

**COMMUNICATIONS  
ALLIANCE LTD**



**Australian Communications and Media Authority's  
Draft Determination 2010 consultation: *Do Not Bill / Do Not  
Contract***

**Submission by Communications Alliance**

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## **Australian Communications and Media Authority's**

### ***Do Not Bill / Do Not Contract***

#### **Consultation Paper**

#### **Submission by Communications Alliance**

## **1 INTRODUCTION**

Communications Alliance is pleased to have the opportunity to comment on the Australian Communications and Media Authority's Consultation Paper on the draft *Do Not Bill / Do Not Contract Determination* (the Consultation Paper).

Communications Alliance believes it is in the best interests of industry, customers, regulators and government that the industry takes responsibility for assisting with the development of practical consumer protection measures which facilitate both increased consumer confidence and opportunities for industry growth.

In doing so, Communications Alliance seeks to facilitate open, effective and ethical competition between service providers while ensuring efficient, safe operation of networks, the provision of innovative services and the enhancement of consumer outcomes.

The themes presented in this submission reflect the views expressed by the members of Communications Alliance involved in the delivery of premium sms/mms in response to the ACMA consultation paper and draft 2010 Do Not Bill / Do Not Contract Determination. Those members comprise the majority of providers involved in the delivery chain, that is mobile carriers, resellers, aggregators and content providers.

The structure of this submission reflects industry's response to the key issues raised by the ACMA in the Consultation Paper. Members of Communications Alliance may also make individual submissions directly to ACMA following consideration of both the Consultation Paper and the draft Determinations. This submission is intended to represent a consolidation of industry's position which complements the submissions of individual members but does not derogate from the individual positions advanced.

Based on experience as facilitator of industry outcomes over more than a decade, Communications Alliance has provided constructive responses to the questions posed by the ACMA and also makes a number of general observations with regards to the intent and wording of the Determination.

### ***Communications Alliance***

Communications Alliance is the peak telecommunications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including service providers, vendors, consultants and suppliers. Its vision is to provide

a unified voice for the telecommunications industry and to lead it into the next generation of converging networks, technologies and services. The prime mission of Communications Alliance is to promote the growth of the Australian communications industry and the protection of consumer interests by fostering the highest standards of business ethics and behavior through industry self-governance. For more details about Communications Alliance, see <http://www.commsalliance.com.au>.

## 2 EXECUTIVE SUMMARY

Industry supports the development of the service provider determination under section 99 of the *Telecommunications Act 1997* noting that it will serve to both enhance the effectiveness of the Mobile Premium Services Industry Register as a regulatory instrument (via the Do Not Contract order) and also provide the ACMA with a practical means of effectively deterring systemic and/or gross examples of non-compliance with the Mobile Premium Services Code (via the Do Not Bill order). Industry also supports the ACMA's proposal to repeal the *Telecommunications Service Provider (Premium Services) Determination 2004 (No.2)* in light of the pending implementation of the Mobile Premium Services Barring Determination on 1 July 2010.

Whilst supportive of the ACMA's proposed approach, in its review of the draft Determination industry has identified six key issues which require address in order to ensure both practical and effective implementation of the instrument which is reflective of its intent:

- (i) implementation timeframe to consider impacts of redrafting contracts and implementing procedures to support the new obligations;
- (ii) the trigger point for a Do Not Bill Order;
- (iii) acknowledgement of pre-established billing events which may occur prior to the implementation of a Do Not Bill Order;
- (iv) provision of indemnity for mobile carriage service providers during the course of complying with the Determination (i.e. implementing a Do Not Bill Order);
- (v) a notification process for mobile carriers that a Do Not Bill Order has been issued against a specific short code or provider and the reason why; and
- (vi) clearer differentiation between aggregators and content providers when attributing responsibility for non-compliance with regards to the implementation of a Do Not Bill Order.

Industry also sets out to provide practical responses to the questions posed by the ACMA in its consultation paper along with other general observations relating to wording and intent.

### 3 GENERAL OBSERVATIONS

#### 3.1 Timing for implementation

Section 1.2 of the draft Determination stipulates that it take effect 14 days from the date of its making/registration by the Authority. Industry requests that consideration be given to the time required for the appropriate systems and processes to be implemented at a mobile network level in order to comply with the Determination once it has been finalised. Accordingly industry proposes that the ACMA allows for an appropriate timeframe from the date of making of the Determination to the date that it takes effect. Specific timeframes are proposed in individual submissions provided by the mobile carriers.

#### 3.2 Naming Convention for ACMA Determinations

Industry requests that consideration being given to the naming conventions used for this Determination and future ACMA instruments of this type. Identification of the specific intent of the Determination in the document title (i.e. *Do Not Contract /Do Not Bill*) would facilitate immediate identification at both an industry and consumer level.

#### 3.3 Change of service or short code during the course of an investigation

Industry would like to draw the ACMA's attention to the potential for a short code to be recycled and used for a different service during the course of an investigation. Any issue of a Do Not Bill Order against a specific short code could potentially be applied to a different service which was not the subject of any investigation by the ACMA. Industry requests clarification from the ACMA as to how such scenarios might be addressed.

## 4 RESPONSE TO QUESTIONS

### DO NOT CONTRACT

**Question 1: Please provide comments on the proposed 'Do Not Contract' rule.**

#### a) Can you identify any practical difficulties associated with this rule?

- Section 2.1.1 and 2.1.2 stipulates that a premium SMS/MMS content service provider and/or mobile carriage service provider cannot enter into a contract with another content service provider unless that party has complied with the registration requirements under the MPS Code. Industry contends that a content service provider and/or mobile carriage service provider cannot be held liable for non-compliance with the rules of the MPS register (Code clauses 4.1.1 and 4.1.2 which specify obligations on information to be provided and currency of registration) by a contracted partner other than ensuring that the partner is registered prior to the commencement of the contract. Industry proposes that Section 2.1.1 and 2.1.2 of the draft Determination be reworded as follows to clarify that a contracting party can only be held responsible for ensuring that its partners are registered:

*"2.1 Restriction on right to contract*

*(1) A content service provider must not enter into a contract with another content service provider for the supply of premium SMS and MMS services to a customer unless the other content service provider **is listed on the MPS industry register.**"*

*(2) A mobile carriage service provider must not enter into a contract with a content service provider for the supply of premium SMS and MMS services to a customer unless the content service provider **is listed on the MPS industry register.**"*

- Sections 2.1.1 and 2.1.2 of the draft Determination do not clarify the point at which a contract becomes subject to the obligations in the Determination. Industry contends that contracts in place prior to the implementation of the Determination should not be subject to the requirements of the Determination under the Do Not Contract rule. Industry proposes that 2.1.1 and 2.1.2 be further reworded as follows, noting amendments previously proposed in response to Question 1(a):

*"2.1 Restriction on right to contract*

*(1) A content service provider must not enter into a contract **on or after the commencement of the Determination** with another content service provider for the supply of premium SMS and MMS services to a customer unless the other content service provider **is listed on the MPS industry register.**"*

*(2) A mobile carriage service provider must not enter into a contract **on or after the commencement of the Determination** with a content service provider for the supply of premium SMS and MMS services to a customer unless the content service provider **is listed on the MPS industry register.**"*

- In support of the above attention is drawn to Part 3.1 (2) of the Determination which stipulates that no requirement in Part 3 *"...affects a mobile carriage service provider in relation to a contract mentioned in subsection (1) before the commencement of this Determination."*

**b) Do you foresee any problems with this rule taking effect immediately following the making of the service provider determination?**

Industry requests that consideration be given to the time required for the drafting and notification of new partner contract terms in order to comply with the Determination once it has been finalised. Accordingly industry proposes that the ACMA allows for an appropriate timeframe from the date of making of the Determination to the date that the Do Not Contract rule takes effect. Specific timeframes are proposed in individual submissions provided by the mobile carriers.

## DO NOT BILL

**Question 2: Please provide comments on the proposed 'Do Not Bill' rule.**

**Can you identify any practical difficulties with this rule?**

- With regard to Sections 3.1.1 (a) and 3.1.2 (b) industry notes that contracts with content providers that were initiated prior to the implementation of the Determination and have not varied since that time cannot be subject to the Do Not Bill rule. Industry contends that the trigger point for compliance with the Determination in relation to contracts must be the initiation of the contract with the content provider, and not the contract with the consumer. Industry contends that the resulting situation of a mobile carriage service provider having to differentiate between customers who were party to contracts initiated prior to the Determination and those customers party to contracts after the implementation of the Determination when applying a Do Not Bill Order is patently unworkable. Mobile carriage service providers could also find themselves in breach of a pre-Determination contract with a content service provider if it were to withhold billing following the issue of a Do Not Bill Order.
- Section 3.2 (1) of the Determination stipulates that a contract between a mobile carriage service provider and a content provider for the supply of premium SMS/MMS must include a provision for compliance with the requirements of a Do Not Bill Order by the mobile carriage service provider. Industry does not believe such a prescriptive approach is appropriate when mandating inclusions in provider contracts and accordingly tables that the wording of 3.2 (1) be modified to make reference to the requirement for a mobile carriage service provider to include in its contract a clause that would ensure that the same outcome as that proposed in 3.2 (1) (a) and 3.2 (1) (b) is achieved.
- The aggregator sector of the premium SMS/MMS industry draws the ACMA's attention to the apparent absence in the draft Determination of any acknowledgment of the delineation between the activities of aggregators and content providers. Industry notes that an aggregator could potentially be the subject of a Do Not Bill Order if one or more of its contracted content providers were found to be in breach of the MPS Code and the ACMA deemed the aggregator to be the appropriate recipient of the Do Not Bill Order. Industry contends that this would in effect be penalising an aggregator for the non-compliant activities of its contracted content provider. The effect of the Do Not Bill Order would also be felt by other content providers who were contracted to that aggregator but had not been found to be in breach of the Code.

**(b) Is the time period for the actioning of a Do Not Bill Order by mobile carriage service providers sufficient? If not, what time period should be allowed?**

- Section 3.9 stipulates that a mobile carriage service provider must comply with a Do Not Bill Order (or a variation of an existing order) within one business day after the day on which it is issued. Industry draws the ACMA's attention to the potential for content to be delivered and the billing for this event to be triggered during the period before the billing is denied by the mobile carriage service

provider. In this event the mobile carriage service provider cannot be held in breach of the order.

- Industry also proposes a more specific stipulation of the period in which the mobile carriage service providers must have complied with the order. Section 3.9 states a period of one business day. Noting that public holidays may fall in one state whilst still a business day in another industry proposes that this wording be modified to:

*"...one business day (excluding public holidays in any state or territory)"*

### Question 3.

**a) Do you consider the ACMA's proposed criteria for identifying detrimental behaviour leading to a Do Not Bill Order appropriate?**

**(b) Are there any other criteria that the ACMA should consider for the issue of a Do Not Bill Order?**

- Industry accepts the ACMA's proposed criteria for determining and identifying detrimental behaviour which could lead to a Do Not Bill Order being issued.
- Noting this however mobile carriage service providers must be provided with some form of indemnity against any potential breach of contract action taken out by those content service providers with whom contracts were initiated prior to the implementation of the Determination, and who have been denied billing as a result of the mobile carriage provider carrying out a Do Not Bill Order issued by the ACMA. The ACMA's attention is drawn to similar safeguards in Parts 5 and 7 of the *Broadcasting Services Act*.

### Question 4.

**(a) Do you have any proposals regarding the content to be included in the Do Not Bill Order?**

- Section 3.6 (4) indicates that the duration of a Do Not Bill Order must not exceed 3 years. Industry requests some clarification on the intended approach that the ACMA is proposing to take with regards to reviewing the status of a Do Not Bill Order and also an indication of the proposed process for the Do Not Bill Order to be lifted.
- With regards to the potential consequences of a Do Not Bill Order being applied to a content provider for the proposed maximum period of 3 years industry notes that any exclusion from accessing billing for this length of time would have the effect of removing that organisation from the mobile premium services industry. Where a Do Not Bill Order has been applied against a particular short code for the maximum period it is likely that the short code would be surrendered back to INMS. As noted in Section 3.3 of this submission the potential for a surrendered short code that is the subject of a Do Not Bill Order to be recycled by another content provider needs to be both acknowledged and addressed in the ACMA Determination.

**(b) Do you consider that there are other items that should be included in the Do Not Bill Order?**

- Industry requests that some clarification or reasoning behind the application of a Do Not Bill Order be provided in the details of the Do Not Bill Order itself. This would serve to provide the recipient of the order with specific notice of the nature of the non-compliant activity which led to the application of the Do Not Bill Order, thus allowing appropriate remedial action to be carried out by that organisation to address the issue of non-compliance at its source. Further this would also serve to notify the affected mobile carrier/s of the nature of that content provider's non-compliant activity.

**Question 5: Do you foresee any difficulties with mobile carriage service providers, in order to comply with a Do Not Bill Order, relying on the actions of the mobile carriers?**

Noting that MVNOs are reliant on the mobile carriers for the implementation of a Do Not Bill Order a short code suspension by the mobile carrier would result in a similar punitive measure to the Do Not Bill Order issued by the ACMA.

**Question 6:**

**(a) Do you have any comments on the ACMA's proposed distribution of Do Not Bill Orders?**

**(b) Do you foresee any issues arising from the operation of a Do Not Bill Order being flagged on the Register operated by Communications Alliance Ltd?**

**(c) Do you have any comments on the ACMA's proposed publication of Do Not Bill Orders?**

In Section 3.8 of the Determination the ACMA states that it will maintain a register of all current and expired Do Not Bill Orders for viewing by industry providers. Industry contends that it is not practical for mobile carriers to have to seek out this register, or the Communications Alliance facilitated MPS Industry Register in order to respond to a Do Not Bill Order that has been issued. Industry proposes that a tangible obligation be placed upon the ACMA to notify all mobile carriers upon the application of any Do Not Bill Order against a specific short code or provider and provide a reason for the Do Not Bill Order.

**Question 7:**

**Are any difficulties foreseen in relation to the issue and surrender of premium SMS/MMS short codes for maintenance of Do Not Bill Orders?**

As the ACMA would be aware, the acquisition of a short code is facilitated via INMS. As identified in Part 3.3 of this submission it is possible for a short code to be recycled or in other cases, surrendered back to INMS during the course of an ACMA investigation or following the issue of Do Not Bill Order. Industry requests clarification from the ACMA as to how an aggregator could be alerted to this possibility when

acquiring a short code from INMS. Industry proposes that INMS be updated to include details of any regulatory action that has been taken against short codes that have been surrendered back to the INMS database.

**Question 8:**

**Can you suggest any alternative approaches to address problems associated with 'phoenix' companies, where the original company has been the subject of a Do Not Bill Order?**

If the Communications Alliance MPS Register is to be utilised for the purpose of indicating if and why a Do Not Bill Order has been issued against a content provider then referencing the names of company directors might provide a means of tracking potential systemic non-compliance via these 'phoenix' companies. Industry feedback has indicated that in recent times, with the implementation of the MPS Code and its enforcement by industry participants and an independently contracted Code Monitor, this practice is starting to diminish due to the regulatory framework currently in place.

**Question 9:**

**Do you foresee any difficulties with the implementation dates proposed by the ACMA?**

Section 1.2 of the draft Determination stipulates that it take effect 14 days from the date of its making/registration by the Authority. Industry requests that consideration be given to the time required for the appropriate systems and processes to be implemented at a mobile network level in order to comply with the Determination once it has been finalised. Accordingly and as noted previously in this submission industry proposes that the ACMA allows for an appropriate timeframe from the date of making of the Determination to the date that it takes effect. Specific timeframes are proposed in individual submissions provided by the mobile carriers.

## **5 CONCLUSION**

Industry is committed to working closely with the ACMA to ensure that there are appropriate and effective community safeguards in place in the provision of premium sms/mms services, and that compliance is at the forefront of all activity.

Industry would welcome the opportunity to discuss the issues raised in this submission in greater detail with the ACMA.

## **6 CONTACTS**

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