



FreeTV
Australia

**Submission by
Free TV Australia Limited**

Telephone Information Services Standards
Council (TISSC)

Mobile Premium Services Draft Code of
Practice
Mobile Premium Services Industry Scheme

10 February 2006

Introduction

Free TV Australia (**Free TV**) is the industry body representing all free-to-air commercial television licensees in Australia.

Free TV welcomes the opportunity to comment on the Mobile Premium Services Draft Code of Practice (Public Comment Draft 8 November 2005) (**Draft TISCC Code**) developed by the Telephone Information Services Standards Council (**TISSC**) which forms part of the Draft Mobile Premium Services Industry Scheme developed by the Australian Communications Industry Forum (**ACIF**) (Public Comment Draft 22 November 2005) (**Draft ASIC Code**).

Free TV understands that taken together these documents are intended to meet the requirements of the default Mobile Premium Services Industry Scheme (together referred to as the **Draft MPSI Scheme**) referred to in Division 3 of the *Telecommunications Service Provider (Mobile Premium Services) Determination 2005 No 1* (the **Determination**).

Free TV notes that longer term policy and regulatory issues associated with mobile content on convergent devices are the subject of a current review by the Department of Communications, Information Technology and the Arts (the **Department**) (Discussion Paper released 15 July 2004). Free TV made a submission to that review (6 October 2004) and continues to have a close interest in the outcome of the review.

Free TV's members currently provide content for a number of premium mobile services ranging from news, weather and sport to live streaming of program content on a subscription basis. The range of premium mobile content services offered by broadcasters is expected to increase over time.

One of Free TV's members has announced plans to distribute Australian television programs to portable devices including mobile phones to commence as early as the middle of this year. Another Free TV member is providing television content to a trial of DVB-H technology in Australia, which facilitates broadcasting to hand-held devices.

As such, Free TV's members have a close interest in the regulation of mobile content. In particular, Free TV's members are keen to ensure that regulation of mobile content does not create a disincentive for carriage service providers (and ultimately carriers) to carry third party content; and that regulation does not directly or indirectly hinder broadcasters' ability to pursue legitimate opportunities in this arena.

For these reasons, Free TV strongly supports a technology neutral approach to regulation. We are particularly concerned that content providers, such as television broadcasters, should not be subject to double regulation, where the same content is provided on more than one platform.

This submission addresses the following issues

Section 1: General Comments

Section 2: Classification Assessment Framework

Section 3: Escalated Complaints Process

Section 4: Advertising Requirements

Executive Summary

General comments

- Free TV strongly supports a technology neutral approach to regulation.
- Free TV supports industry self-regulation that is responsive to community standards, transparent, flexible and simple to understand for both industry and consumers.
- Free TV is concerned that the draft TISSC and ACIF Codes are very detailed and prescriptive and may not be sufficiently flexible to adapt to the emerging service and regulatory environment of premium mobile services.
- Free TV would support a code which sets clear objectives in relation to community safeguards, but allows industry flexibility in meeting those objectives.

Pre-assessment obligation

- The service providers who have a direct relationship with the mobile service consumer should be responsible for pre-assessing content delivered to that consumer.
- The assessor certification requirement should be made more flexible to accommodate experienced certifiers.
- Material that has already been classified for television should not require re-classification for distribution on a mobile platform. As in the broadcasting environment, news and current affairs content should be exempt from classification requirements (consumer warnings can be implemented).

Escalated complaints handling

- ACMA is the appropriate body for the handling of escalated complaints concerning classification of content.
- Complaints should be required to be made in writing before a substantive response is required and before a complaint can be escalated.
- Complaints concerning content should be required to be made within a specified time limit before a substantive response is required.

Advertising requirements

- The Code should set out minimum requirements regarding clear and accurate information in advertising. Advertisers should be given flexibility to create advertisements appropriate to the advertising medium provided the minimum requirements are complied with.

1 General Comments

Free TV strongly supports a central role for industry self-regulation, which ensures appropriate consumer protections are in place without imposing unnecessary financial or operational burdens on industry. Self regulatory schemes should be responsive to community standards, transparent, flexible and simple to understand for both industry and consumers.

Free TV has been closely involved in self-regulation by the free-to-air commercial television industry since 1992, when the *Broadcasting Services Act (BSA)* was introduced. Free TV administers the Commercial Television Industry Code of Practice which operates effectively to regulate television content in accordance with community standards.

Free TV is well aware of the complexities involved in drafting a code that meets the objectives of consumers, businesses and regulators. These complexities are particularly pronounced in the context of the premium mobile service market where content services and business models are rapidly emerging and evolving.

Free TV congratulates TISSC and ACIF for their valuable contributions to development of a self-regulatory scheme. However, Free TV is concerned that the draft TISSC Code and ACIF Code may not be sufficiently flexible to adapt to the emerging service and regulatory environment of premium mobile services. The documents are very detailed, prescriptive and descriptive and appear to go beyond the requirements of the Determination in some respects.

Further, the documents appear to have been drafted independently and, as a result, do not “fit” together with any clarity. Industry will need to understand and consult both documents in order to comply with all the requirements of the Determination. Consumers will also need to consult both documents to know, for example, how to make a first instance complaint, and how it will be handled (**Draft ACIF Code**), and how to escalate a complaint and how it will be handled (**Draft TISSC Code**).

Free TV understands that AMTA has been working on an alternative model in consultation with carriers and service providers. Free TV understands that the AMTA model will address all of the issues required by the Determination in a single Code. The AMTA Code is intended to set clear objectives in relation to community safeguards, but to avoid unnecessary detail in order to allow industry flexibility in meeting those objectives.

Free TV understands that the AMTA Code will operate alongside a publicly available ‘Guideline’ document, which will assist industry and consumers to understand the objectives of and obligations imposed by the Code, and to implement practices to meet those obligations and objectives.

Free TV supports such an approach, subject to reviewing the terms of the proposed AMTA Code and Guideline.

The remainder of this submission sets out specific comments on the terms of the Draft TISSC Code and Draft ACIF Code, as they apply to Free TV’s members in their capacity as content providers. These comments may also be applicable to the proposed AMTA Code.

2 Classification Assessment Framework

The Draft MPSI Scheme sets out an Assessment Framework for pre-assessment of content likely to be classified above M (defined as “Relevant Content”) in accordance with the Office of Film and Literature Classification Guidelines (**OFLC Guidelines**).

Free TV has a number of concerns with the Assessment Framework, as it applies to Free TV’s members in their capacity as content providers. Our key concerns, which are set out

below, relate to uncertainty regarding who bears the pre-assessment obligation, the qualification requirements for classifiers and application of classification requirements to material already classified for television.

2.1 Pre-assessment obligation

Part 4 of the Draft ACIF Code sets out the obligations relating to pre-assessment of 'relevant content'. It places the pre-assessment obligation on 'the person who is responsible for the supply of the relevant content'. This is defined to include the content provider which supplies relevant content to content service providers or mobile carriage service providers. It also includes content service providers and carriage service providers (when they act as content service providers, such as through resale arrangements). Part 4 requires content providers, content service providers and carriage service providers to comply with the Assessment Framework set out in Annexure 4 to the Draft ACIF Code.

The Assessment Framework contains the detailed provisions in relation to the pre-assessment obligation. Paragraph D.2.2 of the Assessment Framework provides that both the content provider and content service provider are responsible for ensuring that relevant content is assessed, unless a contract is entered into between the content provider and content service provider specifying that one or other party is solely responsible.

Free TV submits that, as currently drafted, it is very unclear who bears the pre-assessment obligation under the Scheme. First, Part 4 appears to be inconsistent with Annexure 4. Second, under neither formulation will the consumer or regulator know who is responsible for classifying a particular piece of mobile content, as it will either depend on the supply chain for that content and/or the contractual arrangements between the parties in that particular supply chain. Consumers will not necessarily be aware of the identity of the ultimate content provider.

Free TV submits that obligations under the Scheme should apply to carriage service providers and content service providers. These are the entities with whom the consumer has a direct relationship. The contractual arrangements underlying supply of the content are not visible to consumers and should not be relevant to determining who bears the pre-assessment obligation under the Scheme.

This is consistent with other elements of the scheme. For example, it is the contact details of the content service provider which are required to be advertised to consumers (paragraph E.2.7 Draft TISSC Code) and consumers are required to direct their complaints to the content service provider or carriage service provider (paragraph 8.2 Draft ACIF Code).

Applying the pre-assessment obligation to content service providers and carriage service providers is consistent with the Determination which applies only to content service providers and carriage service providers, not content providers. It is carriage service providers and content service providers, who will be bound by the Determination to comply with the MPSI Scheme (in the form registered with ACMA). It is also consistent with the complaints handling obligations under the draft Scheme which are imposed on carriage service providers and content service providers (Section 8 Draft ACIF Code (initial complaints) and Section F Draft TISSC Code (escalated complaints)).

The relationship between a service provider and content provider will ultimately be governed by the contractual arrangements between them. Content providers may play a role in pre-assessment and complaints handling under a contractual arrangement. However, the terms of a private contractual arrangement, should not alter responsibility under the Code. It is important that the first contact point for complaints

and queries from consumers is one of the providers with whom they have a direct relationship.

2.2 Qualification of classifiers

The Draft ACIF Code Assessment Framework provides that assessment of relevant content must only be carried out by a 'certified assessor', which is an assessor that has successfully completed a Mobile Classification Training Course and annual refresher training with the OFLC.

Free TV recognises the importance of ensuring that classifiers are adequately qualified. However, Free TV submits that the requirement that a certifier undergo training and annual refresher courses with the OFLC is unnecessarily narrow. Free TV strongly recommends that the Assessment Framework allow for greater flexibility in meeting the assessor certification requirement.

For example, the IIA Code for *Industry Co-regulation in the area of Internet and Mobile Content* (May 2005) provides a definition of an Assessor (clause 16) as:

"a person who has the following qualifications:

(a) is an Australian resident

(b) has been a member of the Classification Board for at least 12 months within the last 7 years; or

(c) has completed an appropriate course with the OFLC, the IIA, or other body designated by the IIA; or

(d) is able to prove to the satisfaction of the IIA that they are competent to assess Content under this Code."

Free TV recommends that similar criteria be adopted for assessment of content under an MPSI Scheme.

Free TV's members all employ classification officers who have expertise in classifying content under the Television Classification Guidelines and under the OFLC Guidelines. More flexible certification requirements would sensibly allow already experienced classifiers to prove to the satisfaction of TISSC (or other appropriate industry body or regulatory body such as ACMA or the OFLC) that they are competent to assess content under the Code, rather than requiring such personnel to complete the prescribed OFLC training and refresher courses.

Further, more flexible certification may assist in relieving inevitable bottlenecks in the supply of classification personnel, which may unnecessarily stifle commercial development as content services emerge and place pressure on the resources of the OFLC.

2.3 Classification of content already classified for television

It is well recognised that broadcasting services are already highly regulated. Television content (other than Film) is classified under the Television Classification Guidelines contained in the Commercial Television Industry Code of Practice. The Television Classification Guidelines are intended to provide community safeguards which are consistent with the OFLC Guidelines but they provide more detail to assist broadcasters to appropriately classify the variety of material which appears on television, including serials, talk shows and variety programs, infotainment programs, game shows and commercials.

Free TV is concerned that the Assessment Framework will result in the 'double regulation' of broadcasting services if material that has already been classified for television is required to be re-classified for supply on a mobile platform, even though the content has not been altered. Television broadcasters would be subject to double regulation to the extent that they are required to unnecessarily re-classify content.

Further, it will be very confusing for consumers if the classification given to a program broadcast on television differs from the classification given to the same material accessed via a mobile platform.

For these reasons, Free TV submits that if material has already been classified for television it should not require re-classification for distribution on a mobile platform.

This principle appears to have been recognised by the Draft TISSC Code in relation to television advertising. Paragraph E.1.1.1 of the Draft TISSC Code specifically excludes television advertisements from the requirement that advertisements for premium mobile services must comply with relevant classification laws. This appears to be in recognition of the requirement under the Commercial Television Industry Code of Practice that television advertisements are classified before broadcast in accordance with the Television Classification Guidelines.

Free TV submits that a similar exemption be applied to all premium mobile content that has already been broadcast on television.

2.4 Warnings for news and current affairs content

Free TV submits that news and current affairs content should be exempt from classification requirements. Free TV submits that subscriber warnings (similar to those required under the Commercial Television Industry Code of Practice) could be displayed prior to news material which in the content provider's opinion is likely to seriously distress or seriously offend a substantial number of subscribers. This regime has worked well in the commercial television environment, reflecting that viewers have different expectations in relation to the classification and availability of news and current affairs content than other content types.

3 Escalated Complaints Framework

3.1 Escalated complaints handling body for classification of content

Free TV is strongly of the view that ACMA is the appropriate body for escalation of complaints concerning the classification of premium mobile services.

ACMA is the escalated complaints handling body for complaints in relation to the classification of television content¹ and stored internet content². A technology neutral approach to regulation demands that ACMA also consider escalated content complaints regarding premium mobile content. It is imperative from a business, consumer and regulatory perspective that escalated complaints about content are

¹ The BSA provides that if a person has made a complaint to a broadcaster regarding program content or compliance with a Code of Practice and the person has not received a response within 60 days after making the complaint or the person considers the complaint to be inadequate, the person can refer the matter to ACMA for further investigation (s148 BSA). ACMA must investigate the complaint and notify the complainant of the investigation (s149 BSA).

² Complaints regarding access to prohibited or potential prohibited internet content can be made to ACMA, and ACMA must investigate complaints made to it under Schedule 5 of the BSA.

decided by the same regulatory body, regardless of the medium over which the content is delivered and accessed.

It would be unsatisfactory if content providers such as television broadcasters were to be subject to decisions by ACMA in relation to escalated complaints regarding classification of content on television, and another body regarding an escalated complaint made about the same content delivered to a mobile device. Decisions concerning appropriate classification involve a degree of judgment and could be different if made by different bodies. This would cause confusion regarding appropriate classification for both content providers and consumers, and would undermine the effectiveness of classification and complaints processes.

It is also relevant that ACMA assesses content complaints at no cost to the consumer or industry member. This ensures that the scheme is freely accessible to all members of the public, and does not discriminate between industry members with different levels of resources.

Free TV submits that ACMA is experienced in considering escalated complaints concerning classification of the range of content that is delivered over broadcasting and internet services. A similarly wide range of content is likely to be delivered over mobile devices.

3.2 Form of complaints and escalated complaints

Section 8 of the Draft ACIF Code deals with Complaints Handling, however it does not specify the form of consumer complaints. Section F of the Draft TISSC Code deals with Escalated Complaints Procedures and provides that an escalated complaint may be in any form, including by writing or telephone (paragraph F.1.3).

A complaint triggers a formal investigation process which requires a content service provider/carriage service provider to devote resources to investigating the matter and providing a substantive response. Free TV submits that complaints, whether first instance or escalated complaints, should be required to be made in writing (preferably by post or fax) before a substantive response is required and before a complaint can be escalated. A written complaint can still be quickly lodged and resolved, but provides the complainant and content or carriage service provider with a more robust complaints system.

The Commercial Television Industry Code of Practice requires that the substance of telephoned comments on matters covered by the Code be recorded and brought to the attention of key staff. The Code also requires that if a viewer wishes to pursue a complaint further that they should be advised that they need to lodge their complaint in writing within 30 days of broadcast of the matter complained about. Free TV submits that a similar process should apply to telephone comments received in relation to content on mobile devices.

3.3 Time limit on response to complaints and investigation of escalated complaints

The Draft ACIF Code provides that a content service provider or carriage service provider must investigate a complaint made to it and propose a resolution to the complainant within 30 days of the complaint being made (paragraph 8.4). However, the code does not specify a time frame within which a consumer must make a complaint after viewing the content complained of.

In relation to escalated complaints the draft TISSC Code requires TISSC to investigate a complaint which is escalated within 12 months of the complainant becoming aware

of the circumstances surrounding the complaint. This time limit may be extended a further 12 months at the arbitrator's discretion (paragraph F.1.8 Draft TISSC Code).

Free TV submits that a time limit should be imposed on the period within which complaints about the content of a service must be lodged, before a substantive response is required. This is to ensure that service providers are in a position to provide a response to such complaints. For the same reason, a much shorter time limit should be imposed on consumers wanting to escalate a complaint concerning content.

The Commercial Television Industry Code of Practice requires licensees to provide a substantive response to complaints, provided the complaint is made within 30 days of the broadcast of the material complained about. This recognises that stations do not have capacity to archive broadcast tapes for longer than 30 days, unless a complaint has been made. Free TV submits that it will be extremely difficult to investigate a complaint about the content of a service if no time limit is imposed on complainants and if a complainant is allowed up to 12 months to escalate a complaint.

4 Advertising Requirements

The Draft TISSC Code sets out detailed rules applying to advertising of premium mobile services. Free TV recognises the need for advertising rules which ensure that consumers are provided with clear and accurate information regarding the cost and terms and conditions of a service. Viewers often contact television broadcasters if they have concerns with a service or form of advertising. Broadcasters also carry some risk under the misleading and deceptive provisions of the Trade Practices Act if we become aware that an advertisement is misleading and deceptive and continue to broadcast it. However, in Free TV's experience, good compliance with advertising rules is achieved when the rules are clear, flexible, and easy to follow.

Provided that advertising rules set an acceptable minimum standard for providing consumers with important information, we consider that compliance will be higher where the rules are easy for advertisers to understand and implement. Accordingly, Free TV submits that the rules set out in the Draft TISSC Code are too prescriptive to be binding in all circumstances.

For example, paragraph E.2.5 of the Code requires that message cost information must be displayed for at least 10 seconds in a television advertisement. This may not be achievable or necessary in a 15 second television advertisement. There are also specific requirements regarding the size of certain information in the advertisement. Again, these requirements may not be achievable or necessary in the context of the advertisement as a whole.

Free TV submits that the role of the Code should be to set a minimum requirement that advertisements provide clear and accurate information relating to the nature of the service, the cost of the service, other basic terms and conditions of the service, contact information for the provider of the service, information as to where to obtain a copy of the full terms and conditions of the service and other specific consumer safeguard warnings (e.g. such as the age suitability of the service).

Advertisers should be given flexibility to create advertisements appropriate to the advertising medium, whether that be television, cinema, internet, radio or print, provided the advertisement complies with the minimum requirement regarding clear and accurate information.

As noted under section 1 (General approach) above, Free TV understands that the AMTA alternative Code adopts a less prescriptive approach, but is supplemented by voluntary Guidelines which provide specific guidance to advertisers and consumers on practices to ensure the minimum advertising principles set out in the Code are satisfied. Free TV supports this approach, subject to reviewing the terms of the proposed AMTA Code and

Guidelines. The advantage of this model is that the Guidelines could provide advertisers with a best practice example for displaying information, which would give advertisers certainty about what they need to do in order to comply with the Code. However, it would not be a breach of the Code if the advertiser chose to satisfy the requirement in a different way, provided that they still met the minimum Code requirements.

In relation to the specific terms of the Draft TISSC Code, Free TV provides the following comments:

4.1 Definition of parental guidance service

Free TV notes that the Draft TISSC Code has two definitions of parental guidance service marked for discussion. The definitions section of the Code defines a parental guidance service as “a mobile premium service where the placement, context and content of an advertisement for the service is reasonably likely to attract or encourage a significant number of people under 15 years of age to use the service.” A footnote to paragraph E.1.10 (Advertisements for parental guidance services) states that “a mobile premium service is deemed to be aimed at persons under 15 years of age if 50% or more of the readers or viewers of a publication or program that includes an advertisement for the service are under 15 years of age”.

Free TV is concerned that the first definition is unclear and could potentially cover a very large range of services. This will create a substantial degree of uncertainty amongst advertisers, publishers and consumers. From a broadcasting perspective, the second concept is easier to apply. However, as it is impossible to know the audience of a program in advance of its broadcast, we suggest that the definition is “if on an average 50% or more of the readers or viewers of a publication or program that includes the advertisement for the service are under 15 years of age. The average is measured on an annualised basis.”

4.2 Competitions

Paragraph F.7.7 sets out a requirement for refunds for voting and competition services. This provision appears to go beyond the requirement of the Determination and is unnecessary.

Free TV Australia
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