

The Advertising Regulatory Board's Jurisdiction: Implications of *Bliss v Advertising Regulatory Board* for Public Health Policy on Unhealthy Food and Beverage Advertising

YT Radu*, S Mahomed** and M Mafuyeka***

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Authors

Yolanda T Radu
Sameera Mahomed
Mikateko Mafuyeka

Affiliation

University of Witwatersrand,
South Africa
Legal Advice for Africa

Email

Yolanda.Radu@wits.ac.za
Sameera.Mahomed@wits.ac.za
mmafuyeka@advocacyincubator.org

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Abstract

In the trilogy of cases between Bliss Brands, the Advertising Regulatory Board (ARB) and Colgate, the courts considered the self-regulatory powers of the ARB and the extent of its jurisdiction to deliberate on complaints made against an advertiser who is not a member of the ARB. The judgments of the Supreme Court of Appeal and of the Constitutional Court entrenched the advertising industry's self-regulatory regime through the ARB as the industry watchdog. The Bliss Brands decisions, whilst not directly dealing with the advertising of unhealthy commodities, touch on several issues relating to the ARB as a regulatory regime of the marketing industry that are of particular concern to the regulation of the marketing of unhealthy food and beverages. These issues include jurisdiction and independence, which are critical to the attainment of public health objectives. Using the judgments, this case note shows the limitations of self-regulation in curbing the advertisement of unhealthy food and beverages to vulnerable groups.

Keywords

Advertising Regulations; self-regulation; public health policy; unhealthy food and beverages; jurisdiction

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1 Introduction

South Africa's advertising industry makes use of a self-regulatory regime in which "the advertising, marketing, agency, and media industry set voluntary rules and standards of practice complementing and enhancing existing general framework laws and regulations".¹ The current self-regulatory body in South Africa is the Advertising Regulatory Board (ARB). It is the successor to the Advertising Standards Authority (ASA), which until September 2018 was the self-regulatory body for the advertising industry. The ARB is a non-profit company funded by its members and administers its regulatory authority through its Memorandum of Incorporation (Moi) and through its Code of Advertising Practice (hereafter the Code).² Members of the ARB include a significant number of leading brands who fund the ARB by paying the ARB directly on a voluntary basis.³

Given the self-regulatory nature of the ARB (and its predecessor, the ASA), there have been a number of legal challenges questioning its authority to exist, its sanctioning power and its constitutionality.⁴ The challenge to its authority and jurisdiction became more prominent and contentious in the High Court case of *Bliss Brands (Pty) Ltd v Advertising Regulatory Board* NPC 2021 JDR 1019 (GJ) (hereafter *Bliss Brands v ARB*).⁵ The dispute

* Yolanda T Radu. LLB LLM (Wits). Senior Researcher in Law and Policy, SAMRC/Wits Centre for Health Economics and Decision Science - PRICELESS SA University of the Witwatersrand. Email: Yolanda.radu@wits.ac.za. ORCID: <https://orcid.org/0009-0004-8103-7653>.

** Sameera Mahomedy. LLB LLM LLD (US). Senior Researcher in Law and Policy, SAMRC/Wits Centre for Health Economics and Decision Science – PRICELESS SA University of Witwatersrand. Email: Sameera.mahomedy@wits.ac.za. ORCID: <https://orcid.org/my-orcid?orcid=0000-0002-8810-3834>.

*** Mikateko Mafuyeka. LLB LLM (UP). Legal Advisor for Africa, Global Health Advocacy Incubator. Email: mmafuyeka@advocacyincubator.org.

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¹ ARB date unknown <https://www.arb.org.za/index.html>; ARB date unknown <https://www.arb.org.za/arb-moi.html> (the Moi); ARB date unknown https://www.arb.org.za/The_Code (the Code).

² ARB date unknown <https://www.arb.org.za/stakeholders---funders.html>.

³ *Nestlé (SA) (Pty) Ltd v Mars Incorporated* 2001 4 SA 542 (SCA); *Brandhouse Beverages (Pty) Ltd v Advertising Standards Authority of South Africa* (unreported) case number 2331/15 of 28 April 2015.

⁴ *Bliss Brands (Pty) Ltd v Advertising Regulatory Board* NPC 2021 JDR 1019 (GJ) (hereafter *Bliss Brands v ARB*).

became the subject of appeals before the Supreme Court of Appeal (SCA)⁶ and the Constitutional Court.⁷

The effective regulation of the advertising industry is critical for the realisation of public health goals such as the protection of children and vulnerable groups from unhealthy food marketing.⁸ Yet, numerous concerns have been raised about the efficacy of self-regulation as a way of protecting children and other vulnerable groups from harmful commercial exploitation.⁹ Indeed, within South Africa, studies have shown self-regulation and the Code to be ineffective in deterring the marketing of unhealthy food and beverages that are directed at children.¹⁰ In light of these concerns, there is a need to investigate the efficacy of the ARB in regulating marketing. The recent challenges to the ARB in the *Bliss* cases provide crucial insights into the current mechanism of self-regulation in South Africa, especially in relation to the efficacy thereof.

This case note thus explores the implications of a self-regulatory regime on public health goals in the context of the decisions in these cases. It begins with an outline of the High Court decision.¹¹ The note then turns to the Supreme Court of Appeal¹² and Constitutional Court judgments.¹³ A brief analysis of the implications of these cases follows, after which some concluding remarks are shared.

⁶ *Advertising Regulatory Board NPC v Bliss Brands (Pty) Ltd* 2022 4 SA 57 (SCA) (hereafter *ARB v Bliss Brands*).

⁷ *Bliss Brands (Pty) Ltd v Advertising Regulatory Board NPC* 2023 10 BCLR 1153 (CC) (hereafter *Bliss Brands v ARB (CC)*).

⁸ On the need for effective regulation, see Taillie *et al* 2019 *Nutrition Review* 787. This is particularly the case given the links between the consumption of unhealthy food and beverages and the increased prevalence of non-communicable diseases, especially childhood obesity. Companies selling these unhealthy products have been known to target children, which leads to increased consumption and puts them at greater risk of developing NCDs at a young age – a burden which is carried throughout their lives. Hlongwane and Reddy 2023 *Retail and Marketing Review* 87.

⁹ Hebden *et al* 2011 *Medical Journal of Australia* 20. In fact, a recent study highlighted that, despite the existence of industry-led regulation, children are still frequently exposed to television advertisements for unhealthy foods and beverages. In addition, countries with self-regulation had a higher advertising rate of unhealthy foods during peak children's viewing time than countries with no regulation. See Kelly *et al* 2019 *Obesity Reviews* 116-128.

¹⁰ Mchiza *et al* 2013 *Public Health Nutrition* 2213; Yamoah *et al* 2021 *International Journal on Environmental Research and Public Health* 18.

¹¹ *Bliss Brands v ARB*.

¹² *ARB v Bliss Brands*.

¹³ *Bliss Brands v ARB (CC)*.

2 *Bliss Brands (Pty) Ltd v Advertising Regulatory Board* NPC 2021 JDR 1019 (GJ)

2.1 *Facts*

The applicant in this case was Bliss Brands (Pty) Limited whilst the ARB was the first respondent.¹⁴ The ARB as the industry watchdog enforces the maintenance of standards in the industry.¹⁵ Its Mol binds its members who comprise of representative associations of various industries to adhere to the Code.¹⁶ In turn, these members undertake to bind their association members to the ARB's Code.¹⁷

The ARB adjudicates complaints of breaches of the Code both by and against its members and non-members.¹⁸ This means that the ARB can adjudicate on complaints against non-members. However, its decisions are not enforceable on non-members unless the non-members consent to the ARB's jurisdiction.¹⁹ If a non-member refuses to adhere to a ruling of the ARB, members of the ARB may refuse to accept the advert of that non-member. The ARB may also issue an ad-alert, where a non-member whose advert has been the subject of a complaint does not participate in the ARB process.²⁰ The effect of the ad-alert issued by the ARB is that the advert of the non-member may not be published in any advertising medium of the ARB's members.²¹

The second and third respondents were Colgate-Palmolive (Pty) Ltd, and Colgate-Palmolive Company (hereafter Colgate) who are members of the ARB and Bliss's competitors.²² Bliss Brands, on the other hand, was not a member of the ARB but had furnished responses to complaints against it in proceedings before the ARB brought by Colgate.²³ In the High Court, Bliss Brands brought an application for review against a decision of the first respondent, the ARB, and in addition sought a suspension of the operation of the ARB's decision.²⁴

The decision of the ARB that was the subject of review stemmed from a complaint brought by second respondent Colgate. Colgate accused Bliss of packaging its SECUREX soap bar in a way that contained similarities to

¹⁴ *Bliss Brands v ARB* para 1.

¹⁵ *Bliss Brands v ARB* para 22.

¹⁶ *Bliss Brands v ARB* para 22.

¹⁷ *Bliss Brands v ARB* para 22.

¹⁸ *Bliss Brands v ARB* para 22.

¹⁹ *Bliss Brands v ARB* para 22.

²⁰ *Bliss Brands v ARB* para 28.

²¹ *Bliss Brands v ARB* para 27.

²² *Bliss Brands v ARB* paras 29-33.

²³ *Bliss Brands v ARB* para 33.

²⁴ *Bliss Brands v ARB* para 14.

Colgate's packaging of their PROTEX soap bar.²⁵ The alleged issue was that this would cause confusion amongst consumers of these products.²⁶ In addition, Colgate alleged that the packaging of Bliss's SECUREX exploited the advertising goodwill of the packaging architecture of Colgate's PROTEX in contravention of clause 8 of section II of the Code and that it imitated the PROTEX packaging architecture in contravention of clause 9 of section II of the Code.²⁷ As a result, in December 2019 Colgate lodged a complaint with the ARB for the resolution of this dispute.

In January 2020 the Directorate, which is the first tier in the ARB's complaints procedure, dismissed Colgate's complaint. Colgate responded to this dismissal with an appeal to the Appeals Complaints Committee (ACC).²⁸ This appeal was successful, and Bliss was instructed to withdraw their SECUREX packaging within 3 months of the ruling and to immediately cease any advertising showing the product from all mediums except on its packaging.²⁹ Bliss appealed against the AAC's ruling to the Final Appeals Committee (FAC). However, the FAC upheld the ruling of the ACC and it is this decision that Bliss brought for review in the High Court.³⁰

In the High Court, in addition to the request for the review and suspension of the order of the FAC, the court *mero motu* raised an issue on the constitutionality of the ARB process relating to clause 3.3 of the Mol in particular.³¹ Clause 3.3 of the Mol is the provision which emphasises that the ARB has no jurisdiction on non-members unless the non-member consents to the ARB's jurisdiction. It mandates the ARB, however, to consider complaints against non-members on behalf of its members. The parties were given an opportunity to address this issue in their papers. The first constitutional challenge raised was that the ARB's exercise of public powers against non-members has no source in law and the ARB's processes contravened section 34 of the *Constitution* and the principle of legality.³² The respondents initially argued that section 55 of the *Electronic Communications Act (ECA)* provided the ARB with powers to exercise public powers against non-members.³³ The Court stated that while the Act recognises the Code as a code to which licensees of broadcasting must

²⁵ *Bliss Brands v ARB* para 29.

²⁶ *Bliss Brands v ARB* para 4.

²⁷ *Bliss Brands v ARB* para 29.

²⁸ *Bliss Brands v ARB* para 30.

²⁹ *Bliss Brands v ARB* para 31.

³⁰ *Bliss Brands v ARB* para 32.

³¹ *Bliss Brands v ARB* para 32.

³² *Bliss Brands v ARB* paras 34-36.

³³ *Bliss Brands v ARB* para 41.

adhere, it did not mandate the ARB to adjudicate breaches of the Code against non-members.³⁴

The respondents also relied on the *Promotion of Administrative Justice Act* 3 of 2000 (*PAJA*)³⁵ and precedent set in *Ndoro v South African Football Association* 2018 3 All SA 277 (GJ)³⁶ and averred that the exercise of public power could be sourced from outside the law.³⁷ They relied on the definition of administrative action, which envisages that a natural or juristic person may exercise public power in terms of an empowering provision such as an agreement.³⁸ The court confirmed that the exercise of public power by private bodies could be sourced outside of a statutory instrument.³⁹ The pertinent question in this case was whether the exercise of such power was lawful. The court dismissed the respondent's reliance on precedent on the basis that the cases relied on had not dealt with the issue of lawfulness.⁴⁰ Further, the court held that the definitions of administrative action and empowering provision in *PAJA* did not support the respondents as these "beg the question whether the exercise of the administrative power is lawful".⁴¹ This brought the court to consider the legality of the ad-alert as the source of the ARB's coercive power on non-members.

The respondents argued that the lawfulness of the ad alert could be found in the rights to freedom of expression and the right to freedom of association and its corollary right not to associate.⁴² They relied on the reasoning of the court in *Remuskzo v Poland*,⁴³ which stated that the freedom of the press entails the right of the press to establish and apply its own policies in relation to the content of adverts.⁴⁴ The court also stated that the exercise of this freedom includes the right to determine commercial policy in respect of adverts and the choice of whom one deals with.⁴⁵ They further argued that the issue of the ad-alert's legality had been dealt with and the precedent had been set in the *Advertising Standards Authority v Herbex (Pty) Ltd* 2017 6 SA 354 (SCA) (hereafter *Herbex*).⁴⁶ Bliss, on the other hand, argued that

³⁴ *Bliss Brands v ARB* para 42.

³⁵ *Promotion of Administrative Justice Act* 3 of 2000 (hereafter *PAJA*).

³⁶ *Ndoro v South African Football Association* 2018 3 All SA 277 (GJ).

³⁷ *Bliss Brands v ARB* paras 44-46.

³⁸ *Bliss Brands v ARB* para 44.

³⁹ *Bliss Brands v ARB* para 48.

⁴⁰ *Bliss Brands v ARB* para 51.

⁴¹ *Bliss Brands v ARB* para 52.

⁴² *Bliss Brands v ARB* para 56.

⁴³ *Remuskzo v Poland* (case number 1562/10) 16 October 2010 para 20.

⁴⁴ *Bliss Brands v ARB* para 58.

⁴⁵ *Bliss Brands v ARB* para 58.

⁴⁶ *Advertising Standards Authority v Herbex (Pty) Ltd* 2017 6 SA 354 (SCA). In this case the SCA declared that the ASA could consider complaints on behalf of its members, regardless of who had published the advert with a view to determining whether its members should accept the advert for publication.

the ad-alert had the features and effect of an indirect boycott that would exclude them from participation in commerce.⁴⁷ In addition, they argued that the *Herbex* case was not precedent on the legality of the ad-alert as the order in that case was made by agreement between the parties and the court had not given a reasoned judgment.⁴⁸

In consideration of whether the *Herbex* case was precedent, the court reasoned that the question of the lawfulness of the ad-alert had never been considered by the SCA in that case.⁴⁹ The court stated that the order in *Herbex* makes "clear the matter of general application that the ASA has no jurisdiction over non-members" and implies that the effect of this lack of jurisdiction is that no ad-alerts can be issued against non-members.⁵⁰

The court also addressed the constitutional challenge of whether clauses 8 and 9 of the Code violated section 34 of the *Constitution*, which provides for access to courts.⁵¹ Clause 8 of the Code deals with the exploitation of advertising goodwill whilst clause 9 deals with imitation.⁵² Bliss alleged the violation of section 34 on the basis that the subject matter of these clauses should be resolved in a court of law, the ARB's procedures were not fair, and the ARB was not an independent tribunal.⁵³ The applicants further argued that in adjudicating complaints under clause 8 and 9, the ARB sought to exercise judicial authority and as such contravened section 165(1) of the *Constitution*, which vests such authority in the courts.⁵⁴

The court agreed with Bliss' submission that clauses 8 and 9 dealt with matters similar to those dealt with in the *Copyright Act* and the *Trademark Act*, yet in such cases the statutory instruments offer defences which the Code does not.⁵⁵ The court found that the rulings of the ARB had the same effect as interdicts and an ad-alert precipitated an infringement of rights that entails protection under section 34.⁵⁶ The court also stated that "matters which the courts deal with should not be dealt with by other bodies unless the law expressly permits it".⁵⁷

The challenge to ARB's lack of fairness rested on the fact that their processes do not make provision for rules of evidence similar to those in

⁴⁷ *Bliss Brands v ARB* para 60.

⁴⁸ *Bliss Brands v ARB* para 68.

⁴⁹ *Bliss Brands v ARB* para 81.

⁵⁰ *Bliss Brands v ARB* para 82.

⁵¹ *Bliss Brands v ARB* para 84.

⁵² *Bliss Brands v ARB* para 89.

⁵³ *Bliss Brands v ARB* para 87.

⁵⁴ *Bliss Brands v ARB* para 96.

⁵⁵ As the court noted both the *Trademark Act* 194 of 1993 and clause 8 deal with the unauthorised use of trademarks which cause deception or confusion, or the taking advantage of the distinctive character of another trademark.

⁵⁶ *Bliss Brands v ARB* para 94.

⁵⁷ *Bliss Brands v ARB* para 98.

courts of the law.⁵⁸ In addition, it was argued that the process lacks fairness as there is no appeal to a court and as a result non-members are denied their right to defend themselves in a court of competent jurisdiction.⁵⁹ The court accepted that the enquiry into breaches of clause 8 and 9 ousts the jurisdiction of the courts, by establishing another process that non-members have not agreed to.⁶⁰ Further, the court reasoned that the process does not adhere to accepted rules of evidence and procedural fairness.⁶¹

In relation to the independence of the ARB, the respondents argued that the regulation of the Code by the ARB was in the public interest and allowing the applicant's case would result in harm to the public.⁶² In deciding on this issue, the court applied the test for ascertaining independence, which enquires whether, from the objective view of a reasonable and informed person, an institution will be perceived as enjoying independence.⁶³ The court concluded that the funding model of the ARB gave rise to a reasonable perception of a lack of independence in instances where one of the parties to a complaint was a member and the other was not.⁶⁴ The court noted that members of the ARB are entitled to nominate members of its appeals procedures, the AAC and the FAC, and this adds to the concerns on the ARB's independence.

These findings led the court to consider whether the limitations placed on Bliss' rights would be reasonable and justifiable in terms of section 36 of the *Constitution*.⁶⁵ Applying the proportionality test, the court found that the Mol and Code of ARB failed the test as set out in section 36 because they are not law, and that even if they were law, "powerful considerations are required for the limitation to be reasonable and justifiable".⁶⁶ Based on these findings, the court decided in favour of Bliss Brands.

3 The Supreme Court of Appeal: *Advertising Regulatory Board NPC v Bliss Brands (Pty) Ltd* 2022 4 SA 57 (SCA)

Aggrieved by the ruling of the High Court, the ARB approached the SCA. The question before the court was whether the *court a quo* was correct in making a series of orders that affected the jurisdiction of the ARB and the constitutionality of its Mol.⁶⁷ In its decision the High Court had declared clause 3.3 of the Mol unconstitutional and barred the ARB from issuing

⁵⁸ *Bliss Brands v ARB* para 100.

⁵⁹ *Bliss Brands v ARB* para 101.

⁶⁰ *Bliss Brands v ARB* para 101.

⁶¹ *Bliss Brands v ARB* para 102.

⁶² *Bliss Brands v ARB* para 118.

⁶³ *Bliss Brands v ARB* para 115.

⁶⁴ *Bliss Brands v ARB* para 116.

⁶⁵ *Bliss Brands v ARB* para 119.

⁶⁶ *Bliss Brands v ARB* para 122.

⁶⁷ *ARB v Bliss Brands* para 9.

rulings against or in relation to non-members and their adverts.⁶⁸ The issues for determination by the SCA were whether the power of the ARB was sourced in law, the constitutionality of clause 3.3 of the ARB's Mol,⁶⁹ and issues around the jurisdiction of the ARB.⁷⁰

As the constitutionality challenges in the High Court arose only once Fisher J issued a directive to the parties to submit arguments on these issues, the SCA first dealt with the appropriateness of this.⁷¹ The SCA emphasised that courts should decide matters that are before it only as the parties have pleaded them and that constitutional matters should be raised by a court *mero motu* only in exceptional circumstances.⁷² Further, the court stated that though Bliss was not a member of the ARB its submission to the jurisdiction of the ARB should have ended any challenge to jurisdiction, or to the constitutionality of the ARB's Code or Mol.⁷³ The letter advising Bliss of the complaint against it had also requested Bliss to indicate if they considered themselves bound by the ARB.⁷⁴ While the High Court had ruled that the submission by Bliss to the ARB's jurisdiction could not have been said to be actual consent, the SCA found that this finding could not be sustained based on the evidence before the court.⁷⁵ Bliss had responded to the complaint in full without objecting to the ARB's jurisdiction, legitimacy or procedures.⁷⁶

The SCA proceeded to look at the High Court ruling as it pertained to whether the ARB's powers were sourced in law or not. The High Court accepted that private bodies could exercise public power if the said powers are sourced from a legal agreement or instrument, if statutory authorisation is absent.⁷⁷ The issue, it stated, was whether the exercise of power was lawful, and it held that the ARB's exercise of power was not. The SCA held that the ARB's Mol and Code fall within the definition of empowering

⁶⁸ *Bliss Brands v ARB* para 142.

⁶⁹ Clause 3.3 of the Mol states: "The Company has no jurisdiction over any person or entity who is not a member and may not, in the absence of a submission to its jurisdiction, require non-members to participate in its processes, issue any instruction, order or ruling against the non-member or sanction it. However, the Company may consider and issue a ruling to its members (which is not binding on non-members) regarding any advertisement, regardless of by whom it is published to determine, on behalf of its members, whether its members should accept any advertisement before it is published or should withdraw any advertisement if it has been published."

⁷⁰ *ARB v Bliss Brands* para 6.

⁷¹ *ARB v Bliss Brands* para 6.

⁷² *ARB v Bliss Brands* paras 9-10.

⁷³ *ARB v Bliss Brands* para 10.

⁷⁴ *ARB v Bliss Brands* para 11.

⁷⁵ *ARB v Bliss Brands* para 11.

⁷⁶ *ARB v Bliss Brands* paras 11-12.

⁷⁷ *ARB v Bliss Brands* para 15.

provisions as contained in *PAJA*.⁷⁸ The fact that there was no statutory source for the powers exercised by the ARB did not invalidate the ARB's exercise of public functions.⁷⁹ The court stated that to interpret otherwise would have the twofold effect of invalidating the powers of private bodies that exercise public functions without an empowering statute and would also strain the interpretation of the phrase "public powers or public functions".⁸⁰

The SCA further considered the four bases on which the ARB is empowered to consider complaints as provided for in the Code⁸¹ and section 55 of the *ECA*.⁸² Based on its reading of the provisions of section 55, the SCA rejected the order of the High Court that section 55 ousted the ARB's jurisdiction. The court stated that according to section 55, all broadcast licensees, whether they are members of the ARB or not, are obliged to adhere to the Code.⁸³ Where the broadcast licensee is a member of the ARB, the ARB is mandated to enquire into whether a breach of the Code has occurred.⁸⁴ Where the broadcast licensee is not a member of the ARB, the Complaints and Compliance Committee of the Independent Communications Authority of South Africa (ICASA) makes the enquiry of whether a breach of the Code has occurred.⁸⁵ The court concluded that a proper interpretation of section 55, which gives meaning to all the words used in the section, does not oust the ARB's jurisdiction under the *ECA*. The

⁷⁸ *ARB v Bliss Brands* para 17.

⁷⁹ *ARB v Bliss Brands* para 17.

⁸⁰ *ARB v Bliss Brands* para 17.

⁸¹ (a) If the advertiser is a member of the ARB, or a member of one of the industry bodies that is a member of the ARB, the ARB is entitled to consider the complaint because the advertiser has agreed to be bound by the Code, either directly or indirectly through its membership of an industry representative body or association. (b) If the publisher of the advertisement is a member of the ARB, then the ARB is entitled to consider the complaint because the publisher has agreed to abide by the Code. The Code precludes those who are bound by it from accepting advertising that conflicts with the Code.

(c) If neither the publisher nor the advertiser is a member of the ARB, the ARB is still entitled to consider the complaint on behalf of its members, so that they may decide whether or not to publish that advertisement.

(d) If the advertisement is broadcast by a broadcast service licensee in terms of the *ECA*, s 55(1) of the *ECA* confers on the ARB the power to consider complaints in respect of that advertisement.

⁸² Subsection 1 of s 55 of the *ECA* mandates all service licensees to adhere to the Code and any advertising regulations prescribed by the Authority in respect of scheduling of adverts, infomercials and programme sponsorships. Subsection 2 vests the adjudication of complaints concerning alleged breaches of the Code by broadcasting service licensees who are not members of the ASA (ARB's predecessor) in the Complaints and Compliance Committee. Subsection 3 provides that where a member or non-member broadcasting licensee has been found to have breached the Code, they must be dealt with in accordance with the provisions of the *Independent Communications Authority of South Africa Act 13 of 2000*.

⁸³ *ARB v Bliss Brands* para 21.

⁸⁴ *ARB v Bliss Brands* para 21.

⁸⁵ *ARB v Bliss Brands* para 21.

section is an empowering provision for the ARB and its powers to determine breaches of the Code by broadcasting licensee who are its members.⁸⁶

Having ascertained the obligation of all licensee's to adhere to the Code, the SCA found that the order in the High Court prevented the ARB from performing its statutory duties as stipulated in section 55 by removing from its remit the "power to address complaints in respect of a non-member's advertisement, even in instances where the determination of a breach did not arise from a dispute".⁸⁷

The ARB was also entitled on behalf of its members to consider advertisements by non-members to enable its members to decide on whether they wished to publish an advertisement.⁸⁸ The SCA noted that the exercise of powers under (a), (b) and (c) of the Code was an incident of members' rights to freedom of association and freedom of expression.⁸⁹ These provisions state that the ARB has jurisdiction where the advertiser is a member of the ARB or a member of an industry body that has membership, or where a publisher of an advertisement is a member of the ARB. Where the advertiser or publisher is not a member of the ARB, the ARB is entitled to consider complaints on behalf of its members. The result of the High Court's order would be an unjustified limitation on the exercise of these rights. In the same vein, the court noted that clause 3.3 of the ARB's Mol outlining its jurisdiction was a mirror of paragraph 1 of the *Herbex* decision. Paragraph 1 of the *Herbex* decision outlined that the ARB's predecessor, the ASA, did not have jurisdiction over non-members and could not therefore compel non-members to participate in its processes.⁹⁰ In addition, it stated that the ASA could consider complaints and issue rulings to its members on any advert for the purposes of determining for its members whether they should accept the advert.⁹¹ At this point the court took the opportunity to address the *court a quo*'s assertion that the order in the *Herbex* case was not of general application.⁹²

The SCA found this conclusion by the court *a quo* to be incorrect and stated that even though in the *Herbex* matter the order was granted by consent it was no less binding, as a court does not simply accept any order proposed by the parties.⁹³ A court, when making its decision or exercising its discretion in terms of whether to make a settlement agreement an order of court, is still required to assess the wider impact its order may potentially

⁸⁶ *ARB v Bliss Brands* paras 21-22.

⁸⁷ *ARB v Bliss Brands* para 23.

⁸⁸ *ARB v Bliss Brands* para 24.

⁸⁹ *ARB v Bliss Brands* para 24.

⁹⁰ *ARB v Bliss Brands* para 27.

⁹¹ *ARB v Bliss Brands* para 27.

⁹² *ARB v Bliss Brands* para 28.

⁹³ *ARB v Bliss Brands* para 30.

have.⁹⁴ Flowing from these assertions, the court stated that once a settlement agreement has been made an order of court, it stands to be interpreted as any other order of court.⁹⁵ Therefore, the SCA in *Herbex* was satisfied that

on the merits, setting aside the prohibition on the ASA from deciding whether an advertisement breached the Code, so as to enable it to determine, on behalf of its members, whether they should accept an advertisement for publication or withdraw the advertisement if it has been published, was justified".⁹⁶ The SCA therefore held that the court a quo's order declaring the ARB's Mol unconstitutional went against the precedent set in the *Herbex* case.⁹⁷

The next issue the SCA had to address related to the constitutional rights implicated, namely the rights to freedom of expression and freedom of association. In its consideration the court affirmed that members of the ARB are entitled to refuse to publish adverts as part of their right to freedom of expression as contained in section 16 of the *Constitution*.⁹⁸ This right also extends to the right not to hold an opinion or not to have to express opinions.⁹⁹ When an offending advertiser ignores a reasonable request for cooperation, the ARB may issue an ad-alert to its members, who, as a result, are obliged to comply with the ruling and not publish the offending advertisement.¹⁰⁰

The *court a quo* in its findings concluded that the ARB's power thus lies in the coercive nature of its ad-alert as its members comprise "the whole of the print, digital and broadcast media in South Africa".¹⁰¹ The High Court had concluded that the effect of the ad alert was to cut off commercial activity.¹⁰² The SCA dismissed this assertion, stating that it had no basis on the evidence.¹⁰³ In its response the ARB averred that its membership did not consist of the entire industry.¹⁰⁴ The court concluded that it was still possible for an advertiser to advertise its product through other means, even in instances where an ad-alert had been issued by the ARB to its members.¹⁰⁵

Relying on precedent, the SCA elaborated on the parameters of the rights to association as including enabling individuals to organise around particular issues of concern and as permitting a group to collectively decide on the

⁹⁴ *ARB v Bliss Brands* para 30.

⁹⁵ *ARB v Bliss Brands* para 30.

⁹⁶ *ARB v Bliss Brands* para 32.

⁹⁷ *ARB v Bliss Brands* para 34.

⁹⁸ *ARB v Bliss Brands* para 35.

⁹⁹ *ARB v Bliss Brands* para 35.

¹⁰⁰ *ARB v Bliss Brands* para 38.

¹⁰¹ *ARB v Bliss Brands* para 39.

¹⁰² *ARB v Bliss Brands* para 39.

¹⁰³ *ARB v Bliss Brands* para 39.

¹⁰⁴ *ARB v Bliss Brands* para 39.

¹⁰⁵ *ARB v Bliss Brands* para 40.

processes determining its association, including its decision making.¹⁰⁶ The SCA stated further that by doing so members of the ARB had given effect to the two important components of the rights contained in section 18 of the *Constitution*, which are the right to self-regulation and the right to choose not to associate.¹⁰⁷

In this consideration the SCA reiterated the *dictum* in the *Herbex* case elaborating the extent to which the decisions of the ARB are not binding on non-members.¹⁰⁸ It noted that members of the ARB, by their membership, had elected to associate and therefore to be bound by the Code.¹⁰⁹ Similarly, non-members exercised their rights to disassociate by not becoming members.¹¹⁰ The court concluded that Bliss, having opted to disassociate, could not demand that members of the ARB ignore their contractual obligations.¹¹¹

The last interrelated issues under consideration by the SCA related to the High Court's decision that the ARB's processes infringed on the right to access to the courts as provided for in section 34 of the *Constitution*, and usurped judicial authority.¹¹² In relation to this, the SCA held that the ARB is a tribunal or forum as envisaged under section 34 of the *Constitution*.¹¹³ It stated that the decisions of the ARB are subject to judicial control to the extent that its processes allow a dissatisfied party to apply for an interdict suspending the operation of a decision and also to institute proceedings for judicial review.¹¹⁴

Regarding the finding of a lack of independence due to the ARB's funding structure, the SCA concluded that the evidence did not support this assertion.¹¹⁵ The court reasoned that not every funder was a member of the ARB's committees, and no reasonable objective person would consider that the few funders who were part of the committees would influence the entire ARB. The court highlighted that out of the three hundred and thirty-five members, funders constituted a minority at thirty-eight.¹¹⁶ The court noted that the structure of the ARB's committees promoted independence as the chairpersons of the Appeal Bodies were required to be a practicing advocate for the AAC and for the FAC, independent practising or retired

¹⁰⁶ *ARB v Bliss Brands* para 41.

¹⁰⁷ *ARB v Bliss Brands* para 42.

¹⁰⁸ *ARB v Bliss Brands* para 45.

¹⁰⁹ *ARB v Bliss Brands* para 45.

¹¹⁰ *ARB v Bliss Brands* para 45.

¹¹¹ *ARB v Bliss Brands* para 48.

¹¹² *ARB v Bliss Brands* para 49.

¹¹³ *ARB v Bliss Brands* para 50.

¹¹⁴ *ARB v Bliss Brands* para 50.

¹¹⁵ *ARB v Bliss Brands* para 53.

¹¹⁶ *ARB v Bliss Brands* para 53.

legal practitioners or judges.¹¹⁷ In addition, members of the adjudicating bodies were not informed of whether a funder was a complainant or respondent.¹¹⁸

The High Court had held that the ARB process lacked fairness as its procedural guide did not provide for rules of evidence and did not provide for appeals to a court of law.¹¹⁹ In response to this, the SCA stated that the court *a quo* had erred in its conclusion on the issue. It specified that "no dissatisfied respondent in an adjudicative administrative process is entitled to appeal to a court against an administrative decision - the remedy is to review under *PAJA*".¹²⁰ The SCA went on to state that the High Court had overlooked the "flexible requirements of procedural fairness under *PAJA*".¹²¹ Section 3(2)(a) provides that "fair administrative procedure depends on circumstances of each case".¹²² Section 3(4) "permits departures from requirements of procedural fairness under section 3(2) where this is reasonable or justifiable".¹²³ The SCA concluded by stating that section 3(5) of *PAJA* "permits an administrator to follow a procedure that is fair but different to the requirements of section 3(2)".¹²⁴

Lastly the SCA addressed the *court a quo*'s ruling on clause 8 (the exploitation of advertising goodwill) and clause 9 (imitation) of the Code¹²⁵ respectively. The High Court had held that these are legal issues "which entail the same enquiries as those which courts are called upon to consider in cases dealing with passing off and contraventions of copyrights and trademarks".¹²⁶ The SCA held that the fact that a complaint may deal with similar matters did not oust the court's jurisdiction.¹²⁷ The court stated that the ARB is a forum that is distinct from courts and has its defined powers.¹²⁸ It is a consensual forum that is not permitted to make determinations on breaches of copyright or passing off, but only determines whether its Code has been breached.¹²⁹ In doing so, it does not exercise a judicial function.¹³⁰

The SCA thus upheld the appeal and set aside the *court a quo*'s order.

¹¹⁷ *ARB v Bliss Brands* para 53.

¹¹⁸ *ARB v Bliss Brands* para 53.

¹¹⁹ *ARB v Bliss Brands* para 54.

¹²⁰ *ARB v Bliss Brands* para 55.

¹²¹ *ARB v Bliss Brands* para 56.

¹²² *ARB v Bliss Brands* para 56.

¹²³ *ARB v Bliss Brands* para 56.

¹²⁴ *ARB v Bliss Brands* para 56.

¹²⁵ *ARB v Bliss Brands* para 58.

¹²⁶ *ARB v Bliss Brands* para 58.

¹²⁷ *ARB v Bliss Brands* para 58.

¹²⁸ *ARB v Bliss Brands* para 58.

¹²⁹ *ARB v Bliss Brands* para 58.

¹³⁰ *ARB v Bliss Brands* para 58.

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Unhappy with the ruling in the SCA, Bliss Brands took to the Constitutional Court, seeking leave to appeal on five grounds. Bliss contended that:

- a) the SCA should not have made an issue of the fact that constitutional issues were raised by the High Court as that was not a ground for appeal and that once Bliss amended their papers these constitutional issues were then properly before the High Court;
- b) that their consent or submission to the ARB's jurisdiction was not a ground for appeal before the SCA and therefore the SCA should not have decided on the matter. That the participation of a non-member can never amount to true consent as the ARB would still decide on the complaint thus making the consent of no consequence;
- c) the SCA's decision on section 55 of the *ECA* was not applicable to it and of no relevance;
- d) the *Herbex* case was not authority for the ARB's jurisdiction over non-members as the settlement agreement in *Herbex* referred only to the ASA, and not to the ARB;
- e) the dictum in relation to ARB members' rights to freedom of expression and association was unrelated to the issue before the Court;
- f) the ARB's processes violated section 34 of the *Constitution* by ousting the jurisdiction of the courts to consider the merits of complaints.¹³¹

The ARB and Colgate opposed the application for leave to appeal. They argued that Bliss' case did not meet the jurisdictional or leave to appeal thresholds as no constitutional issues had been raised.¹³² Further, they averred that the relief sought by Bliss would undermine the system of self-regulation of the advertising industry, which is an exercise of the rights to freedom of association and expression by the ARB's members.¹³³

In its analysis the Constitutional Court's first consideration was whether Bliss brands had consented to the ARB's jurisdiction. The court agreed with Bliss' assertion that should the court find that Bliss had consented to the ARB's process that would dispose of the matter as "the springboard for all the grounds of appeal is the idea that the ARB was not entitled to exercise its jurisdiction over Bliss brands".¹³⁴ If Bliss had consented to jurisdiction this

¹³¹ *Bliss Brands v ARB (CC)* para 13.

¹³² *Bliss Brands v ARB (CC)* para 14.

¹³³ *Bliss Brands v ARB (CC)* para 14.

¹³⁴ *Bliss Brands v ARB (CC)* para 15.

would render all the other grounds moot. The court further stated that as the respondents had not raised any interests of justice considerations that would compel it to consider the other grounds of appeal and as the court itself could not identify any, it would first consider the issue of jurisdiction.¹³⁵

In this regard, the Constitutional Court stated that it is a legal precedent that:

A defendant who raises no objection to a court's jurisdiction and asks it to dismiss on its merits a claim brought against him is invoking the jurisdiction of that court just as surely as the plaintiff invoked it when he instituted the claim. Such a defendant does so in order to defeat the plaintiff's claim in a way which will be decisive and will render him immune from any subsequent attempt to assert the claim. Should he succeed in his claim, the doctrine of *res judicata* will afford him protection. Should his defence fail, he cannot repudiate the jurisdiction of the very court which he asked to uphold it.¹³⁶

Bliss' argument, however, was that non-members are effectively coerced to participate by the ARB since the ARB will still make a determination and issue an ad-alert where a non-member does not consent to jurisdiction.¹³⁷ Bliss contended that the refusal to consent to the ARB's jurisdiction did not afford a beneficial result for non-members.¹³⁸

The Constitutional Court rejected this argument, however, and showed that non-submission by a non-member would yield a result distinct from one that would arise when a non-member consented to jurisdiction.¹³⁹ The court stated that when a non-member did not consent the effect of an ad-alert would still allow the non-member to advertise through other advertisers that are not members of the ARB.¹⁴⁰ On the other hand, where a non-member consented to jurisdiction, the ARB could make decisions which were binding on the non-member.¹⁴¹ The court further stated that it was quite a leap to say that those non-members that choose to submit themselves to the jurisdiction of the ARB do so under coercion.¹⁴²

The Constitutional Court then proceeded to delve into the facts which led the SCA to hold that Bliss had consented to the jurisdiction of the ARB. The letter informing Bliss of the complaint against it requested Bliss to inform the ARB if Bliss did not consider itself to be bound by the ARB and further advised Bliss that it was not obliged to respond.¹⁴³ Bliss had not raised any objection, however, and had gone on to provide a response that fully

¹³⁵ *Bliss Brands v ARB (CC)* para 15

¹³⁶ *Bliss Brands v ARB (CC)* para 16.

¹³⁷ *Bliss Brands v ARB (CC)* para 71.

¹³⁸ *Bliss Brands v ARB (CC)* para 71.

¹³⁹ *Bliss Brands v ARB (CC)* para 18.

¹⁴⁰ *Bliss Brands v ARB (CC)* para 18.

¹⁴¹ *Bliss Brands v ARB (CC)* para 18.

¹⁴² *Bliss Brands v ARB (CC)* para 19.

¹⁴³ *Bliss Brands v ARB (CC)* para 20.

addressed the merits of the complaint.¹⁴⁴ Further, Bliss had participated in the various stages of the ARB's complaints process and in its prayer before the High Court had requested a remittal to the FAC.¹⁴⁵

The Constitutional Court noted that when it comes to matters that are before it, the court does not contend with contested factual issues.¹⁴⁶ The court makes its decisions based on the factual findings made by the lower courts as it "cannot be burdened with the responsibility of doing so when said disputes have been determined by a lower court".¹⁴⁷ Exceptions to this rule on the determination of disputed facts by the Constitutional Court, however, exist in instances where the dictates of justice require the courts to delve into the facts.¹⁴⁸ The Constitutional Court held that in this case there was no basis for the ordinary rules of court not to apply to the factual findings made by the SCA.¹⁴⁹ The court concluded that Bliss had consented to the jurisdiction of the ARB.¹⁵⁰ The leave to appeal was, as a result, denied.

5 Analysis

The Bliss SCA judgment read together with the Constitutional Court judgment entrenches the recognition of self-regulation and its characteristic elements, such as the Code of Conduct and freedom of association and disassociation, as the regulatory regime of the advertising industry in South Africa. It decisively affirms the authority of the ARB as the industry's watchdog and delineates the parameters of its authority. This decision, while providing clarity on the jurisdiction of the ARB, has several implications for public health policy considerations.

Central to the *Bliss* cases was the jurisdiction of the ARB, which is an issue that is of vital concern for the regulation of the advertising industry, including the regulation of marketing of unhealthy food and beverages. Effective regulation, including the regulation of marketing, is an important aspect in the promotion of policy response. Unhealthy diets have been recognised as one of the highest public health risks globally¹⁵¹ and South Africa is no exception. Food marketing has been identified as a key influence on diets as it often affects consumption patterns and food choices.¹⁵² The marketing

¹⁴⁴ *Bliss Brands v ARB (CC)* para 21.

¹⁴⁵ *Bliss Brands v ARB (CC)* para 21.

¹⁴⁶ *Bliss Brands v ARB (CC)* para 20.

¹⁴⁷ *Bliss Brands v ARB (CC)* para 21.

¹⁴⁸ *Bliss Brands v ARB (CC)* para 21.

¹⁴⁹ *Bliss Brands v ARB (CC)* para 22.

¹⁵⁰ *Bliss Brands v ARB (CC)* para 22.

¹⁵¹ WHO 2023 <https://iris.who.int/bitstream/handle/10665/370113/9789240075412-eng.pdf?sequence=1>; Backholer *et al* 2024 *Australia and New Zealand Journal of Public Health*.

¹⁵² WHO 2023 <https://iris.who.int/bitstream/handle/10665/370113/9789240075412-eng.pdf?sequence=1>.

of unhealthy food is ubiquitous and food companies are known to spend large amounts of money on the promotion of these foods.¹⁵³ Addressing this public health concern requires effective regulation that demands that ethical concerns, social responsibility and human rights inform the regulation of marketing and the actions of advertisers. For this reason, the World Health Organisation (WHO) amongst several other leading institutions has called for countries to adopt and implement the mandatory statutory regulation of advertising.¹⁵⁴

Evidence suggests that self-regulation does not fare well as a means of regulation in the advertising industry, particularly in the promotion of public health concerns.¹⁵⁵ It has been shown, for example, that self-regulation does not provide comprehensive protection from the advertising of unhealthy foods and has resulted in the exposure of children and vulnerable groups to content that is harmful.¹⁵⁶ Often this is due to the fact that self-regulatory actions such as commitments and pledges lack clear and specific provisions, measurable targets and enforcement provisions, and are often voluntary in nature.¹⁵⁷ From the decision it is clear that the Code is very much a product of agreement between members of the regulatory body. This means that the values and ethical and human rights concerns, and the extent to which these are encapsulated in the Code, lie largely within the purview of the membership of the ARB.

While an analysis of the content of the ARB's Code is beyond the scope of this note, what is clear is that, to the extent that self-regulation remains the regulatory framework, the effectiveness of the responsible marketing particularly of unhealthy food relies heavily on the effectiveness of the ARB. The ARB membership is essentially voluntary and as elaborated by the court is an exercise of the right to association or disassociation in the case of non-members. Effective regulation works best when the whole sector decision highlights the inadequacies of voluntary self-regulation regimes such as the ARB. The voluntary self-regulation regime provides a lacuna in regulation. While the ARB is able to exercise its jurisdiction over members, this is not the case with non-members. Non-members are at liberty to submit to the jurisdiction of the ARB. It is therefore open for non-members who do not adhere to the Code to air advertisements that are inconsistent with

¹⁵³ Harris and Taillie 2024 *Annual Review of Public Health* 213; UNICEF 2018 <https://www.unicef.org/media/139591/file/A%20Child%20Rights-Based%20Approach%20to%20Food%20Marketing.pdf>.

¹⁵⁴ WHO 2023 <https://iris.who.int/bitstream/handle/10665/370113/9789240075412-eng.pdf?sequence=1> 23.

¹⁵⁵ Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 260; Yamoah *et al* 2021 *International Journal on Environmental Research and Public Health*.

¹⁵⁶ Clark *et al* 2020 *Lancet* 605; Smithers *et al* 2019 *Australia and New Zealand Journal of Public Health* 519; Erzse *et al* 2022 *Nature Food* 650.

¹⁵⁷ Aiken *et al* 2018 *Australia and New Zealand Journal of Public Health* 234.

public policy goals through channels/platforms not affiliated to ARB members.

This presents a major loophole when it comes to harmful marketing practices, which would then not be subject to any sort of regulation. This is particularly concerning given that companies producing unhealthy food and beverage products are increasingly making use of child-directed marketing to expand their markets.¹⁵⁸ This marketing often encourages the consumption of unhealthy foods which contain excessive amounts of sugar and other foodstuffs of concern, and which have very little nutritional value.¹⁵⁹ Unhealthy childhood diets have severe health consequences and life-long effects.¹⁶⁰

In addition, children can often affect parents' and household consumption through pester power.¹⁶¹ Within the current regulatory regime, the ARB would be able to exercise jurisdiction over its members only as required by the contractual nature of the regime, whilst its regulatory influence over non-members would be limited. As a result, the current regulatory regime does not sufficiently curtail the risk of the migration of advertising of content that is harmful to other advertising platforms that do not have strict regulation. This has the potential to violate various rights, including the right to health and children's rights. Furthermore, it goes against various international obligations such as the WHO's guidelines on child-directed marketing¹⁶² and the UN *Convention on the Rights of the Child*.¹⁶³

While the SCA stated in its decision that the funding model of the ARB does not create room for the perception of a lack of independence, this is open to question. While not all members of the ARB are funders, the funding models do introduce questions on the credibility of its independence. The ARB is sustained through voluntary contributions, which means it is dependent to an extent on these contributions for its continued operation. This puts into question its independence and ability to adequately sanction those that sustain it.

¹⁵⁸ WHO 2022 <https://iris.who.int/bitstream/handle/10665/351521/9789240041783-eng.pdf?sequence=1&isAllowed=y>. This tactic has also been used with new tobacco products such as vape products. See White *et al* 2023 *Breathe* 1-11.

¹⁵⁹ OHCHR 2016 <https://www.ohchr.org/en/press-releases/2016/08/un-experts-call-regulating-advertising-directed-children>.

¹⁶⁰ OHCHR 2016 <https://www.ohchr.org/en/press-releases/2016/08/un-experts-call-regulating-advertising-directed-children>.

¹⁶¹ OHCHR 2016 <https://www.ohchr.org/en/press-releases/2016/08/un-experts-call-regulating-advertising-directed-children>.

¹⁶² WHO 2023 <https://iris.who.int/bitstream/handle/10665/370113/9789240075412-eng.pdf?sequence=1>.

¹⁶³ WHO 2023 <https://iris.who.int/bitstream/handle/10665/370113/9789240075412-eng.pdf?sequence=1>.

6 Conclusion

The Bliss cases highlight the continued uncertainty surrounding the ARB, its legitimacy and its efficacy in regulating advertisers. While the Constitutional Court and SCA judgments have provided some clarity in relation to the scope of the ARB's powers and its ability to regulate non-members, there are still numerous concerns as to whether the current self-regulatory format of this body is effective in adequately regulating potentially harmful marketing practices that have direct implications for the right to health and the protection of children's rights. This is especially the case given that research has shown that self-regulation is ineffective. There is thus a need to push for a stricter form of regulation, such as co-regulation or state regulation, to ensure that the ARB has the proper statutory authority, backing and power to regulate all advertisers and ensure the protection of consumers' rights. This could assist with reducing the number of disputes relating to the ARB such as the one seen in the cases discussed, and which will likely to arise in the future. It could also ensure that the ARB (or a similar body) would be able to effectively monitor and sanction marketing practices that contravene its Code and that have implications for constitutional rights.

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List of Abbreviations

ACC	Appeals Complaints Committee
ARB	Advertising Regulatory Board
ASA	Advertising Standards Authority
ECA	Electronic Communications Act 36 of 2005
FAC	Final Appeals Committee
ICASA	Independent Communications Authority of South Africa
Mol	Memorandum of Incorporation
OHCHR	Office of the High Commissioner for Human Rights
PAJA	Promotion of Administrative Justice Act 3 of 2000
SA Merc LJ	South African Mercantile Law Journal
SCA	Supreme Court of Appeal
WHO	World Health Organisation