

Premium SMS Regulation: A necessary reform or over-regulation stifling innovation?

The first week of March 2010 saw the Australian Communications and Media Authority (ACMA) announce the next wave of regulation for the premium SMS market, with the release of a Determination under the Telecommunications Act 1997 (Cth) and a Consultation Paper for a proposed second Determination. In this paper Hamish Fraser reviews the effects of recent regulation and discusses whether the premium SMS market is now being stifled by heavy-handed regulation.

Background

What is Premium SMS

In short, a premium SMS (or Multimedia Messaging Service), is an SMS sent or received by a mobile phone user, that costs more than a 'normal' SMS. The formal definition under the various regulations is more complicated, but not relevant for the purposes of this paper. Australians were introduced to the concept of premium SMS through participation in voting schemes associated with television programs such as *Big Brother* or *Australian Idol*, where the SMS 'vote' was charged at a higher rate than the user's regular SMS.

Since its introduction, the premium SMS market has developed and evolved quite significantly. Today premium SMS can be used to provide a variety of services (or access to them), as well as a method for paying for other goods or services received. Premium SMS has become, in effect, the entry level for mobile commerce (M-Commerce). M-Commerce via premium SMS can now be used to provide content such as wallpapers, music and ringtones. There can be no denying that, despite the many criticisms, it is well accepted and understood by many users. By way of example, in 2004, in the UK and Australia, a ringtone download of Crazy Frog's adaptation of the *Beverly Hills Cop* theme went to #1. Premium SMS can also be used to provide access to web site games, chat rooms, sporting results and other services.

The price for premium SMS can vary widely, ranging from 55c to \$10 (and there is no reason it cannot be higher).

Subscription Services

One area of controversy that has dogged the premium SMS market has been the use of premium SMS as a payment mechanism for services on an ongoing basis, known as subscription services. Subscription services can arise when, for example, potential customers of a service are invited to enter a quiz, test their IQ, or perhaps receive free content, and in doing so agree to receive ongoing materials or join a club that has ongoing subscription charges.

Complaints about subscription services primarily centre around the following areas:

- (a) that the advertisements inviting participants to join are misleading;

- (b) that participants are often minors using perhaps a parent's phone; and
- (c) the high cost and ongoing nature of the services (linked also to the misleading concern in (a) above).

This paper argues, however, that the proposed regulation is not the appropriate mechanism to address these concerns and that the concerns about subscription premium SMS services are nothing more than a modern manifestation of some age old problems. However, it is appropriate first to complete the relevant background before examining the proposed regulation and its likely impact.

Complaints

From December 2006 the Telecommunications Industry Ombudsman (TIO) began to record complaints relating to premium SMS services (previously logged with billing complaints) and that record has shown a steady increase in complaints since then. The diagram on page 12 only shows the increase throughout 2008 peaking in the 3rd quarter. This rise is consistent with earlier data showing complaints increasing steadily since 2006.

The decline from late 2008, prior to the introduction of the new MPS Code (discussed below) is consistent with the active campaign commenced by the Australian Competition and Consumer Commission (ACCC) in this market in 2008.

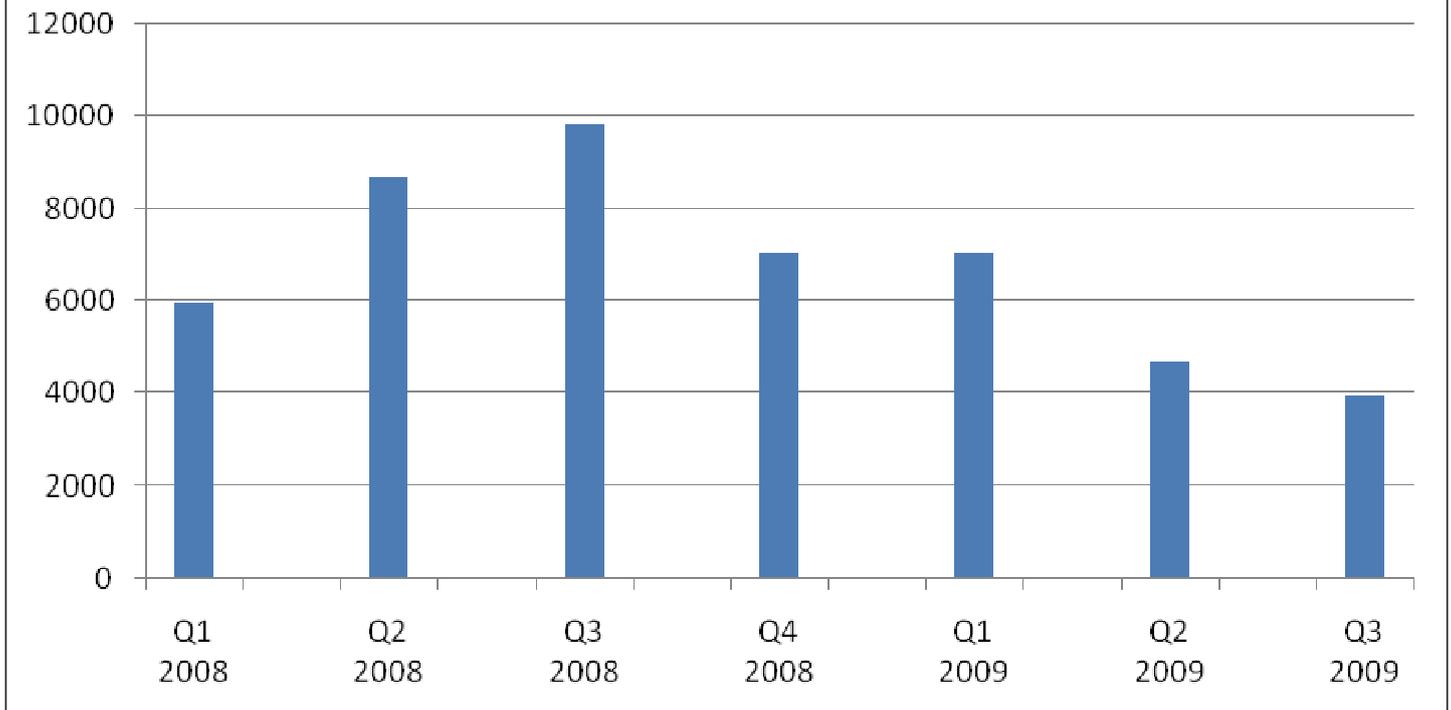
ACCC and Minister's comments

The Chairman of the ACCC, Graham Samuel, has been a very vocal critic of the premium SMS market, and, in particular, subscription services and the advertising of them. Similarly Minister Conroy has, since the election of the Rudd Government in 2007, made it plain that he wants to see complaints about these services to the TIO reduced.

It is not the intention of this paper to criticise the ACCC or the Minister. It is without question that many of the subscription services were flagrantly misleading, and complaints about them were understandably high and justified. However it is important to distinguish between the problem, being largely misleading advertising, and the billing mechanism, premium SMS.

Premium SMS, as a billing mechanism has not been well understood. Until relatively recently, many people did not appreciate that by simply receiving an SMS, there could be an associated

Quarterly PSMS Complaints to TIO



charge. So they allowed the service (and the premium SMS) to continue at least until they looked at their next bill. However, again, it is important to identify the real problem, perhaps a failure to appreciate the problem itself, and not blame the messenger.

MPS Code

On 14 May 2009, ACMA registered a new industry code of practice, the Mobile Premium Services Code C637:2009 (**MPS Code**). The MPS Code came into effect on 1 July 2009 and regulates suppliers of premium services with regard to:

- appropriate advertising;
- information to be supplied;
- the manner in which they are supplied; and
- adequate complaints handling and ability to unsubscribe.

One of the key elements of the MPS Code is that subscription services must contain what is known as 'double opt in'. That is, when subscribing to a service, the user must be sent an SMS asking them to confirm they wish to proceed. This is intended to prevent any unintended subscriptions, and is likely to be the most significant tool to overcome the types of complaints identified above, particularly with respect to subscription services.

Further to the diagram above, the diagram on page 13 gives a month by month breakdown of complaints, showing a dramatic reduction since the introduction of the MPS Code, almost halving.

March 2010 Reforms

The diagrams above suggest that the recent activity and, in particular, the MPS Code are working. Notwithstanding this apparent success in industry self-regulation, and following a consultation process in the latter part of 2009, the ACMA released in early March The *Telecommunications Service Provider (Mobile Premium Services) Determination (No. 1)* (**Determination No. 1**). At the same time the ACMA released a consultation paper for a proposed *Telecommunications Service Provider (Mobile Premium Services) Determination (No. 2)* (**Consultation Paper**)

Determination No. 1

Subsection 99(1) of the *Telecommunications Act 1997* (Cth) provides that the ACMA may make a written determination setting out rules for service providers in relation to the supply of specified carriage or specified content services. Carriage service providers and content service providers are service providers pursuant to section 86 of the Act, and, under section 101, service providers must comply with the service provider rules that apply to the provider.

The effect of Determination No. 1 is that consumers will have the option (after 1 July 2010) to request their carrier to bar all premium SMS services (at no cost to the consumer). There are also requirements that carriers notify their customers about the availability of barring within 30 days of the commencement of the operation of the Determination, within 5 days of a consumer becoming a customer, every 6 months for 3 years, and when a consumer complains about a PSMS service or associated charge.

Proposed Determination No. 2

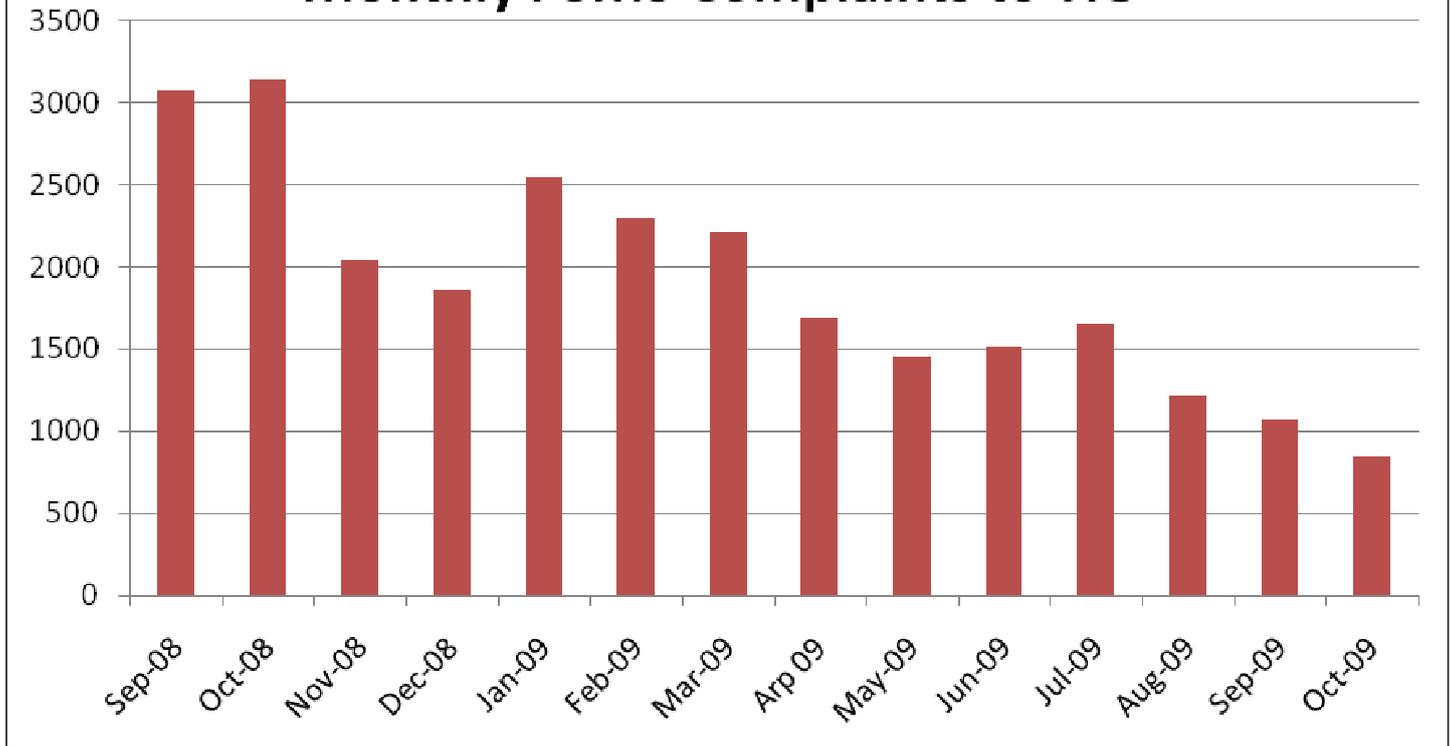
The Consultation Paper (submission for which closed on 9 April 2010) proposes a series of associated regulations to complement Determination No. 1. In particular it proposes two rules, referred to as:

1. The 'Do Not Contract' rule; and
2. The 'Do Not Bill' rule

The 'Do Not Contract' rule is a general prohibition that prevents aggregators and mobile carriage service providers (ie, carriers and aggregators) from entering into any contracts with content service providers who provide premium SMS/MMS services, unless those providers are registered in accordance with the MPS Code.

The 'Do Not Bill' rule provides a significant punitive power ACMA may exercise, which will prohibit mobile carriage service providers (ie, a carrier) from charging customers for any

Monthly PSMS Complaints to TIO



premium SMS/MMS services received from a specified provider – effectively preventing such suppliers from receiving any Australian revenue, for a period of up to 3 years.

Provided these rules operate consistently with Determination No. 1, they provide complementary and logical industry based enforcement for the underlying regulation.

Commentary

The author suggests that the approach in Determination No 1 is flawed and will be an unnecessary, technology-specific stifling of innovation. It incorrectly targets the mechanism rather than the offensive conduct, and will limit innovation and competition in this market.

There can be no denying that misleading conduct in any industry should be actively discouraged and new industries, particularly industries such as the burgeoning internet and mobile telecommunications industries, are susceptible to such conduct. However premium SMS services and the newer technologies are not alone when it comes to misleading advertising. *Reader's Digest* has operated a very successful subscription service since 1922, but was quite recently accused of misleading advertising in inducing people to subscribe. Other mail subscription services have been similarly susceptible to the short term gains from misleading advertising. The solution to mail subscription services has not been to bar mail services. Premium SMS is nothing more than a mechanism to allow payment from a mobile phone. To be sure, it is a relatively crude mechanism (for example each message from a given number is charged at a fixed cost), but it works and, like many payment mechanisms, is open to refinement and improvement over time.

Mobile handsets are increasingly powerful. Applications (apps) for iPhones (and other smartphones) are growing exponentially, and enable users to undertake many valuable transactions from banking to share trading to online movie and airline tickets. By comparison, premium SMS is at the lower end of the value scale. Further, the premium SMS market, like all of M-Commerce, is

only just starting to flourish. New premium SMS services that are far removed from the targeted subscription and ringtone style of services are being developed. Services that allow people to obtain real time traffic updates, directory assistance, delivery of high school results, reverse charge calling services, to name just a few have begun to thrive. It is possible to liken today's M-Commerce growth to the growth of E-Commerce in the 90's. In the 90's, the pornography industry drove internet payment and e-commerce adoption that we now use to buy everything from flowers to Christmas presents. Who doesn't do their banking online? A blanket bar on premium SMS will simply throttle these developing M-Commerce solutions and the author submits, risks stifling growth.

Whilst stamping out misleading advertising (in any form) is to be encouraged, it is suggested that the proposed barring of premium services is an over reaction to a problem with consequences far beyond its intention or need.

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