

Mr. Chris Chapman
Chair, Australian Communications and Media Authority
PO Box Q500 QVB
Sydney NSW 1230

19 March 2009

Dear Mr. Chapman,

Re: Mobile Premium Services (MPS) Code and Guideline

We would like to register our concern regarding the Communications Alliance (CA) Mobile Premium Service Code (the Code) published yesterday. It is our firm belief that the Code does not provide adequate consumer protection and customers will continue to suffer significant detriment due to misleading industry practices.

The intention of the Code was to replace the Mobile Premium Services Industry Scheme, which came into force 1 December 2006 (MPSI). That Scheme contained clear rules about ensuring customers are informed about the services, including how to opt out of receiving any further services. As the body charged with handling complaints under the MPSI Scheme, the TIO recorded receipt of 7,086 complaints in the first 7 months of the Scheme's operation, or 1012 complaints per month. In 2008, the number of complaints rose to 13,899, or 1158 complaints per month. For both reporting periods, the complaint's main concern was receipt of services they had not requested, followed by complaints that, in spite of opting out of receiving further services, the opt out request was not acted on.

Clearly, the MPSI Scheme and its requirements for customer information, particularly information on opting out of services, have not been effective in stopping industry practice on mobile premium services that has caused such significant detriment to consumers. For consumers, therefore, it is vital that the regulatory mechanism that replaces the MPSI Scheme provides more than just a right for consumers to receive more information, there must also be a robust safety net that can be understood by consumers.

The Code includes rules about subscribe and unsubscribe functions, advertising, restrictions on advertising to minors, access to live customer service, complaints handling and refund policies, marking for all charged messages with "\$MSG" at the beginning of all SMS content services, expenditure updates and information about expenditure control tools. While useful, these rules are focused on information and do not address the need for an effective consumer safety net.

In seeking a more robust safety net for consumers, the consumer representatives on the CA Code Working Group asked that the Code also include stronger safety net provisions that could include a 'double opt-in' mechanism for all subscription services; easy unsubscribe steps; clearer advertising, especially highlighting where services are of a subscription nature; better protection for minors and vulnerable consumers; regular expenditure updates and real expenditure limits (call barring); clarification on each message that is not free; registration

processes for content providers with an exclusion from the network for all content providers who do not follow the Code; better information about the terms and conditions of each service and a service similar to “SMSRUS” in the UK; access to live customer service on well advertised help lines and better refund processes. They also asked for a more straightforward complaints handling process without referrals from the phone company to third parties. (For a fuller discussion on consumer protections sought by the consumer representatives on the CA Code Committee, see Appendix A)

Consumers also called for the Code to include industry funded, independent code monitoring provisions which would give the monitoring body the ability to propose remedial action where necessary, as happens in other industries. We consider this approach to be in the spirit of self regulation because the industry itself would take responsibility for a proactive and more persuasive approach that would result in a more immediate response focused on rehabilitation. Properly constructed independent monitoring rules in the Code will assist ACMA to enforce the Code and act as an effective deterrent to the use of misleading and confusing practices. The rules on monitoring in the current Code do not ensure that there will be funding available for monitoring nor do they ensure the monitoring will be independent or require any improvements in practices.

In all instances listed above, the consumer representatives were prepared to agree on Code rules that are significantly less of an impost on industry than obligations preferred by other consumer organisations. The consumer representatives agreed to these compromises on the proviso that an effective industry funded, independent code monitoring process would be included in the Code. It has not been included.

We urge ACMA **not** to support the MPS Code until the specific areas of community safeguards outlined above are addressed by specific Code rules. Should this not be possible, we call on ACMA to make a service provider determination that adequately addresses community concerns.

We also strongly support the actions already taken by ACMA using its existing powers under the Spam Act. We also encourage ACMA to use its full investigative and reporting powers to request information from suppliers in regards to carrier and carriage service provider agreements with content providers and aggregators; how many complaints all suppliers actually receive and address by making refunds; what education strategies they have in place for their customers and what their policies for reimbursements and refunds are. This information can be called for now without waiting for the Code to be registered.

We would also recommend that ACMA continue to stay in close consultation with the TIO in gathering more detail on complaints about the MPS short codes (19 numbers) as this may identify further systemic issues.

Finally we would like to make a statement regarding the process employed by Communications Alliance to develop this Code. Consumer representatives were excluded from the start; they were only included towards the end of the Code negotiations; the consumers did not have equal representation on the committee and the committee was not

independently chaired. Subsequently when the consumers raised serious concerns about the lack of adequate community safeguards in the Code it was published without a committee vote in contradiction to the CA Operating Manual. The consumer representatives have also been effectively gagged due a requirement of confidentiality until the committee is disbanded which is once again a CA Board decision. Consumer groups have widely criticised the telecommunications consumer code development process because consumer issues are not given an equal hearing. We look forward to a much more equal and democratic approach to code development in the future because these practices are not sustainable.

Thank you for your on-going concern regarding consumer issues. Should you wish to discuss this correspondence in more detail please contact Teresa Corbin, CEO at the Consumers' Telecommunications Network on 02 9572 6007 or on 0414 748 906. Given the Minister for Broadband, Communications and the Digital Economy's expressed interest in this issue we are sending a copy of this letter to him as well.

Yours sincerely,

Consumers' Telecommunications Network
Australian Communications Consumer Action Network
Choice
TEDICORE (Telecommunications Disability Consumer Representation)
Australian Privacy Foundation
Federation of Ethnic Communities Councils of Australia
Legal Aid Queensland
Telecommunications Consumer Group South Australia
Cyberspace Law Policy Centre
Connecting Up Australia
Legal Aid Queensland
Consumer Association Queensland
Hobart Community Legal Centre
National Children's and Youth Legal Centre
Country Women's Association of Australia
Australian Financial Counselling and Credit Reform Association
Deafness Forum of Australia
Australian Federation of Disability Organisations
Public Interest Advocacy Centre
Consumer Action Law Centre
National Ethnic Disability Alliance

cc. Minister of Broadband, Communications and Digital Economy
DBCDE Secretary

APPENDIX A

Double Opt-in

The Industry have only agreed to implement “double opt in” for subscription services signed up for on the internet because in these cases there is no message originating from the mobile handset linked to the account. Their argument is that the information based protections that are provided for elsewhere in the Code ensure that there is no need for “double opt in” for other ways for signing up for subscription services (e.g via a mobile or fixed phone). Consumer organisations are still not satisfied that the partial “double opt in” provisions in the Code will be adequate to protect consumers. Consumer representatives proposed a number of additional measures in this area in the Code negotiations to ensure informed decision making, however we are prepared to accept full “double opt in” for all subscription services regardless of how the service is initially solicited.

Protection for Minors and vulnerable consumers

The industry have refused to guarantee a better approach regarding the protection of minors and vulnerable consumers. To ensure that these groups are protected all new mobiles should come set to block MPS and it would require the account holder to opt in to using MPS services as a specific step. This is done in other jurisdictions overseas. Consumer representatives proposed a number of additional measures in this area however we are prepared to accept this measure as a final outcome to address this problem.

Expenditure Controls (call barring)

The industry have not included any commitment to implementing call barring in the Code rules as they claim it would be a large cost impost to industry. Our investigations reveal that it is not technically difficult or unreasonable expensive to implement full call barring options and that indeed one carrier already provides these options to consumers. This would assist in a number of areas involving unexpected high bills and assist in protecting minors and vulnerable consumers. Consumer representatives proposed a number of additional measures in this area however we are prepared to accept this measure as a final compromise.

Content Register

We are also now concerned about another clause that was in the Public Comment version of the Code but has been withdrawn on the advice apparently from the ACCC that it could be anti competitive (i.e. in breach of Part 4 of the TPA) This Code rule would allow for suppliers to not provide network access (via their contracts) to content providers who are not on the Content Provider Register. This rule linked with the proposed ACMA Service Provider Determination to “black list” providers who do not follow the Code for up to 2 years would act as a significant deterrent for bad practices. We understand that ACCC could authorise CA to include this in the Code and that there are a number of precedents for this to occur. It is also possible to get an interim authorisation for the Code rule so that the Code can progress to registration. We do not want to lose this important pillar of protection that we believe underpins the effectiveness of the Code and believe it must be re-included in the Code to ensure the Code has some power. We cannot understand why it was removed so hastily.