



Changes to the restrictions on access to Mobile Premium Services

An ACMA consultation paper relating to the amendment of the *Telecommunications Service Provider (Mobile Premium Services) Determination 2005 (No.1)* and a variation to the *Telecommunications Numbering Plan 1997*.

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SUBMISSIONS TO ACMA

ACMA invites submissions from industry and the public on matters set out in the discussion paper to assist it in finalising the proposed Restricted Access Systems Declaration.

The closing date for comment is 5.00 pm on Thursday 29 November 2007.

Submissions received after this date may not be considered in finalising the amendments.

ACMA encourages people to make submissions electronically by email to:

NewContentRegulation@acma.gov.au

Written submissions can be addressed to:

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Publication of submissions

In general, ACMA publishes all submissions it receives.

ACMA prefers to receive submissions which are not claimed to be confidential. However, ACMA accepts that a submitter may sometimes wish to provide information in confidence. In these circumstances, submitters are asked to identify the material over which confidentiality is claimed and provide a written explanation for confidentiality claims.

ACMA will consider each claim for confidentiality on a case by case basis. If ACMA accepts a confidentiality claim, it will not publish the confidential information unless required to do so by law.

When can ACMA be required by law to release information?

Any submissions provided to ACMA may be released under the *Freedom of Information Act 1982*. ACMA may also be required to release submissions for other reasons including for the purpose of parliamentary processes or where otherwise required by law (for example a court subpoena). While ACMA seeks to consult and where required by law, will consult with submitters of confidential information, before that information is provided to another body or agency, ACMA cannot guarantee that confidential information will not be released through these or other legal means.

New content regulatory framework established by Schedule 7 of the Broadcasting Services Act

The *Communications Legislation Amendment (Content Services) Act 2007* (the Content Services Act) was passed on 20 June 2007 and inserts a new Schedule 7 into the *Broadcasting Services Act 1992* (the Broadcasting Services Act).

Schedule 7 amalgamates the regulation of all content services delivered via carriage services and extends the regulatory framework established under Schedule 5 to a broad range of content services delivered on convergent devices. The Content Services Act also repeals parts of Schedule 5 of the Broadcasting Services Act as it applies to content services and obligations on internet content hosts.

Schedule 7 is due to commence on 20 January 2008.

The main elements of the new content regulatory framework in Schedule 7 to the Broadcasting Services Act are:

- Extension of obligations to live streamed content and categorising content services as: hosting services, live content services, links services and commercial content services;
- a prohibition on X18+ and RC content (all classification categories as defined by the *Guidelines for the Classification of Films and Computer Games 2005*);
- a prohibition on R18+ content, unless it is subject to appropriate access restrictions;
- a new prohibition on MA15+ content, unless it is subject to appropriate access restrictions;
- ‘take down’ or ‘access removal’ notices to remove access to content that is the subject of a complaint; and
- a co-regulatory approach that provides for the development of industry codes to address issues including the classification of content, procedures for handling complaints about content and increasing awareness of potential safety issues associated with the use of content services.

Under Schedule 7, ACMA has the power to investigate complaints about potentially prohibited content on a wide range of content services, including the internet, monitor compliance with industry codes and undertake necessary enforcement action.

IMPACT ON CURRENT REGULATORY ENVIRONMENT

Schedule 7 will replace both the existing restricted access arrangements for internet content in place under Schedule 5 and existing interim arrangements for mobile premium content under the *Telecommunications Service Provider (Mobile Premium Services) Determination 2005 (No.1)* (MPS Determination) and the Mobile Premium Self-Regulatory Scheme (MPSI Scheme) established under that instrument.

Schedule 7 also requires ACMA to make a restricted access systems declaration to regulate access to R18 content and MA15+ content (in certain circumstances),

including internet content, live content services and mobile premium content whether the service providing the content has an Australian connection.

A number of changes to related instruments are also required including:

- Variation to the *Telecommunications Numbering Plan 1997* (the Numbering Plan).
- Development of new industry codes of practice under Schedule 7.
- Review of the Internet Industry Schedule 5 codes of practice.

The MPSI Scheme is separately required to be reviewed every 12 months. Communications Alliance, the administering body, is currently reviewing the MPSI Scheme and will be incorporating changes stemming from the commencement of Schedule 7 as part of this review.

CURRENT ARRANGEMENTS FOR THE REGULATION OF MOBILE PREMIUM SERVICES

The Minister directed the former Australian Communications Authority (ACA) on 13 May 2004 to establish interim regulatory controls on access to age restricted content supplied via mobile phones, whether the content was supplied by premium rate SMS and MMS or on mobile portals. The former ACA made the MPS Determination on 29 June 2005 to address these concerns.

The arrangements established under the MPS Determination were made pending the development of the Government's longer term approach to regulation of emerging content services.

In addition to the Minister's requirements, the ACA included consumer protection requirements in the service provider determination relating to the transparency of premium content services; assessment of content; escalated handling of complaints; and access restrictions or monitoring of mobile chat room services.

Key features of the interim arrangements under the MPS Determination are:

- Prohibition of content provided via premium mobile services that is or would be rated X18+ or is, or would be, refused classification.
- Restricted access to content that is or would be rated MA15+ and R18+ (including measures to verify the age of customers wishing access to such content).
- Rules to protect children from predatory behaviour while using chatrooms that are provided via premium mobile services.
- Rules to ensure the transparency of information on costs and terms and conditions of use of premium mobile services.
- Arrangements for the handling of complaints and the application of remedies where complaints are upheld.

- Enforcement powers allowing ACMA to issue interim take-down notices, interim access-removal notices and final access removal notices in relation to offending content.

An equal emphasis of the MPS Determination was the establishment of an industry self regulatory scheme which must contain rules about providing mobile customers with clear and transparent information on the costs of the service being accessed, the terms and conditions of use of mobile premium services and the handling of complaints arising from the use of mobile premium services.

The Mobile Premium Services Self-Regulatory Scheme (MPSI Scheme) was developed by industry and approved by ACMA on 28 September 2006. The MPSI Scheme is the self-regulatory scheme for the purposes of the MPS Determination.

During the same period the Internet Industry Association undertook a review of its Codes of Practice and in recognition of the growth of the use of convergent devices, in conjunction with mobile carriage service providers, incorporated provisions into its Content Code 2 that would apply to mobile portals provided by mobile carriage service providers who are members of the Internet Industry Association. The revised codes were registered by the former Australian Broadcasting Authority on 26 May 2005.

SCOPE OF THIS CONSULTATION PAPER

The new content regulatory framework requires amendment to existing regulatory arrangements for mobile premium services and the creation of new instruments to facilitate the implementation of the Government policy intention expressed in Schedule 7.

This discussion paper is concerned with the amending Determination at Attachment A which will remove content-related provisions from the MPS Determination that are obviated by the creation of Schedule 7.

ACMA also seeks feedback on two regulatory mechanisms relating to ongoing provision, by the mobile premium services industry, of safeguards to protect consumers from financial detriment:

- the retention of the MPS Determination and the MPSI Scheme (as revised by the amending Determination at Attachment A); or
- the possibility of replacing the residual provisions of Determination and MPSI Scheme with a Part 6 code.

This discussion paper also seeks comment on a proposed variation to the Numbering Plan at Attachment B to move the requirement that age-restricted services provided on premium rate numbers use numbers with specified 19x prefixes from the MPS Determination into the Numbering Plan.

Amendment to the *Telecommunications Service Provider (Mobile Premium Services) Determination 2005*

REPEAL OF CONTENT RELATED PROVISIONS

ACMA proposes to remove all the provisions of the MPS Determination that relate to the restriction of access to content and content classification, as these will now be articulated in other instruments:

- Paragraph 2.2(a)(i) of the objects of the Determination outlines the intention for the Determination to regulate age-restricted content;
- Part 3 deals with the prohibition and restriction on access to certain services as the matters therein will either be covered by Schedule 7, replaced by the proposed RAS Declaration, inserted into the Numbering Plan or removed completely from legislation
 - Paragraph 3.1 which deals with prohibition and restriction of access to certain content services.
 - Paragraphs 3.2, 3.4 -3.7 which deal with the supply of age-restricted content, including age verification requirements, reasonable diligence checks, compliance plans, record keeping and ACMA's ability to audit those plans.
 - Paragraph 3.3 specifies number prefixes on which age restricted services can be supplied. It is proposed that these provisions be repealed and form the basis of the proposed variation to the Numbering Plan, discussed below.
- Division 2 of Part 5 of the Determination deals with requirements of an MPSI Scheme. Content related provisions proposed to be removed are:
 - Paragraph 5.5(3)(b) which will be amended to remove reference to age restricted services
 - Paragraph 5.5(3)(c), which specifies that the MPSI Scheme set out procedures for assessing the classification of mobile content. These procedures are now dealt with under clause 82 of Schedule 7;
 - Subparagraph 5.6(1)(c) which requires the removal of content or access to content in a self regulatory complaints handling procedure
 - Subparagraphs 5.6(1)(f)(iii) and (iv), which provide for the obtaining of advice from a classification board regarding the classification of content and to rely on that advice in determining a complaint. Provisions for ACMA to refer content to the Classification Board for classification exist in Schedule 7; and
 - Subparagraph 5.6(1)(f)(vi) which provides for the giving of directions in connection with a complaint including directions to remove content or remove access to content
- Paragraphs 6.1 and 6.2, which detail ACMA's enforcement provisions. ACMA will be able to issue take down notices and access removal notices to content providers under Schedule 7 and has also been granted a range of other investigative powers. However it is proposed that transitional provisions be included to cover current ACMA investigations. Detailed enforcement

proceedings, depending on the nature of the content, will be provided for in Part 3, Div 3-4 of Schedule 7

- A number of definitions from Part 1.3 of the MPS Determination will no longer be required due to the removal of regulation to age restricted content in the determination.

These proposed amendments are machinery in nature and are to ensure consistency with the content regulatory framework created in Schedule 7 and to remove any regulatory overlap. The amending Determination at Attachment A reflects the changes required to repeal the relevant provisions.

These changes to the MPS Determination will require the removal of like provisions in the MPSI Scheme. ACMA understands that the removal of these provisions is being considered as part of the 12 monthly review of the Scheme by the mobile premium services sector.

The MPS Determination also established a Default Scheme which applies to any service provider who is not a member of the ACMA approved self-regulatory scheme. To the extent that the MPS Determination and the MPSI Scheme are revised, these amendments revise the Default Scheme.

INVITATION TO COMMENT

ACMA seeks comment on the repeal of the content related provisions of the MPS Determination as proposed in the amending Determination at Attachment A.

ACMA requests that submitters provide reasons behind any views expressed.

REMAINING PROVISIONS AND FUNCTIONS OF THE MPS DETERMINATION

Removal of the content related provisions leaves the MPS Determination with two main functions:

- ensuring the provision of safety measures for mobile chat services; and
- establishing consumer safeguards relating to advertising, charges, and terms and conditions of the supply of mobile premium services are in place via an industry self-regulatory scheme (realised in the MPSI Scheme).

ACMA proposes to eventually repeal the chat safety measures provisions in Part 4 of the MPS Determination, however these provisions will not be removed at this time.

The MPS Determination deals with safety of children using mobile chat services and requires that service providers assess the risk presented in a given service, implement measures to mitigate that risk including from among the measures listed in the *Safety Measures Notice 2006*, and keep appropriate records of the procedures employed in the implementation of the measures.

Paragraphs 83(3)(g), (h) and (i) of Schedule 7 will provide for the establishment of safety procedures related to commercial content services, commercial content services that are chat services and live content services within an industry code. These services defined in Schedule 7 encompass, but are not limited to mobile premium services, and also include mobile portals.

ACMA understands that the Internet Industry Association is considering the inclusion of chat safety measures in the industry code of practice currently under development.

Because timing of the code development and registration process is currently being determined, the relevant chat safety measures have been left in the MPS Determination. ACMA will give consideration to repealing these provisions once the Schedule 7 code is registered. This approach ensures that a requirement for the provision of chat safety measures for child users of these services continues.

Discussion of the regulatory mechanism by which the mobile premium services sector is obliged to provide consumer safeguards

The nature of the regulatory overlap between the existing interim arrangements for the mobile premium services sector and the new regulatory framework in Schedule 7 has necessitated revision of the current MPS Determination and MPSI Scheme as they relate to content matters.

However, the introduction of the new regulatory framework also presents ACMA and industry with an opportunity to consider the regulatory mechanism by which the mobile premium services sector is obliged to provide consumer safeguards.

ACMA has been asked by some industry participants to consider the proposal that the MPSI Scheme be replaced with a consumer code under Part 6 of the Telecommunications Act.

ACMA seeks feedback from stakeholders on the most appropriate regulatory mechanism to achieve safeguards for consumer while being mindful of costs to industry.

OPTION 1 – PROPOSAL TO REPLACE THE MPSI SCHEME WITH A CONSUMER CODE UNDER PART 6 OF THE TELECOMMUNICATIONS ACT

To give some context to this proposal, the MPSI Scheme was developed in accordance with provisions in a service provider determination (the MPS Determination) under the Telecommunications Act. The then ACA made provision for the MPSI Scheme as an alternative self-regulatory mechanism to a Part 6 code because, under section 115(1)(b) of the Telecommunications Act, a consumer code may not deal with content of a content service.

As the new regulatory framework in Schedule 7 brings together the regulation of internet and mobile content under the Broadcasting Services Act, it is no longer

imperative to retain the MPSI Scheme as alternative regulatory structure once provisions related to the regulation of content are removed from the Determination.

The majority of the issues currently dealt with under the MPSI Scheme may be regarded as issues that would ordinarily be regulated via a Part 6 code. The MPSI Scheme outlines a framework to implement appropriate community safeguards in relation to the use of mobile premium services, pursuant to section 5.5(3) of the MPS Determination. These include:

- ensuring customers receive accurate information about the costs and terms and conditions of mobile premium services;
- how to unsubscribe to subscription services;
- acceptable use policies for chat services; and
- the method in which such services are promoted thereby enabling consumers to make educated decisions regarding their use of the services.

The MPSI Scheme also establishes a complaints handling and escalation process and includes obligations relating to the assessment of content supplied by way of mobile premium services.

A registered consumer code under Part 6 is an industry developed code registered on ACMA's codes register. Before a code can be registered it must meet the criteria set out in section 117 of the Telecommunications Act which requires that the code:

- be made by a body representative of the sector of industry;
- provides appropriate consumer safeguards;
- stakeholders are consulted including:
 - industry (wider than just members of the body developing the code);
 - the general public and at least one consumer representative organisation; and
 - the Australian Competition and Consumer Commission and the Office of the Privacy Commissioner;
- be considered against the public interest test in section 112 of the Telecommunications Act.

All codes are assessed by ACMA against these criteria. This ensures that registered codes provide objectively assessed, uniform rules for conduct across the industry. Once a code is registered ACMA has the power to direct an industry participant to comply with the code, thus making compliance mandatory for that participant.

OPTION 2 – RETENTION OF THE MPS DETERMINATION AND MPSI SCHEME (AS AMENDED TO REMOVE CONTENT RELATED PROVISIONS)

The requirement to develop a unique self-regulatory mechanism in the MPSI Scheme resulted in arrangements crafted to suit the particular needs of the mobile premium

services sector at that time. ACMA considers these arrangements operate satisfactorily in performing the function for which they were designed.

ACMA is aware that the development and implementation of these arrangements has required investment of time and resources and is mindful of the impost of regulatory costs to industry.

INVITATION TO COMMENT

ACMA is seeking input from industry on what is considered the most appropriate and effective structure for the mobile premium services industry.

Comment is invited on:

- (1) whether the regulatory framework for the mobile premium service industry should continue in the form of the MPS Determination and MPSI Scheme, as revised as a result of the introduction of Schedule 7; or
- (2) the possibility of the residual provisions of the MPSI Scheme being replaced with a registered consumer code under Part 6 of the Telecommunications Act; and
- (3) if a Part 6 code is the preferred option, is it that should be implemented immediately, or considered in the longer term?

In considering a Part 6 code, it should be noted that the obligations in the MPS Determination and MPSI Scheme would need to be in force until such time as a consumer code is registered.

ACMA requests that submitters provide reasons behind any views expressed.

Variation to the Telecommunications Numbering Plan - 195 and 196 prefixes

BACKGROUND

In 2004, the then Minister directed the ACA to include in the MPS Determination a prohibition on the supply of age-restricted content by way of SMS or MMS unless the content was supplied on a prefix or prefixes specified by the ACA. Prior to the creation of the MPS Determination, the Numbering Plan housed a restriction that a person must not use a premium rate number to supply prohibited content or adult services.

Once the MPS Determination was made in June 2005, and confined the provision of age-restricted SMS and MMS services to numbers with a prefix of 195 or 196, the relevant provisions were removed from the Numbering Plan. In the MPS Determination, those prefixes have the practical effect of assisting end-users in recognising age-restricted services that are provided via SMS or MMS.

As a result of the introduction of Schedule 7, ACMA considers that the Numbering Plan is the logical instrument to specify the prefixes 195 and 196 on which age-restricted SMS and MMS services are permitted. The Numbering Plan already places limits on the use of certain other prefixes. For example, the restriction of telephone sex services to the 1901 prefix.

Consequently, ACMA proposes to vary the Numbering Plan to set out the prefixes on which age-restricted services can be accessed.

SUMMARY OF THE PROPOSED VARIATION

The proposed variation to the Numbering Plan will contain the following amendments:

- Subsection 3.35A of the Numbering Plan will provide that Schedule 4C includes a new column 3 that restricts the provision of age-restricted services to 195 and 196 prefixes only. The existing column 3 will become column 4.
- In accordance with the above, insert a new column 3 in Schedule 4C which can be titled “limits on the use of the number” (ie mirror the headings currently in Schedule 4B) and which makes reference to the intention that the prefixes 195 and 196 must be used only to supply age-restricted services.
- A new subsection 3.37A entitled ‘Prefixes for age-restricted services’ reflects those requirements on carriage service providers (CSPs) that were in clause 3.3 of the MPS Determination, with some minor drafting changes. This proposed clause indicates that a CSP must not supply age-restricted services by way of a premium SMS or MMS services otherwise than on a prefix 195 or 196. This change will not specifically impose obligations on content services providers. However, ACMA is of the view that using the Numbering Plan to place obligations on CSPs, as holders of the numbers, will adequately ensure appropriate use of 195 and 196 prefixed numbers. Insertion of this obligation in the Numbering Plan allows ACMA to use the targeted enforcement provisions of section 7.20 that give ACMA the power to withdraw numbers that are used in a manner inconsistent with the Plan.
- Schedule 4C of the Numbering Plan will include a cross-reference to 3.35A of the Numbering Plan.

EFFECTS AND IMPLICATIONS OF THE PROPOSED VARIATION

The proposed variation to the Numbering Plan reflects existing arrangements relating to age-restricted services included in the Determination. The ACMA is therefore of the view that the variation does not have any additional effects and implications for those parties already subject to the Determination.

INVITATION TO COMMENT

ACMA seeks comment on the variation to the Numbering Plan to set out the prefixes on which age-restricted services can be accessed as proposed in Attachment B.

ACMA requests that submitters provide reasons behind any views expressed