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Mr John Stanton
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By email: stanton@commsalliance.com.au

6 August 2010

Dear Mr Stanton

C637:2008 *Mobile Premium Services Code* Review

I refer to the Communications Alliance's call for comments for the scheduled review of the Mobile Premium Services Code (MPS Code).

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to comment on the operation and impact of the MPS Code since it came into effect on 1 July 2009. Our submission indicates that while the ACCC believes the Code has helped improve consumer outcomes, there are still significant consumer problems in relation to the provision of MPS that warrant strengthening of various aspects of the MPS Code.

Positive impact of the MPS Code

The ACCC acknowledges that the MPS Code has contributed to a positive impact on customer outcomes since that time. The ACCC believes that the range of additional safeguards that were incorporated into the MPS Code provides consumers of these services with higher levels of protection than under the previous Mobile Premium Services Industry Scheme (MPSIS).

The ACCC welcomes the decrease in the volume of complaints to both the ACCC and the Telecommunications Industry Ombudsman (TIO) about mobile premium services, although we note that complaints are still at unacceptably high levels. It is not clear whether this decline in complaints is primarily because of the impact of the additional safeguards or because of a decline in the popularity of mobile premium services – both factors are likely to have contributed to the decline.

Improved MPS Code provisions relating to informed consent; the adequacy of information provided to consumers in the promotion of MPS; processes to protect minors from encountering difficulties with MPS; and those relating to customer service and complaint handling, appear to be providing an improved level of protection for consumers.

In particular, the ACCC believes that the double opt-in mechanism has gone some way to reduce the high proportion of complaints relating to consumer allegations of unsolicited services. The ACCC notes, however, that the benefits of this mechanism can be defeated by not requiring suppliers to employ the double-opt in process for follow-up messages that are sent as call to action for the MPS service. In addition, in some cases the content of double opt-in messages can be unclear and unhelpful. These and related issues are discussed further in Attachment A where we suggest some potential improvements to the double opt-in requirement.

As mentioned above, the ACCC is also mindful that a decrease in complaints about MPS services is likely to be consistent with a decrease in overall usage of MPS services. The uptake by consumers of smart phone devices and use of software applications (or apps) is increasing as consumers substitute 3G mobile applications for mobile premium content services.

Outstanding concerns

Despite a decrease in the complaint volumes overall, the ACCC maintains a number of outstanding specific concerns about the operation of the MPS Code. These concerns have been identified from consumer complaints as well as experience in investigating and taking enforcement action against MPS industry participants over a range of issues. These concerns remain relevant and are set out in Attachment A. Attachment B notes ACCC enforcement actions about MPS matters since 2008. A summary of our recommended changes to the MPS Code is at Attachment C.

In particular some advertising practices in some sectors of the media for MPS continue to be problematic. The ACCC continues to monitor such practices and where appropriate, will continue to take enforcement action.

The ACCC considers that it is vital that carriers and aggregators make a substantially greater contribution to improved consumer outcomes in the provision of MPS. This can be achieved if MPS Code provisions encourage them to more actively engage with mobile premium service providers who engage in breaches of the law by requiring those providers to comply with the law as a condition of carriage of their services. Indeed if carriers and aggregators are aware of systematic contraventions and fail to act to stop them they may be putting themselves at risk of prosecution for being knowingly concerned with contraventions of the law by MPS providers.

Accordingly, the ACCC considers that the MPS Code chapters relevant to these concerns warrant review, with a particular focus on the sections relating to information provision, advertising and complaint handling.

The ACCC considers that a review of relevant MPS Code chapters provides an opportunity to address ongoing consumer protection issues in the telecommunications industry in a manner which complements the consumer protection provisions of the *Trade Practices Act 1974* and other legislation.

At a minimum, the MPS Code review processes must be able to deliver outcomes that will provide a tangible net benefit to telecommunications consumers. These outcomes

must include the development of robust processes and protections that will seek to prevent and minimise consumer detriment.

Please contact Brenton Philp on 02 6243 1220 or Shyam Ediriweera on 03 9290 6916 should you have any queries relating to this submission.

Yours sincerely

Marcus Bezzi
Executive General Manager
Enforcement and Compliance Division

Attachment A: ACCC Comment - Industry Code C637:2008 Mobile Premium Services

Information provision

Use of 'subscription'

The ACCC previously expressed concern that the word 'subscription' is not well understood by consumers, and that this had led to confusion about the nature of services being promoted. Specifically, the ACCC considered that consumers may not universally understand, in the context of MPS, that words or abbreviations such as 'sub', 'subscription' and 'subscribe' used in isolation (even when qualified by an asterisk) mean an ongoing commitment that includes the regular delivery of premium paid mobile messages. The ACCC considers that these words do not in themselves convey all of the relevant detail about the nature and cost of MPS.

In the matter *Australian Competition and Consumer Commission v Teracomm Ltd* [2009] FCA 903 (20 August 2009), his Honour Justice Moore stated in reference to print advertisements that used the term 'subscription' to describe the service:

> ...the services were still described in terms that suggested a one-off acquisition of information, a sound or an image... this aspect of the advertisement suggested a one-off provision of content and did not suggest a subscription service. [para 26]

It is clear from ACCC investigations and complaints that there continue to be problems around the use of the standalone term 'subscription' to describe the delivery of MPS and its associated costs. These problems relate primarily to the lack of clarity about nature of the service and the costs associated with its delivery.

The ACCC's initial concerns have not been addressed by the requirement under the current MPS Code to provide a 'per-message' cost alongside the word. The MPS Code should require that where used, the term 'subscription' should be qualified by the 'per-message' cost and frequency of service. This qualification should be provided in the voice-over for any oral representations or be placed alongside the word in any print media or other text.

The ACCC is also concerned that there are also no specific requirements in the MPS Code to provide the total cost of initiating a subscription service, for example the total cost of the sign up fee and the delivery of the first product.

In 2009 there were statutory changes which required the provision of the total single up front price in certain circumstances, as set out under the component pricing provision section 53C of the *Trade Practices Act 1974* (TPA). Where an MPS includes a sign-up cost and the cost of the first product and these costs are incurred at the commencement of the service they may be subject to these provisions. These two costs will also need to be displayed prominently as one single price. The MPS Code should include a provision with regards to this requirement.

Advertising requirements

Advertising of MPS is a source of ongoing consumer detriment to the extent that the ACCC has taken successful enforcement action against MPS industry participants that have engaged in misleading advertising practices. Attachment B notes ACCC enforcement actions concerning MPS matters since 2008.

While the MPS Code does include provisions that require clear disclosure of all salient terms and conditions there are other provisions that may weaken that requirement, such as the term 'within sufficient proximity' (3.1.2(a)(iii)) and the reference to qualifying disclaimers with an asterisk (3.1.3(b)).

The ACCC also maintains that some of the prescriptive MPS Code provisions – such as those specifying font sizes as per 3.1.2 (c) and in 3.2.3 and may lead MPS providers to believe that compliance with the MPS Code will automatically mean compliance with the TPA when this may not be the case.

The ACCC would emphasise that the test of whether an advertisement is misleading or deceptive depends on the overall impression created by the representation – in some circumstances, an advertisement that complies with the MPS Code's advertising requirements may still create a misleading overall impression in the mind of a consumer. In this regard:

- qualifications, such as asterisks and fine print disclaimers are not likely to be sufficient to dispel a misleading or deceptive overall impression
- pertinent costs and conditions regarding the nature and frequency of the service should be prominently displayed at the calls to action as well as near the short code in print advertisements, including scratch cards, on the internet and within mobile applications.
- audio-visual advertisements whether they be on television or online that feature distracting images can result in consumers not being aware of pertinent details related to the nature and costs of the advertised services, even if they are on the screen for the time required by the MPS Code (3.2.4(e))
- all costs and frequency of the service should be included clearly in the voice over and close to all calls to action, to provide greater clarity to consumers.

It is also important to note that the double opt-in requirement in no way mitigates the impact of misleading advertising.

These concerns are also relevant to non-subscription services. In order to avoid the double opt-in regime some traders appear to have changed their delivery mode by offering expensive one-off products, for example: "$20 per product". The high cost of such a service may not be clear if, for example, the images in visual advertisements are distracting and in particular if broadcast at a time when a younger viewer may respond, or be shown on a website that would attract minors. This has the potential to result in an unexpectedly high telephone bill. Again, the cost of such services should be made clear at all calls to action.

In relation to internet based services, the ACCC notes that some MPS providers are still placing pertinent details such as cost and nature of the service "below the fold" – that is, a consumer needs to scroll to the bottom of the web page to find the information. This is despite a provision in the MPS Code that prohibits such conduct (3.1.2(a)(viii)). To avoid this there should be a provision in the MPS Code that stipulates that all such details be placed at the call to action and where the consumer is required to enter their phone number online.

Introductory messages and adequacy of double-opt in

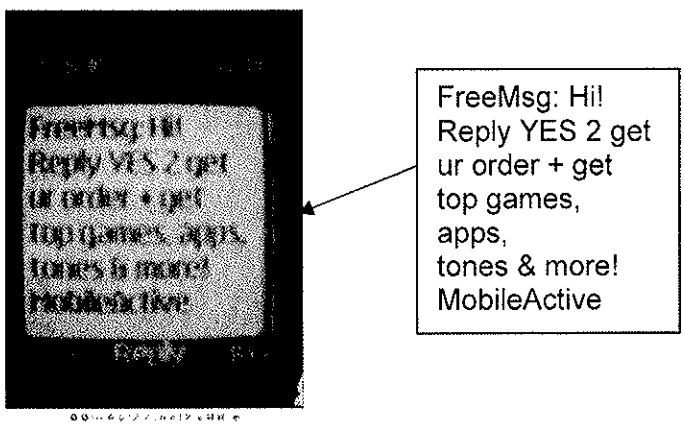
The ACCC considers that a fundamental element of establishing informed consent is that all material terms for any contract are clear and easy to understand. Consumers must be provided with sufficient information up-front and should not have to search for essential information in lengthy terms and conditions or fine print disclaimers away from the 'call to action'.

As required by the MPS Code, the opt-in text message sent to consumers should contain critical details including cost, frequency, duration of the service, and whether it is a subscription service. In other words, it should be clear and unambiguous for consumers. Given the ACCC's experience, the MPS Code should be more prescriptive on the manner in which the opt-in message is provided to consumers, as there seem to be too many instances where there is a lack of clarity for consumers about double opt-in (see examples below).

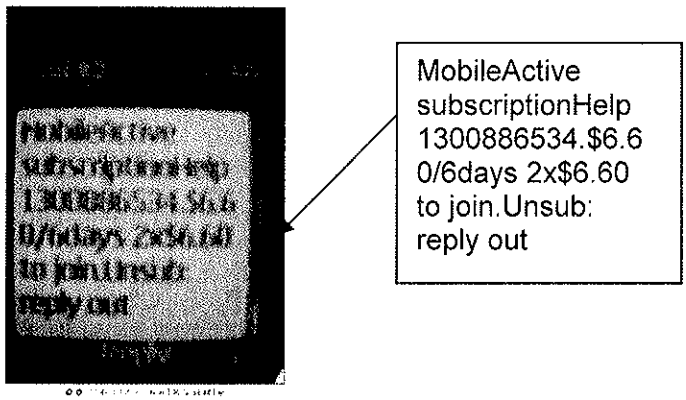
The ACCC notes that while this information is provided in some form for services surveyed, in some cases the content of double opt-in messages is unclear and unhelpful.

Testing of MPS shows that some services do not put costs in the first part of the double opt-in message for subscription services. On phones with smaller screens this can result in the consumer responding to the call to action without seeing the cost and frequency of the service as these are only to be found after scrolling down to the second screen. Below is a recent example of such a message that has come to the attention of the ACCC:

Opt-in message - Screen 1 – message in response to television advertisement screened 7 April 2010, on a Nokia 3500 Classic

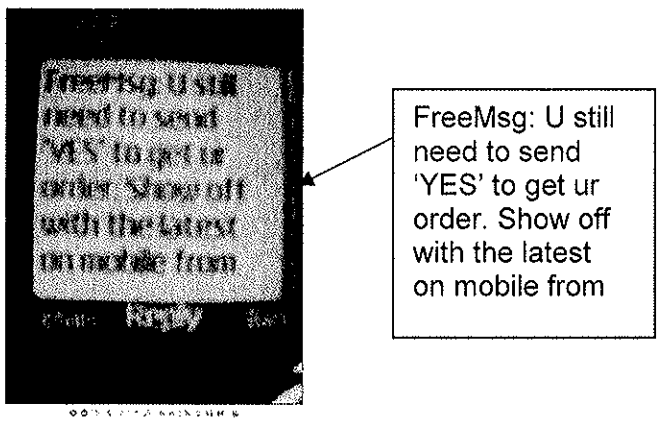


Screen 2 – message in response to television advertisement screened 7 April 2010.

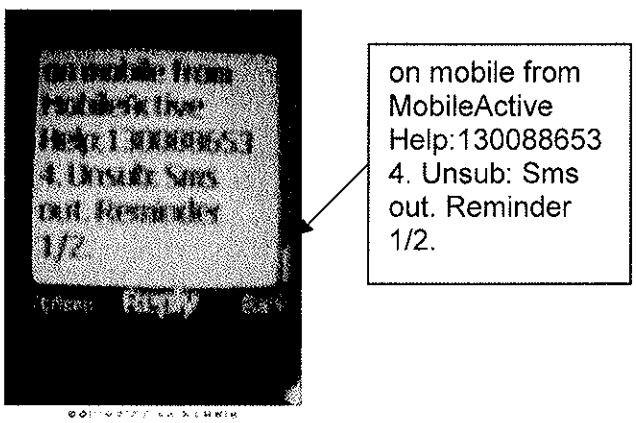


Some services send follow-up messages where the consumer has not replied to the opt-in message. For the services tested, these messages did not include the crucial cost and frequency of the service, only the call to action, help desk number and how to unsubscribe. Below are recent examples of reminder messages that do not include the cost and nature of the service.

Screen 1



Screen 2



The MPS Code does not extend the requirements for the initial double opt-in message to any follow-up messages that are a call to action for the subscription service. Such short-comings in relation to double opt-in mechanisms should be addressed.

Double opt-in and competitions and prizes

The ACCC has taken court action against traders that have combined a 'game of chance' with initiating an MPS. The ACCC is of the view that some consumers may not be aware that in agreeing to win or view a potential prize that they are signing up to a premium rate subscription service. This is of particular concern if the opt-in message is combined with agreeing to a prize and this agreement constitutes the confirmation of the subscription service.

There is also the issue of using the ploy of a 'game of chance' to entice consumers when in fact all consumers would be deemed 'winners'. The ACCC is of the view that it is potentially misleading to assert that a game, competition or quiz is a game of chance when it is not. This has been borne out by action taken in court.

In the matter *Australian Competition and Consumer Commission v Clarion Marketing Pty Ltd* [2009] FCA 1441 (4 December 2009), his Honour Justice Nicholas stated in reference to the scratch card promotions that were the subject of the conduct:

> There was, therefore, no luck or chance involved in matching the three symbols. Everyone who played was bound to win a prize... I think that the scratch cards were, in this particular respect, misleading and deceptive and likely to mislead and deceive. [paras 46-47]

And also:

> ...the scratch cards do not sufficiently bring home to the minds of ordinary and reasonable consumers that it is necessary for them to subscribe to the Moby Planet service to win a prize. [para 61]

His Honour went on to say in reference to the terms and conditions being placed on the back of the scratch card:

> ...it is by no means clear why people who scratched away the latex panel to discover that they were "winners" of one of the listed prizes should even bother to look at the reverse side of the scratch cards before sending the SMS containing their "prize code" ...All the information necessary for them to send this SMS appears on the front of the scratch card. [para 63]

The MPS Code should make reference to the appropriate way of using games of chance. Agreeing to view a prize or answering a quiz question or similar should not equate with opting into a premium rate subscription service.

Opt-in confirmation messages should only be used to opt-in to a specific MPS, not into any other offer. This should be clearly stated in the MPS Code.

Marketing messages

The ACCC maintains that consumer consent to receive a service should not also include consent to receive marketing messages. The offer of any premium service and the offer of receiving marketing messages should be put to the consumer separately.

The current practice for some traders seems to be to view the agreement to accept an MPS as also meaning to agree to marketing messages or 'related offers'.

While the MPS Code does include provisions that require consumers to be informed that by subscribing they are also consenting to their details being included in a marketing database (3.3.3(a)), it is the ACCC's view that this is not always 'stated clearly' as is required in 3.3.3.

There do not appear to be any provisions in the MPS Code requiring marketing information to be in the double opt-in message. For the services surveyed, the marketing information for the consumer was usually only located in the fine print.

Also, while the MPS Code does include provisions related to the opting out of marketing messages it appears that for the services surveyed that consumers are required to opt out of marketing messages separately from opting out of an MPS subscription.

The ACCC considers that the "stop" message to discontinue an MPS subscription should have the effect of also stopping all marketing messages from a content provider.

Furthermore, all offers to accept marketing messages should be made separately with clear information as to how to opt out of marketing messages as per the *Spam Act 2003*.

From reading complaints to the ACCC, it is possible that some of the complaints regarding unsolicited services may apply to consumers not understanding that the messages being received from a mobile premium number may be marketing messages.

Complaints handling

The ACCC continues to receive complaints from consumers about MPS complaint handling processes.

Previously the ACCC noted concerns about consumers not being informed of their consumer rights when making a complaint about MPS. At that time, the ACCC noted that consumers were not being informed about the existence of the current MPS industry scheme or its complaints handling processes at the time of making a complaint to Carriage Service Providers and MPS Providers.

The ACCC considers that MPS Code compliance training for staff involved in marketing, sales and customer care relating to MPS should be undertaken to ensure consistent factual information is provided to consumers. The ACCC considers that the

MPS Code should contain a requirement that such training be undertaken by all service providers, including Carriage Service Providers and aggregators. Carriage Service providers deliver MPS and must accept the ultimate responsibility for dealing with these issues.

A number of complaints to the ACCC indicated that help desk, for both the Carriage Service Providers and the content suppliers are either not providing a response at all or not being helpful.

Effective consumer protection requires consumers to be appropriately aware of their rights. Additionally, the ACCC considers that failing to provide accurate information, in particular at the time the complaint is made, may constitute misleading or deceptive conduct under the TPA.

Service barring

The ACCC considers that underage consumers are particularly vulnerable to MPS-related consumer detriment, and additional measures, such as call barring and mechanisms to control expenditure, including "hard caps" at the request of consumers for example, would reduce the likelihood of young consumers encountering problems.

The ACCC notes that the Australian Communications and Media Authority has implemented a rule requiring mobile phone companies to allow customers to request a bar on receiving any MPS. The ACCC expects call barring should reduce consumer detriment and better enable consumers to manage their expenditure. The ACCC notes that this rule came into effect on 1 July 2010 and as such it is not yet clear to what extent this measure is working to enhance consumer welfare.

Code review

The ACCC notes that after 1 July 2010 the MPS Code will be reviewed every 5 years subsequently, or earlier in the event of significant developments that impact on the MPS Code, or as otherwise determined by Communications Alliance.

Given the rapid development in communications technologies and service provision, it is appropriate to ensure the MPS Code is relevant and meets consumers and community expectations. To ensure that the MPS Code remains relevant the ACCC considers that a Code review should take place earlier than the stated 5 year review period. The ACCC considers a minimum two year timeframe for review more appropriate in the circumstances.

Attachment B - ACCC enforcement actions taken on MPS matters

- October 2008 - TMG Asia Pacific Pty Ltd and The Mobile Generation I BV (Netherlands) for TV 'text and win' promotions and internet pop-up (Wixawin). Outcomes were consent orders and section 87B undertaking for the Wixawin matter.
- February 2009 - ACP and Pacific Magazines – for print advertisements in their teen magazines. Individual section 87B undertakings were accepted from both publishers.
- June 2009 - AMV Holdings Limited (UK) – for print advertisements in teen magazines. Consent orders and section 87B undertaking were obtained.
- August 2009 - Teracomm Limited (Bulgaria) – for print advertisements in teen magazines. Court action was taken which resulted in judgment in favour of the ACCC.
- December 2009 - Clarion Marketing Australia Pty Ltd – scratch card promotions. Court action resulted in interlocutory injunctions (in June 2009) and final judgment in favour of the ACCC (December 2009).
- March 2010 - Star Promotions Club Pty Limited – scratch card promotions. Outcome was consent orders (March 2010).

Attachment C – Summary of recommended changes to the MPS Code

Use of 'subscription'

- the term 'subscription' should be qualified by the 'per-message' cost and frequency of service. This qualification should be provided in the voice-over for any oral representations or be placed alongside the word in any print media or other text.

- the total cost of initiating a subscription service should be displayed - for example the total cost of the sign up fee and the delivery of the first product.

Advertising requirements

- pertinent costs and conditions regarding the nature and frequency of the service should be prominently displayed at the calls to action as well as near the short code in print advertisements, including scratch cards, on the internet and within mobile applications. Term such as 'within sufficient proximity' in the context of MPS section (3.1.2(a)(iii)) and the reference to qualifying disclaimers with an asterisk (3.1.3(b)) weaken the requirements in the MPS Code for clear disclosure of all salient terms and conditions.
- stipulate that the cost and nature of the service must be placed at the call to action and where the consumer is required to enter their phone number online.

- ensure that all costs and frequency of the service should be included clearly in the voice over and close to all calls to action..
- avoid use of distracting images in audio-visual advertisements, even if they are on the screen for the time required by the Code (3.2.4(e)), to minimise the risk of consumer missing pertinent details related to the nature and costs of the advertised services.
- avoid prescribing font sizes as per MPS Code sections 3.1.2 (c) and in 3.2.3 – prescribing font sizes may lead MPS providers to believe that compliance with the MPS Code will automatically mean compliance with the TPA when this may not be the case.

3. Introductory messages and adequacy of double-opt in

- opt-in messages must be clear and unambiguous – information about the cost, frequency and nature of the service should be included in the first part of the double-opt in message.

- requirements for the initial double opt-in message must be extended to any follow-up messages that are a call to action for the subscription service - reminder messages where the consumer has not replied to the opt-in message must include the cost, frequency and nature of the service.

Double opt in and competitions and prizes

Opt-in confirmation messages should only be used to opt-in to a specific MPS, not into any other offer - agreeing to view a prize or answering a quiz question or similar should not equate with opting into a premium rate subscription service.

Marketing messages

- the offer of any premium service and the offer of receiving marketing messages should be put to the consumer separately with clear information as to how to opt out of marketing messages as per the *Spam Act 2003*. Consumer consent to receive a service should not also include consent to receive marketing messages.

- the 'stop message to discontinue an MPS subscription should have the effect of also stopping all marketing messages from a content provider.

Complaints handling

Staff involved in marketing, sales and customer care relating to MPS should undertake MPS Code compliance training to ensure consistent factual information is provided to consumers. Such training should be undertaken by all service providers, including Carriage Service Providers and aggregators.

Mechanisms to control expenditure

Suppliers should be required to implement mechanisms, including 'hard caps' for example, upon request to allow consumers to control their expenditure.

Code review

The MPS Code should be reviewed every two years.