjudicator.

8. Due to the large number of submissions that were made by each party during the formal complaint process, these will not all be repeated in this report. However, the appeal panel has reviewed and considered all the initial and supplementary submissions that were made by both parties in the initial complaint, together with all materials submitted to the independent adjudicator.

Adjudicator's findings

9. The formal complaint was assigned to an independent adjudicator in terms of clause 24.29 of the Code. The Adjudicator's findings may be summarized as follows:

    9.1 Regarding the alleged breach of clause 4.9(c) of the Code, the Adjudicator noted the admission made by the Appellant and found that, based on their own assessment of the wording of the promotional material used, the promotional materials used did induce an unacceptable sense of fear or anxiety in breach of clause 4.9(c) of Code. The Adjudicator also noted that the Appellant had immediately suspended the non-compliant campaigns after receiving notification from WASPA.

    9.2 The Adjudicator considered the basis for the complaints in respect of clauses 5.1, 5.4 and 5.5 of the Code to be that the promotion referenced an *'antivirus'* service to protect or secure the user's data or phone, but this service was not the service actually provided by the resulting subscription. The Adjudicator found that the offer made did not adequately correspond with the service provided.

9.3 The Adjudicator also found that the promotional material used was ambiguous at best and false and deceptive at worst. Both *'antivirus'* terminology and *'phone cleaner apps'* terminology (that could include solutions for viruses) were used at different points of the subscription process and a reasonable consumer would believe that continuing or proceeding to subscribe to the service would present some measure of response to the issue raised in the promotional material and not to a subscription to a catalogue of games and applications.

9.4 The Adjudicator found that the Appellant had breached clauses 5.1, 5.4 and 5.5 of the Code.

9.5 Regarding the alleged breach of clause 5.6A of the Code, the Adjudicator found that the Baseplay Games portal may have included a *''Phone Cleaner App'',* but this was not made readily available to the subscriber to access once their subscription was completed. The Adjudicator found the Appellant to be in breach of clause 5.6A of the Code.

9.6 Regarding the alleged breach of clauses 5.7 and 5.8 of the Code, the Adjudicator noted from the second test conducted on the Cell C network that the customer was presented with an acknowledgement of the terms and conditions on the subscription confirmation page, but found that the Appellant had not provided evidence that these terms and conditions were made accessible to a potential customer prior to subscription via a working hyperlink. The Adjudicator found that the full terms and conditions were not readily available to the potential customer at the material time prior to subscription, or after being redirected to the confirmation page, and the Appellant was therefore in breach of clause 5.7 of the Code.

9.7 With regard to the alleged breach of clause 5.8 of the Code, the Adjudicator noted in their report that they had viewed the terms and conditions using the link provided by the Appellant in their initial response to the complaint, but they found that given that these terms and conditions were not accessible to potential customers it was impossible to assert that the customer was able to access the full and complete terms and conditions. The Adjudicator found the Appellant to also be in breach of clause 5.8 of the Code.

9.8 Regarding the alleged breach of clause 5.11 of the Code, the Adjudicator accepted the evidence presented by the Appellant that it had included customer support options in their terms and conditions, but again found that since these terms and conditions were not made accessible to the customer, they also did not have access to this customer support information. The Adjudicator found the Appellant to be in breach of clause 5.11.

9.9 The Adjudicator found that the Appellant had not breached clauses 12.1 and 12.2 of the Code as the pricing information for the subscription to the Baseplay Games service on offer was suitably and fairly prominently displayed adjacent to the call-to-action.

9.10 Regarding the alleged breach of clauses 12.4 and 12.5 of the Code, the Adjudicator found that the pop-up advert and subsequent web page used for the campaign did not contain the minimum terms and conditions required, i.e. a customer support number and a link to a web page containing the full terms and conditions. The Adjudicator found the Appellant to be in breach of clause 12.4 and 12.5 of the Code.

9.11 Regarding the alleged breach of clause 15.9A, the Adjudicator found that the advertising for another service (i.e. the Appellant's ''Stream'' service) intervened in the subscription process and before the user was redirected to the Baseplay Games portal, with the potential for mistaken additional subscriptions. The Adjudicator found that the Appellant did in fact seek to encourage subscription to additional services in breach of clause 15.9A of the Code. The Adjudicator noted in their report that advertising to subscribers of a service was not the concern but that clause 15.9A refers to the avoidance of intervening advertising being used amidst the subscription process, with the potential for mistaken additional subscriptions.

9.12 Regarding the alleged breach of clauses 15.17 and 15.18 of the Code, the Adjudicator referred to section 23 of the Electronic Communications and Transactions Act, 2002 (''ECT Act''), and found that the 'welcome' message was not sent as it had not successfully entered an information system outside the

Appellant's control. The Adjudicator regarded the information system of the Appellant's messaging service provider as being within the Appellant's control or, alternatively, that the Appellant had to have adequate oversight and control over that information system to manage their compliance with the Code.

9.13 The Adjudicator noted that the tester's MSISDN had been registered on the WASPA Do-Not-Contact (DNC) database to enable the monitoring of direct marketing compliance, but referred to clause 16.5 of the Code which requires that members must only block direct marketing messages to numbers listed in the WASPA DNC registry and they must not automatically block all messages (e.g. transactional and commercial) to those numbers. The Adjudicator therefore found that the Appellant was in breach of clauses 15.17 and 15.18 of the Code.

9.14 In arriving at appropriate sanctions for the various breaches of the Code by the Appellant, the Adjudicator considered a prior complaint against the Appellant and the corresponding adjudication and appeal findings in that complaint (i.e. complaint #53300).

9.15 The Adjudicator imposed the following fines:

9.15.1 R 15 000.00 for the breach of 4.9 (c);
9.15.2 R 5 000.00 for the breach of 5.1;
9.15.3 R 10 000.00 for the breach of 5.4;
9.15.4 R 10 000.00 for the breach of 5.5;
9.15.5 R 5 000.00 for the breach of 5.6A;
9.15.6 R 5 000.00 for the breach of 5.11;
9.15.7 R 5 000.00 for the breach of 12.4;
9.15.8 R 5 000.00 for the breach of 12.5;
9.15.9 R 5 000.00 for the breach of 15.9A;
9.15.10 R 5 000.00 for the breach of 15.17; and
9.15.11 R 5 000.00 for the breach of 15.18.

Appeal submissions

10. The Appellant noted an appeal against the decision of the Adjudicator in terms of clause 24.37 of the Code and requested a face-to-face appeal.

11. Both parties were given an opportunity to make further written submissions in the appeal and the Appellant was also given an opportunity to present in person to the appeals panel.

12. In their written appeal submissions, the Appellant admitted that the promotion of the Baseplay Games service was misleading and was in breach of clause 5.5 of the Code. During their in-person presentation to the panel, the Appellant further admitted that the promotion of the service was also in breach of clause 5.4 of the Code.

13. The Appellant continued to refute that they had breached clauses 5.1, 5.6A, 5.7, 5.8, 5.11, 12.4, 12.5, 15.9A, 15.17 and 15.18 of the Code and requested the panel to set aside the Adjudicator's findings and the sanctions imposed in this regard.

14. In the stated grounds for their appeal, the Appellant contested the Adjudicator's interpretation and application of several clauses of the Code and asserted that the Appellant had complied with these clauses. They also challenged the Adjudicator's findings on certain clauses that directly contradict previous decisions and practices applied and accepted by WASPA. Finally, the Appellant challenged the fairness and procedural aspects of the breach notice process, with specific reference to the testing practices conducted by the Complainant.

15. Due to the large number of submissions that were again made by both parties in the appeal, they will not all be repeated in this report, but they have been reviewed and considered by the panel and will be referred to where relevant to the panel's findings.

Deliberations and findings

16. Before examining the substantive merits of the Appellant's appeal, the panel must first address a number of preliminary and/or procedural issues that were raised by the Appellant.

Vexatious proceedings

17. The Appellant alleged that the Complainant had made a number of allegations in their complaint that were unfounded and had no *prima facie* merit and/or that the Complainant had added several clauses to their complaint in a vexatious manner. The Appellant alleged that the Complainant was acting with a malicious intention and not with the intention of protecting customers. The Appellant alleged further that there had been a disregard by WASPA for clauses 24.15B (b) and (c) of the Code.

18. In response to these allegations, the Complainant submitted that there was no evidence of any bias or malicious intent on the part of the Complainant in these proceedings and that these accusations were baseless.

19. At the in-person presentation made before the panel, the Appellant's representative suggested that the previous Compliance Manager, who was no longer with WASPA, had a personal vendetta against the Appellant because they had been overlooked for the position of general manager of WASPA. However, neither this person nor the Complainant were present at the appeal hearing to answer to these allegations and the panel therefore cannot consider or attach any weight to this evidence.

20. Clause 24.15B of the Code provides that: *"At any point in the complaints process, prior to the assignment of a complaint to an adjudicator for review, WASPA may withdraw a complaint, provided that it is determined that the complaint (a) falls outside the jurisdiction and mandate of WASPA, (b) is prima facie without merit, or (c) is vexatious, taking into account factors such as malicious motive and bad faith."*

21. The panel has reviewed the Complainant's initial complaint and is satisfied that they presented *prima facie* evidence of various instances of breach of the Code by the Appellant.

22. A complainant may cite clauses of the Code in their complaint that may later be found to be irrelevant or not applicable to the facts presented. Alternatively, clauses may be cited that overlap with each other. In either case, this does not in itself demonstrate that the

complaint, as a whole or in part, has been brought against the relevant member in a vexatious manner.

23. It is the task of the independent adjudicator (or appeals panel), who is assigned to adjudicate or review a complaint, to determine the relevance and applicability of the clauses of the Code that have been cited in the complaint after considering all the information and evidence presented; and to determine the appropriate sanctions to be imposed if a member is found to have breached any of the clauses cited in the complaint.

24. The panel finds that no evidence was presented by the Appellant that can be relied on to conclude that the initial complaint was vexatious and/or that the Complainant has acted with a malicious motive or in bad faith when lodging their complaint.

25. The panel is also satisfied that WASPA's decision to continue with the complaint was correct.

Defamatory statements

26. The Appellant also alleged that several unfounded allegations had been made by the Complainant which they believed to be defamatory in nature. The Appellant referred specifically to statements made by the Complainant in their supplementary submissions that questioned whether the Appellant's products worked at all and/or that they posed a risk of serious consumer harm.

27. Adjudicators and appeal panels reviewing complaints under the Code do not have the necessary mandate or authority to consider claims of defamation and this is a matter that should be referred by the Appellant to a court of law if they believe there are sufficient grounds to do so.

28. However, for present purposes it should be noted that allegations of serious consumer harm are relevant and must be considered by adjudicators and appeal panels when considering the appropriateness of any sanctions to be imposed if a member is found to have committed a breach of the Code.

29. In the current matter, the panel is satisfied that allegations of serious consumer harm were not unfounded, considering the nature and severity of the alleged breaches of the Code cited by the Complainant in their initial complaint.

Citation of additional clauses after complaint lodged

30. The Appellant alleged that the Complainant had unilaterally added allegations of a further breach of the Code to their complaint after the Appellant had already submitted their first response to the complaint. The Appellant stated that this was procedurally irregular and unfair to the Appellant.

31. The Appellant referred specifically to the request made by the Complainant in their supplementary submissions in the formal complaint that the adjudicator appointed to review the complaint should also consider sanctioning the Appellant for a breach of clause 16.5 of the Code.

32. Clause 24.10 of the Code states that: *''The complaint and subsequent response and adjudication will be limited to those clauses identified by either the complainant or WASPA at the start of the matter.''*

33. It is correct that the Complainant did not allege a breach of clause 16.5A of the Code in their initial complaint submission. However, this became a relevant issue in the context of the complaint relating to clause 15.17 when the Appellant alleged in their initial response that the reason why the required welcome message had not been received by the tester was because their MSIDN had been added to the WASPA's do-not-contact (DNC) registry.

34. The panel is of the view that a complainant should be allowed to supplement their initial submissions before the complaint is referred to adjudication when new issues are raised in the member's response to the complaint, provided that the member is given an opportunity to respond to those submissions.

35. In the present matter, the panel is satisfied that the Appellant was given the opportunity and did in fact respond to the allegations made by the Complainant relating to a breach of clause 16.5A of the Code before the matter was referred to adjudication.

36. In any event, the Adjudicator did not make a finding regarding the alleged breach of clause 16.5A and instead only referred to this clause in the context of their findings on the alleged breach of clause 15.17 of the Code. The panel therefore does not need to take this matter any further.

Contradictory findings by different adjudicators

37. The Appellant alleged that the Complainant had cited certain instances of alleged breach of the Code that were not consistent with other adjudications on the same issue and/or with the manner in which WASPA had, in practice, approached the same or similar issues in the past.

38. The Appellant referred specifically to the Adjudicator's findings in relation to the alleged breach of clause 5.1 of the Code and argued that they directly contradicted the findings of another adjudicator sitting in a concurrent formal complaint (formal complaint 58765), where a similar alleged breach was dismissed.

39. This panel had the benefit of sitting for the appeal lodged by the Appellant against the adjudicator's findings in formal complaint 58765 and is therefore fully acquainted with the facts in that complaint.

40. The nature of the application or service that was promoted in the campaigns that are the subject of this complaint is very different to the application or service referred to in formal complaint 58765. The wording and other elements of the promotional materials used in each of these campaigns were also very different.

41. The panel is therefore satisfied that these two complaints are clearly distinguishable on the facts.

42. Pursuant to clause 24.33 of the Code, each case must be considered and decided on its own merits and, while precedent set in previous adjudications and appeals must be taken into account, it will not be binding on adjudicators or appeal panels tasked with reviewing subsequent complaints or appeals.

43. No evidence was presented that would support a conclusion that this complaint was not evaluated in an impartial, fair and consistent manner in accordance with the stated aims

of the Code, and/or more specifically that previous precedent has not been taken into account by the Adjudicator when it should have been.

Uncertainty/ambiguity in certain provisions of the Code

44. The Appellant also stated in their submissions that certain provisions of the Code were not clear and that certain terms used were not defined in the Code, which created uncertainty for members when responding to complaints. The Appellant referred specifically in this regard to the requirement of *"honest and fair dealings"* in clause 5.4, and the requirement to make their full terms and conditions *"readily accessible"* to customers in clause 5.7.

45. Codes of conduct that form part of a self-regulatory framework, like the WASPA Code of Conduct, do not and cannot legislate for every situation or circumstance that may occur. This is why the Code (which is compiled and approved by WASPA members) adopts a principle-based approach rather than a rule-based approach, to ensure that there is sufficient flexibility in the application of the Code.

46. Members can refer to national legislation to inform their interpretation of certain provisions, terms, or expressions used in the Code that are not expressly defined or set out as a definitive rule to be followed. This is exactly what the Appellant did when responding to this complaint, and correctly so.

47. The panel is satisfied that the clauses of the Code cited in this complaint are sufficiently clear to enable the Appellant to adequately respond to the allegations made against them and/or that they were not otherwise prejudiced in any way by any vagueness or ambiguity in any provisions of the Code.

48. Insofar as the parties may differ in their views on the interpretation of certain provisions of the Code or the application of those provisions to specific factual situations, this is a matter to be argued by the parties and to be resolved by the adjudicator or appeals panel tasked with adjudicating or reviewing the complaint.

Irregular/incomplete testing practices

49. The Appellant alleged further that the Complainant did not have a structured process for conducting their testing, which could cause potential harm to members facing complaints based on such testing.

50. The Appellant highlighted the difference between how the tester had conducted their first test on the MTN network and how the second test on the Cell C network was conducted, including checking for existing subscriptions, confirming their airtime balance, and clearing the cache history on their device before proceeding with the test.

51. The Appellant also complained that the Complainant had presented the results from both tests together without making it clear which was relied on in support of the various allegations of breach made in their complaint. The Appellant alleged that they were forced to then *"plead"* to the results from both tests, which resulted in unnecessary time and cost being spent by the Appellant.

52. The Appellant also took issue with the tester's MSIDN being listed on the WASPA do-not-contact list, which they alleged caused the test results to be adversely affected.

53. The panel has considered all of these points raised by the Appellant but finds no irregularities in the testing conducted by the Complainant which were or would be prejudicial to the Appellant.

54. The Complainant is free to conduct its testing and to present the results as it sees fit. It is again the task of the independent adjudicator (or appeal panel), when reviewing complaints, to consider all the evidence presented and to determine what weight, if any, should be given to that evidence.

55. In summary, the panel is satisfied that there have been no irregularities or procedural unfairness in the manner in which these proceedings have been conducted, including in the breach notice process, with particular reference to the Complainant's testing practices.

56. The panel will now consider the substantive merits of the Appellant's appeal against the findings of Adjudicator, which relate to those breaches that have not been admitted by

the Appellant, namely those relating to the breach of clauses 5.1, 5.6A, 5.7, 5.8, 5.11, 12.4, 12.5, 15.9A, 15.17 and 15.18 of the Code.

Breach of clause 5.1

57. In deciding whether the Appellant had breached clause 5.1, the Adjudicator found that the promotional material referenced *''antivirus''* services or services to protect or secure the user's data or phone and that these services were not the service actually provided by the resulting subscription.

58. The Adjudicator found that a reasonable consumer would believe that continuing or proceeding to subscribe to the service would present some measure of response to the issue raised in the promotional material and that they would not be subscribed to a catalogue of games and apps.

59. It appears from the reasons given by the Adjudicator for their finding made in this regard that instead of determining whether the Appellant was *able* to provide the service or services offered or promised in the promotion, they examined whether the service offered corresponded with the service provided. This is an issue that is addressed by clause 8.8 of the Code (which was not cited in the complaint) and not by clause 5.1.

60. The Adjudicator has erred in their application of the Code and the panel must therefore consider afresh whether or not there was, in fact, a breach of clause 5.1 by the Appellant.

61. The enquiry into whether there has been a breach of clause 5.1 of the Code must be undertaken as a two-stage process, firstly to determine what service was offered or promised by the Appellant in the relevant promotional materials, and secondly to determine whether or not the Appellant was able to provide that service.

62. On the first issue, there was a dispute of fact between the Appellant and the Complainant regarding what service was actually offered or promised by the Appellant in these promotional campaigns.

63. In their initial response to the complaint, the Appellant stated that a number of software applications (colloquially referred to as ''apps'') were available on the Baseplay Games portal that could be downloaded and used for varying purposes by mobile phone users to a) enhance the performance of their device (such as *''phone cleaner apps''*); or b) to protect their device from malware, ransomware or viruses (such as *''antivirus apps''*).

64. The Appellant stated that their intention for these promotional campaigns was to promote the *''phone cleaner apps''* available on the Baseplay Games portal.

65. The Complainant disputed that the Appellant was promoting the *''phone cleaner apps''* in these promotional campaigns and insisted that the Appellant was promoting an *''anti-virus app''*.

66. In order to resolve this dispute of fact, the panel has considered the evidence presented from the two tests conducted by the Complainant, with specific reference to the various elements and wording used in the promotional materials that were presented to the tester.

67. In the first test, the relevant banner advert refers to *''Cleaner Apps''.* There were no further references to other products or services in any of the subsequent promotional materials used for this campaign on the MTN network.

68. It was noted that the terms *''phone cleaning app''* and *''cleaner app''* are used interchangeably by the Appellant, but the panel finds that nothing material turns on this and that both terms refer to the same type or category of application.

69. Insofar as a reference was made to *''viruses''* in the pop-up notification that followed the banner advert in the first test, this was used in the context of the description of the uses and/or benefits of these phone cleaning applications, which included finding viruses and other potential threats.

70. The panel accepts that the service offered or promised by the Appellant in the MTN promotional campaign was the ''phone cleaning applications'' (or ''*Cleaner apps''*).

71. In the second test conducted on the Cell C network, the tester clicked on a similar banner advert and they were redirected to a web page where an animated ''scanner''

graphic was displayed, with the text: *"Scanning for viruses and threats…"*. The animated ''scanner'' graphic starts from 0% and loads up to 100% and when it reaches 100% the same pop-up notification used in the MTN campaign is displayed, i.e. with the recommendation to update to the *''Cleaner Apps''*.

72. However, after the tester clicked *"Continue"* on the pop-up notification, they were then directed to another web page which displayed another animated ''loading'' bar graphic, with the text: *"Loading Antivirus".* The body copy of this web page, which is backgrounded when the animated ''loading'' graphic is displayed, has the text *''Antivirus to Scan and PROTECT YOUR DATA''*.

73. At this point in the promotional flow and taking into account the sequencing of the banner advert, the pop-up notification, and the graphics and wording displayed on the subsequent web pages, it is reasonable to conclude that an ordinary consumer, with average literacy skills and minimal experience as a consumer of mobile value-added services and applications, would be led to believe that: a) a scan had taken place on their device to find viruses and other threats; and b) that by pressing continue on the pop-notification presented, some kind of antivirus software had been loaded onto their device; and c) that by clicking ''YES'' when prompted to do so, they would be able to access this antivirus software.

74. The panel is of the view that the Cell C promotional campaign differs significantly from the MTN campaign in that the predominant impression created by all the promotional materials used in the Cell C promotional campaign was that some form of *''antivirus''* software application or service was offered or promised to prospective customers.

75. In considering the second part of the two-stage enquiry, i.e. whether or not the Appellant was able to provide the service that was offered or promised, it was noted that the tester stopped the first test after the subscription process had been completed and before they were redirected to the Baseplay Games website. The tester was therefore not able to show whether or not the Appellant was, in fact, able to provide the '*'Cleaner Apps''* that were offered or promised in the campaign conducted on the MTN network. The results from the first test therefore do not support a finding that the Appellant was unable to provide the service offered or promised in breach of clause 5.1 of the Code.

76. The question then remains whether the Appellant was able to provide the *"antivirus"* application or service that was offered or promised in the Cell C promotional campaign.

77. Despite stating in their initial response to the complaint that the Baseplay Games service included access to applications to protect a user's device from malware, ransomware or viruses, such as *"antivirus apps"*; the Appellant subsequently qualified this statement in their supplementary submissions by stating that they did not offer a standalone antivirus software product in South Africa but there was an antivirus service available within some of the phone cleaning applications on the Baseplay Games portal.

78. Where there is a dispute of fact between the parties, the panel must consider the undisputed facts and the Appellant's version in order to make a finding, provided that the Appellant's version does not appear so patently false that it cannot reasonably be accepted.

79. It was not disputed by the Complainant that phone cleaning applications were available to subscribers to the Baseplay Games service.

80. The test results from the second test presented by the Complainant showed that a search on the Baseplay website using the search term *"antivirus"* did not yield any positive result. While this may be relevant to determining whether or not the Appellant has fulfilled the requirements of clause 5.6A (considered below), it does not conclusively show that the Appellant was, in fact, not able to provide the antivirus software or service offered or promised in this campaign.

81. The panel has also confirmed from its further investigations into the characteristics and functionality of the phone cleaning applications made available on the Baseplay Games portal that they may include some form of virus detection capability.

82. The panel must therefore conclude, on the basis of the undisputed facts and the Appellant's version, that the Appellant was able to provide an antivirus service to subscribers to the Baseplay Games service.

83. The appeal against the Adjudicator's finding in respect of a breach of clause 5.1 of the Code by the Appellant is accordingly upheld and the sanction imposed by the Adjudicator in this regard is set aside.

Breach of clause 5.6A

84. Following on from the findings made above, i.e. that the Appellant was able to provide the phone cleaning applications offered and promised, which included an antivirus service, the next question is to determine whether the Appellant satisfied the requirements of clause 5.6A of the Code by ensuring ready access to information on how to access and use that service.

85. The Adjudicator found, having assessed the video evidence from the second test conducted on the Cell C network, that the Baseplay Games portal may have included the *''phone cleaner apps''* (that could have included solutions to viruses) but that they were not readily available to access on subscription and that the Appellant was therefore in breach of clause 5.6A of the Code.

86. When interpreting the requirements of clause 5.6A, the Adjudicator appears to have missed the distinction between making the service itself readily available upon subscription, and providing ready access to *information on how to access and use the service*. Clause 5.6A of the Code requires the latter and not the former.

87. While it would have been good practice for the Appellant to provide a direct link to the phone cleaning applications offered after the subscription was completed, this is not a compulsory requirement and the Appellant may instead choose to redirect a new subscriber to the home page of the Baseplay Games website, as they did, provided that the subscriber was then given ready access to information on how to access and use the phone cleaning applications and, in the context of the campaign conducted on the Cell C network, ready access to information on how to access and use the *''antivirus''* software or service that the Appellant stated was available within the phone cleaning applications.

88. What constitutes *''ready access''* to information in the context of clause 5.6A of the Code is informed by the provisions of section 22 of the Consumer Protection Act, 68 of 2008.

89. Section 22 reads:

22. (1) The producer of a notice, document or visual representation that is required, in

terms of this Act or any other law, to be produced, provided or displayed to a consumer must produce, provide or display that notice, document or visual representation—
(a) in the form prescribed in terms of this Act or any other legislation, if any, for that notice, document or visual representation; or
(b) in plain language, if no form has been prescribed for that notice, document or visual representation.
(2) For the purposes of this Act, a notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort, having regard to—
(a) the context, comprehensiveness and consistency of the notice, document or visual representation;
(b) the organisation, form and style of the notice, document or visual representation;
(c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and
(d) the use of any illustrations, examples, headings or other aids to reading and understanding.

90. The video and other evidence presented from the second test shows that, after the subscription was completed and the tester clicked on the *"click here"* link provided, they were redirected to the ''apps'' area on the home page of the Appellant's website (baseplay.co/games). The tester then manually scrolled through the various applications presented on the portal, looking for an *''antivirus''* application without success. They then typed the word *''Antivirus''* into the search bar provided on the Appellant's site, but no results were found.

91. The Appellant's contention was that the use of the search term *''antivirus''* would not yield any positive results because the antivirus software or service that was available to users was an element within another application and was not a standalone application in itself.

92. The Appellant stated further that if the tester had been looking for a phone cleaning application, they would have found this in the ''app'' area of the portal and further information about the application was provided via the ''information'' icon displayed.

93. However, the Appellant failed to provide any further evidence to show what information was provided for the phone cleaning applications on the portal, and specifically whether information on how to access and use the antivirus functionality within these applications was given to subscribers.

94. Based on the evidence presented, it is reasonable to conclude that an ordinary consumer, after subscribing to the Baseplay Games service, would not be able to find information about how to access and use the antivirus software or service that was offered or promised; or that if such information was available in the Baseplay portal, it would require undue effort on the part of the subscriber to find that information.

95. The panel therefore finds that the Appellant failed to give ready access to information on how to access and use the antivirus software or service that was alleged to be available within the phone cleaning applications on the Baseplay Games portal and they were in breach of clause 5.6A of the Code.

96. The Appellant's appeal against the Adjudicator's finding in this regard is dismissed.

Breach of clause 5.7

97. In their response to the complaint that they had breached clause 5.7 of the Code, the Appellant provided a link to a web page that contained the full terms and conditions of the service (https://baseplay.co/terms), thereby demonstrating that a web page containing the full terms and conditions did exist at that time.

98. However, the central issue to be determined for the purposes of clause 5.7 of the Code is whether this web page was made ''*readily available''* to ''*potential customers''* of the service.

99. It is a generally accepted principle of our law that the terms and conditions applicable to a transaction with a customer must be brought to the customer's attention before that

transaction is concluded. This can either be done by ensuring that a physical copy of the terms and conditions is made available to the prospective customer; or in the case of digital transactions, it is common practice to provide a working hyperlink to a web page containing the full terms and conditions in accordance with the legal doctrine of incorporation by reference.

100. For terms and conditions relating to subscription services advertised by members, clause 12.4 of the Code provides for a link to the full terms and conditions to either be provided in the subscription confirmation step, or failing that, by providing a link in any preceding web page advertising that service.

101. The Appellant alleged in their response to this complaint that potential customers of the Baseplay Games subscription service were given access to the terms and conditions in various ways, including via a link provided on the service landing page prior to subscription.

102. However, this was contradicted by the evidence provided by the Complainant. The screenshot (and video evidence) of the Cell C confirmation page shows that the following wording was displayed below the *''Yes''* and *''No''* buttons: *By signing up you are agreeing with our Privacy Statement and Terms and Conditions*. However, no link was provided.

103. The screenshots of the service landing pages used for both the MTN and Cell C campaigns also do not show any link to the full terms and conditions being displayed on these web pages.

104. The Appellant, in turn, alleged that this evidence was incomplete in that the screenshots provided by the Complainant had been cropped and did not show all of the information that was displayed on the tester's screen during the test.

105. The panel has scrutinized the screenshots of the various web pages advertising the Baseplay Games service in both campaigns and the video evidence provided, and disagrees with the Appellant that this evidence was incomplete.

106. The panel also had the benefit of viewing the service landing page used in the promotional campaign that was the subject of complaint 58765, where a link to the Appellant's privacy policy and terms was clearly visible and was positioned directly below the call-to-action and pricing information provided. Had a similar link been displayed on the relevant landing pages used in the MTN and Cell C campaigns in this complaint, it would be reasonable to conclude that they would have been positioned in more or less the same place on the screen. As the Appellant has acknowledged, there is limited space on a mobile screen to display all the information required by the Code.

107. In any event, it would have been an easy matter for the Appellant to provide its own screenshots or other evidence to contradict the evidence provided by the Complainant. But the Appellant failed to do this in any of their submissions, both in response to the initial complaint and in their appeal.

108. Based on the evidence presented, the panel finds that the Appellant failed to make the web page containing the full terms and conditions for the Baseplay Games service readily available to the tester, who in this case can be regarded as a ''*prospective customer*''.

109. The appeal against the Adjudicator's finding that the Appellant has breached clause 5.7 of the Code is accordingly dismissed.

Breach of clause 5.8

110. The Adjudicator then went on to find that because the terms and conditions were not made readily available to prospective customers prior to subscription, the Appellant was also in breach of clause 5.8 of the Code.

111. The panel finds that the Adjudicator's reasoning in this regard is flawed and agrees with the Appellant that the Adjudicator has misconceived the distinction between a requirement that the terms and conditions for a service must be made accessible to customers (as per clause 5.7), and a requirement that certain prescribed terms and information must be included in those terms and conditions (as per clause 5.8).

112. A finding against a member that they have not made the terms and conditions for a service readily available to customers cannot, in itself, lead to the conclusion that the member has also breached clause 5.8 of the Code.

113. Further evidence would need to be presented to show that terms or information prescribed by clause 5.8 was missing from the full terms and conditions for the service in question. In the current matter there was no evidence presented to show that the Appellant's terms and conditions for the Baseplay Games service did not include any of the prescribed information or terms required by clause 5.8 of the Code.

114. The appeal against the Adjudicator's findings in respect of a breach of clause 5.8 of the Code is upheld and the sanction imposed by the Adjudicator for this breach is set aside.

Breach of clause 5.11

115. In considering whether the Appellant had breached clause 5.11 of the Code, the Adjudicator accepted the Appellant's statement that customer support details were contained within its full terms and conditions, but they again found that because these terms and conditions were not made readily available to prospective customers prior to subscription, the Appellant was also in breach of clause 5.11 of the Code.

116. In reviewing these findings, it is important to highlight that clause 5.11 does not expressly stipulate what customer support must be made available to prospective customers prior to a subscription transaction being completed. This is an issue that is instead addressed by clause 5.7, read with clause 5.8; and clause 12.4, read with clause 12.5.

117. Clause 5.7 requires a web page with the full terms and conditions for a service to be made available to prospective customers and clause 5.8 stipulates that those terms and conditions must include certain customer support related information, including: a) a customer support number; b) unsubscribe instructions; c) any handset compatibility requirements for the service; and d) an indication of how billing errors are handled.

118. Clause 12.4, read with clause 12.5 of the Code, provides further that if no link to the full terms and conditions is provided to a prospective customer in the confirmation step for a

subscription service, then the member must at least display a customer support number on any web pages advertising the service.

119. It has already been established that the Appellant breached clause 5.7 of the Code by not making the full terms and conditions for the Baseplay Games service readily available to prospective customers prior to the subscription process being completed. It logically follows that, if those terms and conditions included customer support details, then the Appellant would also be in breach of clause 5.11.

120. Similarly, if the Appellant failed to display a customer support number as required by clause 12.4, read together with clause 12.5, then it would also be in breach of clause 5.11.

121. The panel therefore finds that, insofar as the Appellant did not make customer support easily available to prospective customers (such as the Complainant's tester in this complaint), they are in breach of clause 5.11 of the Code.

122. However, since the Appellant has already been sanctioned for their breach of clause 5.7 of the Code, the panel is of the view that it would be unfair to sanction the Appellant twice for the same contravention as this would amount to ''double jeopardy'' or ''double punishment''. The sanction imposed by the Adjudicator for the breach of clause 5.11 is therefore set aside.

Breach of clause 12.4

123. The panel once again notes the overlap between the provisions of clause 12.4 and the provisions of clauses 5.7 and 5.11 respectively.

124. The panel has already found, based on the evidence provided, that the Cell C confirmation page from the second test did not include a link to the full terms and conditions for the Baseplay Games subscription service.

125. The Appellant was then required, in terms of clause 12.4 (read with clause 12.5) of the Code, to display the minimum terms and conditions for that service in any web pages used to advertise the service. The minimum terms and conditions must include a customer support number and a link to the full terms and conditions.

126. These minimum terms and conditions were not displayed in any of the web pages used by the Appellant to advertise the Baseplay Games service in either of the promotional campaigns that it ran.

127. The panel therefore finds that the Appellant is also in breach of clause 12.4 of the Code and the appeal against the Adjudicator's finding in this regard is dismissed.

128. However, since the Appellant has already been sanctioned for their breach of clause 5.7, they cannot be sanctioned again for the same conduct as this would again amount to double jeopardy or double punishment.

129. The sanction imposed by the Adjudicator for the breach of clause 12.4 of the Code is accordingly set aside.

Breach of clause 12.5

130. The Adjudicator's reasoning in finding that the Appellant had breached clause 12.5 because they had breached clause 12.4 is flawed.

131. The aim of clause 12.5 is to supplement the provisions of clause 12.4 by stipulating what information should be included in the ''minimum terms and conditions'' that must be displayed on any web page advertising the relevant service if the subsequent confirmation step does not include a link to the full terms and conditions.

132. The two clauses must be read together and if a finding has already been made against the Appellant that they have breached clause 12.4, then they cannot be found separately to have breached clause 12.5 too.

133. The Appellant's appeal against the Adjudicator's finding that there was a breach of clause 12.5 is upheld and the additional sanction imposed for this breach is set aside.

Breach of clause 15.9A

134. With reference to the second test conducted on the Cell C network, the Adjudicator took issue with an intervening banner advert for another service (i.e. the Appellant's ''Stream''

service) that was presented to the tester after they had completed their subscription to the Baseplay Games service. The Adjudicator found that that the Appellant was seeking to encourage subscription to additional services in breach of clause 15.9A of the Code.

135. Before reviewing the Adjudicator's finding in this regard, it is useful to outline the relevant aspects from the second test conducted on the Cell C network.

136. The evidence presented shows that after confirming their subscription on the Cell C confirmation page, the tester was advised as follows, *''Please wait while we process your request'',* followed by, *''Your subscription has been successfully completed. In 10 seconds you will be redirected back to the web site you were browsing, or click on this link''.*

137. The tester did not click on the link provided and they were redirected back to the previous website they had been browsing (wandacool.com) and to a web page with the Baseplay Games logo displayed, followed by the text *''Continue to get unlimited access to your content''.* Another animated loading graphic was also displayed with the text *''Loading Access to your Content''*.

138. The bottom half of this web page was faded but one can faintly see a video player icon with the word ''Stream'' displayed (which appears to be the logo used for the Appellant's Baseplay Stream subscription service), together with a *''Continue''* button and other text.

139. When the animated loading graphic reached 100%, another banner advert was then presented to the tester, with the Baseplay Stream logo (video player icon) and the following text: *''Add Stream to your Plan and get unlimited access to Video Streaming Content & Community and much more''*. Below that wording is a large green *''CONTINUE''* button, followed by the text: *''Subscription. R15/day. Unlimited Ad free Video Streaming Content & Community. Cancel anytime''*. Below that is a link with the text: *''Accept the Privacy Policy and Terms''*.

140. The tester closed the banner advert and remained on the same web page. A completed loading graph, stating 100%, was now displayed with the text, *''You can access now. You'll be redirected in 50s or you can click here to continue".*

141. The bottom part of the web page remained faded but a large green *''CONTINUE''* button was now displayed.

142. The tester clicked on the *"click here"* link provided in the top part of the page and they were redirected to the Baseplay Games website (baseplay.co/games).

143. Clause 15.9A states that once a customer confirms a subscription to a specific service on the network hosted confirmation page, the customer must *only* be redirected to information related to that specific service and may not be redirected to any additional network hosted confirmation pages *in such a way that it encourages the customer to mistakenly subscribe to additional services*.

144. The use of the word *''only''* is indicative of the intention of the drafters of the Code, namely that information, which is unrelated to the specific service that has been subscribed to, should not be presented to the customer straight after they have confirmed their subscription to that service. This would include the presentation of a banner advert for a completely unrelated service.

145. More concerning is that even after the tester closed the banner advert for the Appellant's ''Stream'' service, thereby indicating that they were not interested in this additional offer from the Appellant, a large green *''Continue''* button relating to this service continues to be displayed on the same web page in a way that makes it the dominant visual element foregrounded on the page.

146. It is reasonable to conclude, from the manner in which the Appellant has designed this additional banner advert and web page, that an ordinary consumer could be misled or be encouraged to mistakenly subscribe to the Appellant's video streaming service, which would be charged at an additional R15 per day.

147. Based on the aforegoing, the panel agrees with the finding of the Adjudicator that the Appellant has breached clause 15.9A of the Code and the appeal against the findings of the Adjudicator in this regard is dismissed.

Breach of clause 15.17

148. Clause 15.17 requires that an SMS message (known as the ''welcome message'') is immediately sent to a new subscriber to confirm the initiation of a subscription service.

149. The results provided by the Complainant from the first test conducted on the MTN network clearly show that the tester received a welcome message which read: *''Y'ello. Thank you for subscribing to Baseplay Games at R39.99/week or lesser amount. Visit now http://mtn.to/622460848. To manage your subscriptions dial *123# or visit https://mtnapp.mtn.co.za/webaxn?67024025. Ts&Cs www.mtn.co.za.''*

150. However, the Complainant submitted that the required welcome message was not received by the tester after they confirmed their subscription on the Cell C confirmation page in the second test. This was supported by the video evidence provided by the Complainant which shows the tester checking their incoming messages and confirming that no welcome message was received.

151. The Appellant refuted these allegations and provided logs confirming that a welcome message had been sent and which showed the wording that was used by the Appellant for that message.

152. It was subsequently confirmed by the Appellant that they used the services of a third party messaging provider (who was also a member of WASPA) to send messages relating to their services to their customers. It appears that although the Appellant sent the required message to their service provider, the service provider did not send the message to the tester's MSIDN because it was registered on the WASPA do-not-contact (DNC) registry.

153. The Complainant confirmed that the tester's MSIDN was registered on the DNC registry. This was so that they could test members' compliance with the direct marketing provisions of the Code.

154. The Appellant's contention was that they should not be held responsible for the welcome message not being received by the tester for this reason. The Complainant, in turn, argued that clause 16.5 of the Code clearly states that when members are taking steps to block direct marketing messages to numbers listed in the WASPA DNC registry, they must not automatically block transactional and commercial messages to those numbers,

and that the SMS message required in terms of clause 15.17 must be regarded as a transactional or commercial message.

155. The Complainant also provided further evidence to show that the required welcome messages for other subscription services tested from the same MSIDN had been received while that number was listed on the DNC registry.

156. It is also noted from the results from the second test that when the tester terminated their subscription, the required subscription termination message was received by the tester using the same MSIDN.

157. When making their finding in respect to the alleged breach of clause 15.17, the Adjudicator referred to section 23 of the Electronic Communications and Transactions Act, 2002 (''ECT Act'').

158. Section 23 of the ECT Act reads as follows:

A data message- (a) used in the conclusion or performance of an agreement must be regarded as having been sent by the originator <u>when it enters an information system outside the control of the originator</u> or, if the originator and addressee are in the same information system, when it is capable of being retrieved by the addressee.

159. The Adjudicator reasoned that, because the information system of the Appellant's service provider was in the Appellant's control or that the Appellant was able to exercise adequate oversight over the provider's information system to ensure that there was compliance with the Code, the Appellant therefore remained the ''originator'' of the required welcome message for the purposes of section 23 of the ECT Act. Since the welcome message had not entered an information system outside the originator's control, it was not sent for the purposes of clause 15.17 of the Code.

160. In its appeal submissions, the Appellant submitted that the ECT Act was drafted before the *''anti-spamming''* provisions of the Protection of Personal Information Act, 2013 were introduced, and argued that the Adjudicator had failed to take cognizance of the fact that this would affect the application of section 23 of the ECT Act. The Appellant argued

further that their compliance with clause 15.17 of the Code, read together with section 23 of the ECT Act, would result in them contravening other national legislation.

161. Even if this argument could be sustained, the Appellant has failed to recognise the important distinction that must be drawn between direct marketing messages and other commercial messages that are sent for the purpose of concluding (or performing) a contract. The welcome message that is required to be sent to a new subscriber in terms of clause 15.17 of the Code clearly forms part of the subscription process and does not constitute a ''direct marketing message''.

162. The inclusion of the tester's MSIDN on the WASPA DNC registry (or on the DMASA registry) serves as a pre-emptive block against receiving unwanted direct marketing messages only. It should not prevent the Appellant, or its service providers, from sending commercial messages relating to a specific transaction that has been concluded with a customer.

163. Furthermore, clause 16.5A of the Code also expressly deals with this issue.

164. The panel is satisfied, based on the evidence presented, that the Appellant's service provider did not send the required welcome message to the tester's MSIDN in breach of clause 15.17 of the Code. The inclusion of the tester's MSIDN on the DNC registry does not constitute a valid justification for them not doing so.

165. It was noted that the messaging provider used by the Appellant was also a member of WASPA and that section 3.4 of the Code is applicable in these circumstances. The panel is satisfied that the Appellant remains liable for the breach of clause 15.17 of the Code as they have not demonstrated that they took reasonable steps to ensure that their messaging provider provided their services in a manner consistent with the requirements of the Code.

166. The appeal against the Adjudicator's finding in this regard is dismissed.

Breach of clause 15.8

167. The aim of clause 15.18 is to supplement the provisions of clause 15.17 by stipulating what form the required welcome message must take and what information must be contained within that message.

168. The two clauses must be read together and if a finding has already been made against the Appellant that they have breached clause 15.17 of the Code, then they cannot be found separately to have breached clause 15.18 too.

169. The Adjudicator's reasoning in this regard was again flawed and the appeal against their finding that the Appellant also breached clause 15.18 is upheld and the additional sanction imposed for this breach is set aside.

Conclusion

170. In summary, the panel has made the following findings:

170.1 The breach of clause 4.9c was not appealed and therefore stands.

170.2 The Appellant did not breach clause 5.1 of the Code and the appeal against the Adjudicator's finding in this regard is upheld and the sanction imposed is set aside.

170.3 The Appellant did breach clauses 5.6A, 5.7, 5.11, 12.4, 15.9A and 15.17 of the Code and the appeal against the findings of the Adjudicator with regard to these clauses is dismissed. However, due to the overlap between clause 5.7 and clauses 5.11 and 12.4, the sanctions imposed for the breach of clauses 5.11 and 12.4 must be set aside as this would result in the Appellant being sanctioned twice for the same conduct, which would be unfair.

170.4 The Appellant cannot be held liable separately for a breach of clauses 5.8, 12.5, and 15.18 of the Code as these clauses overlap with and supplement clauses 5.7, 12.4 and 15.17 respectively. The appeal against the findings of the Adjudicator with regard to these clauses is upheld and the sanctions imposed for these breaches are set aside.

Amendment of sanctions

171. Clause 24.63 of the Code provides that if the appeal panel determines that there has, in fact, been a breach of the Code, then the panel must review the sanctions recommended by the Adjudicator.

172. The panel may either maintain the same sanctions recommended by the Adjudicator or determine such other sanctions as it deems appropriate, given the nature of the breach and the evidence presented.

173. Based on the new admissions made by the Appellant in their appeal that they were also in breach of clauses 5.4 and 5.5 of the Code, the panel must also then consider whether the sanctions imposed by the Adjudicator for the breach of these clauses remain appropriate.

Sanctions imposed for breach of clauses 4.9(c), 5.4 and 5.5

174. Part F of the Consumer Protection Act, 68 of 2008 (''CPA'') deals directly with a consumer's right to fair and honest dealing, and sections 40 and 41 are of particular relevance to the current complaint.

175. Section 40 of the CPA states that a supplier of services must not use unfair tactics or any other similar conduct in connection with the marketing of its services. This section is directly relevant to the interpretation and application of clause 4.9(c) and 5.4 of the Code.

176. Obtaining a consumer's consent to enter into a transaction by improper means such as using unfair promotional tactics that induce an unacceptable sense of fear and anxiety on the part of the consumer must be regarded as unconscionable conduct on the part of the Appellant. Such tactics weaken the consumer's normal powers of judgment and may coerce or influence them to entering into transactions that they would otherwise not choose to enter into.

177. Section 41 of the CPA is directly relevant to the interpretation and application of clause 5.5 of the Code. Section 41 provides that, in relation to the marketing of services, a supplier must not, by words or conduct, directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer; or use exaggeration, innuendo or ambiguity as to a material fact; or fail to disclose a material fact if that failure amounts to a deception; or fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading or deceptive representation.

178. The section goes on to state that it is a false, misleading or deceptive representation to falsely state or imply, or fail to correct an apparent misapprehension on the part of a consumer to the effect that services have performance characteristics, uses, benefits, qualities that they do not have; or that they are needed or are advisable.

179. In the campaigns that were the subject of the present complaint, the promotional materials used were intentionally designed to create a sense of danger and urgency on the part of consumers, and they included a number of representations that were patently false, including that the user's device had been scanned for viruses and/or that antivirus software had already been loaded onto their device.

180. These types of promotional tactics not only directly contradict the primary objective of the WASPA Code, which is to ensure that members of the public can use mobile services with confidence, but they also pose a real risk of serious consumer harm where consumers are unintentionally subscribed to and charged for services that they did not want or that they did not intend to subscribe to.

181. The panel has also noted the previous complaint that was upheld against the Appellant (see formal complaint 53300), which related to a promotional campaign for the same service that was also found to be in breach of clauses 4.9(c), 5.4 and 5.5 of the Code.

182. In this previous promotional campaign, the Appellant also made use of similar pop-up notifications and other elements and wording that were designed to invoke a sense of danger and urgency, as well as making representations that were again patently false, including that a number of viruses had been detected on the user's device that needed to be cleaned immediately and/or that their SIM card had been locked and their device needed to be updated immediately.

183. The Appellant stated in their submissions in response to the present complaint that these *''antivirus''* promotional campaigns were run in error by their marketing department in the South African market.

184. Even if the panel were to accept the truth of these submissions, which it finds difficult to do in light of the previous findings reported in complaint 53300, clause 4.1 of the Code in any event requires that the Appellant must ensure that its employees are made aware of the requirements of the Code, which they have clearly failed to do.

185. The adjudicator, who reviewed the previous formal complaint against the Appellant, imposed a fine of R 10 000.00 for the Appellant's breach of clause 4.9(c); a fine of R 10 000.00 for their breach of clause 5.4; and a fine of R 10 000.00 for their breach of clause 5.5.

186. The Adjudicator in the present complaint imposed a fine of R 15 000.00 for the breach of clause 4.9(c); a fine of R10 000.00 for the breach of clause 5.4; and a fine of R10 000.00 for the breach of clause 5.5.

187. Taking into account the Appellant's repeated transgressions of the same clauses of the Code, as well as the nature and severity of these transgressions, the panel is of the view that the sanctions imposed by the Adjudicator for the breach of clauses 4.9(c) and 5.5 of the Code should be adjusted as follows:

187.1 The fine imposed for the Appellant's breach of clause 4.9(c) is increased from R15 000.00 to R20 000.00; and

187.2 The fine imposed for the Appellant's breach of clause 5.5 is increased from R10 000.00 to R20 000.00.

188. The fine imposed by the Adjudicator for the Appellant's breach of clause 5.4 of the Code is maintained.

Sanction for breach of clause 5.6A

189. The panel has reviewed the sanction imposed by the Adjudicator for the Appellant's breach of clause 5.6A of the Code and sees no reason why this sanction should not be maintained.

Sanction for breach of clause 5.7

190. Although the Adjudicator made a finding that the Appellant had breached clause 5.7, they did not impose any sanction for this breach. It is not clear whether this was an oversight or an intentional omission by the Adjudicator. In either case, the panel does not agree that no sanction should be imposed and deems it appropriate to impose a fine of R5 000.00 for the Appellant's breach of clause 5.7 of the Code.

Sanction for breach of clause 15.9A

191. The panel has reviewed the sanction imposed by the Adjudicator for the breach of clause 15.9A and finds that this sanction was appropriate and should be maintained.

Sanction for breach of clause 15.17

192. The panel has reviewed the sanction imposed by the Adjudicator for the breach of clause 15.17 and finds that this sanction was appropriate and should be maintained.

Conclusion

193. The fines imposed by the Adjudicator for the breach of clauses 5.1, 5.8, 5.11, 12.4, 12.5, and 15.18 of the Code are set aside for the reasons stated previously.

194. The sanctions imposed by the Adjudicator for the Appellant's breach of clauses 5.4, 5.6A, 15.9A and 15.17 of the Code are maintained.

195. The sanctions imposed by the Adjudicator for the Appellant's breach of clauses 4.9(c), and 5.5 of the Code are replaced by the following sanctions:

195.1 a fine of R20 000.00 is imposed for the breach of clause 4.9(c); and

195.2 a fine of R20 000.00 is imposed for the breach of clause 5.5;

196. The panel has imposed a fine of R 5 000.00 as a new sanction for the Appellant's breach of clause 5.7 of the Code.

Appeal fee

197. The appeals panel must determine, based on the merits of the appeal, whether the appeal fee must be refunded, partially refunded or forfeited by the Appellant.

198. The panel finds that the Appellant has been partly successful in their appeal to warrant a refund of 50% of the appeal fee paid. The remaining 50% of the appeal fee is forfeited.