



# **Draft Mobile Premium Services Code (DR C637:2019)**

Submission by the Australian Communications Consumer Action  
Network

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## **About ACCAN**

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 represent the views of its broad and diverse membership base to policy makers, government and industry to get better outcomes for all communications consumers.

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## Executive Summary

The Australian Communications Consumer Action Network (ACCAN) welcomes the opportunity to comment on the Draft Mobile Premium Services Code (DR C637:2019) ('the Code').

Since the previous review of the Code undertaken in 2017 evidence has been brought forward indicating material misconduct in the sale of mobile premium services and direct carrier billing services. As a result ACCAN believes that there are strong grounds for the considerable strengthening of the Code.

ACCAN welcomes the inclusion of Direct Carrier Billing services in the draft Code, but is concerned that many of the additional protections proposed will have little or no substantive effect on consumer outcomes. This concern is driven primarily by the limited scope of many of the provisions, and their limited applicability when examined against actual market trends.

This submission sets out:

- the extent of the loss that consumers have faced;
- the reason for additional safeguards;
- the substantive problems associated with the draft provisions; and
- recommendations to address these drafting issues.

Despite consumers having faced material loss, the proposed additions to the Code are unlikely to provide substantial protections to consumers. Accordingly ACCAN believes that there is scope for considerable revision to the draft Code in order to ensure that there are appropriate safeguards for consumers and small businesses.

## Consumer loss – the case for change

Consumer losses associated with unintended purchases of premium services have been material and widespread. For consumers who are facing financial stress and are seeking to constrain their telecommunications expenditure, the additional costs associated with non-consenting or accidental purchase of premium services are material.

### The impacted population

ACCAN is aware that a significant number of consumers have been impacted by the unintended purchase of premium services, and that as a consequence the harm faced has been widespread. At a minimum the number of individuals that have been harmed by the non-consensual sale of these services have been outlined in recent court action.

In the course of these two court cases:

- Optus admitted that the number of customers impacted by unintended Direct Carrier Billing purchases is at a minimum 100,000 and possibly in excess of 240,000;<sup>1</sup>
- Telstra admitted that the number customers impacted by unintended Direct Carrier Billing purchases numbered in the tens of thousands and possibly on Telstra's estimate as many as 100,000 customers.<sup>2</sup>

### The estimated loss

The losses attributable to consumers who have been charged for services that they did not purchase have been significant. On the basis of the information provided in the course of these cases and extensive Ipsos surveying, ACCAN has estimated that the loss to consumers from unexpected charges for premium direct billing service is at a minimum:

- \$24.24 million as a consequence of Telstra's conduct;<sup>3</sup> and
- \$23.4 million as a consequence of Optus's conduct;<sup>4</sup>
- Cumulative losses to consumers in the order of \$47.64 million.

<sup>1</sup>. Australian Competition and Consumer Commission v Optus Mobile Pty Limited [2019] FCA 106, at 58, <<http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2019/106.html>>.

<sup>2</sup>. Australian Competition and Consumer Commission v Telstra Corporation Limited [2018] FCA 571, at 73, <<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2018/571.html>>.

<sup>3</sup>. ACCAN, 2017, *Mobile third party billing: Consumer experiences and expectations*, Sydney; Australian Competition and Consumer Commission v Telstra Corporation Limited [2018] FCA 571, at 52. This figure has been estimated by applying the rate of non-consent to revenue figures using ACCAN survey results (12%), if the limited survey results set out at 37 were accurate the estimated loss would be \$155.4 million. As the sample size was exceptionally limited ACCAN considers that this upper bound figure is likely to be inaccurate, but notes that consumer losses may be in excess of the baseline estimate.

<sup>4</sup>. This figure has been estimated by applying the rate of non-consent to revenue figures using ACCAN survey results (12%), against Optus revenues of \$195 million, set out in detail at [57] in Australian Competition and Consumer Commission v Optus Mobile Pty Limited [2019] FCA 106.

This misconduct has resulted in the imposition of fines in the order of \$10 million each on Telstra and Optus, with both entities admitting to misleading consumers under the terms of the *Australian Securities and Investments Act 2001* (Cth).<sup>5</sup> However, despite industry offering refunds for some non-consenting charges and the imposition of fines, the loss attributable to consumers has exceeded the costs of rectification and penalties imposed on industry.

## TIO statistics are useful, but do not reflect the extent of the harm

Consumers face material costs when seeking to complain about telecommunications services and this has been identified as a material barrier to consumers attaining effective redress. Research undertaken with respect to third party billing services indicated that 48% of consumers will not make a formal complaint due to the charge being worth a small amount and due being time poor.<sup>6</sup>

Moreover of those consumers surveyed by Ipsos only 6% contacted the Telecommunications Industry Ombudsman in order to seek redress.<sup>7</sup> As a consequence, the use of TIO statistics to assess the ongoing scale of this issue is fraught – noting that contacting the TIO does not necessarily entail the lodgement of a formal complaint.

Accordingly ACCAN considers that in the circumstances where consumers have strong disincentives to make formal complaints and seek redress, that it cannot be genuinely put forward that low rate of formal complaints is evidence that this issue has been resolved. Rather, it merely demonstrates that the costs that consumers face in attempting to resolve these charges exceeds what they could feasibly expect to attain in compensation.

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<sup>5</sup> Australian Competition and Consumer Commission v Optus Mobile Pty Limited [2019] FCA 106; Australian Competition and Consumer Commission v Telstra Corporation Limited [2018] FCA 571.

<sup>6</sup> ACCAN, 2017, *Mobile third party billing: Consumer experiences and expectations*, Sydney, p. 55; this results in sub-optimal enforcement, Shavell, S. 1982, 'The social versus the private incentive to bring suit in a costly legal system', *Journal of Legal Studies*, vol. 11, no. 2, pp. 333–9.

<sup>7</sup> ACCAN, 2017, *Mobile third party billing: Consumer experiences and expectations*, Sydney, p. 11.

## The case for additional safeguards

Telecommunications service providers have been able to generate considerable revenue and profit from the sale of mobile premium services. As a sector the mobile premium services sector has generated revenues in the order of \$397 million in the period since 2012, and profits of at least \$127.5 million based on the figures provided to the court by Telstra and Optus.

Since 2012 there have been numerous instances where industry participants have demonstrated that the financial incentives to mis-sell mobile premium services have outweighed consideration of customer interests. As a significant source of revenue and profitability for these service providers it is reasonable to believe that there are ongoing incentives for firms to continue to seek to sell these services to maximise their profitability.

During this period the case for deregulation of these services had been made, on the basis of good conduct on the part of industry. In 2014, the ACMA noted that improvements in the conduct with respect to the sale of mobile premium services were grounds for a less restrictive regulatory approach.<sup>8</sup>

However at the same time certain industry participants were engaging in conduct in contravention of the *ASIC Act 2001* (Cth) with respect to Direct Carrier Billing services. This situation was made worse by the failure of the then Code to capture new forms of third-party billing arrangements.

In the absence of comprehensive and enduring safeguards that reflect the incentives for industry to re-name or redefine third-party channels to obviate the intent of the Code, it is foreseeable that consumers will continue to face harm. Moreover, it is evident that some industry participants have the risk appetite to engage in conduct of questionable legality with the view that such conduct is unlikely to elicit penalties in excess of the profit to be made.

It should not be the case that regulatory frameworks, whether co-regulatory, self-regulatory or command-and-control create a circumstance where the imposition of penalties is considered the cost of doing business. Industry, through the Code process, has the ability to demonstrate its rejection of this attitude and commit itself to comprehensive safeguards for consumers to preclude the repetition of the outcomes that have been experienced with respect to mobile premium services.

Without the creation of additional safeguards, the risk to consumers associated with existing services and new services will remain material. Moreover, the legitimacy of the co-regulatory Code making process may itself be questioned should ongoing harm continue to occur.

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<sup>8</sup>. ACMA, 2015, *Optimal conditions for effective self- and co-regulatory arrangements*, Occasional Paper, pp. 19-20.

## Drafting issues

The drafting of the Code should seek to address the status quo, and put in place sound incentives for future conduct. ACCAN is concerned that the proposed scope of key protections within the Code will fail to capture the vast majority of customers, and therefore fail to have their intended effect.

### Mobile Premium Services not just Premium Services 4.1

The Code appears to have a drafting error or inconsistency between its intended scope set out at 4.1 and the table set out at p. 27 of the draft Code which indicates that the rules are to apply to Mobile Premium Services which are defined to include:

**Mobile Premium Service** means:

- (a) a Premium Messaging Service
- (b) a Premium Direct Billing Service; and
- (c) a Proprietary Network Service.

However, ACCAN notes that the drafting of the new rules including 4.1.12 and 4.1.13 refer to Premium Services which is defined as:

**Premium Service** means a Premium Messaging Service or a Premium Direct Billing Service and includes either or both a Subscription or a Single Purchase Service.

The result of the use of this definition is that the Code excludes the application of the protections set out at **4.1.12** and **4.1.13** to Proprietary Network Services. This drafting appears to be in error given the inconsistency with the summary table provided at page 27 of the Code. This table indicates that rules **4.1.12** and **4.1.13** are to apply to Proprietary Network Services in addition to the other services identified in the table.

In rectifying this drafting there is also opportunity for more explicit inclusion of Proprietary Network Services in provisions **4.1.12**, **4.1.13** and **4.3.4**. As the issues that apply to Proprietary Network Services are consistent with the issues that apply more broadly to Mobile Premium Services, ACCAN believes that there is ground for uniform treatment of these services.

ACCAN has received a series of reports that the use of Proprietary Network Services in remote communities has been a considerable source of loss for consumers. Problems of inadequate information concerning how these services operate and the charges that these services entail have consistently been referred to ACCAN.

For individuals residing in remote and regional Australia, continued access to their mobile service is their connection and lifeline to the rest of their community. The potential for individuals on low incomes to lose access to essential communications services as a result of inadvertent purchase of expensive mobile premium services is of material concern to ACCAN.

## Barring of Services: 4.1.12

Rule **4.1.12** of the draft Code provides that End Carriage Suppliers, Aggregators and Content Suppliers must provide information on the availability of barring when a customer makes an *inquiry* about premium services.

ACCAN considers that the customers should not be required to make an *inquiry* in order to be provided with information concerning the barring of premium services. Approximately half of all consumers are not aware that they can make third party purchases via their mobile phone accounts.<sup>9</sup> Accordingly it is unlikely that consumers will be inclined to make an inquiry and therefore trigger the operation of the rule.

## Recommended Drafting

ACCAN considers that the operation of rule **4.1.12** may be enhanced by redrafting it as follows:

*Barring: End Carriage Suppliers, Aggregators and Content Suppliers must provide information on the availability of barring **prior to the sale of a service, at the point of sale of a service and** when a Customer makes an inquiry about **Mobile Premium Services**. This information must include:*

- (a) A description of what **Mobile Premium Services** are and how charges for them are incurred;*
- (b) Confirmation that there is no charge for activating barring of **Mobile Premium Services**: and*
- (c) A description of how, and to whom, a Customer can make a Complaint about **Mobile Premium Services**.<sup>10</sup>*

ACCAN considers that in the absence of these changes, a significant proportion of consumers will remain uninformed about the existence of mobile premium services and continue to face unintended charges as a consequence. The provision of upfront information at the point of sale concerning the availability of barring should allow

<sup>9</sup>. ACCAN, 2017, *Mobile third party billing: Consumer experiences and expectations*, Sydney, p. 5.

<sup>10</sup>. ACCAN proposed drafting changes highlighted in blue.

consumers to more readily exercise control over the purchase of mobile premium services and constrain future harm as a consequence of unintended purchases.

ACCAN believes that this information should be made available at the point of purchase for consumers as part of the Critical Information Summary provided to consumers and via additional notifications and information at the point of purchase of a service.

## Default Spend Limit: 4.1.13

Rule **4.1.13** of the draft Code establishes that there will be a default spend limit of \$50 per month for premium services for all new residential customers using pre-paid and post-paid services. Although ACCAN welcomes the creation of a lower default limit for premium services than currently exists, the current drafting of the provision is unlikely to protect consumers.

### New residential customers

As rule **4.1.13** will only apply to *new* residential customers ACCAN has sought to determine what proportion of the total consumer base this would be. On the basis of publicly available data, the most recent research indicates that approximately 6.51% of all mobile numbers were ported in the 2017-18 financial year.<sup>11</sup>

The porting of numbers is typically associated with the formation of a new contract with a provider and in the absence of alternative population level statistics ACCAN considers that the porting figures give a fair indication of the proportion of new contracts formed in a year. This implies that approximately 6.51% of contracts would be *new* and consequently captured within the scope of rule 4.1.13. ACCAN notes however that the proportion of *residential* customers may be lower than the overall population and therefore the coverage of this provision may be lower.

### Small businesses

The scope of the provision also excludes small businesses from its operation, and ACCAN remains concerned that businesses may continue to face significant unwanted charges as a consequence. ACCAN considers that there is no clear basis for discriminatory treatment for small business customers, and that in absence of such a basis that the protections set out in rule **4.1.13** should apply to small businesses.

ACCAN regularly receives information from small businesses that have faced unwanted and unexpected charges for mobile premium services as a consequence of inadvertence on the part of their employees. The establishment of strong default limits would eliminate this problem for the vast majority of small businesses and reduce the burden associated with

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<sup>11</sup>. ACMA, 2018, *Communications Report 2017-18*, p. 119, p.5. The report notes that 2.271 million services were ported and 34.84 million mobile services in operation as at 30 June 2018.  $2.271m/34.84m = 6.51\%$ .

disputing these charges and seeking redress from service providers.

## Substance of the protections

Having determined that the provision would in principle cover 6.51% of the consumer market, ACCAN has then sought to examine the actual proportion of transactions to which the provision is likely to apply to. Research undertaken by Ipsos on behalf of ACCAN in 2017 indicates that of those consumers who have faced unexpected charges, 83% are for amounts in the order of less than \$30.<sup>12</sup>

Although Ipsos's research used a \$30 threshold figure, ACCAN considers that it is reasonable to expect that the current drafting of the provision would, at a maximum provide protection to 17% of the potential mobile premium service transactions. However, this would imply that the current drafting of the Code would provide protections with respect to 1.1% of all mobile consumers.<sup>13</sup>

ACCAN considers that a rule that provides protection to effectively 1% of all mobile services is unlikely to have any material effect on the problem of non-consensual charges. Accordingly we consider that there is an opportunity for significant revision of the proposed rule to provide all customers with appropriate protections.

## Recommended Drafting

In light of the material losses attributable to consumers as a consequence of non-consenting purchases, and the weak incentives for consumers to challenge low value charges ACCAN considers that a default limit for premium services of \$0 is warranted. The adoption of a \$0 default limit would bring the protections for mobile premium services into alignment with those offered to consumers using direct carrier billing services to buy apps and content over registration-only digital content services such as Googleplay and the Apple Appstore.

Accordingly ACCAN considers that the operation of rule **4.1.13** may be enhanced by redrafting it as follows:

*For a ~~new residential customer~~ Pre-Paid or Post-Paid **Customer** with an End Carriage Supplier, an End Carriage Supplier must limit a Customer's monthly expenditure on **Mobile Premium Services** to no more than **\$0**, ~~When the limit is reached an End Carriage Supplier must restrict the Customer's access to Premium Services~~, so that no ~~additional~~ expenditure can be incurred by the Customer unless the Customer requests the End Carriage Supplier to increase the limit.<sup>14</sup>*

<sup>12</sup>. ACCAN, 2017, *Mobile third party billing: Consumer experiences and expectations*, Sydney, p. 8.

<sup>13</sup>. The 1.1% figure represents 17% of all of the 6.51% of mobile numbers ported. This estimate may be lower as 4% of the aforementioned 17% of consumers could not recall the value of their purchases.

<sup>14</sup>. ACCAN proposed drafting changes highlighted in blue.

## Content of \$30 expenditure update: 4.3.4

Rule 4.3.4 of the draft Code requires that an update be sent to consumers when they have spent \$30 on non-subscription premium services within that month, or following the expenditure of a further \$30 per month. Rule 4.4.11 similarly applies the \$30 expenditure warning notification to a subscription premium service.

As outlined above however, the failure of the provision to explicitly refer to Mobile Premium Services in its drafting excludes Proprietary Network Services from the scope of the update requirements. In light of the material harm faced by users of these services ACCAN considers that it is appropriate to extend the expenditure update requirements to these services.

As noted elsewhere in this submission less than 17% of consumers face charges in excess of \$30 in value per month.<sup>15</sup> Accordingly advising consumers when they have exceeded a \$30 threshold of expenditure is unlikely to provide assistance except to those consumers that typically see bills well in excess of the average. This is concerning to ACCAN as a significant number of consumers who face unexpected charges are on low incomes, and have purchased low cost mobile services in an attempt to constrain their telecommunications expenditure.

In a market context where consumers can purchase pre-paid mobile services at the price of \$10 ACCAN considers setting the threshold for notification at \$30 or three times the entry level price is inappropriate and likely to be ineffective in protecting vulnerable consumers. Accordingly ACCAN supports the reduction in the threshold for notification to \$5 to ensure that all consumers using services are notified in a timely fashion.

## Recommended drafting

ACCAN considers that the operation of rule 4.3.4 may be enhanced by redrafting it as follows:

*\$5 expenditure updates: A Content Supplier must send an expenditure update to a Customer of a Single Purchase Service, as a standard, dedicated SMS message (with no Premium Fees charged to the Customer for the message):*

- (a) Once the Customer has incurred \$5 of Mobile Premium Fees in a single calendar month; and*
- (b) Each time the Customer incurs an additional incremental \$5 of Mobile Premium Fees in that calendar month.*

<sup>15</sup>. ACCAN, 2017, *Mobile third party billing: Consumer experiences and expectations*, Sydney, p.41.

ACCAN believes that the modification of this drafting will support the rapid identification of unexpected and non-consensual charges by consumers. Accordingly when faced with the prospect of loss consumers will be in a positive position to take immediate steps to mitigate and minimise any potential financial impact associated with mobile premium services.

## **Content of \$30 expenditure update: 4.4.11**

ACCAN considers that the issue associated with the mechanism to provide updates to consumers for individual purchases applies equally to the subscription services. As a consequence ACCAN believes that there should be consistent treatment under rule **4.4.11** with notifications being sent to customers when they incur charges of \$5 in a single calendar month, and additional notifications being sent as they incur incremental charges of \$5 within that calendar month.

## **Recommended drafting**

ACCAN considers that the operation of rule **4.4.11** may be enhanced by redrafting it as follows:

*\$5 expenditure updates: A Content Supplier must send a Subscription Premium Service Customer a standard, dedicated SMS message containing an expenditure update, with no Premium Fees charges to the Customer:*

- (a) Once the Customer has incurred \$5 of Premium Fees as a result of using a Subscription Premium Service in a single calendar month; and*
- (b) Each time the Customer incurs an additional incremental \$5 of Premium Fees as a result of using a Subscription Premium Service in that calendar month.*

## Conclusion

ACCAN thanks Communications Alliance for the opportunity to comment on the draft code. With suitable revisions ACCAN considers that the code can be an effective instrument for protecting consumers and small businesses that use mobile premium services and constrain the potential for customer harm.