



FreeTV
Australia

**Submission by
Free TV Australia Limited**

Australian Communications Authority

Regulation of Premium Mobile Services

8 March 2005

Table of Contents

Introduction	1
Free TV's Interest in the Review	1
Matters for self-regulation	1
Technology-specific regulation	2
Division of regulatory obligations	2
Classification	3
Information in Promotional Material	3

Introduction

Free TV Australia is the peak industry body representing all 48 commercial free-to-air television licensees in Australia.

Free TV welcomes the opportunity to provide comment to the ACA's Discussion Paper regarding the regulation of premium content services supplied by means of messaging services and "walled garden" mobile portals and the ACA's Draft Service Provider Determination.

Free TV has also had the opportunity to review the joint submission of the Australian Mobile Telecommunications Association (AMTA) and the Australian Direct Marketing Association (ADMA).

Free TV's Interest in the Review

As content providers, Free TV members have a strong interest in regulatory measures that impact upon the provision of mobile premium services.

Free-to-air broadcasters currently provide content for a number of premium services ranging from news, weather and sport to live streaming of program content on a subscription basis. In addition television broadcasters also rely on the mobile platform to facilitate interactivity with television programs such as SMS voting associated with programs such as *Big Brother*, *Australian Idol* and *Dancing with the Stars*.

Viewer interaction and enhancement of the viewing experience through mobiles is becoming increasingly important for broadcasters as digital television internationally is moving towards more interactive programming. The range of mobile content offered by broadcasters is expected to increase over time as mobile devices that are capable of receiving video footage become more prevalent and as experience demonstrates what mobile content is most appealing to consumers.

At this time, when the market for mobile content is still emerging, it is essential that over-regulation does not unnecessarily stifle commercial development or create an environment which advantages carriage service providers over third party content providers. In particular, Free TV is concerned to ensure that any additional regulation of mobile premium services does not create incentives for carriers to stop (or discourage) third party content providers such as broadcasters from accessing their distribution platforms.

Matters for self-regulation

The Minister's direction of May 2004 required the ACA to develop a service provider determination that would ensure:

- Adult services only use numbers with ACA designated prefixes;
- Access to adult services is restricted;
- The supply of content that would be classified X or refused classification is prohibited.

The ACA proposal, as set out in the Discussion Paper, includes two levels of requirements. The first are 'core obligations', which address the requirements of the Ministers direction. The proposal also includes a series of 'further obligations' which are specified in the determination to apply only where a carrier is not subject to an approved self-regulatory scheme.

Free TV supports the submission made by the AMTA and the ADMA that industry self-regulation should be afforded an opportunity to address all of the matters that are additional to those the Ministerial Direction expressly required the ACA Determination to address.

The experience of the commercial television industry with the self-regulatory aspects of the co-regulatory regime under the Broadcasting Services Act has been extremely positive. Free TV considers that the Commercial Television Industry Code of Practice has ensured that the television industry operates in a manner consistent with community expectations and the public interest.

Free TV supports the AMTA/ADMA submission that the “default scheme” should be removed from the draft determination and be replaced by a requirement that certain matters be addressed in an Industry Code (which may be an expanded version of the TISSC Code or an alternative code developed by the industry).

To the extent that the ACA decides to retain the “default scheme” Free TV supports the drafting comments and suggestions set out in Part C of the AMTA/ADMA submission, subject to the comments set out below:

Technology-specific regulation

Free TV supports the view that a technology neutral approach to regulation is desirable. Consumers do not expect that their choice of device or platform should impact upon their ability to receive the content of their choice. For this reason, we support the proposition that internet content that is accessed through a mobile device should be regulated in the same way as internet content that is accessed through a PC.

Division of regulatory obligations

Free TV is concerned that additional regulation of mobile premium content should not operate in a manner which will create a disincentive for carriers or carriage service providers to allow third party content providers access to distribution platforms. Carriers and carriage service providers are ultimately the “gatekeepers” of the mobile distribution platform and are in a position to control the range of content that is provided to users.

Free TV agrees with the concerns expressed in the ADMA/ATMA Submission that the Draft Determination only applies to carriage service providers. Where a carriage service provider is merely providing carriage for third party content and is not acting as a content reseller, it would seem appropriate that the content service provider and not the carrier should be responsible for those aspects of the regulatory scheme not related to carriage.

If carriers have regulatory responsibility for content that they have no control over, Free TV is concerned that carriers will be less willing to distribute content other than that which they have aggregated themselves. While it is possible that this issue could be dealt with at a contractual level, this could lead to inconsistent, and company specific, arrangements across the industry. Ultimately, this will significantly limit the extent to which broadcasters are able to deliver services via the mobile platform and will reduce the diversity of content available to mobile users.

Classification

In relation to classification, Free TV submits that any mobile content classification regime, whether under an industry Code, ACA Determination or otherwise, should abide by the following general principles:

- *Content providers with appropriate expertise should be able to classify their own mobile content.*

Broadcasters already have staff with extensive expertise in the area of classification, including the application of the OFLC's classification guidelines. Free TV would recommend giving content providers a choice as to whether they rely on their own staff for classification decisions or to elect to have an external organization provide content classifications.

- *Not all material carried on a mobile device should require a classification.*

The majority of content delivered to mobile handsets will not raise any classification concerns. Given that only material classified MA or above will be subject to specific regulation content that is clearly below MA should not require a classification in order to be provided via a mobile premium service. Content providers should be responsible for making an assessment of whether material could potentially be MA or above and therefore seeking a classification determination.

- *News and current affairs content should be exempt from the classification requirements.*

Under the Commercial Television Industry Code of Practice, news and current affairs programming is exempt from classification. The same approach should apply to mobile news and current affairs content. News material that was likely to be distressing or offensive to a substantial number of subscribers could be dealt with using warnings prior to the display of the relevant material.

- *Clips or promotions for material that is classified MA should not be treated as adult content unless the content of the clip or promotion itself contains MA level material.*
- *If material has already been classified for one purpose, such as TV, it should not require reclassification for mobile distribution.*

Information in Promotional Material

Free TV agrees with the views expressed in the ADMA/ATMA submission that matters such as the content of promotional material are already extensively regulated and that inclusion of these matters in the Draft Determination is therefore unnecessary.

The proposals put forward in the Draft Determination have the potential to smother the use of mobile interactivity within television programming. Viewers have welcomed interactivity with television programming, evidenced by the fact that programs with interactive voting components have become some of the highest rating programs on Australian television (for example, *Australian Idol* and *Dancing with the Stars*).

Given the popularity of these programs, and their dependence on audience participation, there is a very strong commercial incentive for broadcasters and carriers to ensure that viewers trust the voting system. This trust could not exist if viewers felt that they were not aware of the terms and conditions of the voting system, including the cost of calls. Given the high number of votes that are recorded in these programs, the level of complaints received by broadcasters is extremely small. Free TV members are concerned that the ACA's

proposals to impose further regulation on ‘promotional material’ are based on an incorrect assumption that a problem exists, rather than any evidence of market failure.

To the extent that the ACA decides to retain the “default scheme”, Free TV is concerned to ensure that the requirements in relation to “promotional material” are significantly curtailed or clarified.

As noted in the ADMA/ATMA Submission, the term promotional material is not defined in the Draft Determination and it is therefore unclear whether it would capture material such as television content which instructed viewers how to use a premium mobile service to interact with a television program. To the extent that such material was intended to be captured within the provisions, this would be another area where placing the regulatory obligation on the carriage service provider would, in our view, be inappropriate and cumbersome.

In addition, the current wording of the Draft Determination does not clarify in what way the required matters should be included in promotional material. For example, in a television commercial or promotion of a premium mobile service within a television program it would not be possible to orally or in writing set out in full matters such as competition terms and conditions and how to discontinue a service.

To the extent that Draft Determination or an industry Code does intend to regulate the content of promotional material it is important that consideration be given to the level of detail that is possible in different mediums – as what can usefully be set out in a large print advertisement for example, is clearly different to the level of detail possible in a short television or radio commercial. In our view, if such material is to be required in all promotional material, it should be able to be provided by reference to another information source, such as a webpage or standard phone number.

Free TV is also concerned that the definition of ‘children’s service’ as a service that is ‘either wholly or partly aimed at children or would reasonably be expected to be particularly attractive to children’ is unclear and on one reading would essentially cover every service apart from adult only services. Again, to the extent that the Draft Determination or an industry Code intends to provide specific regulation for promotions to children Free TV would recommend a definition of ‘children’s service’ that can be applied with greater certainty, emphasizing specific parameters such as:

- A specific % of the services customers that one would expect to be under a particular age; or
- Characteristics of the promotional material itself that would lead to an assumption that the services was being targeted to children.

For example, under the Commercial Television Industry Code of Practice there are specific requirements that apply to premium charge telephone services which are placed in a G program with a substantial child audience or which are ‘directed to children’.

The Code contains an Advisory note providing guidance on the factors broadcasters are to take into account in determining whether a commercial is ‘directed to children’, a copy of which is attached. We would recommend that a similar approach be used in any draft determination or Industry Code seeking to specify requirements for promotional material aimed at children.

Free TV notes that there are other regulatory processes operating in parallel to the current ACA process, including a review currently being conducted by the Department of Communications, Information Technology and the Arts into the regulation of content delivered over mobile communications devices. In our view, this lends further support to the view that the Draft Determination should be limited to those matters expressly required in the Ministerial Direction and industry self-regulation should be afforded an opportunity to address those further matters currently set out in the Draft Determination.