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Dear Communications Alliance,

Mobile Premium Services Code Review

The Australian Communications Consumer Action Network (ACCAN) would like to thank Communications Alliance for the opportunity to comment on the draft Mobile Premium Services (MPS) Code.

The draft MPS Code contains a number of significant new rules, for example measures to address advertising disclosures and provide a content supplier's helpline in MPS messages.

But the test as to whether a revised Code should be registered by the Australian Communication and Media Authority (ACMA) is not whether the code has more rules, or even a few better rules. Rather the test is whether the Code provides "appropriate community safeguards". In this regard, ACCAN is far from convinced that the draft MPS Code is sufficiently developed to warrant registration.

The ACMA provides minimal guidance about what constitutes appropriate community safeguards but its *Developing Telecommunications Codes for Registration – A Guide* states that the kinds of matters that the Code must address and the safeguards they must provide include:

- consistency with legislation;
- enforceable provisions;
- for consumer codes, rules that enable the effectiveness of the code to be demonstrated;
- performance benchmarks for measuring compliance;
- full and proper consultation; and
- full administration of the code including implementation mechanisms, complaints handling processes, compliance monitoring and sanctions provisions.

The draft MPS Code fails on the significant point of codifying compliance monitoring and sanctions provisions. It remains our expectation, as it has been since the outset of the code's review, that monitoring must be a codified, enforceable obligation. It is not sufficient for the industry to state (as they do at 1.8) that they 'intend' to undertake monitoring activities.

We note that the code proposes not to codify explicit details of code compliance reporting, instead leaving it to negotiations between industry and the ACMA. ACCAN believes this fails the crucial test of full and proper consultation. We expect that the code will be revised and full details of compliance reporting will be incorporated in the code. We look forward to a public discussion, preferably led by the ACMA, about the details of the compliance reporting "categories of information" and the ultimate codification of these agreed measures.

ACCAN is also concerned that the draft MPS Code has been revised quite separately to the Telecommunications Consumer Protection (TCP) Code. ACCAN has always expressed a view that the codes should, as much as possible, be aligned and preferably amalgamated into a single code. We remain concerned that two quite separate compliance models are being put forward in the two codes, neither of which in ACCAN's view is good enough.

The recent *Reconnecting the Customer Inquiry* has revealed how poorly consumer codes have been serving the Australian community. The revised MPS Code offers no new solutions and continues with an opaque, non-enforceable commitment to monitoring. ACCAN believes that codified rules are only as good as their compliance and enforcement regime. We regretfully find that the poor state of the compliance and enforcement in the draft MPS Code fails what might otherwise be useful rules.

The previous MPS Code (currently in force) relied on the Code Administration and Compliance Scheme which was completely defunct during the entire operation of the Code and continues not to be in operation. Its removal from the proposed code is pragmatic but leaves consumer representatives broadly questioning how seriously the industry is committed to monitoring compliance with its voluntary industry codes.

At this point we must refer to the excellent example already being set by the Telephone Information Services Standards Council (TISSC) and question why Mobile Premium Services aren't subject to the oversight conducted by the independent and transparent overseer of the 190- service industry. We provide more commentary below on aspects of the TISSC model that should be replicated more widely.

We look forward to seeing a revised code that addresses these concerns.

Reduction in complaints

ACCAN notes that Telecommunications Industry Ombudsman (TIO) complaints have revealed a dramatic reduction in MPS complaints by 70.5%.¹ However Galaxy research

¹TIO, *TIO Annual Report 2010*,
http://www.tio.com.au/data/assets/pdf_file/0008/9458/TIO_2010AR_ComplaintsLandscape.pdf page 14

commissioned by ACCAN in 2010 found that only 7% of people who are dissatisfied with their way their provider has handled a problem or complaint take it to the TIO.²

Improved consumer protection in draft code

The Mobile Premium Services Code has also made significant developments towards better consumer protection. This includes the provisions around advertising which was raised by consumer groups as a key problem in the past. We also support the removal of the guideline to allow clearer understanding of the Code's contents. We commend the retention of the double-opt in and MPS barring mechanisms.

ACCAN supports the new flexibility of code review process that will require the code to be reviewed every two years instead of five. This serves a practical purpose in responding to technological changes or changes affecting consumers more readily. ACCAN also commends the inclusion of the content suppliers' helplines in MPS text messages.

Unrequested MPS messages

Receiving unrequested MPS

A large number of vulnerable consumers are receiving an unacceptable amount of unrequested messages. 46.2% of consumers aged 14 to 17 received an unrequested message and more generally 85.5% could not discover why MPS were sent to their phone.³ In addition to this, in 2010 there were 3,325 possible and confirmed MPS Code breaches relating to section 5.1.1 (a) 'Content suppliers must not supply MPS products that have not been requested'.⁴

Being charged for unrequested MPS

In addition to not understanding why they have received MPS text messages, evidence reveals that consumers are being charged for this. Complaint issues about charges for services that have never been requested still account for 41% of all MPS issues⁵. To this end, there were 4,004 possible and confirmed code breaches about 5.1.1 (b) 'content suppliers must not impose charges for unrequested MPS' of the MPS Code.

ACCAN would like to see unrequested messages addressed in the MPS Code.

Education

ACCAN acknowledges that the draft MPS Code includes a flowchart to assist consumers in understanding the message flow process and a helpline for consumers to seek redress. However, consumers still report not being able to find solutions to their MPS complaints which indicates a need for more measures. A common complaint to the TIO from 2009 to

²Galaxy research, <http://accan.org.au/files/News%20items/Galaxy%20Research%20Fact%20Sheet.pdf>

³ ACMA, *Mobile Premium Users Survey 2010*, slide 37, available at: http://www.acma.gov.au/webwr/assets/main/lib311865/mobile_premium_services_user_survey_2010.pdf

⁴ TIO, 'Industry Code Data' in *TIO 2010 Annual Report*, p. 51, available at: http://www.tio.com.au/data/assets/pdf_file/0005/9464/TIO_2010AR_IndustryCodes.pdf

⁵ TIO, 'Complaints landscape' in *TIO 2010 Annual Report*, p. 15

2010 was that telcos and content suppliers were failing or refusing to assist consumers with their complaint. Another common complaint was consumers being unable to get in contact with a content supplier.⁶

Similarly, ACCAN has been contacted by consumers who were unable to find solutions once they had a complaint about Mobile Premium Services as highlighted in the case studies below.

Case Study 1

Andrew contacted ACCAN when his 12 year old daughter used a Mobile Premium Service to vote on the Logie Awards. The bill amounted to \$71.50. Andrew realised that the MPS text messages were continuing and immediately texted 'STOP' when he realised what was going on. Andrew contacted ACCAN because he did not know where to find redress.

Case study 2

Damien informed ACCAN that he had been receiving unsolicited messages from a competition that he did not knowingly enter. Each call has been charged to him at \$6.00 and these charges contributed to more than half of his phone bill. Damien contacted his provider and the company running the competition with no direction on how to solve the matter. ACCAN directed Damien to the 19SMS site so he could track down the content suppliers and resolve the issue.

To genuinely reduce the confusion about who consumers must contact and what to do, consumers need to be aware of the 19SMS website and the Telecommunications Industry Ombudsman's contact details. We recommend the MPS Code detail the following measures to ensure widespread education about the 19SMS website:

- Prominent display of the 19SMS website link on the major telcos' websites
- TIO contact details to be displayed on the homepage of 19SMS website
- Link to the ACMA's MPS fact sheet on the 19SMS website
- ACCAN believes the 19SMS website should be audited on a regular basis to ensure it is up to date with 19 Service Finder information for consumers

Compliance, enforcement and monitoring

The United Kingdom's Mobile Premium Service regulator, PhonepayPlus, currently requires all carriers to register with their Code of Practice in order to operate. This registration is mandatory and failure to do so may result in sanctions such as fines.⁷ This registration

⁶ TIO, 'Complaints landscape' in *TIO 2010 Annual Report*, p. 15

⁷ Phonepay Plus, '10 day countdown to regulatory changes for PRS industry' 22 August 2011, available at: <http://www.phonepayplus.org.uk/News-And-Events/News/2011/8/10-day-countdown-to-regulatory-changes-for-PRS-industry.aspx>

means that industry are be able to understand whether or not the content suppliers they work with are displaying best practice by registering with the code. It also provides carriers with the breach of history of another content supplier or carrier, any ongoing investigations, relevant breach history of suppliers and any prohibitions or bars that apply to content providers.

ACCAN believes that this approach exemplifies the highest standard of protection for consumers of Mobile Premium Services. The difficult legislative arrangements that operate in the Australian telco market make it impossible for the same scheme to operate.

But the TISSC does provide an example of how compliance monitoring and enforcement can be done well.

TISSC approach to remedies

TISSC has established levels for the seriousness of a breach of practice. The Arbitrator may determine one or more of the following remedies:

- (a) if there is any breach of the Code of Practice, the service provider may be required to rectify the breach within a period specified by the Arbitrator;
- (b) if there is a minor breach, the service provider may be required to provide a refund to a complainant;
- (c) if there is a significant breach:
 - (i) the service provider may be required to provide a refund to a complainant; and/or
 - (ii) the service may be suspended until the breach is rectified, or for a period as specified by the Arbitrator;
- (d) if there is a moderately serious breach:
 - (i) the service provider may be required to provide a refund to a complainant; and/or
 - (ii) the service may be suspended until the breach is rectified, or for a period as specified by the Arbitrator;
- (e) if there is a serious breach:
 - (i) the service provider may be required to provide a refund to a complainant; and/or
 - (ii) one or both of the following:
 - (A) the service may be suspended until the breach is rectified, or for a period as specified by the Arbitrator; or
 - (B) the service may be terminated;
- (f) if there is a very serious breach:
 - (i) the service provider may be required to provide a refund to a complainant; and/or

(ii) one or more of the following:

- (A) the service may be suspended until the breach is rectified, or for a period as specified by the Arbitrator;
 - (B) the service may be terminated;
 - (C) the service and services deemed to be held in breach in terms of Paragraph F.7.4 may be terminated;
 - (D) the carriage service provider may be requested to terminate a service agreement.
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Ideally, monitoring and compliance should be undertaken by one **independent** body to ensure that monitoring activities are streamlined and undertaken with as little complexity as possible. The Telephone Information Services Standards Council (TISSC) which regulates the 190 number industry is a formidable model for compliance and monitoring. The governing body of TISSC provides equal representation with three industry members, three community members and an independent chairperson, and is responsible for establishing the standards in the Code of Practice.

The ACMA has indicated that for a code to be effective, it must impose clear obligations on industry participants that can be enforced should a breach be detected.

Conclusion

With the expanded use of smartphones and associated applications there is a downward trend in the use of Mobile Premium Services.⁸ The introduction of double opt-in and barring measures has contributed to a reduction in the use and complaints of MPS. Even so, in 2010, more than half of users excluding 18 to 24 year olds expressed overall satisfaction with mobile premium services.⁹ MPS complaints persist and revision of the MPS code provides an opportunity to improve consumer safeguards. The improved measures in the draft MPS Code are a step in the right direction for consumers but as we state above, new code rules are weakened by the code's weak approach to compliance monitoring and enforcement. The final iteration of this progression would be a code that is enforceable and enshrines compliance and monitoring measures.

⁸ Australian Communications and Media Authority, *Communications Report 2009 – 2010*, p. 108, available at: http://www.acma.gov.au/webwr/_assets/main/lib311995/2009-10_comms_report-complete.pdf

⁹ Australian Communications and Media Authority, *Mobile Premium Services User Survey 2010*, slide 44 http://www.acma.gov.au/webwr/_assets/main/lib311865/mobile_premium_services_user_survey_2010.pdf