



Telecommunications Service Provider (Mobile Premium Services) Determination 2010 (No.2)

Submission by the Australian Communications Consumer Action Network
to the Australian Communications and Media Authority



April 2010



The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of communications services for all Australians.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will activate its broad and diverse membership base to campaign to get a better deal for all communications consumers.

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Response to the Telecommunications Service Provider (Mobile Premium Services) Determination 2010 (No.2) and related matters

Introduction

ACCAN is pleased to provide comments to the ACMA in response to Response to the Telecommunications Service Provider (Mobile Premium Services) Determination 2010 (No.2). The 'Do Not Contract' Rule and the 'Do Not Bill' Rule are important new tools that can be deployed to protect consumers from some of the excesses of SMS/MMS services. While we welcome these measures, we believe that consumer protection can be still further enhanced, in particular in relation to the 'Do Not Bill' Rule.

1. The *Do Not Contract* Rule

ACCAN strongly supports this rule prohibiting aggregators and content suppliers from contracting with a content supplier to deliver the content supplier's premium SMS/MMS service, where the content supplier has not completed the registration process. We support the underlying rationale behind requiring registration to increase transparency around the identity of content suppliers.

We note that the maximum penalties for breach of the proposed rules under section 570 of the *Telecommunications Act 1997*¹ is \$10 million for a body corporate and \$50,000 for an individual or partnership. For penalties to act as a real disincentive to breaching the proposed rules, they should be proportionate to the income derived by the illegal practice. Section 76 of the *Trade Practices Act 1974*² provides such an approach. Under this provision a company may be penalised three times the value of any benefit derived from the act or omission which has caused the breach³.

Recommendation:

- **That the penalties be proportionate to the income derived from the illegal practice**

2. The *Do Not Bill* rule

We support the *Do Not Bill* rule as a way of addressing situations in which there have been serious or repeated breaches of the MPS Code. In particular, we support the creation of a

¹s570 *Telecommunications Act 1997*: http://www.austlii.edu.au/au/legis/cth/consol_act/ta1997214/s570.html

² http://www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/s76.html

³ Alternatively, they may be charged 10% of their annual turnover or a flat amount of \$10,000,000.



mechanism which will be able to protect consumers from being unfairly charged for services which are being provided in way that are not compliant with MPS Code.

However, we feel that there are several areas that could be enhanced to better protect consumers.

Recommendations:

- **Notify consumers of suspension of service**
- **“Phoenix” companies *should* be subject to Do Not Bill Orders**
- **Impacts on vulnerable consumers should be considered**
- **When a company is suspended from charging, they should be required to produce evidence of rectification**

2.1 Notifying consumers

As mentioned above, ACCAN supports a mechanism protecting consumers from being unfairly charged for services which do not comply with MPS Code. However, we recognise that as a *Do Not Bill Order* will have general effect on a group of consumers, it is important to notify them that the SMS/MMS service will be suspended as a result of the Do Not Bill Order. Keeping consumers informed of any changes to services for which they are recipients promotes transparency and consumer empowerment.

2.2 “Phoenix” companies *should* be subject to Do Not Bill Orders

At 02.8 of the ‘Proposal – a new determination’, it states that individuals in a company which is the subject to a Do Not Bill Order may attempt to avoid the consequences of the Order by setting up a new company and transferring operations to that company – known as a ‘phoenix’ company. Surprisingly, it continues that:

The principles of natural justice suggest that the ACMA should not issue a Do Not Bill Order (or take any other type of compliance action) unless and until an adverse finding has been made against the new company in an ACMA investigation.

ACCAN does not agree that a presumption of innocence should be extended to a new company which may have been set up deliberately in order to avoid the consequence of a prior Do Not Bill Order. Such a presumption creates a loop-hole that invites non-compliance and sends a signal that legal obligations can be avoided. We believe that in such circumstances, the new company should be subject to the same period of suspension as the previous company, and further should be required to provide proof that they’ve rectified the problem (as outlined further in 2.4). At the very least, the presumption should be reversed, that is, unless and until the ACMA has completed an investigation into the new company, the company remains suspended from charging consumers.

2.3 Impacts on vulnerable consumers

At point 3.5 (1)(b) of the draft Telecommunications Service Provider (Mobile Premium Services) Determination 2010 (No.2), it provides three factors that the ACMA may consider when assessing whether a content provider has acted in a way that is significantly detrimental to the interests of customers or other consumers.

We believe that there is evidence that vulnerable and disadvantaged consumers suffer particular detriment in such situations. At point 3.5 (1)(b), a new sub-letter should be added



to reflect this, stating that the ACMA should consider the effects on vulnerable and disadvantaged consumers. According to the ACCC⁴, businesses need to act responsibly and take extra care in their dealings with such consumers, to ensure that no unfair advantage is taken.

According to the ACCC, some consumers may be disadvantaged or vulnerable in some marketplace situations if they:

- have a low income
- are from a non-English speaking background
- have a disability—intellectual, psychiatric, physical, sensory, neurological or a learning disability
- have a serious or chronic illness
- have poor reading, writing and numerical skills
- are homeless
- are very young
- are old
- come from a remote area
- have an indigenous background.

2.4 Suspension *plus* requirement to produce evidence of rectification

Point 3.6 of the draft Telecommunications Service Provider (Mobile Premium Services) Determination 2010 (No.2) states that “the duration of a do not bill order must not exceed 3 years”. We believe that along with prohibiting a company from billing for a period of time, a company subject to a *Do Not Bill Order* should also be required to produce evidence that the original problem leading to the *Do Not Bill Order* has been rectified.

In the absence of such evidence, the *Do Not Bill Order* should not lapse, and another *Do Not Bill Order* should be issued, along with the requirement to provide again evidence that the problem has been rectified.

Conclusion

This submission provides the ACMA with the opportunity to enhance the *Telecommunications Service Provider (Mobile Premium Services) Determination 2010 (No.2)* in protecting consumers. In particular, we believe strongly that “Phoenix” companies should be subject to Do Not Bill Orders, and thus avoiding the creation of any major loophole. Equally, a company that is suspended from charging for a period of time should also be required to produce evidence of how they’ve rectified the initial problem, before being allowed to operate the service again.

⁴ Dealing fairly with disadvantaged or vulnerable consumers, Australian Consumer and Competition Commission, available at <http://www.accc.gov.au/content/index.phtml/itemId/705064>