

30 July 2010

Mr John Stanton
Chief Executive Officer
Communications Alliance
Level 9
32 Walker St
NORTH SYDNEY NSW 2060

ACMA2010/1171



Dear Mr Stanton

Review of the Mobile Premium Services Code

As you are aware, a review of the Mobile Premium Services (MPS) Code is due to commence this month. I understand that Communications Alliance (CA) invited public comment on the Code on 5 July 2010 (with comments due 31 July 2010) and that CA's internal processes then require an analysis of whether or not the Code requires revision, reconfirmation or withdrawal. I am therefore writing to you at this early stage of the code review process to foreshadow matters which the Australian Communications and Media Authority (ACMA) considers important to address in this process.

You can well appreciate that mobile premium services continue to be an area of significant focus for the ACMA, as evidenced by the development of regulatory measures to support the MPS Code, the ACMA's ongoing compliance monitoring and investigations and its citation in the ACMA's rationale for the recently announced telecommunications inquiry 'Reconnecting the Customer'. The ACMA has also conducted qualitative and quantitative research into consumer expectations and usage behaviours in regards to mobile premium services. These activities and sources of information, augmented by Telecommunications Industry Ombudsman (TIO) complaints data and the related experiences of overseas premium services regulators, represent a comprehensive evidence base for assessing the effectiveness of safeguards for mobile premium services.

The ACMA is pleased to note a substantial decrease in TIO complaints regarding mobile premium services and the commitment to monitoring made by several carriers since the inception of the Code. I view the improvements over the last 12 months as attributable to the mobile premium services regulatory framework introduced in July 2009 and which continues to evolve. The improvements are also evidence that changes to this market introduced by the Code and the supporting regulatory measures have begun to take effect in the multiple layers of the mobile premium services supply chain.

The *Telecommunications Act 1997* requires the ACMA to give industry an opportunity to develop self-regulatory measures before other forms of intervention are considered. The ACMA's analysis of the various evidence bases has led the ACMA to conclude that there is a strong case for revision of the MPS Code. Priority areas include compliance with the

advertising obligations, which has specific implications for the subscription service business model and associated transparency of subscription service pricing, and the adequacy of current safeguards to protect young and vulnerable users of mobile premium services. There is also need to further address in the Code methods to identify and sanction rogue operators within this industry.

Advertising and the subscription service business model

As advertisements are often the first (and only) communication from a content supplier to a consumer about terms and conditions for service, compliance with the Code obligations regarding advertising content and presentation are key to a consumer getting adequate information from which to give their informed consent to receive a service.

The ACMA's audits and subsequent investigations reveal this to be an area of continuing weakness in the current regulatory arrangements. There continue to be issues around clarity in the advertising of mobile premium services, particularly as regards the nature of the service and the real cost of the service. Clarity of pricing and adequate information as to the nature of the service are of particular importance in the advertising of **subscription services**, given the ongoing nature of and charging for these services. The ACMA's quantitative research indicates that subscription services equate to approximately one in every four services purchased while TIO complaints data point to subscription services contributing to around four in every five complaints.

This indicates to the ACMA that the current business model for subscription services is itself an underlying source of problems for consumers. The subscription service business model generally relies on an automatic and ongoing debiting payment method. This places primary control of the receipt of the service in the hands of the content supplier, with the user of the service (who may or may not be the customer of the service) realistically having no (or only limited) means of controlling the frequency of receipt and the charging for the service.

Also, the pricing of subscription services rarely (if ever) gives any clear indication of the cost the consumer will incur over even a short period of time. Price is typically advertised as, for example, '\$10 join-up \$5 per msg' or for subscription chat services, cost per message pair (for example, \$4 send/receive, \$4.25 msg pair). In neither case is it apparent how many messages a customer will receive, nor that the number of messages sent will be at the content supplier's discretion.

To improve the transparency of the prices, terms and conditions and address the significant potential for consumer detriment associated with the subscription service business model, the MPS Code should require:

- use of a statement or term that conveys more clearly than 'subscription service' the fact that charges are directly debited at regular or ad hoc intervals from a customer's mobile phone account;
- provision of pricing information that more realistically foreshadows the cumulative price a customer may be charged for use of a subscription service. I am aware of several content delivery models currently on offer, including the applications model and some UK premium service business models which have moved to offering a fixed charge for a given period of time, which CA may wish to investigate; and
- provision of measures which give consumers greater control over the receipt of content and the associated charges provided by a subscription service; for example, mechanisms that allow individualised control of spending on mobile premium services and which can limit any detriment accrued to a level that the individual consumer can manage. This point is discussed in detail below.

Additional safeguards for young and vulnerable users of mobile premium services

A key issue with mobile premium services has been that the owner of the phone is not always the customer for the service. This is typically the case when parents buy a phone service for their children. The ACMA's qualitative research revealed an expectation among parents that measures be available to protect minors who use mobile premium services, as there was a strong perception that mobile premium services (and especially the subscription services) targeted minors. While these concerns are partially addressed by the ACMA's Barring Determination, which gives consumers the ability to bar access to all mobile premium services, there was a strong preference for an intermediate option for parents who wish to limit, but not terminate, their children's use of mobile premium services.

I am aware that some mobile carriage service providers already offer mechanisms by which consumers can limit their spending on mobile premium services. However, the ability to exercise close control over expenditure most commonly arises in post-paid accounts, while ACMA research finds that minors favour pre-paid accounts. The ACMA is aware that several carriers' default limits for mobile premium service expenditure are set at around \$100 per month. This appears more oriented towards limiting providers' exposure to debt risk rather than offering a means for consumers to control spending, particularly in light of the ACMA research which has found that parents believe \$20 per month to be a more appropriate spend limit for their children.

The ACMA considers that many of the problems associated with mobile premium services would be alleviated by giving customers – particularly parents – greater control over their levels of expenditure on mobile premium services. It seems a logical extension to ensure that the Code includes an obligation on mobile carriage service providers to provide standardised arrangements by which expenditure on mobile premium services can be restricted to customer-specified levels for both post-paid and pre-paid accounts.

Compliance and monitoring measures

The responsiveness of a co-regulatory measure can be enhanced where it includes a 'self-executing' remedy for a breach of the provision. When used appropriately, such provisions may obviate the need for complaints about non-compliance to be escalated to a complaint-handling body, and act as an incentive on code parties to ensure their compliance. A number of the matters presently covered by the Code – including advertising, supplying a mobile premium service, unsubscribing and opting out – may be amenable to such an approach. For example, a breach of the unsubscribe and opt-out requirements in section 7 of the code may be remedied by refunding charges incurred after the 'STOP' command is sent and confirmed. It would be desirable for CA to consider including self-executing remedies in any revised Code.

Evidence bases are an important tool in informing assessments of the Code's efficacy. In the interest of transparency and establishing a collaborative environment for the Code review, the ACMA will share its research and audit findings with CA. I would expect industry to similarly make available to parties negotiating the Code, the full results of all monitoring activities undertaken over the life of the Code.

The ACMA has been provided with top-line results of the compliance monitoring activity undertaken by Telstra and Optus (through WMC Global) and Vodafone Hutchison Australia, and I am pleased to note the significant improvement in compliance that has resulted from these activities. I further consider that mobile carriage service provider monitoring of compliance with the MPS Code is critical to the ongoing management of MPS Code

obligations. Such an obligation should be made explicit in the Code, with the requirement to publish aggregate results annually and to provide the ACMA with quarterly reports on compliance, including the details of content suppliers who have been found to be non-compliant and the nature and extent of their breaches.

Such transparency of self-regulatory activities will enhance the ability for mobile carriage service providers and the ACMA to work in tandem to identify and penalise the rogue providers that regrettably do tarnish the reputation of this industry from time to time. Public release of results will provide other interested stakeholders with tangible evidence of the work mobile carriage service providers are doing 'behind the scenes' to encourage a culture of compliance with industry rules for content suppliers, often quite removed from the customer and the consequences of any non-compliance.

Other Code review issues

Reports to the ACMA regarding SMS spam point to weaknesses in the obligations relating to confirmation messages for subscription services, forming part of the 'double opt-in' process by which consent to the supply of subscription services is acquired. The ACMA has received reports of multiple 'confirmation reminder' messages being sent if a person does not respond to the initial confirmation message. Again, it seems logical to extend the Code to include obligations that prohibit multiple 'reminder' messages.

There is also a range of additional and clarificatory matters in the attachment to this letter for the revision of the Code to address.

In considering issues for the Code review, the ACMA expects all code negotiating parties to adopt an evidence-informed approach for Code review matters, aligning with the broader governmental requirements of evidence-informed regulation. In particular, this is consistent with the requirements of the Office of Best Practice Regulation, the agency charged with scrutiny of all Federal regulatory instruments, which requires stringent and detailed evidence to inform any new regulatory impost.

Consumer representation

I am aware that CA has been working with the Australian Communications Consumer Action Network to find a way of ensuring effective consumer representation, consultation and participation in upcoming Code reviews and I really do appreciate the genuine efforts being made in this area. If CA is unable to deal effectively with submissions made by consumer representatives on any issue, CA should bring this to the attention of the ACMA and provide evidence to support the arguments as put forward by industry and consumer representatives for the ACMA's consideration.

Next steps

I am very cognisant of the fact that several of the outlined revisions, particularly potential changes to the subscription service business model and the introduction of standardised expenditure controls, may go to the core of the structure and delivery of services within this industry. I am also cognisant of the scale of the task CA potentially faces in securing the necessary industry agreement to create an effective and enforceable Code that will meet the ACMA's expectations. In this context, I would appreciate you identifying by 30 September 2010 those issues you believe can be addressed through the Code review process, and those, if any, you believe may well fall outside of the 'elasticity' of co-regulatory arrangements and may be better addressed by direct regulation. I understand CA has recently publicly requested input on terms of reference for the MPS Code, which will

undoubtedly inform your response. Should CA decide to revise the MPS Code, I would anticipate being presented with a Code for registration within six months from September 2010, and for a timetable of consultation to be developed in consultation with ACMA staff. Please note that I would expect any future code to have a review period of no more than three years given the pace of change in this industry, and not the five years that is the usual practice for CA codes.

You will also be aware of an occasional paper recently released by the ACMA, 'Optimal Conditions for Effective Self- and Co-regulatory Arrangements', which details the analytical framework the ACMA applies in assessing ex-ante whether or not the co- or self-regulatory arrangements are likely to be effective in any particular industry (and therefore, by implication, whether other regulatory options are more appropriate). You may find this paper instructive as insight into the assessment processes the ACMA will be applying in consideration of the mobile premium services industry. I have enclosed a copy of the paper with this letter.

If you have any further questions or wish to arrange a meeting to discuss these matters, please contact Nerida O'Loughlin, General Manager, Digital Economy Division at nerida.o'loughlin@acma.gov.au or 03 9963 6702.

Please note I am sending a copy of this letter to Keith Besgrove, First Assistant Secretary, Digital Economy Services at the Department of Broadband, Communications and the Digital Economy, given the Department's ongoing interest in this area.

Regards
Yours sincerely



Chris Chapman

Chairman



The following issues relevant to the review of the Code have been identified through ACMA monitoring and audit activity. The number references refer to specific clauses of the MPS Code.

Terms and Obligations requiring further clarification

- 3.1.2(a)(viii) – *which specifies that pricing information must be above the fold in online advertisements* - define what constitutes the “fold” in online advertisements. The location of the ‘fold’ can vary according to screen size and resolution.
- 4.1.3(d) – *which requires that prior to supplying a mobile premium service or renewing a subscription service, the content supplier must inform the customer that in accessing a Mobile Premium Service, they may incur Carriage Fees as well as Mobile Content Fees* - The scope of this clause requires clarification. Content suppliers have argued that the intent of this clause is the disclosure of carriage fees related to data downloads, however, the Guide to the Code also refers to carriage fees as also including standard SMS fees.
- 4.4.1, 4.4.2 and 4.4.3 - *which describe the way in which the double opt-in provisions should be delivered* should be restructured to improve clarity. The current structure of the clause is also convoluted and confusing with the double opt-in obligations for non-mobile initiated services and mobile initiated services not clearly differentiated. The double opt-in provision is a key obligation on Content Suppliers and a significant consumer safeguard. This clause should be labelled as relating to double opt-in obligations for initiation of subscription services, as opposed to the current heading of ‘Premium Messaging Subscription Services – Providing Information’. Re-naming the provision will make the nature of the obligations more explicit and easier for content suppliers to identify.
- 4.4.2(e) – *which states the subscription request message must instruct the customer to send an MO message to a particular short code in order to subscribe* – ACMA audit results have shown that content suppliers send messages which instruct a customer to send an MO message but it is not clear that the purpose of that MO message is to initiate a subscription. For example, the message might read ‘text YES to get your score’ but doesn’t state that by texting YES the customer is subscribing to the service. The confirmation request message should expressly indicate that the service being initiated is a subscription service.
- All obligations concerning pricing need to be clarified to ensure that all charges relating to the use of mobile premium services are disclosed including where Mobile Originating Messages are charged at small costs such as 25 cents. The view expressed by some content suppliers to the ACMA that as such costs are generally consistent with the usual cost of sending an SMS it is not essential that they be disclosed is not acceptable.
- 4.4.5 – *which requires that a content supplier must send recipients of subscription services expenditure update messages where increments of \$30 are reached within a calendar month* – should be revised to require expenditure update messages for any 30 day period. The clause currently allows a customer to spend \$28 in the last few days of a month and \$20 in the first few days of the following month, yet not receive a \$30 expenditure update.

New obligations

- An obligation should be introduced requiring that where service names are used in messages, they are consistent with the service name featured in advertisements for the short code. That is, all messages should carry the same service name. ACMA

audits have found that names used in advertisements can be different to the names used in messages sent as part of the service. Consistent naming ensures that the customer has transparency of the service they are purchasing.

- A requirement should be introduced that where a customer sends a message to opt out of marketing messages, no charges are incurred.