

SUBMISSION BY HUTCHISON TELECOMS

“REVIEW OF THE REGULATION OF CONTENT DELIVERED OVER MOBILE COMMUNICATIONS DEVICES”

Department of Communications, Information Technology and the Arts

Hutchison Telecommunications (Australia) Limited and Hutchison 3G Australia Pty Limited (“Hutchison”) respond jointly in this submission.

Hutchison supports regulatory consistency across a range of technological platforms. Hutchison also supports consistent classification of content and controlled access arrangements for certain categories of content.

However, Hutchison is concerned with the direction the Minister has taken in requiring the Australian Communications Authority (“ACA”) to make certain service provider determinations in relation to premium SMS, MMS and ‘proprietary network services’. These steps, particularly in relation to proprietary network services, are premature given the review the Department is undertaking and the scope of existing regulation.

‘Proprietary network services’ as defined in a recent Ministerial Direction are a construct of wording only. Hutchison maintains that content services provided by carriers through a portal are covered by and should be dealt with under Schedule 5 to the *Broadcasting Services Act 1992* (“Online Provisions”). Treating these services in this manner would ensure a technologically neutral application of regulation and promote regulatory consistency across content that may be provided using a range of delivery platforms.

The Online Provisions and supporting Code provide a working model of government and self-regulation providing complaints investigation, industry codes of practice and initiatives such as education and research. This model can similarly be adapted to cover new developments in content delivery, including live content streaming, both to fixed and mobile devices.

Hutchison urges the Department to consider the revised Internet Industry Association Code of Practice in relation to Internet Content (“proposed IIA Code”), which will be available shortly. The proposed IIA Code incorporates new provisions specifically aimed at the regulation of content delivered to mobile devices. These provisions have been drafted with the protection of consumers against the inappropriate supply of adult content in mind, and with the objective of maintaining regulatory consistency.

Hutchison Telecoms

3 September 2004

Identify new and emerging communications devices and platforms, capable of receiving and delivery audiovisual services (including text), and related features

Communication devices

Present 3G communication devices contain a variety of applications that are typically found on personal computers, utilising the internet and related protocols. Such applications include HTML browsers, audio and video streaming clients, multiplayer games and email applications. These applications are representative of the general principle that anything that can be done with a personal computer using internet access can also be done on present 3G devices, subject only to the physical limitations of the device. The device limitations are mostly processing capability, screen resolution and memory; technology advances will continue to improve all of these areas.

The mobile devices used by Hutchison are becoming similar to personal computers in the fixed line environment. The devices have an operating system (closed or open) that can support the operation of a number of applications available to the customer. Some examples of these applications may be playing games, listening to music or viewing a picture. All these applications have been possible on a personal computer for many years.

The most common personal computer applications to be recently included on 3G communication devices are Browsers (Internet), Email Clients, Video Calling, Video Streaming and High Speed Data Modem. These types of technologies are possible in conjunction with a 3G network that supports far greater bandwidth throughput (i.e. data speed) than existing mobile networks.

The distinguishing factor of Hutchison's mobile devices in relation to personal computers is their wireless capability, with the customer's only limitation being the physical coverage area of Hutchison's 3G network.

A further feature of current 3G communication devices is the standard inclusion of digital cameras capable of still and video image capture. The resolution and quality of cameras is expected to improve in the near future. The cameras are typically utilised in services that result in person-to-person communication, such as MMS or video-telephony. Integrated digital cameras are usually not found as standard features on technologies in the fixed environment.

In the context of this submission the definition of a 'communication device' needs to be considered. A 3G communication device may be viewed as a discrete unit that of itself contains sufficient functionality to perform the tasks described in the preceding paragraphs. A 3G communication device may also form part of a greater communications device whereby the 3G communication device will enable network access to another piece of equipment such as a Personal Digital Assistant or personal computer. That access may be facilitated through a wired connection such as a serial port or USB cable, or through other wireless means such as infrared or Bluetooth™. In the latter situation the 3G communications device may be considered in the same category as any other technology that provides wireless internet access such as 802.11b or 802.11g.¹

¹ Two types of LAN standards from the Institute of Electrical and Electronics Engineers – see www.ieee.org

Technology development

From the early stages of mobile content services, internet standards have been the choice of operators, vendors and the standards community. This has been driven by the view that there is a 'natural' association between handheld devices and the internet.² The differences between early mobile-specific content standards such as WAP³, iMode⁴ and HDML⁵ and the equivalent internet standards were due to the desire to get certainty in a nascent market and to account for the practical limitations of mobile devices.

The maturing of the mobile content market and handset capabilities has been reflected in successive versions of mobile content standards that have converged towards the equivalent internet standards for content delivery. For example WAP 2, introduced in 2002 provides for end-to-end delivery of XHTML formatted documents, using mechanisms that are all defined within internet standards process. Technology convergence has also been facilitated by the internet standards community (eg. IETF, W3C), which has worked extensively with the mobile standards community (eg. WAP Forum, OMA, 3GPP).⁶

Features of Internet Protocol

A distinguishing feature of mobile communication technology is the flexibility that the mobile network operator and customer have in selecting which networks based on Internet Protocol⁷ ("IP") will be made available. The network operator can connect to a virtually limitless number of IP-based networks. These networks may be categorised as either:

1. Private Internal - one or more IP-based networks that are controlled by the network operator for the provision of services such as multimedia content, MMS and IMS.
2. Private External – one or more private IP-based networks. These are typically the networks of corporate customers where technical and commercial relationships have been established such that the external IP-based network performs authentication, authorisation and accounting functions in respect of the certain customers.
3. The internet

IP-based networks may also be interconnected with each other to varying extents (eg. email only, web only, open access) and by various means (eg. proxy servers, firewalls). For the 3G communications device the only factors that distinguish the IP-based networks from each other are a few basic (optional) configuration details such

² "The World Wide Web provides a robust, flexible, and ubiquitous model for information access. The adoption of the WWW as the preferred means of disseminating and accessing information from desktop PCs and workstations has created a demand for access to the same information for other devices." Introduction to HDML 11/4/1997 - see <http://www.w3.org/TR/hdml20-3.html#HEADING3-0>

³ See <http://www.openmobilealliance.org/tech/affiliates/wap/wapindex.html>

⁴ See http://www.nttdocomo.co.jp/english/p_s/imode/

⁵ See <http://www.w3.org/TR/hdml20-3.html>

⁶ eg. "The XHTML Basic document type includes the minimal set of modules required to be an XHTML host language document type, and in addition it includes images, forms, basic tables, and object support. It is designed for Web clients that do not support the full set of XHTML features; for example, Web clients such as mobile phones, PDAs, pagers, and settop boxes. The document type is rich enough for content authoring." Abstract to XHTML Basic 19/12/2000 - see <http://www.w3.org/TR/2000/REC-xhtml-basic-20001219/>

⁷ See <http://www.ietf.org/rfc/rfc0760.txt?number=760>

as username, password and network name. There are also network products available that remove the necessity of managing this basic information on the device by giving the mobile network 'intelligence' to dynamically choose which IP-based network the 3G communications device should be connected to.

In the longer term the most significant technology that will affect communications devices may well be IMS – IP Multimedia Subsystem. This technology has been standardised by 3GPP⁸ and is now being adopted by ETSI⁹ as the recommended means to design and interconnect voice over IP (VOIP) networks in the fixed environment. IMS has adopted much of the prevailing standards of IP-based networks that provide person-to-person communications and can be seen as a truly standardised convergence between telecommunications and the internet. The IMS technology extends well beyond voice and includes all forms of IP multimedia communications such as video, text and chat. The adoption of IMS in the fixed and mobile environments will remove the fixed and mobile distinction for IP multimedia services.

Report on the type of audiovisual services and related features that are available or are being developed for mobile devices and platforms in Australia and overseas

The convergence of the internet and mobile communications technologies introduce exciting new ways of delivering content and applications to the end user. Already WAP applications such as Instant Messaging/buddy lists, astrology, dating, chat and games have come to market.

Advances in both telecommunications network capabilities and the functionality of end-user devices, has started to provide internet and television-like services that were previously only available in a fixed line environment. Some examples of these services, particularly offered by Hutchison on its 3 service include mobile multimedia such as images, music and audiovisual services (both via download and streaming); multiplayer games, and tools enabling access to back-office applications for the mobile salesforce.

The combination of network and device capabilities has prompted internet-based operators to create mobile extensions of their existing propositions as well as bespoke solutions for the mobile environment.

Some examples include:

- Location-based services (where's my nearest?, mapping, mobile dating, multiplayer/fantasy games etc)
- Mobile Event & Destination guides (dining, television and movie guides etc)
- Peer-to-Peer Communication tools (Instant Messenger/buddy finder, MMS, video calling)
- Age relevant services

Another key development in the convergence of internet and mobile technologies is the ability to stream media direct to user devices. Operators such as Optus are now offering branded streaming media of existing TV broadcasts such as the ABC and

⁸ The 3rd Generation Partnership Project – see www.3gpp.org

⁹ European Telecommunications Standards Institute – see www.etsi.org

SBS while Telstra has acquired the rights to stream CNN properties to users of Telstra's soon to be launched i-mode service.¹⁰

3 currently offers a range of multimedia content including news, sports and weather reports, comedy and music video clips, movie trailers and live surf cams. Video content is available via downloading or streaming media. Recently 3 provided 24 x 7 live cam streaming of activity from the Big Brother House.

Other potential streaming applications include weather cams and home security-cam. In fact, it is now possible to connect a mobile user with a capable device to any web cam via IP (packet or circuit switched) technology.¹¹ As commercial incentives are recognised, webcasting of any event (music concert, political event, sporting fixture) via a mobile device will become more prevalent.

With respect to wagering, mobile applications catering to this market could provide access to information such as odds and results. Mobile operators in other countries have launched a variety of wagering and betting applications.

When considering location-enabled applications it is important to draw a distinction between applications that use location features to enhance a service request from a user (e.g where is my nearest restaurant) and those that accurately share a users location with another user. Many location-based services simply provide more useful applications for mobile device users, for example the real-estate application that Hutchison tested recently which enables real estate agents to download accurate maps and aerial photos, calculate distances from points of interest (eg schools, transport), call-up sales histories, current listings, appraisals and forecasts while on location with a potential vendor.

Report on relevant technical features, marketable characteristics and commercial drivers for take-up of such services and features including but not limited to:

(a) their means of delivery

Customer delivery

All of the content described in this section can be accessed on a mobile device through:

- the world wide web
- carrier portal content
- m-sites accessed via the carrier portal ('m-sites' is Hutchison name for websites that are hosted by a third party on the Internet which are specifically configured to be viewed on mobile phones. M-sites can be accessed from the internet by any person who knows the URL.)

The decision to provide access to content through the latter two categories is a commercial one by Hutchison for its 3 service based on its technical capabilities and the arrangements it can make for the supply of suitable content. The experience for the user in navigating through the portal content and the m-sites offered by Hutchison's 3 service is the same. That is, the customer may not realise whether

¹⁰ Gary Barker, "Telstra hits i-Mode road", Gary Barker, The Age, 18 August 2004

¹¹ see <http://www.three.com.au/videotalk>

they have remained within the 3's portal or been taken to an m-site hosted by a third party.

Technological delivery

Content that is delivered to a 3G communications device can be broadly split up into the following 4 information types.

1. Basic Text (like SMS or HTML to view in a browser window)
2. Still Picture (eg, JPG,)
3. Video File (eg, 3GPP, MP4)
4. Music File (eg, Midi, MP3, MP4-audio)

Mobile devices are capable of both receiving/playing content in these formats. They are currently available across a broad range of 3G devices.

The delivery of content to mobile devices is, broadly speaking, achieved using either a circuit switched or a packet switched delivery method. The choice of network delivery method fundamentally affects the range and type of content services that can be offered.

Circuit switched technology is suitable for content services where there is a bi-directional throughput of data at a constant rate between parties, such as in person-to-person and person-to-multiparty voice and video telephony. It can also be used for uni-directional content services.

The 3G mobile packet switched standards (GPRS) provide for a number of packet switched network protocols.

The range of technologies used to deliver audiovisual and other content on packet switched mobile networks is broadly speaking the same as that used on the internet. The 'workhorse' protocols are the same as the internet eg. TCP, UDP, DNS, HTTP, HTML, RTP, RTSP, SDP. The common audiovisual formats are mostly the same as the internet eg. JPEG, GIF, MPEG4. The applications are also a subset of the most common internet applications – browsing, email, audio/video streaming.

In practice IP has been the single option that operators and vendors have chosen to implement. The selection of IP as the underlying packet technology is a deliberate choice to adopt internet technology, leveraging the existing depth of that industry to achieve economies of scale. This is exemplified by Hutchison's infrastructure for content delivery where the architecture, vendors, software and hardware are identical to that required for delivery of the same content services on fixed IP-based networks. The only minor differences relate to the accommodation of various handset and network types that are in service.

There are a number of very strong reasons that make IP and associated protocols the natural choice for 3G mobile packet switched networks. IP caters for different quality of services ("QoS"), allowing for efficient utilisation of network resources, particularly the air-interface. Non-realtime QoS is used for services that have or permit a large degree of variability in their throughput requirements over the duration of a session eg. content browsing and download. Realtime QoS is used when a constant throughput is required eg. streaming. The QoS can be changed dynamically to accommodate network conditions and a single user can run multiple packet switched sessions concurrently if required.

A further key advantage of adopting IP technology is that a far more extensive range of higher layer protocols and applications are commonly available compared to circuit

switched and other packet switched alternatives. Any application or service that is available on the internet is a candidate for utilisation on the mobile packet network, subject to consideration of the technical limitations discussed above.

The IMS technology discussed above is expected to deliver a range of new audiovisual and other content over the next few years. The IMS entrenches IP-based technologies in such a way that it can flexibly incorporate both current and future internet audiovisual and other content services within an architecture that provides common functions such as authentication, charging and mobility management.

(b) commercial arrangements established for their supply

There are several different business models for the supply of content services, which can result in different commercial structures as well as different marketing, and promotional models – for example:

1. Content provider marketing its own content and services to a mobile carrier's customer base, for example premium SMS.
 - a. In this case the content provider will request that the carriers provide their customers access to the content provider's content and services. This model might involve 2 to 3 participants in the supply chain:
 - i. Party 1: content provider
 - ii. Party 2: content aggregator (if content provider or carrier can not provide this function)
 - iii. Party 3: mobile carrier
 - b. This arrangement is usually coupled with a commercial model in which the mobile carrier will recover the revenue for the content provider (and aggregator) and charge the content provider a percent fee of the revenue plus a carriage charge component for carrying the customer traffic.
 - c. The content provider will take the lead in advertising and promoting their services to the end user to encourage take up and usage.
 - d. Usually the mobile carrier does not manage or monitor the content in these types of relationships, instead, the mobile carrier might set some initial requirements that the content provider (and/or aggregator) must satisfy before the mobile carrier will provide access to its customer base, for example, restrictions on the nature of the content.
2. Mobile carrier marketing content or services, sourced from an independent content provider, to its own customer base (eg m-sites or WAP services developed and managed externally)
 - a. In this case the mobile carrier provides its customers with access to the content provider's content and services as chosen by the mobile carrier through one of the carrier's content delivery services (eg WAP or SMS). This model might involve 2 to 3 participants in the supply chain:
 - i. Party 1: content provider
 - ii. Party 2: content aggregator (if content provider or mobile carrier can not provide this function)
 - iii. Party 3: mobile carrier

- b. This arrangement is usually coupled with a revenue share commercial model in which the mobile carrier will split the revenue at an agreed rate with the content provider. If an aggregator is needed, the revenue might be shared with them or a set monthly management fee might be paid.
 - c. With this model, the mobile carrier will usually take the lead in advertising and promoting the services to their customers to encourage take up and usage. The commercial model also encourages the content provider to do what it can to also increase take up and usage – which can include some advertising and promotion – but in most cases the content provider's role revolves around providing more relevant, rich and update to date content and services.
 - d. Usually the mobile carrier does not manage the content on a day-to-day basis in these types of relationships. Instead, the mobile carrier will set requirements for the content or service that the content provider (and aggregator) provide.
3. Mobile carrier marketing content or service to its own customer base that it has developed in house (eg mobile carrier portal content, WAP services developed in-house)
- a. In this case the mobile carrier provides its customers with access to its own proprietary content through one of the carrier's content delivery services.
 - b. There are no external commercial relationships in this model and therefore the carrier alone will advertise and promote the services to their customers to encourage take up and usage.
 - c. In this case the carrier will manage the content on a day-to-day basis, as it is the only supplier in the chain.

The involvement of the carrier is heavily influenced by its go-to-market content model (outside of the premium SMS area). A carrier portal model allows the carrier to control access to the content and to determine the management of the content both directly and indirectly with the content supplier. In this model, the carrier has the ultimate control and ownership of the customer.

An open access model to content results in the carrier being more involved in providing access to the content and billing for data carriage, similar to a traditional fixed internet ISP. Hutchison's 3 service utilises both of these models.

(c) their importance in contributing to commercial viability of platform investment

Hutchison has invested significantly in content delivery platforms to enable the delivery of rich multimedia services across its 3G network. These platforms include SMS, MMS, video calling, image download, video download, video streaming, audio download, audio streaming and XHTML browsing. Hutchison believes that content and communication services are a key point of differentiation in the competitive mobile telecommunications market and will subsequently continue to focus on innovation and investment in this area.

In order to achieve a return on these platform investments, Hutchison charges its customers for accessing services. The platform cost is spread over several years in

order to make the service price acceptable to end users today. As Hutchison provides the delivery mechanism to third party content providers it will partially recover its investment. Commercial arrangements with content providers allows Hutchison an opportunity to obtain a return on its initial platform investments and a revenue stream for justifying future platform investments. As the Department has noted: "It is the content that drives the take-up of technologies essential to our nation's future prosperity".¹² Without such commercial arrangements, continued platform investment and expansion would be prohibitively expensive.

(d) the commercial availability and performance of filtering technologies for mobile devices

Filtering technologies

Hutchison considers that it is impractical and ineffective to filter all content available on mobile devices whether on the open internet, WAP or carrier portal. There are limitations on present filtering technologies and their operation in relation to mobile devices. However the proposed IIA code has committed to monitoring developments in filtering technologies, including in connection with mobile devices. This will ensure that members are informed of developments, and assessments regarding implementation of filtering technologies can be made as technologies improve.

There are different approaches to filtering technologies such as URL blocking, keyword blocking both in realtime and from databases. However no system can guarantee the entire blocking of undesirable material. Additionally there is a difficulty in defining what is undesirable and creating technology that can make that assessment. The provisions adopted in the United Kingdom use the following wording: "The filter will be set at a level that is intended to filter out content approximately equivalent to commercial content with a classification of 18."¹³ Obviously this differs from the approach taken by the Minister and highlights the difficulties in standardising technologies that may be developed overseas. It is difficult to imagine that a single solution would be available that would work with all devices, due to a mixture of operating systems and processing capabilities.

A vendor of filtering technology accurately captures the role of such software in its user guide: "Bionet Systems does not claim that Net Nanny software will make the use of your computer, the Internet, or any other online service safe for you or other individuals. This software is a tool to help you take responsibility for making your own personal decisions about the freedom of speech and Internet safety".¹⁴

Hutchison entirely supports this sentiment. The goal of any regulation or use of filtering technology should be to empower end users to control their own mobile experience.

Access controls

Hutchison refers the Department to the proposals made by the Australian Mobile Telecommunications Association ("AMTA") to the ACA in relation to opt-in and opt-out requirements for adult content. The detail of these proposals has also been captured in the proposed IIA Code.

¹² "Data", Communications Newsletter, July 2004 at p10

¹³ "UK code of practice for the self-regulation of new forms of content on mobiles", 19 January 2004 at p3

¹⁴ "Net Nanny 5" - see <http://www.netnanny.com/assets/docs/nn5/userguide.pdf>

Whilst Hutchison currently utilises a password solution in relation to its adult content on 3, this solution was adopted in order to launch the content prior to a clear regulatory direction being taken. Hutchison's age verification systems require a date of birth and sighting of identification. Where for some reason this information is sighted but not captured at point of sale, Hutchison requires customers to complete a form and provide a copy of identification by facsimile or post.

Hutchison has not directly received any complaints in relation to the provision of its adult content, other than complaints by adults that Hutchison's age verification system is too onerous. Customers have indicated that as they have taken up a post-paid service and as such already demonstrated that they are over 18 in-store or by utilising a credit card for other sales, they believe an added requirement to provide identification and to complete an additional form is too restrictive.

Hutchison supports the position take by AMTA in relation to age verification and does not support the continued use of a password or PIN option where age has been verified and a customer has the ability to opt-out of the relevant service.

Report on the extent to which existing regulatory approaches apply to the different new and emerging audiovisual services and features

Hutchison supports the consistent regulation of all content accessed by or delivered to mobile devices. Consistency is essential due to the range of content types and the range of request, supply, delivery, charging and billing methods. Hutchison has created a flowchart to illustrate the various combinations in the content request and supply cycle – see Attachment A.

It can be seen that the customer could desire a particular item of content and request that content by a range of methods, not all mobile based. The content may be supplied by a variety of suppliers who may or may not utilise a mobile carrier. It is unlikely to be important to the customer the type of content provider who fulfils their request. Charging methods vary and include event based, subscription, data usage. Payment could take place at the time the request for the content is made or be calculated and billed at a later time. The entire cycle could take place without the customer being aware of the applicable regulatory regime for each stage of the cycle.

One example of many of these applications being utilised at once is the game recently featured by the Department which operated using 3G technology, 3D mapping, web chat, voice messages and text messages to enable multiple players to share information.¹⁵

For these reasons regulatory approaches need to be content and platform neutral or if there is a requirement to be specific, regulation must be consistently applied.

(a) whether the content of the service is of a type that is suitable for categorisation under the national classification system established under the Classification Act

Hutchison considers that there should be a consistent regime applicable to the assessment of content accessed through fixed internet and through mobile communication devices.

The Minister has determined that 'adult' content available over mobile devices should include content that would be assessed as MA or R under the Office of Film and

¹⁵ "Data", Communications Newsletter, July 2004 at p3

Literature Classification (“OFLC”) guidelines. Hutchison does not agree with the inclusion of MA as ‘adult’ content given that only R content is restricted to viewers over the 18. Further, Hutchison believes that the objective of consistent regulation is not achieved by including MA content as “adult content” in relation to mobile communication devices as only R content is restricted under the Online Provisions.

Hutchison has been actively involved in the drafting of the proposed IIA Code. The underlying intent of that code is to base the assessment of content on the OFLC categories but not to incorporate the formal OFLC pre-classification scheme, requiring the involvement of the OFLC.

Hutchison supports a regulatory position that where text, visual images and video games are likely to contain sex, violence, nudity, drug use and adult themes then an appropriately qualified person within the carrier, content provider or a third party should assess the relevant content. Hutchison supports an ‘assessment’ regime as opposed to a ‘classification’ regime for content provided over mobile devices. It would be commercially unmanageable to require all content to be reviewed by the OFLC. Assessment of content should only be used in order to determine which content should be subject to any controlled access arrangements. There should not be a requirement to label content that has been assessed - if it is assessed as adult content it should be subject to controlled access arrangements. If the content is not assessed as adult content then no labelling or warning is required.

The proposed IIA code provides that content that is not reasonably likely to contain the elements that would take it within the restricted content category is not required to be assessed. For example, sports and news services should not be required to be assessed.

The proposed IIA code also seeks to cover the provision of live content, although this is not subject to the Online Provisions. Where a content service will involve a real time or ‘live’ component and the service is reasonably likely, taking into account the advertising, content description and any other relevant factors, to contain sex, violence, nudity, drug use and/or adult themes, the proposed IIA Code provides for the service to be assessed on the basis of the likely or anticipated nature of that service. In this way, where the proposed live content is likely to contain adult material, the content can be subject to controlled access mechanisms.

(b) whether the content of various service types falls within the definition of internet content under Schedule 5 of the BSA or any other regulatory framework

Online Provisions

Hutchison 3G Australia Pty Limited (“H3GA”) has already provided the Department, the ACA and the ABA with a copy of the opinion it obtained from Stephen Gaegler SC, which clearly indicates that the content of the information services made available by H3GA to its subscribers by means of H3GA’s IP Network constitutes “Internet content” for the purposes of the Online Provisions. Key points from that advice are as follows:

- an Internet Service Provider may supply a service, including an on-line information service or an on-line entertainment service, that is properly described as an “Internet carriage service” even though access to that service is limited.
- a “walled garden” within “the Internet” remains part of “the Internet” even where the provider has chosen for commercial reasons to date to restrict

access to and from the world wide web.

- the provision of m-sites (where the information may or may not be available to users of the world wide web from non-mobile devices) will be sites within “the Internet”. Unquestionably, and on any view, that will make the service by means of which subscribers are able to navigate to those sites one “that enables end-users to access the Internet”. Yet the relevant service enabling that access to “the Internet” will remain a service that enables users to access content hosted by the carrier with limited access as well as other content.
- the information services provided by H3GA to its subscribers by means of its network are also accessed by means of a service “that enables end-users to access the Internet”. This is because H3GA’s network is physically and logically connected to other networks forming “the Internet” and utilises the TCP/IP.¹⁶
- The means by which H3GA blocks access to end-users other than H3GA subscribers using H3GA handsets is by blocking IP packets¹⁷ from unknown sources. Another method H3GA could have used to block access could easily have been to require password access. The technology would be different but the effect the same.

Ministerial action

Hutchison is concerned at the approach that has been taken to regulate content such as that provided by Hutchison’s 3 service. Under the *Service Provider Direction 2004 (No. 2)* issued by the Minister earlier this year, the ACA was directed to make a service provider determination setting out certain rules in relation to “proprietary network services”. The *Premium Service Determination 2004 (No. 1)* defined a “proprietary network” relevantly as a service “...that enables customers of [a carriage service provider] to access a premium content service by way of a mobile device where that service is not otherwise generally available.”

There are a number of issues that arise from the Minister’s directions and determinations, which Hutchison have taken up directly with the ACA. The key issue for the purposes of this submission is the use of the words “where that service is not otherwise generally available” in the definition of proprietary network. These words highlight a degree of misunderstanding in relation to the operation of carrier portal services, the 3 service in particular, and create an inconsistency in the regulation of content which is unnecessary given the potential to apply the Online Provisions.

As discussed above, Hutchison provides access to a range of content via its 3 service including:

- content hosted by Hutchison that is exclusive to it, for example Hutchison commissioned animated comedy series
- content hosted by Hutchison that is available to television viewers, for example SkyNews bulletins
- content that is streamed live via web cam, for example Surfcam, also available to the public from the content provider’s website

¹⁶ Transmission Control Protocol – see <http://www.ietf.org/rfc/rfc0761.txt?number=761>

¹⁷ Data packets formatted according to the Internet Protocol

- content on m-sites hosted by content providers, for example yourMovies (movie session times and trailers) and Scoreboard (sports scores) services, also available to the public from the content provider's website

Similarly, WAP services draw content on a non-exclusive basis from content aggregators who supply a variety of other content providers.

Whilst Hutchison's entire service is 'not otherwise generally available', much of Hutchison's content is generally available to the public through a variety of means. Hutchison's commercial model is to make content available to customers of its mobile devices – the benefit to the customer being the convenience of accessing on a mobile device information they could have obtained elsewhere, with the added benefit of some exclusive content.

As indicated above, the customer experience is such that a customer would be unaware if viewing content hosted by Hutchison or a third party. The logic behind regulating content differently because it is available on a mobile device is unfounded and the result can only be confusing for industry and consumers.

Consider:

- (a) what, if any, measures are necessary (eg regulation, cooperative arrangements, public awareness and end-user empowerment initiatives) in order that the supply and accessibility of audiovisual services are managed**

National Office for the Information Economy Convergence Report

There are many areas where convergence raises questions about policy objectives and implementation. The National Office for the Information Economy Convergence Report ("NOIE Report") notes that the fundamental question to be addressed is: "How must government's policy objectives and intervention strategies be adapted to fit a convergence industry environment?"¹⁸ The NOIE Report goes on to raise a number of issues to be addressed in formulating policy for the next 5 to 10 years.

These include:

- how to facilitate innovative and competitive networked service industries, including content based industries, in domestic and international markets;
- whether and how broadcasting infrastructure should be subject to the same economic regulation as telecommunications and computing networks;
- how to ensure that Australian content and diversity can be achieved within new industry structures and alliances, new international markets and new business models;
- how to provide minimum guaranteed levels of access to networked services in a multi-service and multi-infrastructure environment; and
- how regulatory institutions might be structured to better serve the government's policy objectives.

The NOIE Report sets the objectives for the converged industries: telecommunications, information technology, media and content. Most importantly

¹⁸ http://www2.dcita.gov.au/ie/framework/convergence_review/page1

the review identified the requirements for an appropriate regulatory framework suitable to the convergence of these markets.

Merger of ACA and ABA

As was the case in the United Kingdom (see below), the Australian government acknowledged the necessity for a merged regulator to deal with the changing communication environment. The merger of the ABA and the ACA to form the new communications and media regulator, called the Australian Communications and Media Authority (ACMA) is expected to be established by 1 July 2005. At this stage it is understood that ACMA will assume the existing responsibilities of regulating broadcasting, online content, radiocommunications and telecommunications.

However, the convergence of telecommunications, content, media and information technology has already taken place and new content services are being delivered on new delivery platforms. Despite the proposed creation of ACMA, Hutchison considers that the regulatory policy currently being implemented does not align with the main objectives outlined in the NOIE Report and that the current implementation of regulation is based on outdated paradigms. The implementation of inconsistent and poorly aligned regulatory policy is likely to continue for some time until the merged ACMA is sufficiently established to determine what is the appropriate level of regulation for converged markets.

In the meantime the outcome of implementing inappropriate regulation is likely to result in innovation being stifled in Australia and for content services to be supplied from overseas sources. If Australian regulation policy varies significantly from overseas policy the impact of internationalisation and globalisation (addressed in the NOIE Report) will have a major influence on the future development of local content.

UK Government White paper

Whilst the implementation of the UK regulatory framework is only slightly ahead of Australia (the Office of Communications was formed in December 2003) the overarching policies appear to provide a rational approach to regulation in converged markets.

In 2001 the UK government released a White Paper on Communications¹⁹, setting out the framework for Communications regulation and the creation of the new regulator known as the Office of Communications (OFCOM). The White Paper provides an insight to the UK government's measures for the establishment of an appropriate regulatory environment for future communication services. Key objectives of OFCOM relating to "safeguarding the interests of citizens" as set out in the White Paper are:

- establishing a high level set of principles and objectives for the regulation of content across all electronic communications
- taking full account of the differences between services and people's expectations of them, OFCOM will be responsible for maintaining content standards in the electronic media. It will develop Codes underpinned by statute, for the most pervasive broadcast services, and work with industry to ensure effective co- and self-regulatory approaches to protection for other services, such as the Internet, where they are more appropriate.

¹⁹ http://www.communicationswhitepaper.gov.uk/by_chapter/ex_summ/index.htm

- OFCOM will promote systems to help people make informed choices about what they and their children see and hear; and have a duty to promote media literacy, working with the DfES²⁰, the industries and educators.

It is these objectives that should also be borne in mind in the Australian regulatory environment.

Convergence and the Australian regulatory environment

Overview

The formation of ACMA is an opportunity to establish and implement rational regulatory policy. However, as converged industries (communications, media and content) are already operating in the market place, the industry is best placed to identify practical approaches to implementing sound public policy for content services supplied via various devices (mobiles, PCs, PDAs, laptops) and network platforms (2G, 2.5G, 3G, internet, telephony services).

It is important for structures and measures to be established that address the government's immediate public policies and provide the flexibility to maintain a balanced approach to regulating the converged markets. Hutchison recommends a structure that achieves the following objectives:

- ensuring the public can make informed choices about content that they choose to see or hear
- co-regulation that provides a high level on confidence in the operation of industry codes of practice, content assessment practices and complaints handling.
- facilitation of innovative and competitive content services
- provision of consistent and non-discriminatory regulation
- provision of diverse and internationally competitive content services

These objectives are consistent with the issues outlined in the NOIE Report.

Attachment B details a structure that layers regulatory policy and industry self-regulation responsibilities ensuring that there is flexibility to allow new content and delivery services to be accommodated in the future.

Hutchison considers that there are three key elements for the effective regulation of content services:

- Pre-assessment of content type
- Complaint handling and issues resolution
- Enforcement

Two further overlay elements are considered with respect to types of content:

- Stored content
- Interactive content

'*Stored content*' may include video and sound in the form of: video clips, streamed video, music downloads, multi-media messaging content or WAP delivered content.

²⁰ <http://www.dfes.gov.uk/index.shtml>

'Interactive content' services may include premium rate voice services (19x), interactive SMS/MMS or interactive video services.

Content Assessment

The suggested structure (see Attachment B) identifies a pre-assessment process that could be undertaken by either authorised content assessors or self assessment by certified assessors.

The administration of the content assessment scheme should be undertaken by a recognised expert industry association such as the IIA and accreditation standards should be overseen by ACMA (the current function of the ABA/OFLC). The IIA would maintain a register of accredited assessors and would ensure accreditation standards for assessors are maintained in consultation with ACMA. This approach has already been adopted in the proposed IIA Code.

It is suggested that all content, including 'stored' and 'interactive' could be pre-assessed to minimise complaints about access to unsuitable content material. Whilst content providers and mobile operators may have qualified assessors in-house, the establishment of a panel of accredited assessors means that participants in the industry would have access to assessors to determine whether content is likely to fall into a restricted or non restricted category.

Complaint Handling

It is considered that the Telephone Information Services Standards Council ("TISSC") has a role in receiving escalated complaints about 'interactive content' services (interactive voice, messaging, video). TISSC also continues to have an essential role in resolving and arbitrating complaints with third party service providers where a carrier/carriage service provider ("C/CSP") may not have a direct relationship with that provider.

Although TISSC does not have regulatory power to direct C/CSPs to block access to a particular service there is an important advisory role for TISSC. Given that the ABA has enforcement powers under the BSA to direct an ISP to take down internet content, these powers need to be extended to interactive content services.

In the case where TISSC identifies a contravention in a Code (or legislation) its role would be to advise ACMA (ABA) to issue a take down notice to the C/CSPs involved in the delivery of the content in question.

With respect to 'stored content' ACMA (ABA) would continue to receive escalated complaints and may issue take down notices as is the case for internet content. As noted previously, stored content should include video and sound in the form of: video clips, streamed video, music downloads, multi-media messaging content or WAP delivered content to personal computers or any type of mobile device.

It appears that there have been few take down notices issued by the ABA with respect to content supplied by Australian content providers.²¹ It assumed that Australian based content providers undertake an informal pre-assessment process that ensures few complaints are escalated to the ABA.

Escalated complaints associated with billing, credit and contracts should remain with the TIO. This is consistent with current arrangements for the handling of these types of consumer complaints about C/CSP or ISP services.

²¹ <http://www.aba.gov.au/internet/complaints/statistics/index.htm>

Enforcement

Under the ACMA arrangements it is assumed the current activities of the ABA would continue (ie. classification matters, escalated complaints, take down directions) in dealing with internet content. It is suggested that there is an ongoing role for ACMA to deal with 'stored content' in the context of Schedule 5 of the BSA, to be extended to include all types of stored content associated any device. As the content is stored it is considered reasonable that content be 'pre-assessed' by a qualified assessor in order to minimise the number of content related complaints reaching ACMA. As previously noted the administration of the content assessment scheme would be undertaken by the IIA under the guidance of ACMA.

Currently, the ABA may issue a take down notice to an ISP, including a carrier that may also be an ISP. It would appear logical and appropriate that ACMA has the enforcement power to issue a take down notice on the same basis for both 'stored' and 'interactive' content adopting the same principles specified in Schedule 5 of the BSA.

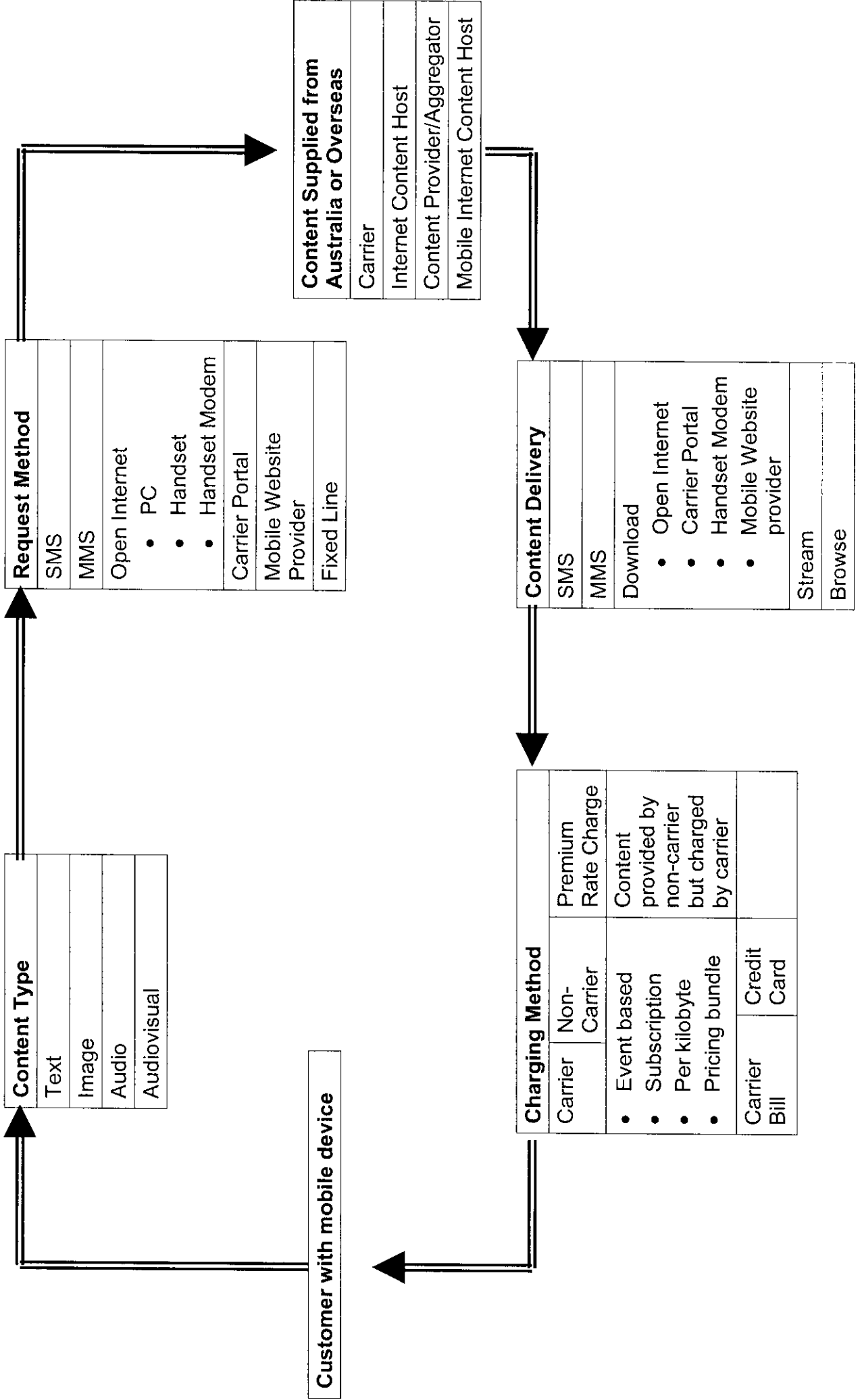
(b) whether there are additional measures that carriage service providers, content services providers and content hosts might take to address contact and child safety issues arising from contact type services (eg chat)

The proposed IIA code provides that mobile carriers and content providers will have a responsibility to provide end users with information about:

- methods of supervising and controlling children's access to mobile content;
- procedures which users can implement to control access mobile content including the availability, use and appropriate application of mobile content opt-out options;
- methods of minimising the risks associated with chat rooms, including personal safety, security of personal information, and limiting exposure to adult content.

End users can be advised of predominant and known risks associated with the use of any chat room and interactive services promoted and marketed directly by a carrier or content provider. This can be facilitated through the provision of information on providers' websites and in advertising collateral as well as the display of appropriate warnings prior to access to the relevant services where practicable (for example this might be practicable at the start of a mobile chat session but may not be practicable where the service is SMS based due to the limited text space and charge to the user).

Content Source & Supply Flow-Diagram



Attachment B

Proposed Regulatory Regime

