

1. Executive Summary

- 1.1. The Australian Mobile Telecommunications Association (**AMTA**) welcomes this opportunity to respond to ASIC's policy proposal paper (**PPP**). AMTA is the peak mobile telecommunications industry body and makes this submission on behalf of Telstra, Vodafone, Optus, Hutchison and Virgin Mobile, who are suppliers of prepaid mobile telecommunications services (**Mobile Operators**) to the public.
- 1.2. Credits in prepaid mobile accounts enable customers to use services supplied by the Mobile Operator (eg. voice calls, SMS and ring tone downloads) (**Mobile Operator Services**) and services provided by third parties (eg. SMS voting on TV programs such as Australian Idol, SMS ordering of ring tones, SMS donations to charity) (**Third Party Services**). As both types of services can be accessed from the one prepaid mobile account, regulation of the facility for providing Third Party Services as part of a prepaid mobile account (**Third Party Service Facility**) will also impact on how Mobile Operator Services are offered.
- 1.3. This submission addresses the issues that would arise if Third Party Service Facilities are regulated under the financial services licensing regime. In making this submission, AMTA does not concede that Third Party Service Facilities are financial products.
- 1.4. AMTA's response to the PPP is summarised below:

- (a) ASIC has not published its views on whether Third Party Service Facilities **should be** regulated under the financial services licensing regime. AMTA seeks ASIC's views on this matter.
- (b) AMTA's position and key recommendation is that Third Party Service Facilities should not be regulated as financial products. AMTA seeks an ASIC declaration that Third Party Service Facilities are not financial products under subsection 765A(2) of the *Corporations Act 2001* to remove any doubt for the industry.
- (c) If ASIC does not support AMTA's position, and Third Party Service Facilities are to be regulated as financial products, ASIC's proposed relief may not be appropriate for these facilities. In this case, AMTA's alternative submission is that ASIC should give specific class order relief for Third Party Mobile Facilities.

- 1.5. AMTA's position is based on the following reasons:
 - (a) Any regulation of Third Party Service Facilities will affect Mobile Operator Services that:
 - are not subject to financial services legislation;
 - are more widely used than Third Party Services; and
 - are the primary purpose of prepaid mobile accounts.
 - (b) The existing telecommunications commercial and regulatory framework applying to prepaid mobile accounts and Third Party Service Facilities already addresses the objectives of the FSRA where they are applicable.
 - (c) The Financial Services Inquiry (**FSI**) recommended that statutory regulation of closed payment systems was not required (recommendation 72).

- (d) Consumers would expect to address their concerns regarding a Third Party Service Facility to the relevant telecommunications body eg. the Telecommunications Industry Ombudsman (**TIO**), the Australian Communications Industry Forum (**ACIF**), or the Australian Communications Authority (**ACA**), rather than ASIC. Further expansion of regulatory bodies would merely confuse consumers.
- (e) Licensing of Third Party Service Facilities will have a net detrimental impact on consumers, third party service providers, Mobile Operators and distributors of prepaid mobile accounts.
- (f) The European Commission (**EC**) has recommended that European member states (including UK) exempt Mobile Operators from the requirements of the E-Money Directive (2000/46) by use of waivers, in consideration of the present risk profile of these facilities for consumers.

1.6. AMTA is keen to meet with ASIC to discuss the matters raised in this submission.

1.7. The following table references AMTA's responses to ASIC's Policy Proposal Paper.

PPP Subject Reference	PPP Page Reference	AMTA Submission Reference
Background NCP Facility Risks	Page 9 Paragraph 15	Page 9
Background International Comparisons	Page 13 Paragraph 32-42	Page 16
A2Q1, Section A ASIC's approach to relief	Page 18 Paragraphs A1, A2	Page 18
A2Q2, Section A Personal Financial Product Advice	Page 18 Paragraph A2	Page 18
A2Q4, Section A Other facilities to be included in ASIC's relief	Page 18 Paragraphs A1, A2	Pages 18, 21, 26
A4Q1, Section A Approach to defining low-value NCP facilities	Page 19 Paragraph A4	Page 19
A6Q1, Section A Case-by-case relief	Page 20 Paragraph A6	Page 21
A15, Section A Product disclosure requirements	Page 24 Paragraph A15	Pages 15, 21
Explanation, Section A Class order relief – hawking provisions	Page 30 Paragraph 4	Page 23
A16Q1, Section A Approach to conditions of relief	Page 25, Paragraphs A16 & A17 Page 30, Paragraphs 3, 4	Pages 23, 23
A17Q3, Section A Conditions of relief – Practical problems of compliance	Page 25 Paragraphs A16 & A17	Page 23
A17(a) & (b), Section A Conditions of relief - Internal dispute resolution	Page 25 Paragraphs A17(a) & (b)	Page 23
A17(c), Section A Conditions of relief – Separate accounts on trust	Page 26 Paragraph A17(c)	Page 24
A17(d), Section A Conditions of relief – Notification of changes	Page 27 Paragraph A17(d)	Page 25
A17(i), Section A Conditions of relief – Reporting of breaches	Page 27 Paragraph A17(i)	Page 25
Explanation, Section A Conditions of Relief – consumer and market integrity risks	Page 30 Paragraphs 3 & 4	Pages 9, 23
Explanation, Section A Consumer and market integrity goals and intention for regulation of NCP facilities	Page 30 Paragraph 1	Page 9

PPP Subject Reference	PPP Page Reference	AMTA Submission Reference
B1Q1 & B1Q2, Section B Regulation of other NCP facilities	Page 34 Paragraph B1	Pages 18, 21, 26
B2Q1, Section B Individual applications for relief	Page 34 Paragraph B2	Page 21

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3. Introduction

About AMTA

- 3.1. AMTA is the peak industry body representing Australia's mobile telecommunications industry. AMTA's mission is to promote an environmentally, socially and economically responsible and successful mobile telecommunications industry in Australia. AMTA members include mobile phone carriers, handset manufacturers, retail outlets, network equipment suppliers and other suppliers to the industry. For more details about AMTA, please see <http://www.amta.org.au>. AMTA makes this submission on behalf of mobile telephony carriers and carriage service providers that provide prepaid mobile telecommunications services (**Mobile Operators**) to the public.

Prepaid Mobile Accounts and Third Party Service Facilities

- 3.2. Prepaid mobile accounts enable consumers to pay in advance for services that can be accessed from a mobile handset connected to a mobile network. Consumers purchase credit or stored value for their prepaid mobile account and these credits can be applied to a range of mobile telecommunications services. Until recently, consumers could only apply account credits to services provided by the Mobile Operator eg. voice calls, short message services (**SMS**), data usage, and ring tones and games sent to the consumer's mobile phone. In this submission, these services provided by Mobile Operators are referred to as "**Mobile Operator Services**".
- 3.3. Mobile Operators and third parties have since developed new applications for mobile telecommunications technology to meet consumer demand to be able to do more with their mobile phone. Examples of new applications include the use of SMS to vote on television polls and programs such as Australian Idol, to make donations to the recent Tsunami appeal, to enter competitions, to request a ring tone to be sent to the consumer's mobile phone. These services are referred to as "**Third Party Services**" in this submission. These developments are reported in the ACA's Telecommunications Performance Report 2003-2004¹:
- "The continued growth in the use of SMS has been stimulated by an expanding array of SMS applications in the messaging market, such as SMS-voting, other TV interactive applications, ticket purchasing for airlines and events, premium content services and SMS chat services."
(p76)
- 3.4. Third Party Services are currently content based and in some cases require a compatible handset for receiving the services (eg. services delivered as images).
- 3.5. Commercial arrangements between Mobile Operators and selected third parties enable the Mobile Operator's customers to use third party services. In this submission these arrangements are referred to as "**Third Party Service Facilities**". These commercial arrangements can be structured in different ways, however the common elements are:
- (a) The Mobile Operator enables carriage of the Third Party Services (in the form of voice, text, pictures, data or a combination of these) over the operator's mobile network;

¹ Available online at http://internet.aca.gov.au/ACAINTER.2752830:STANDARD:712666702:pp=DIR501,pc=PC_60045

- (b) The Mobile Operator is liable to pay the third party for the customer's use of third party services;
 - (c) The Mobile Operator charges the price of the Third Party Service to the customer's prepaid mobile account; and
 - (d) The Mobile Operator periodically accounts for all third party services used by its customers and makes payment for those services to the relevant third party. Usually the Mobile Operator will deduct from this payment its fees for providing the Third Party Service Facility.
- 3.6. There is no direct payment or transfer of funds from the customer's prepaid mobile account to the third party. Consequently AMTA believes that these services are not, and should not be, financial products.

This submission

- 3.7. There are two parts to this submission. In the first section, AMTA addresses the reasons why Third Party Service Facilities should not be regulated as financial products.
- 3.8. If ASIC does not support this position, the second section provides reasons for the need for specified class order relief for Third Party Service Facilities, in response to the specific questions, issues and approach discussed in ASIC's policy proposal paper.

4. General comments on Regulation of Third Party Service Facilities

Summary of Section 4

- A.** ASIC should declare, under subsection 765A(2) of the *Corporations Act 2001* (**Corporations Act**), that Third Party Service Facilities are not financial products to remove any doubt about the regulation of these facilities, and for the reasons set out in this section. In particular, ASIC should have regard to the following:
- (a) the nature, scale, complexity and risk profile of Third Party Service Facilities is significantly different from products that are financial products.
 - (b) the existing telecommunications commercial and regulatory frameworks already achieve the consumer goals of the Corporations Act in relation to Third Party Service Facilities. These frameworks also address competency, capacity, compliance and disclosure risks where they are relevant to Third Party Service Facilities.
 - (c) Third Party Service Facilities pose little or no market integrity risks as they operate in closed systems that do not pose any systemic risk to financial markets.
 - (d) the explanatory memorandum to the FSRA states the intention of parliament that there be flexibility to exclude certain products from the regulatory regime where appropriate. Such exclusion is appropriate for Third Party Service Facilities.
- B.** Regulation of Third Party Service Facilities under either Chapter 7 of the Corporations Act or the proposed conditions of relief would have a net detrimental impact on consumers, third party service providers, Mobile Operators and distributors of prepaid mobile accounts, for no apparent increase in consumer protection.
- C.** The impacts on consumers would include:
- (a) potential confusion;
 - (b) no increase in ability to compare between Third Party Service Facilities provided by different Mobile Operators;
 - (c) no increase in relevant information for deciding whether to purchase a prepaid mobile account; and
 - (d) potential for Loss of consumer benefits of Third Party Service Facilities and future investments in new mobile telecommunications services
- D.** Such regulation of Third Party Service Facilities would impact the community in the following ways:
- (a) reducing the opportunities for purchase of prepaid mobile services; and
 - (b) discouraging investments designed to expand the quality, variety and availability of mobile telecommunications services;
- and for no apparent increase in consumer protection.

- E. Regulation of Third Party Service Facilities under either Chapter 7 of the Corporations Act or the proposed conditions of relief may affect the operations of Third Party providers who are essentially dependent on Third Party Service Facilities.
- F. Regulation of Third Party Service Facilities under either Chapter 7 of the Corporations Act or the proposed conditions of relief would impact on Mobile Operators and distributors in the following way:
 - (a) increased compliance costs for Mobile Operators;
 - (b) reducing distribution opportunities;
 - (c) reducing direct marketing opportunities; and
 - (d) forced changes in business systems and operations.
- G. Excluding Third Party Service Facilities from being financial products is consistent with the European Commission's recommendation that European member states (including UK) exempt Mobile Operators from the requirements of the E-Money Directive (2000/46).

Parliamentary Intention to exclude certain facilities

- 4.1. Parliament's intention, as embodied in the *Financial Services Reform Act 2001 (FSRA)* was to regulate certain NCP facilities, but not all NCP facilities as some facilities clearly are not, and should not be, regulated as financial products. The FSRA provided flexibility for ASIC to exclude particular products from the financial services regulatory regime as appropriate:

"The new definition [of 'financial product'] is designed to be flexible... There is ... a list of specific inclusions in the definition, and a list of specific exclusions. A regulation-making power provides further flexibility to include or exclude particular products from the regime as appropriate." (Explanatory memorandum, paragraph 2.26)

- 4.2. Under subsection 765A(2) of the Corporations Act, ASIC may declare that certain facilities are not financial products. As ASIC has acknowledged in paragraph 1 of the PPP Section A Explanation:

"...the nature, scale and complexity of some NCP facilities will be such that it may not be appropriate for the licensing and ongoing disclosure obligations to apply to them in full."

- 4.3. AMTA submits that regulating Third Party Service Facilities under Chapter 7 or in the manner proposed by ASIC would be inconsistent with the objectives of the FRSA to deliver industry efficiency and lower compliance costs:

"The introduction of a consistent disclosure standard to apply to all financial products addresses consumers' need for comparable information on products, while increasing industry efficiency and lowering compliance costs." (Explanatory memorandum, paragraph 2.39)

- 4.4. Any apparent increase in consumer protection from regulation under Chapter 7 or in the manner proposed by ASIC would not be commensurate with the increased compliance costs of regulation. This is especially the case because:

- (a) the AFS licensing regime and telecommunications regulatory regime share the same consumer protection objectives; and

- (b) the risk profile of Third Party Service Facilities (discussed from paragraph 4.5 below) is also very different to the risk profile of products that are financial products.

NCP facility risks

4.5. ASIC identifies the key risks that are specific to NCP facilities in the Background to the **PPP** at **paragraph 15** (page 9). Because Third Party Service Facilities are significantly different from NCP facilities that are financial products, AMTA believes these risks are addressed by the existing commercial and regulatory framework for Third Party Service Facilities. This section discusses:

- (a) The differences between Third Party Service Facilities and other NCP facilities and financial products; and
- (b) The commercial and regulatory arrangements that address the risks identified by ASIC.

Comparing Third Party Service Facilities and NCP Facilities

4.6. Third Party Services Facilities are significantly different in nature from the NCP facilities and financial products that the FSRA was intended to regulate:

- (a) Both the Third Party Service Facility and Mobile Operator Services can be used from the one prepaid mobile account. However, the primary purpose and use of prepaid mobile accounts is the provision of Mobile Operator Services. The use of the Third Party Service Facility constitutes only a small proportion of total prepaid account balances, with the majority of the account balances being used for Mobile Operator Services.
- (b) Third Party Service Facilities pose no systemic risk as they operate in a closed system for the purposes of the Mobile Operator and selected third party providers, rather than in an open payments system.
- (c) The financial risk to consumers in using Third Party Service Facilities is minimal as consumers use the facility for low value transactions and purchase low value top-ups.
- (d) Consumers purchase prepaid mobile accounts for the primary purpose of using telecommunications services. Consumers do not compare Third Party Service Facilities with products that are financial products. For example, consumers do not purchase prepaid mobile accounts for the purpose of earning returns, managing assets, protecting assets, managing financial risk or making non-cash payments.
- (e) There is already a consistent standard of disclosure applying to prepaid mobile accounts under telecommunications consumer protection regulation that enables consumers to compare equivalent Third Party Service Facilities. In addition, consumers would not compare these telecommunications services with products that are financial products

4.7. These distinguishing features mean that Third Party Service Facilities are not and should not be regulated as NCP facilities.

Existing Commercial and Regulatory arrangements

4.8. The core business for Mobile Operators is not the provision of Third Party Service Facilities, but the carriage of communications over mobile networks. These services are primarily regulated under

the *Telecommunications Act 1997 (Telecommunications Act)*. The Telecommunications Act is administered by the ACA and provides for the development of industry codes.

- 4.9. The Australian Communications Industry Forum (**ACIF**) is the primary industry body which formulates such industry codes.² The ACIF code development process includes consultation with peak consumer organisations and other regulatory agencies, such as the Australian Competition and Consumer Commission (**ACCC**). Mobile Operators have actively participated in ACIF since its inception, including chairing and membership of past and current working groups devising codes and guidelines applicable to the telecommunications industry.
- 4.10. The ACA may determine industry codes and standards in some circumstances³ as well as make determinations in relation to specified matters. Industry codes that are registered with the ACA are enforceable by the ACA. The majority of industry codes currently registered with the ACA are directly or indirectly concerned with consumer protection standards. These codes, together with consumer access to the TIO and Telephone Information Services Standards Council (**TISSC**) address the particular risks for consumers of Third Party Services Facilities.
- 4.11. In addition, the general conduct provisions in the *Trade Practices Act 1974* and *Fair Trading* legislation in each State also apply to Mobile Operators.
- 4.12. Existing commercial and regulatory arrangements in the telecommunications sector address the risks identified by ASIC in paragraph 15 of the Background. **Appendix A** contains the ACA's "M-Commerce Guide", which sets out the key consumer safeguards that specifically apply to Third Party Service Facilities as 'mobile -commerce' practices.

Competency and other capacity risks

- 4.13. There is little, if any, risk for consumers that Mobile Operators will not be able to meet their obligations under Third Party Service Facilities. The competencies and capacity required for operating Third Party Service Facilities fall well within the scope of the technical, financial and human resources required to supply mobile telecommunications services to the public.
- 4.14. The potential for heavy penalties deters market participation by entities that do not have the competency and capacity to meet the commercial and regulatory requirements for the provision of Mobile Operator services. For example, failure to comply with carrier licence conditions attracts a pecuniary civil penalty of up to \$10m for a body corporate.⁴
- 4.15. Mobile Operators have invested heavily in networks and systems for compliance with telecommunications regulation including the Telecommunications Act and the *Telecommunications (Consumer Protection and Service Standards Act) 1999 (TCPSS)*.

Compliance risks

- 4.16. There is little or no risk of fraudulent or negligent conduct by Mobile Operators and their distributors in the issue of Third Party Service Facilities. Unlike standard financial products, these facilities do not involve providing advice to consumers on financial risk management or asset protection. In

² All 17 industry codes which are currently registered with the ACA have been devised by ACIF.

³ Eg. *Telecommunications Act 1997*, s124, s125, s480A.

⁴ s68 & s570 *Telecommunications Act 1999*

addition, industry compliance is encouraged by the existing telecommunications industry complaints handling and dispute resolution arrangements to address consumer protection issues.

4.17. The **Complaint Handling Code** (ACIF C547: June 2004) provides processes for efficient, fair and accessible handling of consumer complaints and complaint monitoring. Requirements under this code include:

- (a) dealing with complaints in a reasonable timeframe and with courtesy;
- (b) complaint response charges;
- (c) escalation processes; and
- (d) publication of suppliers' complaint processes.
- (e) Consumers also have free access to external dispute resolution bodies such as the TIO. Further information about the TIO is extracted from the TIO website <http://www.tio.com.au> in **Appendix B** to this submission. The TIO reports code breach statistics to the ACA in its annual report.

4.18. AMTA is working with TISSC 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 multimedia (**MMS**) services and portal content (**Draft TISSC Premium SMS/MMS Code**).⁵ 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. To date, the work on the draft TISSC Premium SMS/MMS Code has focussed on developing provisions addressing:

- (a) price advisement and notification (including in promotional material);
- (b) rules pertaining to chat services;
- (c) rules around subscription services;
- (d) procedures for raising complaints with TISSC; and
- (e) other matters relating to the operation of premium SMS and MMS services within the Australian market.

Disclosure risks

4.19. The existing telecommunications commercial and regulatory framework for Third Party Service Facilities already addresses the disclosure risks identified by ASIC (at paragraph 15 of the PPP). The FSRA intended that customers would be able to compare functionally equivalent products and the existing telecommunications regulatory framework achieves this. Consumers are already able to compare equivalent Third Party Service Facilities and there is no reason why a customer would compare these telecommunications services with products that are financial products. Therefore, regulation under the FSRA is neither required nor appropriate for Third Party Service Facilities.

4.20. The EM to the FSRA states:

⁵ 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 have been considered in developing this code.

“Consumers will benefit from the new [product disclosure] regime, as a consistent standard of disclosure will allow consumers to compare functionally equivalent financial products, and lead to increased consumer confidence and participation in the financial sector (paragraph 2.37) ... The introduction of a consistent disclosure standard to apply to all financial products addresses consumers’ need for comparable information on products, while increasing industry efficiency and lowering compliance costs.” (Paragraph 2.39)

- 4.21. The *Telecommunications (Standard Form of Agreement Information) Determination 2003*⁶ (**SFOA Determination**) requires Mobile Operators to prepare a written summary of the terms and conditions of standard forms of agreement (including specified matters) and provide this summary to all new customers. Schedule 1 to the Determination sets out matters that must be included in the summary and is reproduced in **Appendix C**.⁷ The Customer Information on Prices, Terms and Conditions Code (ACIF C521: October 2001)⁸ (**PTC Code**) prescribes standards in the advertising and pre-contract stages of the customer relationship to facilitate informed choices and disclosure of terms. For example, the code requires suppliers to disclose matters such as technical limitations on the availability of a service; sufficient information to determine the suitability for the customer’s purpose; and the disclosure of the types of fees included in advertised rates (such as call connection fees). The Consumer Contracts Code (ACIF C620: 2005) (**Contracts Code**)⁹ contains provisions under clause 7 relating to the format and structure of contracts to aid consumer understanding.
- 4.22. The specific disclosure risks identified by ASIC at paragraph 15(c) of the Background to the PPP are addressed in the table below.

Risks consumers may not be aware of	Existing telecommunications commercial and regulatory framework for Third Party Service Facilities
<p>PPP Background Paragraph 15(c)(i)</p> <p>The terms and conditions being able to be changed unilaterally by an issuer of NCP facilities without notice to clients</p>	<p>Disclosure of variation processes is addressed by the SFOA Determination and the Contracts Code.</p> <p>The SFOA Determination requires that the summaries provided to customers must include the following matters¹⁰:</p> <ul style="list-style-type: none"> (a) variations that would cause detriment to ordinary consumers; (b) the minimum period of notice to be given to consumers before the variations take effect; (c) the way in which consumers will be informed of the variations; and (d) in relation to any other variations — the place where an up-to-date copy of the standard form of agreement may be obtained. <p>Clause 31.1 of the PTC Code also requires suppliers to inform consumers of:</p> <ul style="list-style-type: none"> (a) How changes to a telecommunications supply contract can be affected; (b) How such changes are to be notified to the consumer if at all (c) How consumers can obtain or access amended terms and conditions; and (d) The minimum notice period for amending the contact, if any <p>The Contracts Code goes further to require that contract terms must not be unfair. The Code specifies that in certain circumstances, a term may be unfair if it enables a supplier to unilaterally vary a contract term unless certain requirements are met.</p>

⁶ Made by the ACA under subsection 480A (2) of the *Telecommunications Act 1997*

⁷ The determination and the explanatory statement to the determination are available online at http://internet.aca.gov.au/acainterwr/aca_home/legislation/radcomm/determinations/telecom/sfoainfo_03.pdf and http://internet.aca.gov.au/acainterwr/aca_home/legislation/radcomm/acts/telecom/es_tel_sfoainfo_2003.pdf respectively.

⁸ The code is available online at http://internet.aca.gov.au/acainterwr/telcomm/industry_codes/codes/c521b.pdf

⁹ The code is available online at <http://www.acif.org.au/data/page/12605/C620.pdf>

¹⁰ See Item 6 of the Schedule 1

Risks consumers may not be aware of	Existing telecommunications commercial and regulatory framework for Third Party Service Facilities
<p>PPP Background Paragraph 15(c)(ii)</p> <p>Restricted or no access to refunds</p>	<p>Clause 6.2(f)(ii) of the Contracts Code provides that in assessing whether a term in a contract is unfair, it is relevant to consider whether the term has the object or effect of permitting the supplier to terminate a contract for convenience unless the supplier gives the Consumer at least 30 days Notice in Writing and either refunds any unexpired prepaid credits or, if the Consumer agrees, applies those credits for use on another service. A Supplier terminates "for convenience" if they end a contract in circumstances where there is no breach of the contract by the Consumer and there is no other event which triggers the right to terminate.</p>
<p>PPP Background Paragraph 15(c)(iii)</p> <p>Limited means of promptly replacing a card or other item required for the NCP facility without detriment if it is lost or stolen</p>	<p>Consumers are informed when they sign up for a mobile phone service that they can contact the Mobile Operator to suspend their account and replace their subscriber identity module (SIM) card if the consumer's mobile phone has been lost or stolen. In addition AMTA provides an IMEI blocking services for lost and stolen mobile phones.</p> <p>Industry initiatives to address lost and stolen phones are discussed in the ACA's Telecommunications Performance Report 2003-2004 at page 81:</p> <p style="padding-left: 40px;">"Since September 2003, mobile carriers have been sharing information to block calls from identified stolen or lost mobile phone handsets on all GSM networks. The GSM handset's unique electronic serial number, known as the international mobile equipment identity (IMEI) number, is used to 'blacklist' handsets reported as lost or stolen.</p> <p style="padding-left: 40px;">AMTA reported that approximately 165,000 mobile handsets have been blocked by carriers since the program commenced. In July 2004, AMTA launched an online IMEI checking service that enables consumers or retailers to find out the current blocked or unblocked status of individual IMEI numbers."</p> <p>AMTA's online IMEI checking service is available online.¹¹</p>
<p>PPP Background Paragraph 15(c)(iv)</p> <p>The risk of loss of value if the issuer becomes insolvent</p>	<p>AMTA notes that ASIC has not proposed any specific disclosure requirements to address this risk in the proposed product disclosure requirements in paragraph A15 of the PPP. Presumably, therefore ASIC does not consider this to be a significant issue requiring disclosure. AMTA considers disclosure of dispute resolution processes and other risks (addressed above) to be more important for consumers in deciding whether to acquire prepaid mobile services.</p>

4.23. Regulation of Third Party Service Facilities under the FSRA is unlikely to achieve an increase in consumer protection for these facilities. As discussed earlier, prepaid mobile accounts are a telecommunications service, with Third Party Service Facilities being a new application of mobile telecommunications technology. Third Party Service Facilities are very different in nature, scale, complexity and risk profile from products that are financial products. The existing telecommunications commercial and regulatory framework already addresses the risks identified by ASIC.

Market Integrity risk

4.24. ASIC states in the PPP:

"In adopting a tailored approach to the regulation of NCP facilities we have taken into account the ... market integrity goals of the Corporations Act in light of the risks posed by NCP facilities..." (Paragraph 1, Explanation to PPP Section A)

¹¹ See <http://www.amta.org.au/default.asp?Page=405> for the service and <http://www.amta.org.au/default.asp?Page=419&Format=print> for the AMTA media release.

- 4.25. AMTA considers that Third Party Service Facilities pose little or no market integrity risk as Third Party Service Facilities do not operate as an “**open payments system**” as defined by the FSI.

“Open payments systems are those which allow customers to transfer value to third parties. Payment instruments are exchanged between financial institutions rather than one institution acting for both the payee and payer. In open systems, the transaction does not reach finality until the value in the payment instrument has been settled between those institutions through accounts held at the bank.” (p388, footnote 17, Financial Services Inquiry final report)

- 4.26. As a closed payment system, Third Party Service Facilities pose substantially less systemic risk. Therefore the exclusion of Third Party Service Facilities from being financial products would not in any way jeopardise the consumer and market integrity goals of the Corporations Act.

Impact of regulation

Retail Consumer impact

- 4.27. Consumers cannot purchase a Third Party Service Facility separately from a prepaid mobile account that also offers Mobile Operator services. Accordingly, any obligations that apply to Third Party Service Facilities under Chapter 7 of the Corporations Act or as proposed by ASIC would impact on consumers of prepaid mobile accounts irrespective of whether they use the facility.
- 4.28. Consumers would not view a prepaid mobile account as a financial product. Consumers would be confused about whether their concerns and complaints should be addressed to a telecommunications regulatory agency or a financial services regulator if prepaid mobile products are regulated as financial products. Consumers will be confused about what they are purchasing if a financial services guide, product disclosure statement and /or statement of advice is provided in addition to all of the other material currently provided to customers when they purchase a prepaid mobile product.
- 4.29. Imposing AFS disclosure requirements would not increase consumer choice or ability to compare Third Party Service Facilities, but would impose additional compliance costs on Mobile Operators. The existing telecommunications commercial and regulatory disclosure regime provides for consistent standards of disclosure for Third Party Service Facilities and enables consumers to make informed decisions and compare between prepaid mobile accounts offered by different Mobile Operators.
- 4.30. Third Party Service Facilities add value for consumers by expanding the suite of services available from a mobile phone. These benefits are reported in the ACA’s Telecommunications Performance Report 2003-2004¹²:

“Premium rate SMS and MMS services

Premium rate SMS and MMS services and products typically include voting for interactive TV shows, entering competitions, accessing sports results or using SMS ‘chat’ services, representing the convergence of the content and mobile services markets. Costs associated with these services are typically higher than for standard SMS and MMS. Consumers benefit from the immediacy and convenience of accessing services from a mobile phone handset as well as the inclusion of the cost on a mobile phone bill, which eliminates the need for payment at each transaction. Chapter 12 reports on the significant levels of demand for these services.” (p78)

¹² Available online at http://internet.aca.gov.au/ACAINTER.2752830:STANDARD:712666702:pp=DIR501,pc=PC_60045

Community impact

- 4.31. If distributors of prepaid mobile products are required to be financial services licensees or authorised representatives because of ASIC's approach, the resulting compliance costs will force distributors to reconsider whether it is commercially viable to continue to distribute prepaid mobile accounts. This may result in a downscale of distribution networks and thereby reduce accessibility of prepaid mobile services to consumers nationwide.
- 4.32. Such licensing requirements would erode the incomes that Mobile Operators expect to derive from Third Party Service Facilities. In practice, this may result in Mobile Operators being more conservative in developing new offerings and increasing availability of Third Party Service Facilities to support Third Party Services on their mobile GSM and 3G (third generation) networks, to the detriment of the community. This industry has made significant investments in third generation (3G) technologies.

Third party provider impact

- 4.33. Third Party providers of content services are often small to medium enterprises, whose primary business is developing and providing digital content. Their vitality is dependant on the success of the mobile sector, in particular the 3G technology and Third Party Service Facilities. If the unexpected, complex and costly legal environment of Australian Financial Services (**AFS**) licensing applied, it would require Mobile Operators to reconsider their commercial strategies in relation to Third Party Service Facilities and consumers. This may mean reducing or abandoning activities with Third Parties, placing the survival of some Third Party content providers at risk.

Mobile Operator & Distributor impact

- 4.34. Mobile Operators would incur significant increased compliance costs for changes in systems, and operational, process and commercial adjustments to comply with licensing requirements if required. AMTA strongly believes that these consequences were not intended by the FSRA. The impact is wider if Mobile Operators need to incur further costs in providing training, advice and support to their distributors to ensure compliance with AFS licensing requirements.
- 4.35. As discussed earlier, AFS licensing could also potentially impact on distributors of prepaid mobile products if they are regulated as AFS licensees or authorised representatives. These distributors include retail stores operated by Mobile Operators, independent dealers and general retail outlets such as Australia Post and service stations. An increase in compliance costs will force distributors to reconsider whether it is commercially viable to continue to distribute prepaid mobile products. In some cases, this will result in a downscale of distribution networks and loss of business opportunities for both distributors and Mobile Operators. The most affected distributors would be stores whose core business is general retail and not the sale of mobile phone products and services eg. Australia Post, service stations and specialist, variety and electronics stores.
- 4.36. The telecommunications and financial services regulatory regimes share the same consumer protection objectives. Accordingly any additional consumer benefits of regulation of Third Party Service Facilities under Chapter 7 of the Corporations Act would not be commensurate with the increased compliance costs for Mobile Operators.

European Commission position

4.37. On 18 September 2000 the European Parliament and Council issued Directive 2000/46/EC in relation to electronic money (E-money Directive).¹³ Article 1.3(b) of the Directive defines electronic money:

- “(b) ‘electronic money’ shall mean monetary value as represented by a claim on the issuer which is:
- (i) stored on an electronic device;
 - (ii) issued on receipt of funds of an amount not less in value than the monetary value issued;
 - (iii) accepted as means of payment by undertakings other than the issuer.”

4.38. AMTA notes that the definition of ‘electronic money’ under the Directive is concerned with whether “value” has been issued, while the definition of ‘non-cash payment facility’ is concerned with whether a payment “could be” made. The Directive also recognises that there may be differences in the ‘monetary value issued’ and the ‘receipt of funds’ under Article 1.3(b)(ii).

4.39. On 18 January 2005 the European Commission issued a guidance note on the application of the E-money Directive to Mobile Operators.¹⁴ AMTA believes this international guidance to be valuable in its analysis of the issues and does not see any reason for Australia should to be inconsistent with the approach of international regulators. AMTA’s specific comments on the Commission’s findings are set out in the table below.

EC Guidance	AMTA Commentary
“...E-money is now being issued under some circumstances by mobile phone operators to their prepaid consumers when those consumers purchase some third party services and pay for them using their prepaid store of value”. (Paragraph 6)	AMTA notes that ASIC considers electronic cash to be a non-cash payment facility (at paragraph 6, PPP).
“It is generally understood that the value of third party services purchased by prepaid consumers amounts to a little over 1% of their total expenditure. Thus, around 99% of the monetary value stored by Mobile Operators on behalf of their prepaid consumers is used to purchase communications services provided by the Mobile Operators themselves. Those prepaid communication services do not fall within the ambit of the E-money Directive. Neither do the communication or third party services purchased by consumers on a “post-paid (ie. Billing) basis fall under the Directive.” (Paragraph 5)	Spending on Third Party Services is only a small proportion of prepaid spending by consumers and the remainder is spent on Mobile Operator Services. AMTA agrees with the commission’s findings that Mobile Operator Services should not fall within the ambit of financial services regulation and neither should third party services accessed with a post-pay account. Since both Mobile Operator Services and Third Party Service Facilities are offered under the one prepaid mobile accounts, regulation of Third Party Service Facilities will result in de facto regulation of Mobile Operator provided services.
“Turning to the specific issues raised in connection with the issuance of e-money by mobile phone operators, the Commission services believe that a flexible approach needs to be adopted.” (Paragraph 9)	AMTA supports the use of a flexible approach to the regulation of Third Party Service Facilities.
“...[T]here has so far been no evidence presented of harm done to consumers or to the stability and good functioning of payment systems as a result of the issuance of e-money by Mobile Operators... It would appear difficult to justify the imposition of all elements of the Directive (including the redeemability requirement and a limitation on investments) from a ‘proportionality’ point of view.” (Paragraph 10)	AMTA is not aware of any evidence of harm done to consumers or to the stability and good functioning of payment systems as a result of the use of Third Party Service Facilities.

¹³ <http://europa.eu.int/cgi-bin/eur-lex/udl.pl?REQUEST=Seek-Deliver&COLLECTION=oj&SERVICE=all&LANGUAGE=en&DOCID=2000I275p0039>

¹⁴ http://europa.eu.int/comm/internal_market/bank/E-money/index_en.htm.

EC Guidance	AMTA Commentary
<p>“...given the fact that in many cases (though not all), it appears that Mobile Operators themselves arrange for the payment of third party content providers, either as a result of a contractual relationship under which the Mobile Operator assumes the liabilities of its prepaid consumers towards a merchant or through a revenue-sharing arrangement with a merchant, it is arguable that many purchases of third party content do not give rise to e-money”. (Paragraph 13)</p>	<p>Mobile Operators similarly assume the liabilities of their prepaid consumers towards a third party provider. Accordingly, use of a Third Party Service Facility might not give rise to a non-cash payment.</p>
<p>“...[T]here are at present few instances where Mobile Operators act simply as payment agents for consumers vis-à-vis third party merchants. The Directive would therefore only apply in a correspondingly limited number of cases”. (Paragraph 14)</p>	<p>As Mobile Operators assume the liabilities of their prepaid consumers towards a third party provider, they are not acting simply as payment facilitators for consumers vis-à-vis third parties. The ASF regime should not apply to Third Party Service Facilities that operate in this manner.</p>
<p>“...[W]ithout a detailed risk analysis, it is difficult to see that the requirements imposed by the Directive are proportionate to the risks undertaken by either the operators themselves, or prepaid consumers of third party services.” (paragraph 16)</p>	<p>AMTA shares the Commission’s difficulty in seeing how the requirements imposed by the financial services licensing regime would be proportionate to the risks undertaken by Mobile Operators or its prepaid consumers. AMTA further submits that there is little, if any risk to consumers from the use of Third Party Service Facilities because of the robust consumer protection regime already applying to prepaid mobile accounts.</p>
<p>“Although the monetary amounts quoted in Article 8 are possibly low for Mobile Operators (total e-money liabilities of less than €6 million and less than €150 million of stored value per consumer), it should be possible for Member States’ authorities to exempt a large part of the prepaid business of Mobile Operators from the scope of the Directive, at least over the short to medium term.” (Paragraph 18)</p>	<p>At current conversion rates (\$1.68AUD to €1 at 23 February 2005) the European limits in Australian dollars would be \$10.08m for total liabilities and \$252 per consumer. AMTA notes that the European overarching limit of \$10.08m is closely equivalent to ASIC’s proposed \$10m limit on all issued facilities.</p>
<p>“The use of waivers may, however, need to be supplemented by a longer term solution that looks at amending the thresholds mentioned in Article 8. This could of course only be done by amending the Directive itself, and is therefore a longer term project.” (Paragraph 20)</p>	<p>Here the Commission has recognised the need for amendment of the legislation in the longer term.</p> <p>ASIC should adopt this approach and declare under s762 of the <i>Corporations Act 2001</i> that Third Party Service Facilities are not Financial Products.</p>

5. Specific comments on Policy Proposal Paper

Summary of Section 5

- A. Third Party Service Facilities should not be treated as financial products. These facilities are significantly different in nature and risk profile from standard NCP facilities. If these facilities are to be treated as financial products, ASIC should provide specific class order relief for Third Party Service Facilities. Specific relief for Third Party Service Facilities is consistent with the Corporations Act and ASIC's intention to adopt a tailored approach as discussed above in Section 4.
- B. ASIC's proposed criteria and conditions for relief are inappropriate for Third Party Service Facilities (and, for any specific class order relief in respect of Third Party Service Facilities) for the following reasons:
- (a) Given the hybrid nature of prepaid mobile accounts, ASIC should give relief to any person who provides personal financial product advice in relation to Third Party Service Facilities offered as part of a prepaid mobile account.
 - (b) the proposed monetary limits for defining low-value NCP facilities are impractical to apply to prepaid mobile phone accounts because of the hybrid nature of these products. Since Third Party Service Facilities are common to all Mobile Operators, class order relief is more appropriate than case by case relief. However, on the basis of ASIC's proposed conditions for class order relief for NCP facilities, Third Party Service Facilities will fall outside the class order relief proposed.
 - (c) the 'small proportion' condition for case-by-case relief is uncertain in its application.
 - (d) the existing telecommunications commercial and regulatory framework already achieves the objectives of ASIC's proposed minimum product disclosure requirements and conditions for class order relief.
 - (e) Mobile Operator Services would be restricted if the anti-hawking provisions applied or if any relief is restricted to general advice and does not extend to relief for personal advice, ie. if ASIC believes that Third Party Service Facilities are financial products and relief is not granted.
 - (f) trust account requirements are not required for Third Party Service Facilities, would impose an unreasonable burden on Mobile Operators and would inappropriately result in giving priority to prepaid customers over all other creditors.
 - (g) ASIC's proposed condition requiring notification of potential breach of conditions creates uncertainty and does not conform with the principles of procedural fairness.

Class order Relief: Personal advice

- 5.2. In response to **A2Q2**, AMTA submits that class order relief should be extended to personal financial product advice for these facilities. Because of the hybrid nature of a pre-paid mobile phone service, it may be implied that a recommendation in relation to a telecommunication service necessarily includes a recommendation in relation to the third party facility - ie that 'personal advice' about a telecommunications service such as a pre-paid mobile service (non-financial

product) may amount to personal advice about a third party service facility because there is no severable link between the two.

- 5.3. It is likely that personal circumstances would be taken into account in the sales process for prepaid mobile services. When giving an opinion or recommendation, such as whether to acquire a prepaid mobile service from one mobile operator or another or by comparison with a postpaid account, mobile operators and dealers may well ask about a person's circumstances, such as how often they use the phone and/or whether they have difficulty in managing the amount they spend on mobile phones.
- 5.4. However, as Third Party Service Facilities do not have the same characteristics as products that are financial products, and cannot be severed from the pre-paid mobile service (non-financial product) that they form part of, AMTA does not believe that it is necessary to impose any obligations on mobile operators or dealers beyond the existing telecommunications regulation that currently applies. Consequently, if Third Party Service Facilities are to be treated as financial products, AMTA submits that class order relief should be extended to personal financial product advice for these facilities.

Class order relief: Defining low-value NCP facilities

- 5.5. This section addresses question A4Q1 in the PPP:

A4Q1 Do you agree with our approach to defining a low-value NCP facility? If not, why not, and what approach would you prefer? Please give details.”

- 5.6. The **PPP A4** definition of low-value NCP facility is based on monetary limits applied on a ‘per account’ basis and ‘all accounts’ basis. These tests assume that an NCP facility will operate as a single ‘account’ holding stored value that cannot be used for any other purpose. Therefore these tests are difficult to apply to a Third Party Service Facility where there is no separate ‘account’ of stored value for use of this facility in isolation from use of Mobile Operator Services.
- 5.7. The only practical way for Mobile Operators to apply a monetary limit on a Third Party Service Facility would be to impose a whole of account limit on a customer's prepaid mobile account. This would detrimentally affect all prepaid mobile accounts including consumers who do not use the Third Party Service Facility. The following discussion assumes that the proposed monetary limits would apply to the stored credit in a prepaid mobile account.

\$10 million total stored value test

- 5.8. AMTA submits that the **PPP A4(b)** \$10m limit test does not take into account the nature, scale and profile of the mobile telecommunications industry. The ACA's Telecommunications Performance Report 2003-2004¹⁵ records a doubling of mobile phone services since June 2000, 15.4 per cent increase since June 2003 and steady growth in prepaid mobile services since 2001 (emphasis added):

“There were around **16.5 million mobile phone services** in operation in Australia at 30 June 2004, an **increase of 15.4 per cent over the previous year's** figure of 14.3 million.”
(p69)

¹⁵ Available online at http://internet.aca.gov.au/ACAINTER.2752830:STANDARD:712666702:pp=DIR501,pc=PC_60045

“...while the expansion in mobile subscriber numbers has moderated in the last three years, the industry is still experiencing reasonable growth. The number of **mobile phone services in operation has doubled in the four years since June 2000.**” (p70)

“Continuing the trend since 2001, more customers chose pre-paid than post-paid contracts in 2003–04. At 30 June 2004, about **43 per cent of the total number of mobile services were pre-paid** rather than post-paid contracts—up from 38 per cent in 2002–03. Pre-paid services are perceived as giving consumers more control over their mobile phone service expenditure and the ability to avoid lengthy contracts.” (p73)

- 5.9. According to the ACA’s report, prepaid mobile services represent 43 per cent of the 16.5 million mobile phone services operating in Australia ie. 7.1 million prepaid mobile services. Between 5 Mobile Operators, this would mean an average of 1.42 million prepaid mobile accounts per operator. If a maximum stored value limit of \$10 million was imposed on 1.42 million prepaid mobile accounts held by each Mobile Operator, the average account balance would need to be less than \$7.05. Consumers would gain no value, and Mobile operators would not be able to sell, prepaid mobile accounts with such low balance limits. This situation will only worsen if mobile phone services continue to grow at the current rate of 15.4 per cent per annum. In order to remain eligible for relief, Mobile Operators would need to refuse to supply prepaid mobile accounts to new customers once total prepaid account balances had reached the prescribed limit.
- 5.10. For the reasons above, the \$10 million total stored value test is not appropriate for the mobile telecommunications industry and should not apply to Third Party Service Facilities.

\$1000 stored value per account test

- 5.11. The **PPP A4(a)** \$1000 stored value limit per account is also inconsistent with the profile of some Mobile Operators in the prepaid mobile telecommunications industry. If Mobile Operators enabled every customer to hold an account balance of \$1000, Mobile Operators would not be able to have any more than 1000 customers before reaching the \$10m total issued value limit. If each customer account balance was limited to \$50, this would still only mean 200,000 customers per Mobile Operator, which is less than 3 per cent of the existing 7.1 million prepaid mobile customers.
- 5.12. The \$1000 limit would also result in different regulatory treatment of similar prepaid mobile products. The table below compares two products that provide the same benefits to customers for the same price, but which are marketed and implemented differently.

	Product A	Product B
Marketing message to customers	Pay for \$150 in services & get \$1050 in services free	Pay \$150 for services and use up to \$1200 in services
Price paid by customer	\$150	\$150
Stored value credited to customer’s account	\$150	\$1200
Value of ‘free services’	\$1050	\$0
Total value of services purchased	\$1200	\$1200

- 5.13. Both products involve a payment of \$150 and enable customers to use services to the value of \$1200. Under product A, however, only \$150 is credited to the customer’s account while under product B, \$1200 is credited to the customers account. Product A would meet the \$1000 account limit test (as only \$150 is credited to the customer’s account), but not Product B (as \$1200 is credited to the customer’s account), even though there is no difference in the risk or benefits to consumers under these products. This demonstrates that imposing a monetary limit on stored value per account would significantly restrict Mobile Operator differentiation and the way prepaid mobile products can be offered and marketed.

Case-by-case relief

- 5.14. At **PPP A6** ASIC states that it recognises that some NCP facilities are designed in such a way that it may be difficult for an issuer to ensure that the balance of facilities held by a client does not exceed \$1000 and proposes giving relief on a case-by-case basis. If Third Party Service Facilities are regulated as financial products, it would be inappropriate to require each prepaid Mobile Operator to make individual applications for relief for the same facility.
- 5.15. The first proposed condition **PPP A6(a)** is that the issuer 'take reasonable steps to ensure that clients do not hold NCP facilities with balances in excess of \$1000'. The reference to balances in excess of \$1000 is problematic for the same reasons as the \$1000 limit test is problematic as part of the definition of low-value NCP facilities.
- 5.16. The second proposed condition **PPP A6(b)** is that the issuer must have reasonable grounds to believe that at all times only a small proportion of clients will have balances in excess of \$1000. In order to remain eligible for relief, Mobile Operators would need to refuse the issue of prepaid mobile accounts to new customers once the 'small proportion' was reached. This would be detrimental to customers and branding for Mobile Operators. Setting any monetary limits on prepaid account balances at this stage is harmful to industry growth in this unique situation where customers use the majority of account balances for Mobile Operator Services rather than Third Party Services.

Class order relief: Product Disclosure Requirements

- 5.17. The objectives of ASIC's proposals for minimum product disclosure requirements are addressed by existing telecommunications regulation and commercial arrangements. There would be little, if any, additional protection to consumers in imposing the proposed product disclosure requirements for class order relief on Mobile Operators in relation to Third Party Service Facilities.
- 5.18. **PPP A15** requires disclosure of certain information in a manner that is clear, concise and effective. Paragraphs 4.19 to 4.23 above describe the relevant consumer disclosure arrangements that currently apply to Third Party Service Facilities. The following table compares the information disclosure proposed under PPP A15 with the existing telecommunications framework:

Information Disclosure Required	Existing telecommunications commercial and regulatory framework for Third Party Service Facilities
<p>PPP A15 Key terms and conditions of the NCP facility</p>	<p>The <i>Telecommunications (Standard Form of Agreement Information) Determination 2003</i>¹⁶ (SFOA Determination) requires Mobile Operators to prepare a written summary of the terms and conditions of standard forms of agreement (including specified matters) and provide this summary to all new customers. Schedule 1 to the Determination sets out matters that must be included in the summary and is reproduced in Appendix C.¹⁷</p> <p>The Customer Information on Prices, Terms and Conditions Code (ACIF C521: October 2001)¹⁸ (PTC Code) prescribes standards to facilitate informed choices and disclosure of terms. For example, the code requires suppliers to disclose matters such as technical limitations on the availability of a service; sufficient information to determine the suitability for the customer's purpose; and the disclosure of the types of fees included in advertised rates (such as call connection fees).</p> <p>The Consumer Contracts Code (ACIF C620: 2005)¹⁹ (Contracts Code) contains provisions under clause 7 relating to the format and structure of contracts to aid consumer understanding.</p>
<p>PPP A15(a)(i) Unilateral variation terms</p>	<p>See table at 4.22 above</p>
<p>PPP A15(a)(ii) Expiry dates</p>	<p>Expiry dates are only relevant to top-ups of account balances and these are disclosed at the time the customer purchases or requests a top-up for their prepaid mobile account and in the SFOA. Requirements for disclosure of termination arrangements are also included in the PTC Code.</p>
<p>PPP A15(a)(iii) Fees & charges</p>	<p>The PTC Code and SFOA Determination require disclosure of fees and charges of prepaid mobile services</p>
<p>PPP A15(b) Dispute resolution</p>	<p>The SFOA Determination requires summaries to include the rights of, or remedies available to, customers including information about the Mobile Operator's internal processes for handling complaints²⁰ and the role of the TIO and Office of Fair Trading of each State or Territory.²¹</p>
<p>PPP A15(c) Unauthorised and mistaken transactions, loss and theft</p>	<p>See table 4.21 in relation to PPP Background paragraph 15(c)(iii). Prepaid mobile customers are able to contact Mobile Operators at any time to report lost or stolen phones or mistaken transactions and request suspension of their accounts. In addition as already discussed AMTA provides an IMEI blocking service for lost and stolen mobile phones.</p>
<p>PPP A15(d) Subscription to relevant code</p>	<p>AMTA considers this is addressed by the relevant disclosures of dispute resolution schemes and the complaint handling code whether or not there has been a breach of the code.</p>
<p>PPP A15(e) Status of Regulation under licensing or specified disclosure requirements</p>	<p>Consumers do not expect financial services regulation of prepaid mobile accounts. Statements about financial services licensing may be confusing for customers.</p>

¹⁶ Made by the ACA under subsection 480A (2) of the *Telecommunications Act 1997*

¹⁷ The determination and the explanatory statement to the determination are available online at http://internet.aca.gov.au/acainterwr/aca_home/legislation/radcomm/determinations/telecom/sfoainfo_03.pdf and http://internet.aca.gov.au/acainterwr/aca_home/legislation/radcomm/acts/telecom/es_tel_sfoainfo_2003.pdf respectively.

¹⁸ The code is available online at http://internet.aca.gov.au/acainterwr/telcomm/industry_codes/codes/c521b.pdf

¹⁹ The code is available online at <http://www.acif.org.au/data/page/12605/C620.pdf>

²⁰ Item 8(c), Schedule 1

²¹ Item 8(f), Schedule 1

Class order relief: Anti-hawking provisions

- 5.19. ASIC has not proposed to give relief from the hawking prohibitions under s992A and s992AA of the *Corporations Act 2001* on the basis that the benefits to consumers of compliance with the hawking prohibitions far outweigh the costs associated with compliance (**PPP Section A Explanation, paragraph 4**). AMTA submits that the hawking provisions are inappropriate for Third Party Service Facilities. These facilities have a significantly low financial risk profile compared to other financial products and are a component of a mobile telecommunications service (ie. the prepaid mobile account). Consumers purchasing a prepaid mobile account will not always use the Third Party Service Facility or use their entire account balances for Third Party Services. In addition, applying the anti-hawking provisions would restrict the direct marketing strategies used by mobile operators for the distribution of prepaid mobile accounts for Mobile Operator Services. Any consumer benefit derived from applying the hawking provisions does not adequately justify the loss of opportunities for Mobile Operators. If ASIC believes that Third Party Service Facilities are financial products, ASIC needs to provide relief from the hawking provisions in relation to these facilities.

Conditions of class order relief: ASIC approach

- 5.20. **PPP Section A Explanation** provides (emphasis added):

3 The conditions of relief are intended, **in conjunction with** the provisions of the Corporations Act and **other laws that would still apply**, to effectively address the limited consumer and market integrity risks associated with these products.

4 ... The conditions we have proposed are intended to address the outcomes that would be achieved by compliance with Div 3 of Part 7.9 (dealing with ongoing disclosure) in a way that is relevant and practical for these schemes.” (Paragraphs 3 & 4)

- 5.21. AMTA submits that the proposed conditions of relief would not address any consumer or market integrity risks that existing telecommunications and other laws do not already effectively address. The existing regulatory and commercial framework is discussed at paragraphs 4.8 above to 4.23 above. AMTA further submits that some of the proposed conditions would not be relevant and practical for Third Party Service Facilities for the reasons discussed at paragraphs 5.22 to 5.31 below in this submission.

Conditions of class order relief: Impact

- 5.22. A number of the proposed conditions of class order relief raise practical problems of compliance while others seek to address issues already covered by existing regulatory and commercial frameworks.

Dispute Resolution

- 5.23. Conditions **PPP A17(a) & (b)** would require that a Mobile Operator have an adequate internal and external dispute resolution systems in place. The ACIF Complaint Handling Code and TIO scheme already adequately addresses these issues.

Holding client money in separate accounts on trust

5.24. Condition **PPP A17(c)** would require Mobile Operators to hold client money in a separate account and in trust unless ASIC approved them as entities of undoubted financial substance.

5.25. In response to the proposed trust account requirements:

- (a) AMTA submits that the proposed trust account obligations are not required. This is because all companies are currently subject to rigorous solvency and related reporting obligations on at least an annual basis under the Corporations Act and more frequently under stock exchange rules for listed entities.
- (b) Every Mobile Operator must make a provision in its accounts for its obligations in relation to prepaid mobile services. Consequently, mobile operators ensure that at all times they have sufficient funds to meet their obligations to prepaid mobile customers. This approach provides more than sufficient protection for their customers.
- (c) We assume that the purpose of the proposed trust account requirement is to reduce the risk of loss of value if a mobile operator becomes insolvent (although we note that no clear explanation of this requirement is provided in the PPP). We submit that ASIC should not impose the trust account requirement proposed in condition PPP A17(c) where a mobile operator already provides for its liability in its accounts and monitors solvency from month to month.
- (d) The trust requirement would give priority to the interests of prepaid mobile customers over all other creditors. It is not clear why it would be appropriate to give prepaid customers such priority. AMTA submits that any decision which affects the priority of interests as between creditors must be given very serious consideration and requires an appropriate level of public debate.'

5.26. Condition PPP A17(c) provides an exception to the trust account requirement for entities of "undoubted financial substance approved by ASIC":

- (a) AMTA is concerned that ASIC has not set out the criteria to be used by ASIC in determining whether or not it will approve an entity as being of undoubted financial substance. AMTA believes that specific and objective criteria should be set out in any class order to provide certainty. One of the alternative criteria should include ASIC approving the entity for this purpose if it does not meet one of the other criteria.
- (b) Without such criteria, AMTA is concerned that its members' ability to restructure mobile phone services would be unreasonably fettered. As one of the key objectives of Chapter 7 is to promote efficiency, flexibility and innovation, ASIC should endeavour to ensure that its policies enable industry participants to make appropriate changes to corporate structures without undue impediments.
- (c) AMTA believes that the following types of entities should be treated as entities of undoubted financial substance. AMTA expects that its members would be able to meet one or more of these criteria to be entities of undoubted financial substance:
 - (i) entities listed on an approved stock exchange, such as the ASX - the minimum capital requirements to obtain and retain a listing on a major stock exchange mean that such entities will always be of "undoubted financial substance";

- (ii) entities with at least \$50 million in net tangible assets ("**NTA**") - this is ten times the NTA requirement for custodians and responsible entities of registered schemes and any entity with such a significant amount of net tangible assets will be of undoubted financial substance;
- (iii) related bodies corporate of such entities - as noted, it is important that mobile operators are able to restructure their services and to use different entities within the group for this purpose; and
- (iv) entities that have an "eligible undertaking" or an undertaking approved for this purpose by ASIC for an amount equal to the liability of the entity in respect of the purported NCP facility. By "eligible undertaking", AMTA means the amount of a financial commitment (disregarding any part previously paid), provided by an "eligible provider" (as defined in the standard licence conditions in Pro Forma 209) in the form of an undertaking to pay the amount of the financial commitment to the entity, that is an enforceable and unqualified obligation to pay on written demand by the entity and remains operative until the entity notifies ASIC that it is no longer relying on the relief.

5.27. AMTA is concerned that if the trust account requirement applied to its members, it would have significant implications for their business operations in Australia and impose an unreasonable burden.

5.28. Any additional cost relating to prepaid mobile services would have a significant impact on the profitability and viability of those services. Members would have to consider what impact it would have for products offered to prepaid mobile phone customers. If the trust account requirement applied to AMTA members, it would affect their capacity to introduce innovative products to the Australian market. AMTA believes that imposing such onerous conditions on the relief would outweigh the benefits of being granted relief in relation to the provision of non-cash payment facilities.

Notification of changes to terms and conditions

5.29. Condition **PPP A17(d)** would require Mobile Operators to notify clients of changes to terms and conditions of use of the prepaid mobile account. This condition overlaps with requirements in the Consumer Contracts Code to notify consumers of detrimental changes to their contract. The Code achieves the same objectives in a more practical manner for Mobile Operators as it recognises that there are more efficient and effective ways of communicating with prepaid mobile customers. Clause 4.1 of the Code defines 'notice in writing' to include notice given to prepaid mobile customers by any of the following means:

- (a) Electronic mail (with customer's consent); and
- (b) Recorded or text messages sent direct to the customer's mobile handset informing the consumer how to obtain the information (eg. referring to a website or a phone number to listen to a recorded voice announcement).

5.30. In any case, any requirement to notify changes of terms should be limited to detrimental changes as applies under the Consumer Contracts Code and the SFOA Determination.

Notification of possible breaches of conditions

5.31. Condition **PPP A17(i)** would require a Mobile Operator to notify ASIC when it becomes aware (or should reasonably have become aware) of matters that give the Mobile Operator reason to believe that a significant breach of the conditions of relief has occurred. While AMTA agrees mobile

operators should have arrangements in place to manage compliance, AMTA is still concerned that this condition detracts from any certainty that class order relief may have otherwise. This is because a Mobile Operator, though acting in good faith, might inadvertently lose relief without knowledge of it:

- (a) Note 1 to condition PPP A17(i) provides that reliance on relief would cease to apply 10 business days after the Mobile Operator should have become aware of relevant matters. AMTA would expect, on principles of procedural fairness, that ASIC would notify an issuer in advance if ASIC believed that relief should no longer be available to the issuer.
- (b) Note 2 to condition PPP A17(i) provides that ASIC may notify an issuer that it is no longer entitled to rely on the class order. ASIC has not provided any detail of the grounds on which ASIC would be able to do this.
- (c) ASIC has not discussed what the effect of loss of relief would be on NCP facilities in operation at the time that relief is lost. Again, this detracts from any certainty that class order relief might otherwise provide.
- (d) AMTA strongly submits that any relief should only cease to apply if ASIC first notifies the person relying on it, gives that person an opportunity to be heard and gives appropriate period of notice to enable the person to terminate any contractual arrangements they have entered into in reliance on the relief.

Regulation of Other NCP Facilities

5.32. In response to **PPP B1Q1 & B1Q2** AMTA believes that ASIC should declare, under subsection 765A(2), that Third Party Service Facilities are not financial products. If ASIC does not support this position, additional, specific class order relief would be appropriate for these facilities as they may not fall within the criteria for ASIC's proposed class order relief. The lack of class order relief may result in de facto regulation of Mobile Operator services. The impact of AFS regulation was discussed in more detail in the Section 4 of this submission as part of AMTA's general comments on the regulation of NCP facilities.

5.33. In response to **PPP B2Q1** AMTA repeats its comments in relation to case-by-case relief.

6. Appendix A: ACA Guide to M-Commerce

Industry guide to m-commerce

Introduction

Mobile commerce (m-commerce) uses wireless mobile communications to conduct commercial transactions. Some early m-commerce services in Australia included voting using the short message service (SMS) for popular television programs, mobile phone ring tone downloads, and the use of mobile phones to make payments for car parking, soft drinks, and concert and airline tickets.

New m-commerce services will become available in the coming years, including, for example, ‘mobile wallets’ where a mobile phone can be used to purchase and store everyday items such as train tickets. Services tailored to the user’s geographic location such as directions to the local cinema from where you are standing will also be available.

M-commerce brings with it the need for providers to comply with established consumer protection standards. This industry guide, developed by the Australian Communications Authority (ACA) provides information about the relevant consumer protection arrangements.

The key consumer safeguards associated with m-commerce are:

- marketing practices;
- information on prices, terms and conditions;
- consumer contracts;
- privacy;
- security;
- access to premium rate services;
- billing;
- credit management;
- access for people with disabilities; and
- complaint handling and dispute resolution.

Reference is made to industry codes and guidelines developed by the Australian Communications Industry Forum (ACIF) and codes from other industry sectors that are likely to have a significant role in providing m-commerce. This guide also refers to the relevant Commonwealth legislation and the responsible agency.

Each state and territory has fair trading legislation that largely mirrors the consumer protection provisions of the Commonwealth *Trade Practices Act 1974*. In addition, there are state provisions relating to the use of unfair contract terms and conditions.

The guide refers to laws and codes where they have direct relevance to m-commerce. However, many of the laws and codes apply to business activity in general.

The information in this document is intended as a guide only and should not be relied on as legal advice or regarded as a substitute for obtaining legal advice in individual cases.

Marketing practices

Businesses must be fair and responsible in the way they market their products and services. Concerns have been raised about m-commerce marketing practices that involve SMS or multimedia messaging service (MMS), and material of an offensive, misleading or deceptive nature. M-commerce providers will need to ensure that they operate within the bounds of the [Trade Practices Act 1974](#), state or territory fair trading legislation, the [Spam Act 2003](#), which prohibits the transmission of unsolicited commercial messages including SMS and MMS, and the soon to be finalised ACA legislative rules governing the supply of premium services to mobiles.

Spam

The ACA is responsible for enforcing the Spam Act. As a first step in enquiring about obligations under this Act, consult the Australian Government's [Spam Act 2003 – A Practical Guide for Business](#). Additional information is available at www.spam.aca.gov.au. Enquiries should be directed to the ACA anti-spam hotline on telephone 1300 855 130 or through the ACA [online spam enquiry form](#).

Representatives of the e-marketing industry have developed a draft [Australian e-Marketing Code of Practice](#), which reflects industry best practice compliance with the Spam Act.

Unfair practices

Complaints about marketing practices, such as misleading or deceptive conduct, are dealt with by the ACCC or state or territory fair trading offices.

The [ACCC website](#) has information for businesses on how to market goods and services in compliance with the Trade Practices Act. Alternatively, contact the ACCC on its enquiry line, telephone 1300 302 502, or submit an email enquiry using its [online enquiry form](#). Contact details for the state and territory agencies responsible for fair trading are set out below.

Premium rate services

The ACA intends to establish legislative rules for supplying premium services to mobile phones using messaging services and 'walled garden' mobile portals.

A draft of these rules was released for public comment in December 2004. These draft rules specify that m-commerce providers must ensure that all advertising of services supplied by premium SMS or MMS and 'walled garden' mobile portals include clear and accurate information about the cost of transactions and whether the content is adult in nature. This obligation aims to ensure consumers have sufficient information to make an informed judgement about whether to access the services and how often. The rules are expected to be finalised in mid-2005. For more information, go to [Regulation of premium mobile services](#).

Information on prices, terms and conditions

Providers of telecommunications services are expected to comply with the telecommunications industry code [ACIF C521:2001 Customer Information on Prices, Terms and Conditions](#). This code establishes rules for the supply of information by providers about the prices, terms and conditions of their telecommunications products and services, and rules to guide the development of advertising materials.

Business conduct relating to information on prices, terms and conditions may also be subject to the Trade Practices Act. For more information about the requirements of this Act, contact the

ACCC.

Consumer contracts

The industry approach to contracts with consumers of telecommunications services is specified in the industry guideline [ACIF G601:2002 Consumer Contracts](#). The guideline provides guidance on industry best practice for contracts and sets out what are considered unfair or unintelligible contract terms. ACIF is currently working on an enforceable industry code on consumer contracts. For more information, visit the [ACIF website](#).

The ACA has also produced a 'best practice' sample of a fair and intelligible contract for telecommunications services. The sample contract is on the [ACA website](#).

Business conduct relating to consumer contracts may also be subject to the Trade Practices Act. For more information, contact the ACCC.

Privacy

The [Privacy Act 1988](#) and the [National Privacy Principles](#) stipulate how customer personal information must be treated.

The industry code, [ACIF C523:2001 Protection of Personal Information of Customers of Telecommunications Providers](#), which is not registered with the ACA, is based on the National Privacy Principles and also provides guidance for telecommunications providers about handling customer personal information. The code covers data collection, use and disclosure of information, data security, data access and types of sensitive information not to be collected.

The registered industry code, [ACIF C555:2002 Integrated Public Number Database \(IPND\) Data Provider, Data User and IPND Manager](#), is relevant to customer information from the IPND. The ACA is developing an industry standard to ensure IPND information is only used for appropriate purposes.

The Telecommunications Industry Ombudsman (TIO) may investigate complaints about interference with the privacy of an individual. The investigation looks at non-compliance with the Information Privacy Principles in section 14 of the *Privacy Act 1988* or any industry-specific privacy standards that may apply. The TIO also considers complaints about non-compliance with the National Privacy Principles by telecommunications providers with a turnover of \$3 million or more. For more information on the TIO and privacy matters, visit the [TIO website](#).

Security

Security concerns relating to m-commerce include identity theft and the security of financial transactions carried across mobile phone networks. The industry code [ACIF C523:2001 Protection of Personal Information of Customers of Telecommunications Providers](#) provides guidance on data security practices for telecommunications services.

The TIO is able to investigate complaints concerned with the security of customer personal information.

M-commerce applications may also need to comply with the [Electronic Funds Transfer Code](#). The code establishes basic standards for electronic payments in Australia and compliance with it is monitored by the Australian Securities and Investment Commission (ASIC). Consult the [ASIC website](#) for more information.

Access to premium rate services

The community expects access to adult content services to be restricted to adults. Following ministerial direction, the ACA is developing a regulatory framework designed to govern the provision of adult content over mobile phones.

At present, the [Telecommunications Numbering Plan 1997](#) does not permit the provision of adult services on premium SMS or MMS numbers. However, the ACA is developing rules that will permit the supply of adult services on premium SMS or MMS numbers using prefixes 195 and 196 or through ‘walled garden’ mobile portals. The rules will require that access to adult services be restricted to persons 18 years of age and over, and will prohibit the supply of content that is rated X or refused classification. The rules may also require that m-commerce providers adopt procedures to verify the age of customers wanting to access adult services.

The draft rules are available on the [ACA website](#). For more information, email the ACA on mobilecontent@aca.gov.au.

Billing

Consumers are entitled to adequately detailed billing information to feel confident about using m-commerce applications. The telecommunications industry has an established code for billing practices, [ACIF C542:2003 Billing](#), that sets out minimum standards in areas such as bill content, customer access to billing information, billing itemisation, timeliness and payments. Both telecommunications carriers and content providers are required to comply with the code. The code will cover the wide range of providers likely to play a part in delivering m-commerce.

Credit management

The industry code [ACIF C541:2003 Credit Management](#) also has wide application within the industry. Telecommunications carriers, carriage service providers (Mobile Operators) and content providers are all expected to follow the rules for credit assessment, credit management and debt collection set out in the code.

The Trade Practices Act and state and territory fair trading and consumer protection legislation such as the *Victorian Fair Trading Act 1999* are relevant to debt collection activities. Contact the ACCC and the relevant state or territory fair trading agency for more information about these Acts and debt collection matters. Contact details of these agencies are listed below.

Access for people with disabilities

M-commerce applications must comply with the [Disability Discrimination Act 1992](#), which makes it unlawful to discriminate against people with disabilities when offering products and services for sale. The Human Rights and Equal Opportunity Commission (HREOC) is responsible for the administration of the Act. For assistance with complaints under the Discrimination Act, contact the Disability Rights Office at the HREOC on telephone 1300 369 711 or visit the [HREOC website](#).

Complaint handling and dispute resolution

The TIO is the ‘last resort’ dispute resolution agency for the telecommunications industry. If a small business with fewer than 20 employees or a household consumer cannot resolve a complaint or dispute with their service provider to their satisfaction, they may contact the TIO to seek a resolution.

Telecommunications carriers, Mobile Operators and Internet service providers are required to join the TIO scheme. The TIO has jurisdiction over a broad range of matters including prices,

terms and conditions, contracts, privacy, billing and fault repair. To escalate privacy complaints that are outside the TIO's jurisdiction, contact the Federal Privacy Commissioner on the [OFPC website](#).

Not all businesses involved in the supply of m-commerce services will be required to be members of the TIO, and there are certain types of complaints that the TIO may not be able to investigate. More information about [TIO membership](#) and [jurisdiction](#) is on the TIO website or contact the TIO on telephone 1800 062 058 or TTY 1800 675 692.

M-commerce providers should have a complaints-handling procedure in place. Guidelines for developing such procedures are in the industry code [ACIF C547:2004 Complaint Handling](#), which applies more broadly than the TIO scheme to encompass content providers using carriage services.

More information and contacts

Australian Communications Authority

Telephone: (03) 9963 6800

Fax: (03) 9963 6899

TTY: (03) 9963 6948

Email: (create address)

Website: www.aca.gov.au

Australian Broadcasting Authority

Telephone: 1800 226 667

Fax: (02) 9334 7799

TTY: (02) 9334 7777

Email: info@aba.gov.au

Website: www.aba.gov.au

ACT Office of Fair Trading

Telephone: (02) 6207 0400

Fax: (02) 6207 0424

Email: fair.trading@act.gov.au

Website: www.fairtrading.act.gov.au

Australian Communications Industry Forum

Telephone: (02) 9959 9111

Fax: (02) 9954 6136

TTY: (02) 9923 1911

Email: online enquiry form at http://www.acif.org.au/contact_us

Website: www.acif.org.au

Australian Competition and Consumer Commission

Telephone: 1300 302 502

Fax: (02) 6243 1199

Email: online enquiry form at http://www.accc.gov.au/content/index.phtml/itemId/54217/fromItemId/3634#h2_18

Website: www.accc.gov.au

Australian Mobile Telecommunications Association

Telephone: (02) 6239 6555

Fax: (02) 6239 6577

Email: fiona.mcalister@amta.org.au

Website: www.amta.org.au

Australian Securities and Investment Commission

Telephone: 1300 300 630

Email: infoline@asic.gov.au

Website: www.asic.gov.au

Office of the Federal Privacy Commissioner

GPO Box 5218
Sydney NSW 2001.
Fax: (02) 9284 9666
Email: privacy@privacy.gov.au
Website: www.privacy.gov.au

Consumer Affairs Victoria
Telephone: (03) 1300 558 181
TTY: (03) 9620 1942
Email: consumer@justice.vic.gov.au
Website: www.consumer.justice.gov.au

New South Wales Office of Fair Trading
Telephone: (02) 9895 0111
Fax: (02) 9895 0222
TTY: (02) 9388 4943
Email: online enquiry form at <http://www.fairtrading.nsw.gov.au/icms-public/complaint/registration/newComplaint.sjsp?complaintType=general>
Website: www.fairtrading.nsw.gov.au

Northern Territory Consumer and Business Affairs, Department of Justice
Telephone: 1800 019 319 (within NT only)
Fax: (08) 8999 6260
Email: consumer@nt.gov.au
Website: <http://www.caba.nt.gov.au/>

Queensland Office of Fair Trading
Telephone: 1300 658 030 (within QLD only)
Fax: (07) 3246 1504
TTY: (07) 3246 1588
Email: enquiries should be directed to closest office. BrisbaneOFT@dtftwid.qld.gov.au
CairnsOFT@dtftwid.qld.gov.au
MackayOFT@dtftwid.qld.gov.au
MaroochydoreOFT@dtftwid.qld.gov.au
WidebayOFT@dtftwid.qld.gov.au
RockhamptonOFT@dtftwid.qld.gov.au
SouthportOFT@dtftwid.qld.gov.au
TownsvilleOFT@dtftwid.qld.gov.au
Website: www.fairtrading.qld.gov.au

South Australia Office of Consumer and Business Affairs
Telephone: (08) 8204 9777 (131882 outside Adelaide)
Fax: (08) 8204 9769
Email: metro.cab@agd.sa.gov.au
Website: www.ocba.sa.gov.au

Tasmania Office of Consumer Affairs and Fair Trading
Telephone: 1300 65 44 99
Fax: (03) 6233 4882
Email: consumer.affairs@justice.tas.gov.au
Website: <http://www.justice.tas.gov.au/newca/index.htm>

Telecommunications Industry Ombudsman
Telephone: 1800 062 058
Fax: 1800 630 614
TTY: 1800 675 692
Email: tio@tio.com.au
Website: www.tio.com.au

Western Australia Department of Consumer and Employment Protection
Telephone: 1300 304 054
Fax: (08) 9282 0850
TTY: (08) 9282 0800
Email: consumer@docep.wa.gov.au
Website: www.docep.wa.gov

7. Appendix B: About the Telecommunications Industry Ombudsman

Extract from TIO (Telecommunications Industry Ombudsman) website

http://www.tio.com.au/about_tio.htm

[About the TIO](#)
[How the Scheme works](#)
[Powers of the TIO](#)
[Jurisdiction of the TIO](#)
[Structure of the TIO Scheme](#)
[How the Scheme is funded](#)
[Relationship to Industry and Government](#)

About the TIO

The Telecommunications Industry Ombudsman is a free and independent alternative dispute resolution scheme for small business and residential consumers in Australia who have a complaint about their telephone or Internet service.

Established in 1993 by the Australian Federal Government, the TIO is independent of industry, the government and consumer organisations.

The TIO is authorised to investigate complaints about the provision or supply of telephone or Internet services. The TIO's jurisdiction is discussed in detail [below](#).

How the Scheme works

The TIO aims to settle disputes quickly in a fair, objective and non-bureaucratic way, having regard not only to the law and to good industry practice, but also to what is fair and reasonable in all the circumstances.

The TIO is "an office of last resort". This means that in the interests of fairness the service provider must be given a reasonable opportunity to settle a complaint with a customer before the TIO will become involved.

The TIO investigates complaints by considering the facts provided by both parties in a dispute. The TIO is not a consumer advocacy service but rather seeks to assist both parties to a dispute by reaching a fair and equitable resolution.

Complaints to the TIO can be made [online](#) or by [phone, fax, email, in writing, via TTY or in person](#). Complaints may be made by the person with the problem or by a person authorised to represent the complainant.

Powers of the TIO

The role and powers of the TIO are included in the Telecommunications (Consumer Protection and Service Standards) Act 1999. Copies of this Act are available from the Commonwealth Government.

The TIO has the authority to make Binding Decisions (up to the value of \$10,000) that are legally binding upon the telecommunications company, and Recommendations (up to the value of \$50,000).

The TIO also has the power to exercise its discretion not to investigate a case further if it is of the view that all relevant facts in the matter have been considered.

The TIO cannot take up complaints that are more than 12 months old (except in special circumstances), or if legal proceedings have commenced.

Jurisdiction of the TIO

The TIO can only investigate a complaint if:

- The consumer has given the service provider a reasonable opportunity to address the complaint;
- The complaint is made within 12 months of the consumer becoming aware of the circumstances surrounding the complaint. The time limit may be extended by a further 12 months in certain cases;
- Legal proceedings have not commenced;

- The complainant was resident in Australia at the time that the circumstances surrounding the event occurred;
- The complaint is made in good faith; and
- The complaint type is within the TIO's jurisdiction (set out below)

The TIO has jurisdiction to investigate complaints about:

- The standard telephone service;
- Mobile services;
- Internet access;
- Pay-phones;
- Delays in telephone connections;
- Printed and electronic White Pages;
- Fault repair;
- Privacy;
- Land access; and
- Breaches of the Customer Service Guarantee and industry Codes of Practice.

The TIO cannot handle complaints concerning:

- The setting of tariffs and charges;
- Privately-owned telecommunications equipment, other than the rented handset supplied with a basic phone service and mobile handsets sold as a part of a bundled contract;
- Cabling, except cabling up to the rented handset;
- Business directories (however, the TIO does have an agreement with Yellow Pages that allows us to help resolve some complaints);
- Matters of telecommunications policy
- The 000 emergency service;
- Anti-competitive behaviour or restrictive business practices; or
- The content of 'information services', eg. 1900 numbers and Internet content.

For more information see [Policies and Procedures: Jurisdiction](#)

Structure of the TIO Scheme

The structure of the TIO is designed to ensure its independence. The TIO is governed by a Council and a Board of Directors, and is managed by an independent Ombudsman appointed by the Board on the recommendation of Council.

The Council is comprised of five TIO member representatives and five consumer representatives, with an independent Chairman. While the Ombudsman has responsibility for the day to day operations of the scheme, the Council provides advice to the Ombudsman on policy and procedural matters.

The Board has corporate governance responsibilities including financial management of the scheme and ensuring compliance with the Memorandum and Articles of Association and the Constitution. With the exception of the independent director, who is appointed by the Board itself, directors are appointed by the TIO membership.

How the Scheme is funded

The TIO is an industry-funded scheme, deriving its income solely from members who are charged fees for complaint resolution services provided by the TIO. Members consist of telecommunications carriers, telephone carriage providers and Internet Service Providers (ISPs).

A member is only charged complaint handling fees if the TIO receives a complaint from one of its customers. Therefore, the funding system acts as an incentive for members to keep TIO investigations to a minimum by developing and maintaining effective complaint handling and customer service procedures.

Relationship to Industry and government

The TIO is independent of telecommunications companies, consumer groups and government. However, the TIO provides information and assistance to organisations where this is required by law or where this will help the industry and consumers to resolve complaints without investigation by the TIO.

The Australian Communications Industry Forum (ACIF) is a non-government body, comprised of industry representatives, that develops Codes of Practice for telecommunications providers. The TIO assists ACIF in developing Codes by providing information and other feedback on complaints received by the TIO.

The TIO may refer systemic problems, identified through complaint statistics, to the Australian Communications Authority, Australian Competition and Consumer Commission, the Privacy Commissioner or other appropriate bodies.

8. Appendix C: Summary of Standard Form of Agreement

Telecommunications (Standard Form of Agreement Information) Determination 2003

Schedule 1 Matters to be included in summary of standard form of agreement

1. Identification of the kind of designated goods or services to which the standard form of agreement relates.
2. Whether the provider requires customers to pay a security bond for particular goods or services supplied by the provider and, if so, the circumstances in which the requirement arises.
3. Charging, including the following matters:
 - (a) the types of charges applying to the supply of the designated goods or services;
 - (b) the amount or rate of each type of charge;
 - (c) any circumstances that must exist before a charge becomes payable;
 - (d) the cost of connection, or reconnection, for the supply of the designated goods or services;
 - (e) whether a discount, credit or rebate is available to ordinary customers, and, if so:
 - (i) the amount of the discount, credit or rebate; and
 - (ii) how it is worked out;
 - (f) peak and off-peak times (if any), including:
 - (i) the amounts of the charges for those times; and
 - (ii) how those times are worked out.
4. Billing, including the following matters:
 - (a) if the bills are to be issued, the frequency of billing (including any options available to customers);
 - (b) the charges (if any) for particular billing options;
 - (c) the standard way in which bills will be issued (including any options available to customers);
 - (d) the ways for paying a bill;
 - (e) the policy (if any) in relation to late billing;
 - (f) the penalty (if any) for late payment of a bill.
5. The terms of a contract for the supply of designated services, including the following matters:
 - (a) if applicable, the minimum term of the contract;
 - (b) if applicable, the minimum period of notice to be given by either party to terminate the contract;
 - (c) the events that would give either party a right to terminate the contract;

- (d) the charge, or method of working out the charge, for terminating the contract before the end of its term;
 - (e) if applicable, the terms and conditions applying to the renewal of the contract.
6. Variations of the terms and conditions of the standard form of agreement, including the following matters:
- (a) in relation to variations that would cause detriment to ordinary customers:
 - (i) the minimum period of notice to be given to customers before the variations take effect; and
 - (ii) the way in which customers will be informed of the variations;
 - (b) in relation to any other variations — the place where an up-to-date copy of the standard form of agreement may be obtained.
7. The way in which customers may gain access to or obtain the complete terms and conditions of the standard form of agreement.
8. The rights of, or remedies available to, customers, including information about the following matters:
- (a) the warranty offered by the carriage service provider applying to goods
 - (b) supplied by the carriage service provider;
 - (c) the carriage service provider's internal processes for handling complaints;
 - (d) the process for reporting faults to the carriage service provider;
 - (e) the rights of customers under Part 5 of the Telecommunications (Consumer Protection and Service Standards) Act 1999 (which deals with the customer service guarantee);
 - (f) the role of the Telecommunications Industry Ombudsman and the Office of Fair Trading of each State or Territory.
9. Any terms and conditions applying to the use of personal details of customers, including information about the following matters:
- (a) whether any inquiries will be made about a customer's credit record by the carriage service provider;
 - (b) any other ways that a customer's personal details may be used in relation to the supply of the designated goods or services.

9. Defined Terms

ACA Australian Communications Association. See www.aca.gov.au

ACCC Australian Competition and Consumer Commission

ACIF Australian Communications Industry Forum. See www.acif.org.au

AFS Australian Financial Services

AMTA The Australian Mobile Telecommunications Association is the peak industry body representing Australia's mobile telecommunications industry. See www.amta.org.au

Contracts Code

Consumer Contracts Code (ACIF C620: 2005). See <http://www.acif.org.au/data/page/12605/C620.pdf>

Corporations Act

Corporations Act 2001

Draft TISSC SMS/MMS Code

Code under development by TISSC addressing the supply of premium rate SMS and MMS.

EC

European Commission

E-Money Directive

Directive 200/46/EC issued by the European Parliament and Council in relation to electronic money. See <http://europa.eu.int/cgi-bin/eur-lex/udl.pl?REQUEST=Seek-Deliver&COLLECTION=oj&SERVICE=all&LANGUAGE=en&DOCID=2000I275p0039>

FSI

Financial Services Inquiry established by the Treasurer to provide a stocktake of the results arising from the financial deregulation of the Australian financial system since the early 1980s. The Inquiry made recommendations on the nature of the regulatory arrangements that will best ensure an efficient, responsive, competitive and flexible financial system to underpin stronger economic performance, consistent with financial stability, prudence, integrity and fairness. See www.fsi.treasury.gov.au

FSRA

Financial Services Reform Act 2001

MMS

Multimedia messaging ie. combination of static and dynamic pictures and text

Mobile Operators

Suppliers of prepaid mobile telecommunications services to the public including Telstra, Optus, Vodafone, Hutchison and Virgin Mobile

Mobile Operator Services

Services supplied by Mobile Operators eg. telecommunications services such as voice calls and SMS and content-based services such as ring tone downloads and SMS horoscopes

Open Payments System

Open payments systems are those which allow customers to transfer value to third parties. Payment instruments are exchanged between financial institutions rather than one institution acting for both the payee and payer. In open systems, the transaction does not reach finality until the value in the payment instrument has been settled between those institutions through accounts held at the bank.

PPP

ASIC's policy proposal paper: Regulation of non-cash payment facilities

PTC Code

Customer Information on Prices, Terms and Conditions Code (ACIF C521: October 2001) . See http://internet.aca.gov.au/acainterwr/telcomm/industry_codes/codes/c521b.pdf

SFOA Determination

Telecommunications (Standard Form of Agreement Information) Determination 2003 made by the ACA under subsection 480A (2) of the Telecommunications Act 1997

SMS

Short message service

Telecommunications Act

Telecommunications Act 1997

Third Party Services

Services provided by third parties suitable for requesting and or delivery via mobile telecommunications technologies eg. SMS voting on TV programs such as Australian Idol (from Legion Interactive), SMS ordering of ring tones (from music recording companies), SMS entry into competitions (run by confectionary companies) and SMS donations to charity (such as the Red Cross for the Tsunami appeal).

Third Party Service Facility

Arrangement enabling Mobile Operator customers to use Third Party Services that are charged to, but not paid from, the customer's prepaid mobile account with the Mobile Operator.

TIO

Telecommunications Industry Ombudsman, a free dispute resolution for consumers. See www.tio.gov.au

TISSC

Telephone Information Services Standards Council. See www.tissc.com.au