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Personal Data (Privacy) Ordinance (Cap. 486)**

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香港個人資料私隱專員公署
Office of the Privacy Commissioner
for Personal Data, Hong Kong

The Collection and Use of Personal Data of Members
Under the MoneyBack Program run by
A.S. Watson Group (HK) Limited through “Watsons”

This report in respect of the investigation carried out by the Privacy Commissioner for Personal Data (the “**Commissioner**”) pursuant to section 38(b) of the Personal Data (Privacy) Ordinance, Cap. 486 against A.S. Watson Group (HK) Limited is published in the exercise of the power conferred on the Commissioner by Part VII of the Personal Data (Privacy) Ordinance. Section 48(2) of the Personal Data (Privacy) Ordinance provides that “*the Commissioner may, after completing an investigation and if he is of the opinion that it is in the public interest to do so, publish a report –*

- (a) *setting out -*
 - (i) *the result of the investigation;*
 - (ii) *any recommendations arising from the investigation that the Commissioner thinks fit to make relating to the promotion of compliance with the provisions of this Ordinance, in particular the data protection principles, by the class of data users to which the relevant data user belongs; and*
 - (iii) *such other comments arising from the investigation as he thinks fit to make; and*
- (b) *in such manner as he thinks fit.”*

Allan CHIANG
Privacy Commissioner for Personal Data

Background

Following the Octopus incident in October 2010, the Commissioner examined the collection and use of members' personal data under a number of prominent customer loyalty programs, including the "MoneyBack Program" (the "**Program**") operated by A.S. Watson Group (HK) Limited ("**ASW**") through Watsons. According to ASW's representations to the Commissioner, it operated retail brand businesses including PARKnSHOP, International, Fusion, Express, Fortress, Watsons, Great, and Taste. Under the Program, there are four MoneyBack cards and each card face represents a retail brand, namely PARKnSHOP, Watsons, Great and Taste. According to ASW's website¹, PARKnSHOP is ASW's mainstream brand in supermarket business with over 280 stores in Hong Kong, Macau and Mainland China. Watsons is a pharmacy and personal care chain. Great is an international concept food hall offering food projects and cooking and dining ware. Taste is more than just a supermarket, with a range that spans fresh and ready-to-eat food, an in-store bakery, imported specialist items, a wine cellar, household goods and gifts, and even fashion and luxury accessories.

2. In March 2011, the Commissioner initiated a formal investigation pursuant to section 38(b) of the Personal Data (Privacy) Ordinance (the "**Ordinance**")² against ASW to ascertain whether the Program operated by ASW through Watsons had contravened the relevant requirements under the Ordinance.

Representations from ASW

3. In the course of investigation of this case, this Office collected the information and evidence below from ASW.

The Program

4. The Program has been operated by ASW since January 2007³. ASW stated that the purposes of the Program were to offer members discounts, bonus

¹ www.aswatson.com

² The Personal Data (Privacy) Ordinance was substantially amended on 1 October 2012. However, for the purposes of this investigation, the applicable law at the material time was the version of the Personal Data (Privacy) Ordinance prior to 1 October 2012, which is referred to as the "Ordinance" throughout this report.

³ According to ASW, the Program was launched in January 2007 while the Watsons Membership Card scheme, one of the four card faces of the Program, was launched in October 2010.

point rewards and targeted promotional offers.

5. Under the Program through Watsons, members were offered the following benefits:-

- (a) Reward points gained through purchases at ASW stores⁴ (1 reward point for every \$5 spent at all stores except Fortress where 1 reward point would be awarded for every \$10 spent) and used for the redemption of cash vouchers (\$10 cash voucher for every 500 reward points);
- (b) Beauty tips, health tips and production information relevant to members' buying habit and personal interest are provided to members from time to time; and
- (c) Special discounts provided from time to time through special offers and Watson brand products.

6. According to ASW, the rewards points were valid for 2 years and the maximum to be accumulated for each membership account was 9,999,999,999.

The Application Form

7. To register as a member of the Program through Watsons, an applicant was required to complete a "Watsons membership card application form" (the "**Application Form**") and send it to ASW. Below are the personal information (mandatory fields are asterisked) that an applicant was required to provide in the Application Form :

- (1) Title*
- (2) English name*
- (3) Chinese name
- (4) The first 4 digits of Hong Kong Identity Card number or passport number ("**partial ID no.**") *
- (5) Contact number* - mobile number and / or home / office number
- (6) Email address
- (7) Month and year of birth

⁴ Under the Terms and Conditions of the Program, "ASW stores" include PARKnSHOP, Watsons, Great, Taste, Fortress, International, Fusion and Express.

- (8) Home address*
- (9) Marital status
- (10) Language preference (English or Chinese)
- (11) Health and beauty concerns
- (12) Family status (no. of children, month and year of birth of children and household size)
- (13) Signature*

8. ASW informed the Commissioner that the purposes of collecting individual items of the applicant's personal information were as follows (see Table 1):-

Table 1 – Purposes of collection of personal data by ASW

Item	Descriptions	Purposes
1	Title*	To address the members
2	English name*	Identification of members^
3	Chinese name	Identification of members^
4	Partial ID no.*	Identification of members^ To be used as the members' default password for log-in to the Program website [Mobile no. was the alternative default password]
5	Contact number*	Identification of members^ Communicating promotion offers Mobile number to be used as the members' default password for log-in to the Program website [Partial ID no. was the alternative default password]
6	Email address	Communicating promotion offers
7	Month and year of birth	Designing targeted promotional offers to members Identification of members^
8	Home address*	Communicating promotion offers
9	Marital status	Designing targeted promotional offers to members
10	Language preference	Communication
11	Health and beauty concerns	To provide skin care beauty knowledge and advice to members

Item	Descriptions	Purposes
12	Family status	Designing targeted promotional offers to members
13	Signature*	To confirm that the applicant had read and understood the Terms and Conditions (“T&C”) of the Program

* Mandatory fields

^ Identification of members in case of lost card and replacement of card

9. On the signature page of the Application Form, the applicant may indicate his/her wish not to receive promotional materials “*that are unrelated to MoneyBack*” by ticking the box provided. According to paragraph 9.6 of the T&C, a member may opt out from receiving direct marketing materials from ASW or its Partners by calling the MoneyBack Customer Hotline or by writing to them.

10. In order to apply for membership of the Program, an applicant must acknowledge that he/she agreed to accept and be bound by the T&C. Reproduced below are relevant extracts from the T&C:-

2.1 These Terms and Conditions form the agreement between you, our Member, and us, A.S. Watson Group (HK) Limited, the operator of a consumer reward and targeted offers program (“MoneyBack Program” or “the Program”). We will have other merchants to join the Program in the near future (“Our Partners”) offering you more rewards and targeted offers.

2.2 In these Terms and Conditions, meaning of certain terms shall be as follows:

f. “Our Stores” – they include PARKnSHOP, INTERNATIONAL, TASTE, FUSION, GREAT, EXPRESS, Watsons and FORTRESS.

h. “Retail Outlets” – means Our Stores and Our Partners’ retail outlets in Hong Kong.

3.3 The information you provide us when you register as a Member, will help us and Our Partners to make carefully selected offers that we believe will be of interest and value to you ...

4.4 *Reward Points are valid for two (2) years. Reward Points are personal to you and they are not transferable or assignable to others.*

9. *Personal Information and Data:*

Notice relating to the Personal Data (Privacy) Ordinance (the “Ordinance”)

9.1 *In order for you to become a Member of the Program, it is necessary for you to provide us with your personal information (“personal data”). If you are unable or unwilling to provide us with complete and correct Personal Data, we may not be able to provide or continue to provide the services under the Program to you.*

9.3 *You agree that all the Personal Data provided by you to us and/or Our Partners and all information relating to the use of your MoneyBack Card may be used and retained by us and/or Our Partners for:*

- a. *processing your application for MoneyBack membership;*
- b. *providing you with the services under the Program;*
- c. *marketing of goods and/or services by us, our agent, **our subsidiaries**, or **Our Partners**;*
- d. *providing you with carefully selected offers, promotions and benefits by us, **our subsidiaries**, **our affiliates** and/or **Our Partners**. We, **our subsidiaries**, **our affiliates** and **Our Partners** may need to carry out matching procedure (as defined in the Ordinance) to enable us/them to better understand your characteristics and buying behaviour and to provide other services better tailored to your needs, to assist us and **Our Partners** in selecting goods and services that are likely to be interest to you;*
- e. *provide you with regular communications from us with details of the Program and its benefits;*
- f. *the normal management, operation and maintenance of the Program;*
- g. *designing new or improving existing services provided by us, **our subsidiaries**, **our affiliates** or **Our Partners** to you;*

- h. investigation of complaints, suspected suspicious transactions and research for service improvement;*
 - i. prevention or detection of crime;*
 - j. disclosure as required by law;*
 - k. aggregated behavioral analysis. This may be shared with **Our Partners** and third parties;*
 - l. as a source of information and data for other **related purposes**; and*
 - m. enabling us to comply with our and/or **Our Partners**' obligations to interconnect or other industry practice.*
- (emphasis added)

9.4 You further agree that we may disclose and transfer (whether in Hong Kong or abroad) to our agents, contractors, any telecommunications operations, any third party collection agencies, any credit reference agencies, any security agencies, any credit providers, banks, financial institutions, **any other persons under a duty of confidentiality to us** and any of our actual or proposed assignees or transferees of our rights with respect to you to use, disclose, hold, process, retain or transfer such Personal Data for the purpose mentioned above.

(emphasis added)

9.5 In addition, you further agree with us that we may disclose and transfer your Personal Data (whether in Hong Kong or abroad) to any company within **Hutchison Whampoa Limited, Cheung Kong (Holdings) Limited, their respective subsidiaries and any company in which the same has an interest (collectively "Hutchison Group")** and to include that Personal Data in one or more databases held by us or the Hutchison Group (which may contain other information collected by us or the Hutchison Group) for the marketing of goods and/or services by us and/or the Hutchison Group and for the performance of procedures for comparing Personal Data with other information supplied by you to us and/or the Hutchison Group for the above purposes.

(emphasis added)

[Remark: no further definitions of "Our Partners", "our affiliates" or "our subsidiaries" were given in the T&C]

11. ASW confirmed that it had never sold and had no plan to sell members' personal data, and added that it would not transfer or disclose members' personal data to other organizations for marketing purpose. As to the transfer of customers' personal data to the Hutchison Group as mentioned in clause 9.5 of the T&C, ASW explained that they had never transferred the personal data as suggested in this clause. The clause merely referred to the possibility of transfer of data.

12. As noted in the relevant clauses of the T&C quoted above, "Our Partners", "our subsidiaries" and "our affiliate" were classes of data users who receive members' personal data from ASW in accordance with clause 9.3. However, no elaborations on these three classes of data transferees were found in the T&C. When asked, ASW stated that these three terms meant "*PARKnSHOP, International, Taste, Fusion, Great, Express, Watsons and Fortress*", i.e. the retail brands operated by ASW and should belong to "Our Stores" as per clause 2.2.f. Upon the Commissioner's further enquiry on the requirements to become its "Partners" under the Program, ASW replied that its Partners under the Program were "*PARKnSHOP and Fortress*", both being divisions of ASW. It did not elaborate on the requirements to become Partners.

Change in practice during the course of investigation

13. In ASW's first representation to the Commissioner for this investigation, ASW provided the Commissioner with a revised Application Form which became effective since April 2011.

Revised Application Form

14. The revised application form did not introduce any change to the data collection practice or the contents of the relevant clauses of the T&C quoted above. The font size of the T&C, however, was enlarged (from 0.5mm x 0.5mm to 1mm x 1mm for English and from 1mm x 1mm to 2mm x 2mm for Chinese) and bullet points were used to separate the contents⁵. After the revision, the coverage of the T&C in the Application Form doubled⁶. The headings of the T&C, like "9.

⁵ Before the revision, the T&C (in English or in Chinese) was cramped (without any separation) into one page in the size of 17cmx17cm.

⁶ All along, the Application Form was a leaflet in the size of about 17cm x 17cm in 5 pages with contents

Personal Information and Data” as quoted above, were bold-faced and made more eye-catching.

15. According to ASW, the revisions of the Application Form were made after it had examined the Commissioner’s investigation report “The Collection and Use of Personal Data of Members under the Octopus Rewards Programme run by Octopus Rewards Limited” (the “**Octopus Report**”).

The Legal Requirements

16. The following provisions of Data Protection Principle (“**DPP**”)1 and DPP3 in Schedule 1 to the Ordinance, which were in force at the material time, are relevant to this investigation. **DPP1** stipulated that:-

- “ (1) *Personal data shall not be collected unless–*
- (a) *the data are collected for a lawful purpose directly related to a function or activity of the data user who is to use the data;*
 - (b) *subject to paragraph (c), the collection of the data is necessary for or directly related to that purpose; and*
 - (c) *the data are adequate but not excessive in relation to that purpose.*
- (2) *Personal data shall be collected by means which are -*
- (a) *lawful; and*
 - (b) *fair in the circumstances of the case.*

printed on both sides, i.e. there were 10 pages in 17cm x 17 cm each. After the revision, the T&C (in English and in Chinese) occurred 4 pages as compared with 2 pages before.

- (3) *Where the person from whom personal data are or are to be collected is the data subject, all practicable steps shall be taken to ensure that -*
- (a) *he is explicitly or implicitly informed, on or before collecting the data, of—*
 - (i) *whether it is obligatory or voluntary for him to supply the data; and*
 - (ii) *where it is obligatory for him to supply the data, the consequences for him if he fails to supply the data; and*
 - (b) *he is explicitly informed—*
 - (i) *on or before collecting the data, of—*
 - (A) *the purpose (in general or specific terms) for which the data are to be used; and*
 - (B) *the classes of persons to whom the data may be transferred; and*
 - (ii) *on or before first use of the data for the purpose for which they were collected, of—*
 - (A) *his rights to request access to and to request the correction of the data; and*
 - (B) *the name and address of the individual to whom any such request may be made,*
unless to comply with the provisions of this subsection would be likely to prejudice the purpose for which the data were collected and that purpose is specified in Part VIII of this Ordinance as a purpose in relation to which personal data are exempt from the provisions of data protection principle 6.”

17. **DPP3** provided that:-

“Personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than-

- (a) *the purpose for which the data were to be used at the time of the collection of the data; or*

(b) a purpose directly related to the purpose referred to in paragraph (a).”

18. The term “*use*”, in relation to personal data, was defined under section 2(1) of the Ordinance to include “*disclosure*” or “*transfer*” of the data.

19. According to section 2(3) of the Ordinance, “*prescribed consent*” meant “*express consent of the person given voluntarily*” which had not been withdrawn by notice in writing by the data subject.

20. With regard to the collection of identity card number, paragraphs 2.1 to 2.3 of the “Code of Practice on the Identity Card Number and other Personal Identifiers” (“**PI Code**”) issued by this Office provide that:-

“2.1 Unless authorized by law, no data user may compulsorily require an individual to furnish his identity card number.

2.2 Without prejudice to the generality of paragraphs 2.1 and 2.3, before a data user seeks to collect from an individual his identity card number, the data user should consider whether there may be any less privacy-intrusive alternatives to the collection of such number, and should wherever practicable give the individual the option to choose any such alternative in lieu of providing his identity card number. Such alternatives may include but are not limited to the following:

2.2.1 the identification of the individual by another personal identifier of his choice;

2.2.2 the furnishing of security by the individual to safeguard against potential loss by the data user; or

2.2.3 the identification of the individual by someone known to the data user.

2.3 *A data user should not collect the identity card number of an individual except in the following situations:*

2.3.1 *pursuant to a statutory provision which confers on the data user the power or imposes on the data user the obligation to require the furnishing of or to collect the identity card number;*

2.3.2 *where the use of the identity card number by the data user is necessary:*

2.3.2.1 *for any of the purposes mentioned in section 57(1) of the Ordinance (safeguarding security, defence or international relations in respect of Hong Kong);*

2.3.2.2 *for any of the purposes mentioned in section 58(1) of the Ordinance (the prevention or detection of crime, the apprehension, prosecution or detention of offenders, the assessment or collection of any tax or duty, etc.); or*

2.3.2.3 *for the exercise of a judicial or quasi-judicial function by the data user;*

2.3.3 *to enable the present or future correct identification of, or correct attribution of personal data to, the holder of the identity card, where such correct identification or attribution is or will be necessary:*

2.3.3.1 *for the advancement of the interest of the holder;*

2.3.3.2 *for the prevention of detriment to any person other than the data user; or*

2.3.3.3 *to safeguard against damage or loss on the part of the data user which is more than trivial in the circumstances;*

2.3.4 *without prejudice to the generality of paragraph 2.3.3, for the following purposes:*

2.3.4.1 *to be inserted in a document executed or to be executed by the holder of the identity card, which document is intended to establish or to evidence any legal or equitable right or interest or any legal liability on the part of any person, other than any right, interest or liability of a transient nature or which is trivial in the circumstances;*

2.3.4.2 *as the means for the future identification of the holder of the identity card where such holder is allowed access to premises or use of equipment which the holder is not otherwise entitled to, in circumstances where the monitoring of the activities of the holder after gaining such access or use is not practicable; or*

2.3.4.3 *as a condition for giving the holder of the identity card custody or control of property belonging to another person, not being property of no value or of a value which is trivial in the circumstances.”*

The Findings of the Privacy Commissioner

Whether the collection of applicants' personal data was excessive

21. **DPP1(1)** of the Ordinance stipulated that a data user shall not collect personal data unless the data is collected for a lawful purpose directly related to a function or activity of the data user. Moreover, the collection of the data must be necessary for or directly related to that purpose, and the data is adequate but not excessive in relation to that purpose.

22. According to ASW's representations, the Program was a customer rewards scheme whereby members benefited from redemption of goods and services as well as marketing offers. The Commissioner considers that the purposes of

collection of applicants' personal data stated in Table 1 above are directly related to the function of ASW's Program as stated in paragraph 5 above. Each item of personal data mentioned in paragraph 8 above is further examined one by one so as to ascertain whether its collection is necessary, adequate but not excessive for the purposes of collection under ASW's Program as stated in paragraph 5 above.

Title (Item 1 of Table 1)

23. ASW collected title (item 1) for the purpose of addressing the members. In this regard, the Commissioner does not object that the collection of this item from an applicant.

Name of the applicant (item 2 and item 3 of Table 1)

24. Under clause 4.4 of the T&C (see paragraph 10 above), "... *Reward Points are personal to you and they are not transferable or assignable to others*". Since the provision of the services and benefits under the Program is personal, the Commissioner is satisfied that it is necessary for ASW to collect the name of an applicant. It is noted that the provision of Chinese name was only optional for the obvious reason that some applicants do not have a Chinese name.

Partial ID no. (Item 4 of Table 1)

25. ASW stated that partial ID no. was collected for identification purpose in case of lost card and replacement of card and as the default password for log-in to the Program website.

26. As regards the collection of partial ID for identification purpose in case of lost card and replacement of card, the Commissioner noticed that ASW, at the same time, also required an applicant to provide his/her English name (item 2), contact number (item 5) and home address (item 8). The Commissioner had earlier expressed comments in the Octopus Report that: "[data user] *should be able to confidently authenticate the identity of a Member by using his name and contact information (i.e. item 6 (contact phone numbers) and item 7 (home address))*"⁷. By adopting the same rationale, the collection of partial ID no. in the present case

⁷ Paragraph 3.10 of the Octopus Report.

for the purpose of identification is excessive. It is sufficient for an applicant to be properly identified by reference to his or her name and contact data.

27. Paragraphs 2.1 to 2.3 of the PI Code set out the circumstances (see paragraph 20 above) under which collection of HKIC number is generally justified (*e.g. a doctor may require a patient's HKIC number to ensure that his past medical records are correctly attributed to him to enable proper treatment*). However, collection of HKIC number for the purpose of assigning a default password for log-in does not appear to be justified under any of the specified circumstances under the PI Code. Besides, since it is intended by ASW that either partial ID no. or mobile no. of the applicant was to be used as members' default password for log-in to the Program website, it is obvious that partial ID no. is not strictly necessary for the purpose. In addition, ASW should have been able to generate and assign any set of numbers or characters as the default password to an individual member for customer authentication.

28. ASW argued that partial ID no. should not be deemed as a personal identifier and thereby not covered by the PI Code. In the Commissioner's view, the collection of an individual's partial ID no. coupled with other items of personal data, such as his name and contact data rendered it practicable for the identity of the data subject to be directly or indirectly ascertained. Hence, the Commissioner considers that the partial ID no. collected by ASW, together with other personal data of the applicant in the Applicant Form, fell within the ambit of "personal data" under the Ordinance.

29. ASW further argued that even if the first 4 characters of an ID card is alleged to be an "Identity Card Number", the exception under paragraph 2.3.4.1 of the PI Code shall apply, as the customer is entering into a contract with ASW when he/she signs on the application form. The Commissioner does not accept the argument based on the following grounds. Firstly, paragraph 2.3.4.1 is subject to paragraph 2.3.4 which specifically stated that the same is without prejudice to the generality of paragraph 2.3.3, which is to enable the present or future correct identification of, or correct attribution of personal data to, the holder of the identity card, where such correct identification or attribution is or will be necessary. As stated above, the collection of the partial ID no. is not necessary since there is other information collected by ASW to achieve the purpose of correct

identification. Secondly, the Commissioner reckons that the contract in which the right, interest or liability it intends to establish under the Program is “of a transient nature” and “trivial in the circumstances”. The right and interest conferred under the Program are bonus points and discount privileges which cannot be considered substantial. According to paragraph 4.4 of the T & C, the reward points are only valid for 2 years. According to paragraph 4.1 and 4.6 of the T&C, a purchase of \$200,000 at Watsons for 2 years would only attract 40,000 reward points and a redeemable cash value of \$800 (500 reward points in exchange for \$10 cash voucher). For Fortress, a member has to purchase double the amount (i.e. HK\$400,000) in order to obtain the same value of cash voucher. In short, the Program benefits are trivial and transient in nature and hence do not justify the collection of partial ID no. under paragraph 2.3.4.1 of the PI Code.

Contact number, Email address, Home address, Language preference (Item 5, Item 6, item 8 and item 10 of Table 1)

30. According to ASW, these items were primarily collected for communication purposes. The Commissioner recognizes that contact number (item 5), email address (item 6), home address (item 8) and language preference (item 10) were collected by ASW for effectively communicating with members and providing marketing materials to them. For contact number (item 5) and home address (item 8), they were collected also for the purpose of customer identification. The Commissioner is satisfied that it is necessary for ASW to collect these items from a Program applicant.

Month and year of birth, Marital status, Health and beauty concerns, Family status (Item 7, item 9 and item 11 to item 12 of table 1)

31. In view of the diversity of the goods sold under the Program retail outlets, the Commissioner accepted ASW’s submissions that these data were primarily collected for designing targeted promotional offers as they enable ASW to better understand members’ background and make offers more suited to their needs. Further, the applicant is free to decide whether or not to provide these additional data items.

32. In the circumstances, the Commissioner is of the view that the collection of items 7, items 9 and items 11 to 12 is directly related to the purposes of the Program. He found no evidence to suggest that such collection is excessive.

Signature (Item 13 of Table 1)

33. According to ASW, the collection of signature was necessary for the purpose of confirming that the Program applicant had read and agreed to the T&C. The T&C set out the rules and regulations on how the Program is operated, the members' rights, and the use of their personal data collected under the Program. They form the basis of the agreement between every member and ASW. It is therefore a matter of contract for the applicants to attest on the Application Form. The Commissioner is satisfied that the collection of signature serves the legitimate purpose of proving the existence of contractual relationship and is not excessive.

Summing up

34. The Commissioner finds that ASW's collection of the applicants' partial ID no., i.e. the first 4 characters of Hong Kong identity card number or passport number was excessive for the purposes of the Program, contrary to **DPP1(1)(c)**.

Whether the means of collection is lawful and fair in the circumstances of the case

35. **DPP1(2)** of the Ordinance required data users to collect personal data by means which are lawful and fair in the circumstances of the case. There is no evidence in this investigation to suggest that the means of collection of the applicants' personal data under the Program by ASW is unlawful.

36. According to Clause 3.3 of the T&C, the information collected by ASW will help ASW to make carefully selected offers to members. Given that one of the features of the Program is to promote the products and services of ASW, it should be within the reasonable expectation of the applicants that, upon becoming a member, promotional information and materials relating to the products and services of ASW offered under the Program would be communicated to them. There is no information or evidence before the Commissioner to show that the

applicant of the Program was forced to or misled into signing the Application Form.

37. The Commissioner is satisfied that ASW had not used any means that was unlawful or unfair in the circumstances when collecting personal data from applicants of the Program. Hence there was no contravention of **DPP1(2)**.

Whether the duty to inform data subjects was discharged

38. In determining whether ASW has met the notification requirements under **DPP1(3)**, it is necessary to ascertain whether ASW had taken all reasonably practicable steps to ensure that an applicant registering for membership under the Program was explicitly informed, on or before the collection of his/her personal data, of the purposes of such collection and the classes of persons to whom the data may be transferred.

39. Notwithstanding ASW's attempt to revise the Application Form by making reference to the recommendations given by the Commissioner in the Octopus Report as mentioned in paragraphs 13 to 15 above, the Commissioner identified the following problem areas:-

- (a) Some of the purposes of use stated in Clause 9.3 of the T&C were ill-defined;
- (b) Clauses 9.3 and 9.4 of the T&C empowered ASW to disclose and transfer members' personal data to classes of persons which are also ill-defined; and
- (c) Clause 9.5 of the T&C enabled ASW to disclose and transfer members' personal data to the Hutchison Group for marketing goods and services by ASW and Hutchison Group, and related purposes.

Purposes of data collection ill-defined

40. The purposes of collection mentioned in Clause 9.3 include, inter alia, the following

- (a) “marketing goods and /or services by us, our agent, **our subsidiaries, or Our Partners**” (9.3(c));
- (b) “providing carefully selected offers, promotions and benefits by us, **our subsidiaries, affiliates and/or Our Partners**. We, **our subsidiaries, our affiliates and our Partners** may need to carry out matching procedure (as defined in the Ordinance) to enable us/them to better understand your characteristics and buying behaviour and to provide other services better tailored to your needs, to assist us and Our Partners in selecting goods and services that are likely to be interest to you” (9.3(d));
- (c) “designing new or improving existing services provided by us, **our subsidiaries, our affiliates or Our Partners** to you” (9.3 (g));
- (d) “aggregated behavioural analysis. This may be shared with **our Partners and third parties**” (9.3 (k));
- (e) “as a source of information and data for **other related purposes**” (9.3(l)); and
- (f) “enabling us to comply with our and /or **our Partners’** obligations to interconnect with other industry practice” (9.3 (m)).

41. Having regard to the nature of the Program, these purposes of use fall foul of being too vague. In particular, they relate to both ASW’s functions and that of its subsidiaries, affiliates and Partners, the nature of business of which is not defined and can therefore be anything. Such purposes of use, for which the sky is the limit, could not qualify as purposes, whether in general or specific term under DPP1(3)(b)(i)(A) as elaborated below:-

- (a) Without specifying in detail the nature of business of ASW's subsidiaries, affiliates and Partners, the scope for the marketing of goods or services under clause 9.3(c) and the making of promotional offers under clause 9.3(d) is too broad. It would include whatever types of products or services provided by these subsidiaries, affiliates and Partners which can be totally different from the products and services offered by the 8 ASW stores covered by the Program. Hence, it would fall outside the reasonable expectation of the Program members.

- (b) While the purpose of "designing new or improving existing services provided by (ASW)" mentioned in Clause 9.3(g) is a purpose directly related to the function of the Program, the extension of such activity under the same clause to ASW's subsidiaries, affiliates and Partners is problematic. Without any knowledge of the nature of business of these entities, the Program members have no way to ascertain how their personal data would be put to use to design new services or improve existing services for them.

- (c) Clause 9.3(l) is objectionable as the purpose of use was very loosely defined. The Commissioner had expressed his views in the Octopus Report⁸ that "as a source of information and data for other related purposes" was an unacceptable catch-all term. Without an emphasis that such "related purposes" are "directly related purposes", they could well include "remotely related purposes".

- (d) The meaning of Clause 9.3(m) is unclear and ambiguous as it enabled ASW and/or its Partners to use personal data to comply with ASW's and/or its Partners' obligations to "interconnect or other industry practice". Apart from the lack of specifications of what a Partner is, the meaning of "interconnect or other industry practice" is not self-explanatory.

⁸ Paragraphs 3.21 to 3.24 of the Octopus Report

Transfer of personal data to ill-defined third parties

42. The classes of data transferees are very loosely defined under Clauses 9.3 and 9.4. One such class of data transferee mentioned is “Our Partners”. ASW explained that this term is meant to cover “PARKnSHOP and Fortress” but literally and according to Clause 2.1, it could well be taken to mean any merchant which will join the Program in future. Indeed, it is a fact that Watsons does partner with health and beauty company to provide discounts and promotion offers from time to time. If ASW intends to restrict Partners to “PARKnSHOP and Fortress”, they should make it explicit. The reference to “third parties” in Clauses 9.3(k), without more, fails to enable the Program members to ascertain with a reasonable degree of certainty who could have the use of the data. For the same reason, the use of the catch-all term “any other persons under a duty of confidentiality to us” in Clause 9.4 is unacceptable. The Commissioner had made this point clear in the Octopus Report⁹.

43. The classes of data transferees are extended under Clause 9.4 to include persons such as “any third party collection agencies”, “any credit reference agencies”, “any security agencies”, and “any credit providers, banks, financial institutions”. It is difficult to appreciate how these classes of data transferees relate to the administration of the Program.

Transfer of personal data to Hutchison Group

44. Clause 9.5 permits the transfer of personal data to Hutchison Group for its marketing of goods and services. This causes grave privacy concern. According to the 2011 annual report of Hutchison Group¹⁰, it has about 300 principal subsidiary and associated companies and jointly controlled entities. These companies operate a very wide range of businesses covering property and hotels, retail, telecommunications, finance and investments. To permit transfer of members’ personal data to them will exceed the reasonable expectation of the members and unnecessarily expose the personal data to an increased privacy risk of misuse.

⁹ Paragraphs 3.28 to 3.29 of the Octopus Report

¹⁰ <http://202.66.146.82/listco/hk/hutchison/annual/2011/ar2011.pdf> and http://www.ckh.com.hk/uploaded_files/news/492_e_content.pdf

Effectiveness of communication

45. Further, although ASW had asked applicants to the Program to signify their consent to the T&C, no means was made available for the applicants to selectively choose the purposes of use of data and the classes of data transferees that they consent to. Instead, a bundled consent approach is adopted whereby applicants have to choose between (i) giving up enrolment in the Program; and (ii) agreeing to all of the purposes of use, classes of data transferee and other T&C of the Program.

46. Also, as the T&C were printed on the backside of the Application Form, the terms in relation to the broad ranges of purposes of use and the ill-defined classes of data transferee could easily escape the attention of applicants when signing on the front page.

Summing up

47. On the basis of the above, the Commissioner is of the view that ASW had not taken all practicable steps to ensure that on or before the collection of personal data from its applicants, the applicants were explicitly informed of the purposes of collection and the classes of persons to whom the data might be transferred. ASW had thus contravened **DPP1(3)**.

Use of personal data

48. ASW confirmed that it had never disclosed or transferred members' personal data under the Program to any third parties for direct marketing purposes or otherwise.

49. On the basis of the facts now known, there is no evidence that indicates that ASW had used members' personal data under the Program in contravention of the requirement under **DPP3**.

Conclusion

50. In view of the foregoing, the Commissioner concludes that ASW had contravened the following requirements under the Ordinance:-

- (1) **DPP1(1)** for having collected “partial Hong Kong identity card number or passport number” for the purpose of identifying applicants and providing applicants with default password for log-in to the Program website; and
- (2) **DPP1(3)** for having failed to take all reasonably practicable steps to ensure that the applicants were explicitly informed of the purposes of collection and the classes of persons to whom the data may be transferred.

Enforcement Notice

51. Pursuant to section 50(1) of the prevailing Personal Data (Privacy) Ordinance (“**PDPO**”) and in consequence of an investigation, if the Commissioner is of the opinion that the relevant data user is contravening or has contravened a requirement under the PDPO, the Commissioner may serve on the data user a notice in writing, directing the data user to remedy and, if appropriate, prevent any recurrence of the contravention.

52. In view of the Commissioner’s finding of contraventions on the part of ASW and the likely damage and distress caused to the data subjects, and having regard to ASW’s continuing practice of collecting personal data for the Program in the manner stated in this investigation report, the Commissioner has served an enforcement notice pursuant to section 50 of the PDPO directing ASW to:

- (i) completely erase the partial ID no. of applicants and/or members that ASW has collected under the Program;
- (ii) cease collection of the partial ID no. of applicants to the Program;
- (iii) revise the T&C to remove the purposes of use mentioned in Clause 9.3 (l) and (m);
- (iv) revise the definition of “Our Partners”, “our subsidiaries” and “our

affiliates” to explicitly mention their names (if available) and their nature of business in the T&C (such “Partners”, “subsidiaries” and “affiliates” should not cover those whose nature of business is unrelated to the businesses of the 8 retail brands, namely PARKnSHOP, International, Fusion, Express, Fortress, Watsons, Great and Taste);

- (v) revise the T&C to remove reference to “any third party collection agencies”, “any credit reference agencies”, “any security agencies”, “any credit providers, banks, financial institutions; any other persons under a duty of confidentiality to us” mentioned in Clause 9.4; and
- (vi) revise the T&C to remove Clause 9.5.

Other Comments

53. After the *Octopus* incident in 2010, public awareness of the collection and use of personal data in direct marketing activities was significantly raised. This investigation is one of the four investigations carried out subsequently in relation to customer loyalty programs.

54. It is disappointing to note that notwithstanding the efforts made by ASW to revise its T&C after studying the *Octopus* Report, the revision is a half-hearted exercise. It falls short of learning from the *Octopus* incident by repeating some of the mistakes made. Instead of being prompted to rectify the mistakes during the investigation, ASW was evasive and slow in responding to the Commissioner’s enquiries, and displayed a lack of sensitivity to privacy and data protection. This is out of keeping with the community aspirations and is particularly unacceptable in view of the high penetration of the Program among the Hong Kong public and the large number of members (about 1.6 million) enrolled in the Program.

55. With the enactment of the Personal Data (Privacy) (Amendment) Ordinance 2012, a tighter regulatory regime will be introduced in 2013 for the collection and use of personal data for direct marketing. The consequences of contravening the new requirements are dire. For example, if a data user fails to inform a data subject in an easily readable and understandable manner of its intention to use the personal data for direct marketing before it engages in the

direct marketing activities, or if a data user fails to specify, in an easily readable and understandable manner, the classes of persons to which the data will be transferred for direct marketing before the data transfer, the data user commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.

56. Hence, the Commissioner would like to remind all organizational data users in Hong Kong to seriously review their privacy policies, personal information collection statements and data protection procedures to ensure compliance with the new provisions of the Amendment Ordinance.