Mobile Premium Services - The New Regulatory Regime

Adrian Lawrence and Simone Brandon outline the new regime for the regulation of Mobile Premium Services, including an examination of the Mobile Premium Services Code, recently registered by ACMA.

On 18 May 2009, the Australian Communications and Media Authority (**ACMA**) announced a new set of regulatory measures in respect of Mobile Premium Services (**MPS**). The centrepiece of the regulatory strategy is the registration of the Mobile Premium Services Code (**Code**) under the co-regulatory provisions of the Telecommunications Act 1997 (Cth) (**Act**). The Code was developed by the telecommunications industry and facilitated by the Communications Alliance through a working committee comprising representatives from all relevant sectors of the mobile premium services industry and consumer groups. The Code, accompanied by the Mobile Premium Services Guideline (**Guideline**), places obligations on carriage service providers and content service providers in relation to the provision of mobile premium services and took effect from 1 July 2009.

The other measures announced by ACMA on 18 May 2009 were as follows:

- ACMA intends to create a new service provider determination to complement the Code, which will:
    - require mobile carriers to implement call barring mechanisms for MPS on their mobile networks on or before 1 July 2010, allowing consumers a choice to block such services should they so desire;
    - require all MPS content providers to become registered on an industry register to be established by Communications Alliance; and
    - provide rules for the deregistration content providers, meaning that "rogue operators" will be prevented from supplying services in the Australian MPS market; and
- a comprehensive framework for the monitoring of MPS services and compliance with the Code and service provider determination.

Background to the Code

The Code and Guideline supersede the Mobile Premium Services Industry Scheme (**Scheme**) which was registered by ACMA in 2006. The Scheme was made under the Telecommunications Service Provider (Mobile Premium Services) Determination 2005 (**Determination**) and dealt with both consumer protection and content regulation issues in relation to MPS.

Following the 2008 commencement of the content services amendments to the Broadcasting Services Act 1992 (Cth) (**BSA**) and the consequent registration of the Internet Industry Code of Practice – Content Services Code under Schedule 7 of the BSA, those parts of the Determination and the Scheme dealing with content regulation issues became redundant.

Industry participants and regulators proposed that the remaining issues covered by the Scheme, dealing with consumer protection matters, could be dealt with by an industry code made under the Act, allowing for the repeal of the Determination (which repeal has now occurred pursuant to the Telecommunications Service Provider (Mobile Premium Services) Revocation Determination 2009).

The Code is the result of a substantive review of the operation of the Scheme, resulting in more stringent advertising rules, improved consumer protections and complaints handling requirements, particularly in relation to subscription services.

Scope of the Code

The Code regulates the provision of MPS. This term incorporates premium SMS or MMS as well as proprietary network services (walled garden or portal content provided by mobile carriers). This article focuses primarily on the provisions that relate to premium messaging services, rather than proprietary network services, as this is the primary focus of the Code.

Communications Alliance will manage the on-going maintenance of the Code including maintaining a register of members, considering ongoing compliance issues, promoting the Code and conducting broad-based consumer and industry awareness-raising activities.

The centrepiece of the new regulatory strategy is the registration of the Mobile Premium Services Code

The Code establishes consumer protection and complaints-handling requirements for the MPS industry by setting requirements in relation to:

- information to be included in advertising and the display of fine print;
- the provision of cost information to customers prior to their use of a service;
- a "double opt-in" requirement for premium messaging services; and
- simplification of process to unsubscribe from subscription services and to opt-out of marketing messages.

The Code places obligations jointly or separately on carriage and content service providers. The arrangements recognise the respective roles of these parties in the service supply chain, placing obligations where they most appropriate.

Whilst the Scheme also contained requirements in relation to advertising, cost information, opting in and unsubscribe mechanisms, the Code strengthens these provisions by setting out stricter and clearer requirements in each case.

Key Code provisions

Advertising

The Code includes specific requirements for TV, print, online and radio advertising. Pricing information must be displayed accurately and within sufficient proximity to the premium messaging service number (**short code**), in the same orientation and direction as the short code, to make it obvious the pricing applies to that number.

For subscription services, the word "subscription" or "subscribe" must be displayed in a prominent and highly visible manner in the main body of the advertisement. Font size and display time requirements are also set out for different media. Information must not be "below the fold" for online pages, that is, it must be visible without the user having to scroll down the page.

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Advertising cannot be placed in media which is primarily targeted at children under the age of fifteen. If the placement, content and context of an advertisement is such that it is likely to attract a significant number of minors to use that service, the advertisement must include a warning to the effect that those under eighteen years of age must seek permission of the account holder before using the service.

Double opt-in for subscription services

Throughout the Code, additional requirements are included in respect of processes for the provision of subscription messaging services, designed to ensure the customer is aware that they are entering into an ongoing transaction rather than receiving a single piece of content. Key to these requirements is the "double opt-in" process whereby a consumer who has made an initial request for a subscription service must receive and respond to a second opt-in message prior to the commencement of the service.

Further, customers who initiate a subscription service via a mobile, WAP, IVR or other mechanism must be sent a separate message to their mobile instructing them to opt-in to confirm the subscription by sending a text message to a particular short code. Customers must also be provided with specific pricing, helpline and unsubscribe information via SMS, in addition to the provision of this information in advertising.

Expenditure management

The ultimate expenditure management tool is the cessation of a service and the requirement for a universal 'stop' command remains in the Code: content service providers must allow customers to unsubscribe from services by sending the word 'stop' to a given number, preferably as a reply to the message containing the service. The existing requirement to provide $30 expenditure notification messages has also been maintained, with additional clarification to ensure that the notification occurs for each incremental spend of $30 within a calendar month.

In addition, a new website (www.19sms.com.au) has been developed in conjunction with Communications Alliance to provide a range of information about MPS to consumers. The website provides advice on how premium messaging services are obtained, how to manage expenditure and how to stop receiving a service.

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Post-subscription marketing

Where a customer unsubscribes from a messaging service, the provider may not send any further marketing messages unless the customer opts back in to receive marketing material. The MPS provider may invite customers to opt in for marketing in the unsubscribe confirmation message that is required to be sent.

Helpline and complaints

Content service providers must offer a local or free-call helpline so that customers can make complaints or opt out of a subscription service or receipt of marketing messages. The helpline must be staffed by 'live agents' from 9 to 5 on weekdays. Content service providers must also have a process for continuously analysing complaints to identify recurring problems and trends so that they can seek to eliminate the underlying causes of complaints. Content service providers must respond to complaints within two business days of receipt. Carriers are also under an obligation to seek to resolve complaints that are not resolved by content service providers, or which are referred to the carrier by the Telecommunications Industry Ombudsman (**TIO**).

Guideline

The Code has been drafted to focus on defining desired outcomes via high level rules rather than prescribing detailed processes. A "how to" guide to assist in the implementation of those requirements as been developed as a companion document in the form of the Guideline. It provides clear, succinct rules and sufficient information on customer information and pricing messages, subscription services and advertising, combined with practical examples. As with the guideline that existed under the Scheme, the new Guideline is intended to become an industry benchmark document used for complaint resolution.

Moving forward

Under the Act, the TIO has the power to investigate, facilitate a resolution and give direction in relation to complaints regarding Code matters. ACMA can direct that a Code participant comply with the Code in the event of a contravention. In terms of advertising, the ACCC also has the power to take action in relation to misleading or deceptive claims under the Trade Practices Act 1974 (Cth) (**TPA**).

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The key issue upon which the success of the Code and supplementary regulatory measures will rest, as was the case with the Scheme, is the level of compliance with the provisions of the Code. While the majority of industry participants have been compliant with the Scheme and will continue to comply with the Code, those who do not will only be encouraged to do so by some level of enforcement. During the life of the Scheme, no official action against non-compliant operators was brought by ACMA. In relation to the Code, however, ACMA has already indicated its intention to closely monitor and, where necessary, enforce the provisions of the Code, with ACMA chairman Chris Chapman promising "a rigorous monitoring regime" and noting the potential for penalties up to $250,000 for non-compliance.

The ACCC has also recently become active in the MPS arena, including action under the TPA against a UK and a Bulgarian company, both of which were supplying MPS into Australia from offshore. In addition, carriers, under their contracts with aggregators and content service providers, are another mechanism for the enforcement of Code compliance, for example requiring MPS providers to refund customers where necessary and removing non-compliant services from their networks.

The Code is the outcome of a review of the Scheme and effectively forms the response to criticisms levied at the Scheme's perceived ineffectiveness. As with the Scheme, it is a result of collaboration between carriers, aggregators, content service providers and consumer groups, with increased engagement by regulators including the Minister. It is to be hoped that such close engagement can be maintained, to encourage and where necessary enforce compliance. In any event the Code will be reviewed in 12 months, ensuring that any issues will be revisited shortly.

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