



**Australian
Mobile Telecommunications
Association**



**Australian Direct Marketing
Association**

**JOINT AMTA AND ADMA SUBMISSION TO THE ACA'S DISCUSSION PAPER:
"REGULATION OF MOBILE PREMIUM SERVICES"**

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CONTENTS

1. INTRODUCTION AND SUMMARY	1
2. BACKGROUND	4
3. STRUCTURE OF THIS SUBMISSION	5
PART A: SUGGESTED APPROACH	6
4. OVERVIEW	6
5. SUGGESTED SOLUTION – A SELF REGULATORY SCHEME	7
1. PRESENTATION BY THE CUSTOMER OF:	12
PART B: KEY REGULATORY ISSUES	16
6. PROMOTION OF SELF-REGULATION	16
7. EFFICIENCY ISSUES	18
8. SCOPE OF THE DRAFT DETERMINATION	19
9. SHARED OBLIGATIONS: CSPS AND CONTENT SERVICE PROVIDERS	20
10. DUPLICATION OF REGULATION / INCONSISTENT REGULATION	22
11. TECHNOLOGY-SPECIFIC REGULATION	26
PART C: DRAFTING ISSUES	27
ANNEXURE 1: DIVISION OF REGULATORY RESPONSIBILITY	34
ANNEXURE 2: COMMENTS ON SCOPE OF DRAFT DETERMINATION	36

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1. INTRODUCTION AND SUMMARY

1.1 Overview: The Associations and Key Principles

The Australian Mobile Telecommunications Association (**AMTA**) is the Australian mobile industry peak body. AMTA's members include mobile phone carriers, handset manufacturers, retail outlets, network equipment suppliers and other suppliers to the industry. AMTA's mission is to promote a socially, environmentally and financially responsible and successful mobile telecommunications industry in Australia.

The Australian Direct Marketing Association (**ADMA**) is the peak body for the direct marketing industry in Australia. ADMA represents over 500 member organisations, primarily organisations that market their products and services directly to consumers and to businesses. ADMA's membership includes carriage service providers and content service providers.

For the purposes of this paper, AMTA and ADMA are together referred to as "**The Associations**".

The Associations welcome the opportunity to respond to the discussion paper issued by the Australian Communications Authority (**ACA**) on 16 December 2004, entitled "Regulation of Mobile Premium Services" (**Discussion Paper**), and the draft service provider determination (**Draft Determination**).

The Discussion Paper is timely as the mobile community has been actively addressing the new challenges and responsibilities in the delivery of new services on mobile platforms. The Associations firmly agree with the ACA:

- that children should not have access or exposure to content that it is inappropriate for children to see or hear, and
- that all steps that can realistically be taken are implemented to ensure that children are not exposed to risk through their access to mobile services.

The solutions proposed in this submission take these principles as a starting point. The Associations accept that the interests of children should not be compromised in striking a balance between:

- the requirement for the protection of children;

- the promotion of ready availability of services to adults; and
- the sustainable development of new content services that meet customer demands.

The Associations also accept that providers of mobile services must ensure that these services are made available in a manner that remains consistent with high standards of responsibility, accountability and effective risk and harm minimisation. The exercise of responsibility in delivery of new content and mobile services (**mobile content**) by content and service providers is essential to ensure that public trust and confidence in mobile services is maintained.

The Associations worked together to develop the industry solutions outlined in this paper. The solutions suggested in this paper reflect and reconcile the various views of individual carriers, carriage service providers and content service providers. This has been a challenging process, and it has taken place within a short period. The Associations believe that the forging of industry views in quick response to the Discussion Paper demonstrates the ability of industry to develop industry codes on a timely basis. For some time Australian operators have been considering child safety issues and the need for effective tools and mechanisms to ensure the right content and services are accessed by the right users. The solutions outlined in this submission build on earlier work by sections of the industry, particularly on the Internet Industry Association's (IIA) draft Internet Industry Code of Practice on *Internet and Mobile Content*. The solutions outlined in this submission also take account of suggestions for improvement of provisions of the draft IIA Code following public consultation and comments from the Australian Broadcasting Authority.

As the ACA may know a number of different territories such as the United Kingdom, France and Italy are in the process of confirming industry self-regulatory mechanisms on mobile platforms to address concerns relating to the protection of children. Considerable discussion and developments are taking place on an international level. The solutions proposed in this paper, and the proposal for their implementation through effective industry self-regulation, accord with good international practice.

The Associations' members as industry participants believe that it is very important to facilitate ways for customers to make informed choices about their access to services and to support parents in defining appropriate access for their children. This requires both educational and technical solutions.

1.2 Self-regulatory response

The Associations believe that a self-regulatory approach is a positive and robust way of producing the best solutions in this area. Industry codes foster innovative responses and solutions which recognise and cater for the differences in operator services and systems that have evolved. Further, and as illustrated from other territories, self-regulation is the preferred approach among a

number of regulators who wish to achieve a healthy and responsible market for premium rate text and multimedia services.

Our proposed industry solution includes an industry code of practice (**Industry Code**), to be submitted for review by the ACA for registration as a binding industry code, based on five foundation pillars to protect children:

- (a) A pre-assessment system for premium mobile content that meets social values and expectations. The pre-assessment system will utilise the Office of Film and Literature Classification (**OFLC**) Guidelines.
- (b) Provision of robust access controls and age verification mechanisms to enable the restriction of access to age-restricted content (referred to as “**Restricted Content**” in this submission) to adults only. This would involve:
 - an opt-in requirement (for all customers);
 - a robust and transparent age verification benchmark agreed with the ACA;
 - a “diversity of operator” approach agreed with the ACA to meet benchmark requirements.
- (c) A framework for the responsible provision of chat services that provides effective protection mechanisms. This will involve:
 - restricted chat services being available only to persons who are aged 18 or over (and who have been verified as such);
 - unrestricted chat services:
 - A. being human monitored and possibly complemented by electronic filtering; or
 - B. being subject to other measures, as outlined in this submission at section 5.6.
- (d) Appropriate education, information and awareness for parents and children about new mobile devices and enhanced features, including the growing variety of mobile content that can be accessed. This will occur on an industry-wide basis and would be:
 - in consultation with educational experts; and

- in advance of new restricted premium services being available.
- (e) Ensuring effective ‘notice and take down’ processes are implemented.

The solution proposed places the compliance burden on the party appropriately responsible to carry that burden – the carriage service provider or the content service provider (as specifically indicated in the table in Annexure A).

It is proposed that the Industry Code outlined above will either stand beside, or be included within, the self-regulatory regime currently being developed by the Associations and the Telephone Information Services Standards Council (**TISSC**) to meet the concerns of the ACA regarding information provision (eg in relation to promotional material, individual transactions and discontinuation of subscription services) and escalated complaints handling. This is noted at section 5 of this submission. All references in this submission to “an Industry Code” or “the Industry Code” should be read in this context.

2. BACKGROUND

On 21 April 2004, the then Minister for Communications, Information Technology and the Arts (**Minister**) foreshadowed an intention to direct the ACA to make a service provider determination that sets out appropriate consumer protections in relation to new premium mobile services.¹

As explained in a recent Departmental publication, these were intended to be “interim measures”. They were to be facilitated through amendments to the *Telecommunications Regulations 2001* that would allow the ACA to make service provider determinations in relation to the supply of, and access of premium services. Specifically, they were to put in place sufficient controls so that inappropriate content cannot be accessed on mobile services, while “avoiding prescriptive regulation”.²

On 13 May 2004, the then Minister directed the ACA to make a service provider determination under section 99 of the *Telecommunications Act 1997* (**the Act**) that set out rules:

- (a) requiring an adult service supplied by way of a premium SMS or MMS service to be supplied only on a number with a prefix, or prefixes, determined in writing by the ACA ...; and
- (b) prohibiting the supply of prohibited content by way of:

¹ http://www.dcita.gov.au/Article/0,,0_7-2_4011-4_118344,00.html

² Department of Communications, Information Technology and the Arts, *Report of Review of Operation of Schedule 5 to the Broadcasting Services Act 1992* (2004), page 41.

- (i) a premium SMS or MMS service; and
 - (ii) a proprietary network service; and
- (c) putting in place appropriate measures to require:
- (i) a premium SMS or MMS service; or
 - (ii) a proprietary network service;
- to restrict access to an adult service.³

For the purposes of this submission, this direction is referred to as the “**Ministerial Direction**”.

In December 2004, the ACA issued the Discussion Paper and the Draft Determination. In its media release dated 16 December 2004, the Acting Chair of the ACA stated that the ACA’s “intention is to promote a sustainable and responsible market for premium services accessed by mobiles”. He also indicated that the ACA is “looking for comment on whether the proposed rules ... will be effective and workable both for consumers and phone companies”.

3. STRUCTURE OF THIS SUBMISSION

Part A of this submission sets out how the Associations would prefer to address the issues raised by the Discussion Paper and the Draft Determination.

The strong view of the Associations is that industry self-regulation should be afforded an opportunity to address matters that are additional to those that the Ministerial Direction expressly required the ACA’s Draft Determination to address – provided, of course, that industry does so in a timely and effective manner. Accordingly, Part A of this submission sets out how the Associations would propose to deal with the relevant matters under an Industry Code and to ensure that industry participants promptly implement and comply with that Industry Code.

Part B of this submission identifies and discusses the key regulatory issues that arise from the Draft Determination. In particular, the Associations consider that:

- the ACA should take due account of the objective in the Act that requires the “greatest practicable use of industry self-regulation”;

³ Clause 4(2), *Australian Communications Authority (Service Provider Determination) Direction 2004 (No 2)*.

- the obligations under the Draft Determination should be appropriately shared between carriage service providers and content service providers (in the manner outlined in Annexure 1);
- amendments to the Draft Determination (as suggested later in this paper) would reduce duplication of existing regulation, and better promote a technology-neutral approach.

Finally, Part C of the submission outlines legal drafting issues arising from the Draft Determination.

PART A: SUGGESTED APPROACH

4. OVERVIEW

From a commercial and compliance perspective, the Associations consider that the most significant issues that arise from the Draft Determination relate to:

- (a) the current demarcation between “mandatory” provisions and matters for self regulation;
- (b) age verification and access procedures relating to Restricted Content;
- (c) the proposal for live moderation of chat rooms / chat services (that do not offer Restricted Content); and
- (d) the imposition of regulatory obligations upon carriage service providers only.

The Associations consider that the current “balance” in the Draft Determination between “mandatory” provisions and matters for self regulation should be shifted in a way that encourages a greater use of industry self regulation. Appendix 2 of this submission elaborates on why this shift would be appropriate and promote more targeted and effective regulation.

The Associations consider that Division 1 of Part 3 of the Draft Determination exhaustively provides for the matters that are required to be addressed in a service provider determination.⁴ Section 5.2 of the Draft Determination could also be included in the list of “mandatory provisions”, to clarify the ACA’s powers to issue take-down notices if this is referred to under an industry code. As the remaining matters that are addressed in Division 2 of Part 3 and all of Part

⁴ There is one exception to this. The Associations consider that the words “in writing” should be deleted from clause 3.3(b) of the Draft Determination, as the procedures for accessing the relevant content will be addressed in an industry code and in individual implementation plans. These proposals are discussed at section 5 of this submission, and further issues in relation to clause 3.3(b) are also discussed in Part C of this submission.

4 of the Draft Determination are not specifically required to be addressed in a service provider determination, a more targeted and effective regulatory approach would be the self regulatory scheme that is outlined at section 5 below.

Having regard to the Industry Code that is proposed to be developed, the Associations do not consider that there is a need for a “default scheme” to be included in the Draft Determination. The Associations suggest that the default scheme be deleted from the Draft Determination. Where an industry code fails, the ACA has the power to make a compulsory industry standard. However, in the event that this submission is not accepted by the ACA, detailed drafting comments about the Draft Determination (in its entirety, including the default scheme), have been set out in Part C of this submission.

5. SUGGESTED SOLUTION – A SELF REGULATORY SCHEME

The Associations propose to develop an over-arching Industry Code that addresses the matters contained in Division 2 of Part 3 and all of Part 4 of the Draft Determination⁵ and as outlined in section 1 of this submission, and to provide this code to the ACA for registration. The Associations’ specific proposals are outlined below.

5.1 Matters for Self Regulation

The Associations suggest that the default scheme be removed from the Draft Determination, and that the Draft Determination require the matters listed below to be addressed through an Industry Code (which as noted, may be an expanded version of the draft TISSC code of practice discussed at section 5.2 below, or an alternative code developed by the industry):

- pre-assessment of content that is or is likely to be Restricted Content;
- access controls and age verification mechanisms in relation to Restricted Content;
- a framework for the provision of all chat services, including informing users about chat services or protecting them when using such services;
- procedures for discontinuing subscription services;
- informing customers about the costs and characteristics of services (in coordination with existing work on high bills and credit management), including education initiatives;

⁵ The exceptions relate to those matters that are already addressed under existing laws, as discussed at section 10 of Part B of this submission.

- procedures for handling complaints; and
- procedures for complying with take-down notices.

5.2 Draft TISSC Premium SMS/MMS Code

The Associations note that members of TISSC, AMTA and ADMA are currently working together on the development of an industry-based code of practice that will provide a set of rules relating to the supply of premium rate SMS and MMS services and portal content (**the draft TISSC Premium SMS/MMS Code**). A working group has been established which is made up of representatives from:

- mobile operators;
- premium SMS service providers;
- 1900 service providers;
- community representatives; and
- TISSC employees including the TISSC arbitrator.

Input to the development of the draft TISSC Premium SMS/MMS Code is being taken from each of the representatives, other SMS codes of practice (eg the recently released ADMA Premium SMS Code), the current TISSC Code of Practice for 1900 services, overseas experience and the underlying regulatory requirements which are being set out by the ACA. A number of meetings of the working party have taken place. The draft TISSC Premium SMS/MMS Code is now taking shape, blending the inputs from each of the different areas mentioned above.

To date, the work on the draft TISSC Premium SMS/MMS Code has focussed on developing provisions primarily relating to premium SMS and MMS services, including:

- price advisement and notification (including in promotional material);
- rules pertaining to chat services;
- rules around subscription services;
- procedures for raising complaints with TISSC; and

- other matters relating to the operation of premium SMS and MMS services within the Australian market.

The draft TISSC Premium SMS/MMS Code is expected to develop and evolve in accordance with, and in response to, the developing premium services market in Australia.

5.3 Division of regulatory obligations

As discussed in detail in section 9 in Part B of this submission, the Draft Determination applies only to carriage service providers (**CSPs**). The Associations consider that the obligations should rest with the body that is directly responsible for the mobile content service or for the relevant regulated activity.

Annexure A sets out where the Associations consider the relevant regulatory obligations (as contained in the Draft Determination) should fall. The Associations propose to reflect this approach in an Industry Code. For clarification, references in this submission to the “**service provider**” are intended, in relation to each regulated activity, to refer to the entity that is identified in Annexure A.

5.4 Individual implementation plans

The members of the Associations (particularly AMTA) have a range of different business processes already in place in relation to the provision of mobile content services. Given this, the Associations propose that a flexible approach be adopted in relation to the self-regulation of such services (within the parameters prescribed by the over-arching regulatory framework).

To elaborate, it is proposed that an Industry Code set out high level principles that are to be implemented by each service provider (eg in relation to the opt in process and age verification measures). Individual service providers will then adopt these principles in individual implementation plans that will be provided to the ACA. Such implementation plans are proposed to set out how the service provider would address the requirements in the Industry Code, having regard to their existing business processes. Under this proposal, compliance with the implementation plans would be deemed to be compliance with the Industry Code.

It is noted that in the context of its report into unexpectedly high bills⁶, the ACA has proposed that individual implementation plans (relating to credit management issues) can be provided by CSPs to the ACA. The Associations understand the approach outlined above to be based on

⁶ ACA, Report to the Minister: *Preventing Unexpectedly High Bills: Credit Management in Telecommunications* (October 2004, released February 2005), page 61.

similar principles, that is, that service providers have different business systems in place to address age verification issues, and so may wish to adopt slightly different practical solutions.

A specific example of what could be included in an implementation plan (in relation to age verification) is discussed at section 5.5.2 below.

5.5 Opt in and age verification measures

The Associations understand that the ACA is unwilling to accept an “opt out” approach for post-paid account holders that request premium services that contain Restricted Content. The ACA’s approach is consistent with the views recently expressed by the ABA.⁷

Accordingly, the Associations propose that an Industry Code would require consumers to “opt in” to access Restricted Content, and for the “opt in process” to include age verification mechanisms. This represents an industry-wide agreement.

5.5.1 Principles for Industry Code - opt in and age verification measures

It is proposed that an Industry Code set out the following principles and obligations.

Restricted Content can only be provided to customers where:

- (a) the customer has requested access to Restricted Content; and
- (b) the service provider has taken reasonable steps to ascertain that the customer is a person aged 18 years or over. For this purpose, “reasonable steps” will include a requirement for the customer to provide the following evidence:
 - (i) a valid credit card in the name of the account holder or;
 - (ii) evidence of some other form of identification by which the age of the customer can reasonably be ascertained. Examples of identification include a valid drivers licence, proof-of-age card, passport or birth certificate in the name of the customer.

A customer may seek access to Restricted Content in the following ways:

- (a) by making a verbal request (eg over the telephone);

⁷ The Associations understand that the ABA outlined this position the context of the proposed Internet and Mobile Content Code of Practice that has been developed by the Internet Industry Association, and which is currently before the ABA.

- (b) by making an electronic request (eg by WAP, SMS, internet, portal or email); or
- (c) in person (eg at a retail store, by filling in a request form).

Before a request for Restricted Content is accepted, the customer must have provided evidence that they are aged 18 years or over, as detailed below.

If the evidence provided by the customer that they are aged 18 or over is a valid credit card in the name of the mobile service account holder, their request for Restricted Content must be accompanied by:

- the name of the account holder;
- the account number;
- other information required by the individual service provider to verify customer identity (eg account password / PIN); and
- a declaration that the account holder is aged 18 or over.

If some other form of identification is used to ascertain that the customer is aged 18 years or over (ie not a valid credit card), their request for Restricted Content must be accompanied by:

- the name of the account holder;
- the account number;
- other information required by the service provider to verify customer identity. Examples of forms of identification by which the age of the customer can reasonably be ascertained include a valid drivers licence, proof-of-age card, passport or birth certificate in the name of the account holder. For clarification, this information may be provided at the time the account is established, or at the time the customer requests the relevant service; and
- a declaration that the account holder is aged 18 or over.

In each case the information that a service provider will require to verify customer identify will be the subject of that service provider's implementation plan, as discussed below.

This will be supplemented by industry education initiatives (about requesting access to Restricted Content), as discussed at section 5.7 below.

In addition, the Associations note that the proposed approach for age verification set out above will need to take into account any regulatory or industry developments in age verification processes including in relation to pre-paid account holders.

5.5.2 Individual implementation plans

An example of what an individual implementation plan could possibly contain is set out below (although it should be noted that this is only an example):

Verification of the age of a customer will require:

1. Presentation by the customer of:
 - (a) a PIN/access code/password (as provided to the post paid mobile customer when they entered into their post-paid mobile contract, following the customer satisfying their service provider that they were aged 18 years or older when they entered into the contract); **OR**
 - (b) a valid credit card in the name of the account holder (supported by a 100 point check when the relevant bank account was opened); and validation of the credit card by the service provider (eg through a pre-authorisation process, or through a “charge and credit back” process);

AND

2. Either:
 - (i) sending an SMS to the mobile account holder confirming that the premium service has been requested; **OR**
 - (ii) providing a message on the next bill (or with the next bill, in the context of accounts that are provided by electronic means) to the customer in relation to the relevant service.

5.6 Moderation of chat rooms

The Associations support the responsible provision of chat services. There are a range of measures that can be implemented to ensure chat services are safer and appropriately managed.

Further, the Associations consider that the regulation of chat rooms should be addressed under an Industry Code, rather than through the mandatory provisions of the Draft Determination.

The Associations are of the firm view that the industry should have the ability to adopt a regulatory approach to chat rooms that is appropriate for the type of service being offered, and which is flexible enough to take account of the fact that chat services are offered in the context of a dynamic market in which new types of services are constantly being created.

The Associations propose that the Industry Code provide for the regulation of Restricted Content, including provisions to ensure that chat services that contain Restricted Content can only be accessed by adults who have been verified as being aged 18 or over, and who have opted in to receive the service.

In relation to unrestricted chat services, service providers will implement measures from the following:

- (a) Human monitoring and possibly complemented by electronic filtering, or
- (b) Other options (which are examples only):
 - (i) participation in chat rooms to be conditional on an agreement to comply with acceptable use policies;
 - (ii) electronic filtering;
 - (iii) working closely with various national and international law enforcement agencies;
 - (iv) a requirement for technical facilities to protect users/customers, for example, an technical ability to:
 - A. block the numbers used by “pest chatters”;
 - B. offer an exit soft key (so that users can exit the service quickly);
 - (v) a requirement to inform users of chat services (through industry-wide education programs) about the characteristics of the services. This may include, for example, safe chatting tips, and the fact that mobile services are easily traceable.

A more detailed discussion of the education options being considered and developed by the Associations is set out at section 5.7 of this submission.

As a separate but related point, the Associations consider that the definition of “chat service” in the Draft Determination is too wide. The Associations consider that the definition of “chat service” should not include services that are provided to a closed user group, where the participants are known to each other, and where the service is not a public interactive service.

Further, the Associations propose that the definition of “chat service” be contained in the Industry Code rather than in the final version of the determination (although it is expected that the final version of the determination would indicate that chat services are to be addressed under an Industry Code). This would recognise that chat services will develop over time, and that it is more practicable to amend definitions in codes to keep up with industry developments than it is to amend definitions in delegated legislation.

To illustrate an example of why chat services should be addressed in an Industry Code, a chat service already being offered is a sports team notification service whereby a message sent by one team member (eg of a touch football team) will be received by all subscribers (ie the other members of the touch football team). This is a one-to-many service and therefore falls within the definition of “chat service” in the Draft Determination (and would therefore fall within the mandatory human moderation provisions). However, it is difficult to see why this type of chat service needs to be the subject of live, human moderation.

However, if the Associations’ submission about leaving the definition of “chat service” to an Industry Code is not accepted, further comments about the drafting of the phrase “chat service” are set out in Part C of this submission.

5.7 Education

The Associations are committed to the promotion of clear and comprehensive information about new capabilities and services available on mobile phones. This would complement the educational role being undertaken by law enforcement authorities and bodies such as NetAlert, which since 1999 has been working on internet education issues, including with the IIA.

The Associations are looking at developing and implementing a range of education initiatives. For example, the Associations are considering ways of informing customers about safe and responsible use of mobile devices and services. Educational tools about other mobile content services are also being discussed. Some possible examples include:

- developing offline educational material to address a broad range of issues relevant to mobile users (including high bills, escalated complaints handling, bullying, mobile etiquette, chat room etiquette);
- distributing educational information via SMS, and messages on bills; and

- including additional online educational information.

The Associations propose to liaise with relevant government and non-government organisations as these ideas are developed.

5.8 Support for take-down scheme

The Associations support the approach in clause 5.2 of the Draft Determination in relation to a take-down scheme, to the extent that it is consistent with the scheme for Internet content in Schedule 5 of the *Broadcasting Services Act 1992 (BSA)*.

It is proposed that procedures for compliance with take-down notices would be incorporated into an Industry Code. If the ACA (or another relevant body referred to in an Industry Code, for example, TISSC) directed that mobile content be taken down, the service providers would be able to ensure that this occurred.

In this context, the Associations consider that it would be appropriate for any future legislative framework for mobile content to contain a similar scheme to that in clause 88 of Part 8 of Schedule 5 of the BSA, which protects Internet service providers from civil proceedings in relation to anything done to comply with a takedown notice issued under that Schedule 5.

5.9 Consistency with existing codes

In developing an Industry Code, the Associations would be concerned to ensure that where possible, its contents are consistent with the provisions in other relevant industry codes of practice. In particular, the Associations would be concerned to ensure that:

- (a) provisions relating to the assessment of content, the qualifications of content assessors and the handling of complaints about the assessment of content are consistent with the relevant provisions of the IIA Content Code (whether by repeating those provisions or cross-referring to those provisions); and
- (b) complaints procedures and remedies relating to all matters that do not relate to content assessment issues are consistent with the relevant provisions of any existing industry codes. It is proposed that TISSC will be the escalated complaint handling body under the Industry Code for those matters that are not already addressed by other complaint handling bodies.

In this context, the Associations understand that the Draft Determination (when finalised) and codes made in connection with or pursuant to the determination, are intended to be “interim measures”. The Associations expect that there will be recommendations arising from the review

currently being conducted by the Department of Communications, Information Technology and the Arts into the regulation of content delivered over mobile communications devices⁸ that will be relevant to the future operation of the determination and related code(s).

The Associations consider that the most efficient approach going forward would involve a single umbrella scheme for content generally. The Associations would expect that such an approach may be able to be developed following the Departmental review, and the implementation of recommendations arising from that review. However, in the meantime, the Associations are concerned that regulatory obligations be consistent (whenever this is possible), including in the context of the separate codes for Internet content and mobile premium service content.

PART B: KEY REGULATORY ISSUES

Part A of this submission outlined the Associations' suggested approach to addressing the identified regulatory objectives. In this Part B, the Associations outline the most significant regulatory issues arising from the Draft Determination (as it presently stands).

6. PROMOTION OF SELF-REGULATION

The principle of self regulation is central to the regulatory scheme contained in the Act. This is made clear by the regulatory policy in section 4, which states:

The Parliament intends that telecommunications be regulated in a manner that:

- (a) promotes the greatest practicable use of industry self-regulation; and
 - (b) does not impose undue financial and administrative burdens on participants in the Australian telecommunications industry;
- but does not compromise the effectiveness of regulation in achieving the objects mentioned in section 3.

From discussions with the ACA, it is understood that the ACA's intention was to attempt to "create a framework that supports self regulation". The Associations agree with the ACA that this is the correct approach. However, the Associations consider that the approach proposed by the ACA in the Draft Determination could place a far greater emphasis on self regulation.

From the Associations' perspective, self regulation is to be preferred whenever this is practicable and feasible, as industry is best placed to understand and develop systems that accommodate technical, operational and commercial parameters. Also, self-regulatory instruments such as

8

http://www.dcita.gov.au/broad/consultation/a_review_of_the_regulation_of_content_delivered_over_mobile_communications_devices

codes of practice are typically subject to regular review and more easily amended to reflect technical or market changes than legislative instruments.

6.1 Matters for self-regulation

Subject to one exception that is noted below, the Associations consider that Division 1 of Part 3 of the Draft Determination is adequate to meet the requirements of the Ministerial Direction (being the matters that must be addressed by the ACA in a service provider determination). The exception to this is clause 3.3(b) of the Draft Determination. The Associations suggest that the “in writing” requirement should be deleted from clause 3.3(b), as access arrangements and age verification procedures are matters to be addressed under the proposed Industry Code. Otherwise, the Associations consider that Division 1 of Part 3 of the Draft Determination meets the requirements of the Ministerial Direction.

The Associations consider that the matters in the balance of Part 3 and all of Part 4 of the Draft Determination should be addressed in an Industry Code, as proposed in Part A above, and removed from the Draft Determination. The Associations also propose to develop procedures in an Industry Code that support the take-down notice provisions in Part 5 of the Draft Determination.

In case the ACA does not accept this submission, the Associations have provided detailed drafting comments in Part C of this submission.⁹

6.2 Default scheme

The Associations understand that the ACA’s intention (in preparing the Draft Determination) was not to pre-empt development of responsible industry self-regulatory schemes by the statement of the default scheme in Part 4 of the Draft Determination. The Associations further understand that the ACA did not intend that the default scheme should establish a ‘benchmark’ for an Industry Code. Given this, and the benefits of a self-regulatory approach as outlined above, the Associations request that the default scheme be removed from the final version of the determination.

As an alternative submission (if this submission is not accepted), the Associations request that either the final version of the determination or the Explanatory Statement accompanying any final determination expressly state that the default scheme in the Draft Determination does not represent a “benchmark” for any industry code, and that it is open to the industry to develop codes that take a different approach to achieving the specified regulatory objectives (as discussed

⁹ For example, the Associations consider that the words “in writing” should be deleted from clause 3.3(b) in Division 1 of Part 3 of the Draft Determination, and for the provision to refer to the verification measures contained in the Industry Code.

above).

6.3 Sunset clause and implementation issues

It is understood that the Draft Determination is intended to be an “interim” measure only, to apply while the Department of Communications, Information Technology and the Arts is conducting its review of content delivered over mobile communications devices¹⁰ and prior to implementation of recommendations arising from that review.

As the ACA will be aware, the mobile content sector is characterised by rapid and innovative service developments. Given this, and the Departmental review noted above, the Associations consider that a “sunset clause” should be inserted into the Draft Determination so that the appropriate scope for continuing regulation is re-addressed within a defined time period. The Associations suggest that the final version of the determination expire two years after its commencement date.

In relation to the implementation date of the final version of the determination itself, the Associations consider that this is a matter that it would like to discuss with the ACA following advance (confidential) publication of the final determination to the Associations, and industry-wide assessment of systems and procedures required to comply with an Industry Code.

7. EFFICIENCY ISSUES

The ACA will appreciate that the mobile content sector is in its infancy, and an onerous regulatory regime will have an adverse effect on the development of that market. Implementation of the Draft Determination (as it stands) would involve significant operational and administrative burdens, particularly if the “default scheme” were to be the benchmark by which an Industry Code is assessed, and if specific provisions of the Draft Determination are retained.

The most significant operational and administrative burdens would arise from:

- the proposed “verification” processes in clauses 3.3(b) and 4.3 of the Draft Determination, especially regarding the following elements of the businesses of carriage services providers:
 - the various and divergent distribution models;
 - the various and divergent business strategies and business models; and

¹⁰

http://www.dcita.gov.au/broad/consultation/a_review_of_the_regulation_of_content_delivered_over_mobile_communications_devices

- the various and divergent scale of businesses.
- the need to establish separate compliance processes for matters already regulated under other laws;
- the proposal for mandatory human moderation of unrestricted chat rooms.

Such operational and administrative costs are an additional reason why a more flexible and tailored approach should be pursued under an over-arching Industry Code.

There are also valid policy arguments that the additional costs that are identified above are unnecessary. For instance, in relation to human moderation of chat rooms, the ACA's proposals duplicate other regulatory and policy initiatives that have already been undertaken by the Australian Government. For instance, the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No 2) 2004* introduces new federal offences into the *Criminal Code Act*. These new offence provisions commence on 1 March 2005, and make it an offence punishable by a jail term of up to 15 years to use a carriage service to procure or "groom" a child under 16 for sex.

Further, under the Australian Government's \$30 million National Child Protection Initiative,¹¹ announced on 5 September 2004, the Australian Federal Police (**AFP**) is to receive significant additional funding to probe and prosecute paedophile networks and online child sex abuse, and an AFP National Child Sex Offenders Strike Team is to be established (to complement the work that is already undertaken by State and Territory police). In addition, part of the National Child Protection Initiative involves a National CyberSafe Programme, under which NetAlert will be funded to run a training and information campaign aimed at parents, teachers and community groups. The AFP will also receive additional funding for the purposes of its education and prevention programs aimed at parents, teachers and relevant community groups, and will work with NetAlert in these areas.

Having regard to all these issues, the Associations consider that an Industry Code would result in a more efficient and cost effective response to the identified regulatory and policy issues.

8. SCOPE OF THE DRAFT DETERMINATION

The Associations consider that the Draft Determination, as circulated for consultation, addresses a range of matters that are outside the scope of clause 4(2) of the Ministerial Direction.

¹¹ http://www.liberal.org.au/2004_policy/Sept05_National_Child_Protection_Initiative.pdf

While the main focus of this submission is to suggest other ways in which the relevant regulatory objectives could be addressed (as detailed in Part A), for the record the view of the Associations about these matters is set out in Annexure 2.

9. SHARED OBLIGATIONS: CSPs AND CONTENT SERVICE PROVIDERS

9.1 General comments

The Draft Determination applies only to CSPs. Accordingly, the Draft Determination does not apply to content service providers who are not also CSPs. It is understood from discussions with the ACA that the ACA decided to adopt this approach in the Draft Determination following deliberation and having regard to the complexity of service provider roles within the premium service industry.

The Associations strongly urge the ACA to reconsider this matter. The Associations wish to emphasise that the business model for the provision of mobile content will differ depending on whether the CSP is reselling content or whether it is merely providing carriage services for third party content. In the latter scenario, content service providers should not be immune from the regulatory scheme proposed by the ACA.

In the absence of this shift in regulatory emphasis, there will be lesser commercial incentives on the part of carriers/CSPs to carry third party content (given the regulatory burdens imposed by the Draft Determination). This can reasonably be expected to adversely affect the growth of and diversity and range of participants within the mobile content sector, and by so doing reduce the diversity of content available on mobile platforms. Such a result would not be in the interests of consumers, industry and broader economy.

Further, it should not be assumed that CSPs will always be able to pass on the regulatory obligations to content service providers under contract, or that this is an effective model of regulation that will achieve the ACA's desired outcomes.

For example, the Associations note that the current regulatory model for 1900 telephone sex services imposes regulatory obligations on the CSP in relation to such services. In practice, where these and other regulatory obligations aimed at ensuring compliance by content service providers (who have control over the content of the service) have been, or have attempted to be, shifted to the content service provider under contract, many challenges have arisen. This is particularly evident when the CSP has attempted to shut a service down. Such action is often resisted by the content service provider who can expect to suffer monetary loss as a result of a service being taken down by the CSP. Accordingly, they will fight such take down notices on legal grounds if necessary which can delay the removal of such services, or seek to open up a new service under a different name.

This is one of the reasons why the Associations consider that certain regulatory obligations (see Annexure 1) should be placed directly on content providers and not CSPs, as discussed below. In particular, changes are needed in relation to clauses 3.1, 3.2 and 3.3(a) of the Draft Determination,¹² as outlined in Annexure 1.

9.2 Suggested allocation of obligations

To assist the ACA's consideration of these issues, the Associations have prepared the table in Annexure 1 to illustrate where it considers the regulatory obligations contained in the Draft Determination (as it stands) should rest.

The fact that the table allocates responsibilities on the basis of the current clauses in the Draft Determination should not be taken to be an indication from the Associations that they accept the drafting of those obligations. As previously noted, detailed drafting comments are contained in Part C of this submission.

9.3 Additional comments: content classification

The Associations have to date been prepared to proceed on the basis that MA content will be included within Restricted Content. This is to facilitate easy understanding of the rules and in the expectation of a policy approach whereby such content could be obtained on an "opt out" basis by "post paid" customers.

Accordingly, in a regulatory environment where an "opt in" approach will apply to the supply of MA content within Restricted services, the Associations request that the fact that MA content is so restricted be taken into account by the ACA when it is determining the regulatory burdens to be imposed upon service providers.

As a separate issue, the Associations also consider that where content has already been assessed under a classification regime that is established under the *Classification (Publications, Films and Computer Games) Act 1995 (Cth)* or the *Broadcasting Services Act 1992 (Cth)*, it should not need to be re-assessed. For example, computer games and movie trailers that have already been assessed by the OFLC or under the OFLC's guidelines should not need to be assessed again. Similarly, if content has already been assessed for television under the *Commercial Television Code of Practice*, it should generally carry the same assessment when provided on a mobile platform.

¹² Note that this assumes that the balance of Part 3 and all of Part 4 will be deleted from the Draft Determination and addressed through the proposed Industry Code.

The Associations consider that if content service providers are able to rely on the assessments that already exist, this would reduce unnecessary duplication and accordingly reduce assessment costs. Also, this approach is intended to promote greater consistency for consumers across all relevant platforms.

Having said that, content service providers¹³ should also have the option of having content re-assessed (according to the relevant OFLC guidelines) if that content is edited in a way that may change the previous classification or assessment of that content. This would be consistent with television broadcasters' current procedures for editing films – for broadcast on television – that have already been classified by the OFLC.

10. DUPLICATION OF REGULATION / INCONSISTENT REGULATION

10.1 General comments

The Associations are concerned that many obligations in the Draft Determination either duplicate or are potentially inconsistent with existing laws and regulatory instruments. This means that the operation of the Draft Determination may raise unnecessary disputes and regulatory uncertainty. In particular, the Associations note that:

- (a) certain elements of the Draft Determination appear unnecessary (as they are addressed elsewhere); and
- (b) in practice, those same elements of the Draft Determination are likely to result in jurisdictional uncertainty.

These two issues are also relevant to the views expressed about the primacy of self-regulation. The following examples of duplicative or inconsistent regulation illustrate these points.

10.2 Consumer protection

Division 1 of Part 4 of the Draft Determination states that a CSP must observe certain requirements in the way a premium service is promoted. The requirement in clause 4.2(1)(a) to ensure that promotional material is not false or misleading duplicates that contained in section 52 of the *Trade Practices Act 1974* (Cth) and the corresponding provisions in State and Territory fair trading legislation.

¹³ This includes a CSP when acting in its capacity as content service provider in relation to the relevant mobile content.

The Associations question why this restatement is necessary. While the Associations consider that there are some instances where restatement of a legislative obligation in an industry code can provide assistance (eg where examples are given to assist compliance with that legislative obligation), this is to be distinguished from a situation where an existing legislative obligation is restated in delegated legislation. The latter approach may invite jurisdictional conflicts between regulatory entities and schemes and create potential double jeopardy (to sanctions under the primary legislation and also under the delegated legislation).

The Associations' view is that if any service provider advertises a product or service in a way that an appropriate regulator considers (or a court confirms) is false or misleading, then that service provider is rightly answerable to that regulator (or liable for such penalty as the court determines). For example, the ACCC continues to actively and vigorously enforce section 52 of the *Trade Practices Act 1974* (Cth) in the telecommunications sector. The Associations are not aware of any suggestion, whether by the ACCC or anyone else, that the ACCC's powers to promptly enforce section 52 or secure ongoing compliance (for example, through imposition of a requirement that a service provider make a section 87B undertaking) of the *Trade Practices Act 1974* (Cth) are insufficient or require supplementation.

In contrast, the Draft Determination effectively appoints the ACA as the regulatory body responsible for judging behaviour that may or may not contravene the prohibitions against misleading or deceptive conduct. This is because the ACA is the authority responsible for administering the Draft Determination.

The Associations are concerned that this may lead to jurisdictional conflict between the ACA, the ACCC, and the corresponding State and Territory fair trading agencies. If it is the ACA's intention to impose specific requirements on how promotional material is structured and what it must contain, then those requirements could either be dealt with expressly under the self regulatory scheme, or expressly in the final version of the determination. The Associations would prefer the former option, particularly as the TISSC Code already contains provisions relating to content on premium rate services that is false, misleading or deceptive (or likely to mislead or deceive), and given that the draft TISSC Premium SMS/MMS Code (discussed at section 5.2 of this submission) will also address other related issues (such as claims in promotional material).

As a separate point, it is noted that the term "promotional material" is not defined in the Draft Determination. This is relevant to the primary and absolute requirement of clause 4.2(1) as drafted: a CSP must ensure that any promotional material advertising a premium service complies with the conditions so listed. The Associations question whether the intention of this provision is to capture every form of promotional material in connection with every advertised instance of the premium service. In reality, promotional material for premium services typically involve the content provider or a third party. One example is an advertisement in a magazine or broadcast on

television for consumers to use a premium service to use a telecommunications device to register their vote on *Big Brother* (or other television programs). In its current form, the Draft Determination imposes the obligation on the CSP to ensure that the magazine publisher or the station broadcaster complies with clause 4.2(1). This would raise practical issues particularly where the service is being provided through five CSPs who would all need to clear the advertisements. This obligations should rest with the content service provider, not the CSP.

Moreover, the Associations note that the extent of the required information would be difficult to provide in a television advertisement, and virtually impossible to present in a radio advertisement. The Associations consider that providing the amount of information required in clause 4.2 of the Draft Determination would be likely to take the entire time of a 30 second radio commercial, leaving no time to actually advertise the service.

The scope of clause 4.2(1) of the Draft Determination therefore imposes unrealistic requirements on CSPs, as it will be close to impossible for a CSP to ensure that every instance of promotional material for a premium service that has been packaged by a content service provider complies with the its terms. This explains why the Associations consider that such responsibilities should rest with the content service provider under an Industry Code.

10.3 Other areas of overlap with existing codes

The Associations also note that various ACIF codes already impose obligations (or otherwise provide specific guidance) on CSPs in relation to their statements and representations about telecommunications goods and services. As noted above, these matters are also addressed under the *Trade Practices Act 1974*. To provide some examples, there are existing codes and guidelines relevant to point of sale and pre-contractual terms. For instance:

- the ACIF *Prices, Terms and Conditions Code (C521:2004)* requires CSPs to conform to standards on how telecommunications services are supplied, pricing information, and the required font sizes and display terms for promotional material and contracts. CSPs are therefore already compelled to comply with clauses 4.1(1)(b)(ii) (charging information) and 4.1(2) (expression and presentation of information) in the Draft Determination; and
- the ACIF *Consumer Contracts Code (C620:2004)* proposes a detailed set of requirements for contractual and operational information about telecommunications goods and services, including the prohibitions against representations in connection with those requirements.

As a general principle, the Associations consider that such duplication is undesirable, particularly where one legislative instrument duplicates provisions in other laws or legislative instruments, and/or there are inconsistencies between such laws or legislative instruments.

Having said that, duplication may be acceptable where it occurs in an industry code in order to give further guidance to service providers. For instance, in some cases, codes may provide some specific examples about how service providers should comply with the relevant legislative obligations. However, this is not what is occurring here, as the duplication is occurring in a legislative instrument (ie in the Draft Determination) rather than in a self-regulatory code.

10.4 Existing premium rate rules

The *Telecommunications Service Provider (Premium Services) Determination No. 1 2004* (as amended) establishes specific requirements on the information to be provided to users of certain premium services (or other services charged at a premium access rate). In this context, the Associations question why the ACA has issued a new series of information requirements at the promotional level, particularly since the earlier Determination compelled all CSPs (regardless of whether or not a customer ever accesses a premium service) to provide written notification of virtually all the substantive issues contained in the Draft Determination. This would appear to be unnecessary duplication.

10.5 Trade promotions and voting

Clause 4.5 of the Draft Determination imposes specific rules on the conduct of carriage service providers in trade promotions. The conduct of trade promotions is already the subject of extensive State and Territory legislation, which imposes strict procedural obligations. In this context, it is not clear why trade promotions need to be addressed in the Draft Determination. This is not an appropriate area for additional regulation or “guidance” through a separate regulatory regime.

In addition, clause 4.6 of the Draft Determination imposes specific rules about the casting of votes via premium services. Part V of the *Trade Practices Act 1974* (Cth) and the corresponding provisions in State and Territory fair trading legislation regulate voting services (as illustrated by the ACCC’s involvement in the *Australian Idol* example referred to in the Discussion Paper).

In both these instances, the Associations consider that it is duplicative and potentially inconsistent for the ACA to impose additional requirements in this area through the Draft Determination.

10.6 Conclusions on inconsistent and overlapping laws

The recent Productivity Commission Research Report into *Australian and New Zealand Competition and Consumer Protection Regimes* (16 December 2004) was highly critical of the plethora of complaints bodies confronting consumers. It noted that the overlapping consumer protection roles of various agencies, laws and regulatory schemes is a systemic problem that only generates consumer confusion and higher compliance costs for industry.

The Associations consider that as drafted, the Draft Determination increases the scope for confusion about which regulatory regime takes precedence (State or Commonwealth, self-regulation versus legislative rules, or any combination of these). The consumer interest is not served by this.

11. TECHNOLOGY-SPECIFIC REGULATION

The Discussion Paper states that where possible, the Government and the ACA aim to ensure that regulation of mobile content is consistent, irrespective of the mode of delivery. However, the effect of the Draft Determination (as it stands) is to make distinctions according to the relevant access-technology that is used by a CSP to provide premium services, rather than the actual content being provided. This is particularly pronounced in the proposed treatment of content on “proprietary networks”.

“Proprietary network service” is defined by reference to the *Premium Service Determination 2004 (No 1)*, being a “public mobile telecommunications service that enables an end user to access a proprietary network”. Proprietary network is in turn defined as follows:

Proprietary network means a telecommunications network used by a mobile carriage service provider that enables customers of that provider to access a premium content service by way of a mobile device where that service is not otherwise generally available.

The ACA has indicated that it considers the phrase “otherwise generally available” to mean “free”. However, it is noted that such an interpretation is open to question. For instance, in other legislation within the Minister’s communications portfolio, express words are used to impose regulatory obligations to a “free” service. For instance, the definition of “commercial broadcasting services” in section 14 of the BSA refers to a broadcasting service that, among other things, “are able to be received by commonly available equipment”, and “are made available free to the general public”. By contrast, the definition of “proprietary network” in the *Premium Service Determination 2004 (No 1)* is far less clear, and in our view, it should not be assumed that content is not “generally available” because consumers have to pay to receive the service.

However, there are more practical reasons why the Associations consider that the regulatory distinctions that the Draft Determination effectively makes between Internet services and content provided from “proprietary networks” are artificial.

For instance, content service providers are capable of independently hosting content under an “open internet model”, and making this accessible to mobile customers through a publicised URL address. When accessed from a personal computer, such content would be regulated under Schedule 5 of the BSA. However, when accessed through a mobile phone, this content may be

regulated as a “proprietary service” under the Draft Determination (even though the carriage service provider does not control the content).

In many cases, identical or near-identical content (whether comprising text, video, still pictures, audio or a combination of all these things) may be distributed by use of a range of different delivery technologies, to many different types of reception devices, but be subjected to quite different regulatory regimes. This will apply to content that looks the same from a viewer’s perspective, and that is accessed at the same time by consumers on different reception devices. For instance, a television program may be simultaneously broadcast on television, retransmitted by a mobile operator through a “proprietary network” service, and streamed onto the Internet. The regulatory regimes applying to each type of delivery (on the basis of the current Draft Determination) will be different.

To illustrate further, the types of delivery technologies will include broadcast transmissions and retransmissions (on a “one to many” basis), online or “dial up” technologies (Internet and other point to point services), mobile telecommunications technologies (whether 2.5G or 3G), as well as fixed line and wireless technologies. The types of devices that will be able to receive content that is delivered by these technologies includes televisions, radios/car radios, personal computers, PDAs, mobile telephones, and other converged devices including “Blackberries”.

Given the broad range of delivery technologies and reception devices that can be utilised to receive “mobile content”, and the fact that there are constant developments in such technologies and the services they can offer, the Associations consider that a technology neutral approach should be a primary objective of any regulation of premium services.

The Associations’ preference is that carrier portals/proprietary networks should be regulated under Schedule 5 of the BSA. This approach encourages a technology neutral application of regulation. However, if the ACA continues to oppose this position, the Associations would include provisions relating to the supply of premium services from carrier portals/proprietary networks in the proposed Industry Code (as outlined at Part A of this submission).

PART C: DRAFTING ISSUES

In Part B of this submission, we identified the key regulatory issues that are raised by the Draft Determination (as currently drafted). This Part C now sets out the Associations’ drafting comments and suggestions about the Draft Determination in its entirety.

As already noted, the Associations consider that the “default scheme” in the Draft Determination should be deleted (as the matters it addresses, as well as other identified matters, can be covered by the proposed self regulatory regime).

However, if the ACA decides to retain a “default scheme” in the final version of the determination, the Associations consider that drafting amendments are required, and makes the following alternative submissions.

The Associations understand that the ACA intends that Part 4 of the Draft Determination operate as “default scheme” and that it is open to the industry to register codes outlining a different scheme with the ACA. However, the Associations are concerned that the provisions of the default scheme will be taken to state what industry should do. Accordingly, the Associations have suggested detailed drafting amendments to the Draft Determination as a whole.

Draft Determination	Comments and Suggested Amendments
1.3: Interpretation	<p>The definition of “adult service” refers to a number of other defined terms, including the definition of “adult chat services”.</p> <p>The definition of “adult chat services” uses the phrase “having regard to the way it is advertised or promoted”. This phrase is also used in the definition of "telephone sex service" in section 158J of the <i>Telecommunications (Consumer Protection and Service Standards) Act 1999</i>, and has caused many practical difficulties. Accordingly, the Associations note that this definition is likely to be similarly difficult to apply in practice. The Associations suggest that “adult chat services” are services that are provided by use of 195 and 196 numbers, or through a restricted access system. This would be supported by the Numbering Plan process which requires adult services to be provided through the use of the designated numbers (ie it is assumed that penalties would apply to the provision of Restricted Content by use of numbers other than 195 and 196, where a number is used to access the service).</p> <p>The definition of “chat service” is very wide, and would include “broadcast SMS” (ie messages that carriage service providers are required by regulation to send). The Associations consider that the definition should be contained in an Industry Code, and exclude broadcast SMS (eg that are provided for marketing or regulatory purposes), instant messaging services and closed user groups/own list groups.</p> <p>The definition of “premium service” includes a “proprietary network service”. However, as discussed at section 11 of Part A of this submission, the Associations’ view is that the distinction between such services and Internet services is an artificial construct.</p>

Draft Determination	Comments and Suggested Amendments
3.3 Access to adult services	<p>While the Associations do not object to restricting access to Restricted Content, the requirement under clause 3.3(b) that a customer “has requested in writing that he or she be given access to adult services” is onerous and unnecessary. The Associations consider that this requirement would not only serve as a deterrent to customers, it would impose very significant operational costs.</p> <p>Clause 3.3(b) should be amended to include, as an alternative to a “request in writing”, compliance with access provisions in any registered industry code (so that more options are available to an adult customer who wishes to receive Restricted Content). However, it is acknowledged that such options need to be backed by adequate age verification processes (as outlined in Part A).</p>
3.5 Posting rules	<p>Imposing the posting rule obligation upon carriage service providers under the mandatory part of the Draft Determination may also lead to inconsistent rules, which will be compounded by human moderators in each chat room (as discussed below in relation to clause 3.6). For this reason, the Associations’ strong preference is to address posting rules in an Industry Code, so that there is a consistent approach across the premium services sector.</p> <p>As a separate practical matter, it is not clear how the ACA envisages that a carriage service provider would address all the requirements in clause 3.5 “at the time a chat service is first accessed by a customer”. It would not be feasible to send all this information by SMS.</p>
3.6 Moderation of certain chat services	<p>Human moderation of chat services that do not contain Restricted Content is a highly interventionist form of regulation which would impose a significant administrative and operational burden. This proposal is also inconsistent with the approach taken to Internet regulation, and again, is based on technology-specific distinctions that are not sustainable. Also, it is not clear how this proposal falls within the scope of the Ministerial Direction.</p> <p>The Associations have set out their preferred approach to the regulation of chat services in section 5.6 of Part A of this submission.</p> <p>It is also noted that clause 3.6 of the Draft Determination applies to “a carriage service provider who provides a chat service”. As a chat service can potentially be accessed from any mobile device (where a customer responds</p>

Draft Determination	Comments and Suggested Amendments
	<p>to an advertisement placed by a content service provider), it appears that all content service providers, regardless of size, would be required to moderate every chat room accessed by their customers. If this is the ACA’s intention, it represents an extremely onerous obligation. If this is not the ACA’s intention, it needs to be clarified. This illustrates why such “moderation obligations” should be imposed upon the content service provider (ie who is offering the service) rather than the CSP.</p>
<p>4.2 Information in promotional material</p>	<p>As explained at length in section 10 of this submission, many of the matters addressed in this clause are already addressed under existing laws. For the reasons set out above, clause 4.2(1) should be deleted.</p> <p>Further, a requirement that a chat service declare itself to be “non-adult” is likely to cause confusion. Different registration procedures for chat services that contain Restricted Content will make it clear which services are adult and which are not.</p> <p>While the Associations are not opposed to the proposals relating to advertising of services directed to children, the requirements are vague and uncertain. For example, interpretation of the requirement that advertising material not contain anything that “a parent would not reasonably want his or her child to see, hear or learn” is likely to be so subjective as to be incapable of effective implementation by a service provider, given that what is reasonable to one parent may not be to another (depending on, for example, the age of the relevant children, and their social, cultural, religious background, for example). Similarly, the requirement that no direct appeals be made to children “unless the product or service is something for which it would be reasonable to expect a child to pay” is difficult to assess on an objective basis. Children have vastly differing economic capabilities (depending on their age and social background). It is not clear how compliance with this provision, or with that noted above, would be assessed. The Associations consider that these requirements are unclear and should be clarified or deleted.</p>
<p>4.3 Age verification procedures</p>	<p>In light of how the Associations propose to address opt ins and age verification processes under an Industry Code, the Associations do not consider that there remains a need for these matters to be contained in a “default scheme” that is included in the Draft Determination.</p>

Draft Determination	Comments and Suggested Amendments
	<p>However, in the event that the Associations’ views are not accepted by the ACA, the Associations wish to emphasise that they are strongly opposed to all the requirements outlined in clause 4.3 of the Draft Determination.</p> <p>A requirement for a customer to attend a shop front of a carriage service provider (this assumes that all carriage service providers have shopfronts) in person, and to make a request in writing for access to Restricted Content (and provide a written acknowledgement about the regulation of access to Restricted Content), creates a very high regulatory barrier to take-up of the service. It also disadvantages customers in remote and regional areas, disabled people who cannot attend a shopfront, and carriage service providers with no or few shopfronts.</p> <p>The requirement that employees, agents or contractors who activate customer access to adult services be over 18 is also unnecessary, given that those persons will not themselves be provided with access to the services (and will not sight the relevant content).</p> <p>The requirement that the CSP create records of the verification process followed in relation to each customer (including a “unique identifier identifying the person’s account”, the type of proof of identity provided the customer, the name of the person who verified the customer) and retain such records for two years would also impose additional obligations under the Privacy Act (given that the “unique identifier” would be personal information), and additional costs (in providing secure storage), and additional costs. CSPs will record how they verify the age of a customer as part of their ordinary record-keeping process. CSPs should not have to create separate verification records simply to comply with a default scheme in the Draft Determination.</p> <p>There is also no guidance on compliance with clause 4.3(3)(c), and what is actually meant by “unauthorised access”. If all that is intended is to refer to the risk that someone else might pick up and use a consumer’s telephone, this would be self-evident. Further clarification is required if this provision is to be retained in the “default scheme”.</p> <p>In this context, the Associations would seek to include different types of</p>

Draft Determination	Comments and Suggested Amendments
	verification provisions in an Industry Code (as discussed at section 5.5 of Part A).
4.4 Information about individual transactions	<p>The Associations consider that as there is already a requirement for service charge information to be included in promotional material, requiring this information to also be provided in each transaction would be duplicative and annoying to customers. Further, the service provider determinations issued during 2004 (as discussed at section 10 in Part A) already address the issue of “unexpected high bills”, as does the ACIF Billing Code.</p> <p>It is understood that the Office of the Telecommunications Industry Ombudsman has been referring to the ACIF Billing Code when it investigates whether suppliers of services have provided sufficient information on bills to enable the charges to be checked and confirmed by the customer, and carriers have developed improvements to billing systems to be able to demonstrate this information. In this context, it is not clear why further regulation of this area is required.</p> <p>However, if the ACA does not accept this submission, the threshold level of \$1 needs to be increased (as in general this would only exempt a single premium SMS vote). The Associations suggest that if a threshold level is considered necessary for the default scheme, it needs to be co-ordinated with the recommendations arising from the ACA’s Report to the Minister on <i>Preventing Unexpectedly High Bills: Credit Management in Telecommunications</i> (October 2004, released February 2005). This is a matter that should be addressed through an Industry Code.</p>
4.5 & 4.6 Terms and conditions for competitions and voting	These areas are already regulated under State and Territory trade promotions and lotteries legislation, and under the <i>Trade Practices Act 1974</i> . It is unclear how these requirements could be implemented by a carriage service provider where it is not the promoter of the relevant competition or the provider of the program/promotion. The Associations consider that these requirements should be deleted.
4.8 Complaints handling	The complaints handling scheme needs to recognise that the CSP may not be the party providing the content or responsible for resolution of complaints about such content.

Draft Determination	Comments and Suggested Amendments
	<p>Significant clarifications are required in this area, particularly in relation to the respective roles and responsibilities of CSPs and content service providers in handling complaints, and the agencies to whom complaints may be referred (particularly the ABA and the TIO). It is not clear who the “review body” referred to in clause 4.8(3)(b) is. From clause 5.1, it is assumed that this is intended to be the ACA, but this is not clear. Greater clarity is required. It is proposed that this issue be addressed prior to the development of an Industry Code.</p>
<p>4.10 Approval of self-regulatory schemes</p>	<p>These provisions need to make it clear that the default scheme is not a benchmark.</p> <p>Further, a number of the requirements in clause 4.10(2) are unnecessary, for reasons previously outlined. This includes the provisions set out in clause 4.10(2)(a)(i), (iii), (iv), and (v), 4.10(2)(b). There should also be a timeframe specified for the approval process.</p>
<p>5.2 Take-down notices</p>	<p>The Associations consider that it is important that this scheme mirror the take-down scheme in Schedule 5 of the BSA (for regulatory consistency). The Associations support a take down notice scheme that is based on the BSA scheme, as this has worked well in practice.</p>

ANNEXURE 1: DIVISION OF REGULATORY RESPONSIBILITY

The following table illustrates where the Associations consider the regulatory obligations contained in the Draft Determination (as it stands) should rest. This should not be taken to be an indication from the Associations that they accept the drafting of those obligations.

Obligations in Draft Determination	Regulated/responsible entity
Preliminary obligation – classification of content (to assess whether it is adult content or prohibited content), including OFLC training.	Content Service Provider (This includes a CSP when acting in its capacity as content service provider in relation to the relevant mobile content).
3.1 Prohibited content	Content Service Provider
3.2 Prefixes for adult services	The Content Provider must classify/assess the service, and the CSP must provide the Restricted service (as notified by the Content Provider) on the relevant prefix(es).
3.3 & 4.3 Access to adult services / Age verification procedures	The CSP that is the billing entity should be responsible for age verification.
Division 2 Chat Services (clauses 3.4 to 3.6)	Content Service Provider
4.2 Information in promotional material	Content Service Provider (noting that a CSP who is carrying third party content should not be responsible for “vetting” third party advertisements)
4.4 Individual transactions	As this is a matter addressed in the terms and conditions of the relevant service, it should rest with the Content Service Provider.
4.7 Discontinuation of subscription services	The entity that receives the request to “stop” in accordance with the specified procedures (whether the CSP or the

Obligations in Draft Determination	Regulated/responsible entity
	Content Service Provider).
4.8 Complaints handling	The role of Content Service Providers needs to be acknowledged in the complaints handling process. In particular, additional procedures need to be incorporated to reflect that if a CSP receives a complaint, it may need to refer such complaint to the relevant Content Service Provider for investigation.
5.2 Take down notices	CSP

ANNEXURE 2: COMMENTS ON SCOPE OF DRAFT DETERMINATION

The Discussion Paper refers to the Ministerial Direction and states that “the ACA is required to make a service provider determination setting out the rules with which carriage service providers must comply”. The Discussion Paper then states that the rules will:

- require adult content that is delivered via premium SMS and MMS services to only be supplied using the ACA designated prefixes;
- prohibit the supply of content by means of premium SMS or MMS services or “walled garden” mobile portals that is X rated or refused classification; and
- restrict access to adult content supplied by means of premium SMS or MMS and “walled garden” mobile portals.

This, and statements elsewhere in the Discussion Paper, indicate that the Draft Determination is intended to address clause 4(2) of the Ministerial Direction.¹⁴

For completeness, it is noted that clause 4(1) of the Ministerial Direction also required the ACA to make a service provider determination in relation to the matters specified in paragraphs 3.12(3)(a), (f), (i) and (j) of the *Telecommunications Regulations (Regulations)*. The provisions give the ACA a discretion to make a determination setting out rules that apply to service providers in relation to the supply of premium services (as defined) in relation to:

- (a) the terms and conditions on which premium services are offered or supplied;
- (f) restrictions on access to premium services, or on access to a particular number used in the supply of premium services supplied using the carriage service provider’s service;
- (i) the obligations of a carriage service provider in respect of premium services supplied using the carriage service provider’s service;
- (j) a matter relating to the supply of premium services used to access an Internet service.

It is understood that clause 4(1) of the Ministerial Direction was relied upon by the ACA when it issued the *Telecommunications Service Provider (Premium Services) Determination 2004 (No 1)* (as amended) and the *Telecommunications Service Provider (Premium Services) Determination 2004 (No 2)*.

¹⁴ Discussion Paper, section 1.1 and 1.2, pages 3-5.

In addressing clause 4(2) of the Ministerial Direction, the ACA has divided the Draft Determination into “mandatory obligations” and a “default scheme” relating to other obligations. Part 3 of the Draft Determination contains the “mandatory obligations”, which are understood to address those issues which are regarded by the ACA as the “most critical in respect of mobile content”.¹⁵ Division 1 of Part 3 of the Draft Determination addresses each of the matters listed in clause 4(2) of the Ministerial Direction. In particular:

- clause 3.1 prohibits the supply of prohibited content (per clause 4(2)(b) of the Ministerial Direction);
- clause 3.2 requires adult services (MMS or SMS) to be supplied only by use of the 195 and 196 prefixes (per clause 4(2)(a) of the Ministerial Direction); and
- clause 3.3 sets out requirements that restrict access to adult services (per clause 4(2)(c) of the Ministerial Direction).

However, the balance of the Draft Determination addresses a range of other matters that are outside the scope of clause 4(2) of the Ministerial Direction.

For instance:

- Division 2 of Part 3 sets out a range of mandatory restrictions that apply to the supply of “a chat service by way of a premium service”; and
- Part 4 sets out a “default scheme” that will apply to “ a carriage service provider who supplies a premium service other than a carriage service provider to whom an approved regulatory scheme applies”. The default scheme sets out requirements relating to the advertising of premium services, age verification procedures, information about individual transactions, terms and conditions relating to competitions and voting, discontinuation of subscription services and complaints handling.

These matters appear to go beyond clause 4(2) of the Ministerial Direction. It is understood that the ACA’s intention in doing so has been to address what it has identified other “key objectives” underlying the Direction and relating to:

- the risks associated with mobile “chatrooms” (particularly the risks arising from paedophiles using chat rooms to “groom” children); and
- general consumer protection concerns relating to mobile premium services.

¹⁵ Discussion Paper, page 7.

However, it is not clear why the ACA has chosen to address these “objectives” in a service provider determination, in advance of attempts by the industry to address the relevant matters (including those in Division 2 of Part 3 and Part 4) under a self regulatory framework. The Associations are concerned that Division 2 of Part 3 and Part 4 exceed the scope of clause 4(2) of the Ministerial Direction.

The Associations suggest that it is not appropriate to extend the scope of the Draft Determination in this way as the Minister did not specifically call for the ACA to make regulations in relation to these matters and the proposed rules pre-empt the findings of the long-term review being conducted by the Department of Communications, Information Technology and the Arts. If regulations are to be made in relation to those matters not specifically requested by the Minister, the Associations would strongly prefer that they be made by the Minister following full evidence-based review of the issues.

In any event, the Associations consider that the balance should be shifted in favour of a framework that better promotes self regulation, as discussed at Part A.

As a separate point, the Associations also consider that comparative reference should be made to the regulatory policies outlined in the *Broadcasting Services Act 1992 (BSA)*, which contains the statutory schemes for broadcasting content, datacasting content and Internet content. This is because the Associations consider that the development of any scheme that regulates mobile content should have regard to established regulatory policies that apply on other delivery platforms. This should encourage a “technology neutral” approach.

Subsection 4(1) of the BSA explains that the Parliament intends that different levels of regulatory apply across the range of broadcasting services, datacasting services and Internet services “according to the degree of influence” that these different services are able to exert in shaping community views in Australia. Further, subsections 4(2) and 4(3) explain that the Parliament also intends that these services are to be regulated in a manner that “enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens” on service providers, and in a way that will “readily accommodate technological change” and which encourages “the development of ... technologies and their application, and the provision of services made practicable by those technologies to the Australian community”.

While these objectives are not mirrored in the Act, the Associations suggest that these objectives should not be overlooked by the ACA, particularly in a rapidly converging content environment.