

EXPLANATORY STATEMENT

Introduction

This is the Explanatory Statement for the *Mobile Premium Services Industry Code* (G637:2009) (the Code).

The *Telecommunications Act 1997* (Cth) encourages self regulatory processes. Communications Alliance has been at the forefront of these processes and has worked closely with suppliers, regulators, the Telecommunications Industry Ombudsman (TIO) and consumer groups to develop industry codes of practice dealing with issues which affect consumers. The focus of this work has been to ensure that the residential and small business segments have adequate consumer protections. This focus is reflected in the *Telecommunications Act*, the operations of the TIO and the work of the Communications Alliance.

The Code will, when registered, replace the *Mobile Premium Services Industry Scheme*.

Accompanying the Code will be the *Mobile Premium Services Industry Guideline* (G638:2009) (the Guideline). The Guideline is designed to:

- aid in interpreting the Code Rules; and
- provide examples of how a Supplier may choose to comply with the Rules.

Background

Since 2005, mobile premium services in Australia have been regulated through a number of different mechanisms as part of a co-regulatory approach.

When the *Communications Legislation Amendment (Content Services) Act 2007* (Cth) was passed in 2007, it set out a new framework for content regulation across a variety of communications platforms (including mobile premium services).

The new legislation has had a "flow-down" effect requiring alignment, development, removal and amendment of a number of regulatory mechanisms.

As part of this, the existing Mobile Premium Services Industry Scheme is to be replaced with a Communications Alliance code.

Current regulatory arrangements

The then Australian Communications Authority (ACA) made the *Telecommunications Service Provider (Mobile Premium Services) Determination 2005* (No. 1) (Determination). The Determination was made pursuant to section 99 of the *Telecommunications Act* and Reg 3.12 of the *Telecommunications Regulations 2001* (Cth) which allows the Australian Communications and Media Authority (ACMA) (at that time the ACA) to make determinations setting out rules that apply to service providers in relation to the supply of mobile premium services.

In summary, mobile premium services are defined in the Determination as:

- (a) premium SMS or MMS services, meaning carriage services or content services supplied by way of a call to a number with certain designated prefixes; or
- (b) proprietary network services, meaning public mobile telecommunications services that enable an end-user to access a network used by a mobile carriage service

provider that enables customers of that provider to access (by way of a mobile device) a premium content service that is not otherwise generally available.

The Determination commenced on 30 June 2005 and was amended on 28 September 2006 (and more recently on 20 January 2008 as described below).

The Determination is enforceable by the ACMA against content service providers who supply mobile premium services in contravention of the Determination and in some circumstances against mobile carriage service providers through a take-down notice and an access removal notice regime.

The Determination also states that the ACMA may give directions under section 102 of the *Telecommunications Act* and issue formal warnings under section 103 of the *Telecommunications Act* in respect of contraventions of the Determination.

The Determination provides for the development of approved self regulatory schemes, being schemes submitted to the ACMA by a content service provider, mobile carriage service provider or by a nominated member on behalf of all members of the scheme, and approved by the ACMA pursuant to clause 5.4 of the Determination.

The MPSI Scheme was approved by the ACMA in 2006 and constitutes the approved self-regulatory scheme. The Determination also provides for a default scheme applicable to content service providers and mobile carriage service providers (Default Scheme). The Default Scheme applies to non-members of the MPSI Scheme. Content service providers and mobile carriage service providers are prohibited from supplying a mobile premium service without complying with an approved self-regulatory scheme that applies to them, or in all other cases, with the Default Scheme.

The *Communications Legislation Amendment (Content Services) Act 2007 (Content Services Amendments)* was passed in 2007. One of the consequences of the Content Services Amendments, was the amendment of the *Broadcasting Services Act 1992 (Cth)* to create a new Schedule 7 to deal primarily with content services delivered via carriage service. Schedule 7 to the *Broadcasting Services Act* commenced on 20 January 2008. The internet industry *Content Services Code* (the IIA Code) was developed pursuant to Schedule 7 of the *Broadcasting Services Act* and was registered by ACMA on 24 June 2008.

Why current regulatory arrangements are inadequate

The implications of Schedule 7 on the existing interim arrangements for mobile premium content existing under the Determination and under the MPSI Scheme have been considered and some changes to those existing arrangements have already been made.

In particular, an amended version of the Determination came into effect on 20 January 2008 (at the same time as the Content Services Amendments).

The amendments to the Determination centred on removal of the content-related provisions of the Determination which are now covered under the new framework existing under Schedule 7 of the *Broadcasting Services Act* and the IIA Code registered under Schedule 7.

The current MPSI Scheme contains rules which were made under now-deleted clauses in the Determination and which therefore need to be removed from the MPSI Scheme. Communications Alliance therefore sought to replace the residual provisions of the Determination, the MPSI Scheme and the Default Scheme with an industry code to be registered under Part 6 of the *Telecommunications Act*.

How the Code builds on and enhances the current regulatory arrangements

Noting that the previous arrangements for mobile premium services were interim in nature, the Code, based on residual elements of the MPSI Scheme and with significantly strengthened consumer protection-related obligations, intends to bring mobile premium services into the regulatory "mainstream". As a registered Code, the ACMA may direct any providers operating within the industry to comply – whereas the MPSI Scheme applied only to signatories to the Scheme (noting that the other providers were covered by the Default Scheme). The Code is enforceable by the ACMA.

What the Code will accomplish

The Code aims to establish appropriate community safeguards and customer service requirements for mobile premium services by:

- requiring suppliers to use appropriate advertising to assist customers to make informed decisions about the use and cost of services;
- providing customers with sufficient information to help enable them to make informed decisions about the use and cost of services;
- requiring suppliers to supply mobile premium services in an appropriate manner;
- ensuring complaints are handled in an appropriate manner; and
- ensuring customers can easily unsubscribe from subscription services and opt-out of marketing in relation to mobile premium services.

How the objectives will be achieved

Acknowledging the need for greater levels of transparency, Communications Alliance and industry are driving the development of an MPS Industry Register (the Register). The Register's function is to capture the contact details of suppliers of mobile premium services in Australia in order to provide for an accessible mechanism for regulatory bodies to identify these parties. Code obligations pertaining to the Register stipulate that registration is mandatory prior to the supply of any mobile premium services in Australia. Under the Code, suppliers will be obliged to ensure that all information retained in the Register is kept up-to-date.

A new website (the 19SMS website) has been developed to provide a single point for consumers to access information about mobile premium services. New Code obligations, specifically clauses 4.1.9 and 4.1.10, relating to expenditure management information to be provided on the 19SMS website, place an obligation upon suppliers to provide consumers with visibility of the measures available to them to manage their expenditure on mobile premium services.

Acknowledging the need to ensure that the new protections are adhered to, obligations related to Code monitoring have been included in the Code. These obligations are specified at each level of the supplier chain (content supplier, aggregator and carriage service provider) and require each provider to cooperate with Code monitoring.

The Code monitoring will be independent of any one industry and consumer group and its role will be to monitor ongoing compliance with the Code and to conduct independent inquiries and investigations into compliance with the Code.

The outputs of these inquiries and investigations are to include the reporting and sharing of information with the Minister for Broadband, Communications and the Digital Economy and the appropriate regulatory bodies. The reports on industry compliance will inform future reviews of the Code. In appropriate circumstances, individual suppliers will also be provided with targeted information to assist them in undertaking compliance activity.

Anticipated benefits to consumers

Consumers are anticipated to benefit from enhanced requirements in the Code ensuring that genuine consent is obtained from customers before subscribing to a service.

The significantly enhanced requirements in the Code, including the following changes, will help achieve this objective:

- clarity of advertising;
- protections relating to the marketing and advertising of services targeted at minors;
- numerous touch points where the consumer is provided with key information including the ability to opt out of premium messaging subscription services at any time; and
- the obligation upon suppliers to require a universal single mobile originated opt-in request from the consumer's mobile handset prior to providing access to any premium messaging subscription service.

Other anticipated benefits to consumers include enhanced customer care and complaint handling obligations and procedures.

Anticipated benefits to industry

It is anticipated that the industry will benefit from the introduction of a regulatory framework that applies equally to all providers.

By introducing the consumer protection measures outlined above, it is anticipated that the Code will promote the entrance and retention of legitimate content suppliers in the industry and the promotion and development of new and innovative services.

Anticipated costs to industry

Industry participants will incur initial and ongoing costs in relation to compliance with this Code. These will include costs associated with the provision of a live helpdesk, education and training of staff, development or enhancement of policies and procedures, reporting requirements, additional messaging requirements, and the development or modification of internal systems.

New suppliers will need to ensure that compliance with the Code is built into their processes and systems.

Delayed implementation provisions

The improved consumer protections included in the Code require a substantial change in the procedures which suppliers undertake. These changes to suppliers' processes will take considerable effort and resources, so a delay in implementation was considered necessary to ensure that suppliers can be compliant with the provisions of the Code when it takes effect.

These procedures include changes to advertisements, the implementation of new customer service complaint handling requirements, technical adjustments to message flows to meet retry rules, "FreeMsg/\$Msg" requirements and marketing messages requirements. In addition, contracts between suppliers will need to be reviewed and amended to ensure alignment with the provisions of the Code.

A further substantive reason for the implementation delay is the need for Communications Alliance to develop the Register, the short code lookup and expenditure management information mechanisms anticipated by the Code. It is anticipated that these systems would not be ready for deployment at the time of anticipated registration of the Code, at which point they would normally become effective.

Other public interests benefits or considerations

All carriers operating their own mobile networks agree in principle that customers should be offered the ability to bar premium SMS services.

Telstra already offers such barring to its customers.

Optus currently offers to its customers a client-based filtering application which, when downloaded to a compatible handset, has the ability to block access to premium SMS services. Optus has also begun implementation of a program that will deliver network-level barring functionality, and plans for this program to be completed in 12-18 months time.

Vodafone has identified a potential technical solution and is actively investigating the effectiveness of this option including implementation costs. Vodafone anticipates that 12 - 18 months will be required before implementation could occur. Due to current capital expenditure constraints, Vodafone is unable to make a firm commitment to implementation at this stage.

Hutchison anticipates that 12 to 18 months will be required before implementation of an appropriate solution could occur. Due to current capital expenditure constraints, Hutchison is also unable to make a firm commitment to implementation at this stage.

To further facilitate the mobile premium services industry's commitment to increasing consumer awareness of both the benefits and caveats of their services, new Code obligations, specifically clauses 4.1.9 and 4.1.10, relating to expenditure management information to be provided on the 19SMS website, place an obligation upon suppliers to provide consumers with details of the controls that currently exist through various products currently available to them to manage their expenditure on mobile premium services.

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