

Response to Telstra's supplementary submission



10 November 2023

Public Version

Submission on the public inquiry into the declaration of the domestic transmission capacity service, fixed line services and domestic mobile terminating access service.

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1. INTRODUCTION

- 1.1 Pivotel wishes to respond to certain claims made by Telstra in its recent submission to the Declaration Inquiry.
- 1.2 Any defined terms in this submission have the meaning set out in Pivotel's earlier submissions.
- 1.3 Pivotel considers that Telstra's submission mischaracterises the statutory test for declaration, fails to take into account the impact of the threat of regulation on recent commercial arrangements and ignores evidence of persistent market failure. However, Pivotel agrees with Telstra's conclusion that it is not necessary for the ACCC to reach a view on whether the declaration of MTAS for SMS would make it easier or harder for MNOs to combat scam¹. It also endorses Telstra's conclusion that "*A2P SMS will continue to be one of the primary forms of communication between businesses and their customers, with continued volume growth*"².

2. TELSTRA'S CLAIMS REGARDING COMPETITION AND MARKET FAILURE

- 2.1 Telstra states that "*regulation should only be introduced in instances where there is evidence of clear market failure which results in loss of consumer welfare*".³ Pivotel considers that this mischaracterises the legal test for declaration and risks limiting regulatory intervention to circumstances where significant consumer harm has already occurred.
- 2.2 Under Part XIC of the CCA, an eligible service may be declared if the Commission is satisfied that declaration "*will promote the long-term interests of end-users of carriage services or of services provided by means of carriage services*"⁴.
- 2.3 In determining whether declaration is in the LTIE, regard must be had to the extent to which declaration is likely to achieve the following objectives:
 - promoting competition in markets for listed services;
 - achieving any-to-any connectivity; and

¹ Telstra supplementary submission to the declaration inquiry (dated 27 October 2023) page 9.

² Telstra supplementary submission to the declaration inquiry (dated 27 October 2023) page 5.

³ Telstra's supplementary submission to the declaration inquiry (dated 27 October 2023), page 2.

⁴ S.152AL(3)(d) CCA.

- encouraging economically efficient use of and investment in infrastructure.⁵
- 2.4 The objective of promoting competition in the context of Part XIC of the CCA has been considered by the Australian Competition Tribunal which has concluded that “*Competition is likely to be promoted in a market when the conditions or environment for improving competition in that market are enhanced*”⁶.
- 2.5 There is no requirement that the Commission be satisfied that market failure has already occurred.
- 2.6 It is therefore not necessary for the Commission to be satisfied that market failure has already occurred in order for it to declare a service. Rather, it must simply be satisfied that declaration will promote competition and efficiency. Once there is demonstrable evidence of market failure, regulation will no doubt be warranted but intervention at that point is too late to prevent a loss of consumer surplus.
- 2.7 The Commission’s power to declare under Part XIC is not intended to operate as an “ambulance at the bottom of the cliff” but rather to prevent that patient from falling off the cliff. Telstra’s argument regarding market failure may be legitimate in relation to the exercise of the ACCC’s *ex-post* powers under Part XIB or Part IV of the CCA, but is of limited relevance to declaration under Part XIC.
- 2.8 Notwithstanding the above, Pivotel considers that market failure has occurred in the wholesale market for SMS termination services. This is evidenced by the approximately [REDACTED] in the cost of termination post-declaration and the constructive refusal to supply by the national MNOs [REDACTED] absent the genuine and recent threat of ACCC intervention including, by conducting a public inquiry into whether it should declare MTAS for SMS. In circumstances where the ACCC has correctly identified that the large MNOs have a monopoly over the provision of SMS termination services on their own networks⁷, this behaviour is inconsistent with a workably competitive market. For example, [REDACTED]
- 2.9 These concerns are supported by Aussie Broadband who have raised similar concerns regarding pricing of wholesale SMS services, as well as the many other submissions that support the re-declaration of MTAS for SMS.⁸

3. ALLEGED SUBSTITUTES TO A2P SMS

- 3.1 Pivotel agrees with Telstra’s conclusion that “*A2P SMS will continue to be one of the primary forms of communication between businesses and their customers, with continued volume growth*”⁹. As the Commission will no doubt appreciate, this runs

⁵ CCA s.152AB.

⁶ *Telstra Corp Ltd (No 3), Re* (2007) 242 ALR 482 paragraph [127].

⁷ ACCC, Domestic Mobile Terminating Access Service Declaration Inquiry (Final Report – 2019) page 3.

⁸ See the submissions of Commpete, Soprano, Symbio and Virtutel to the Declaration Inquiry.

⁹ Telstra’s supplementary submission to the declaration inquiry (dated 27 October 2023), page 5.

contrary to the Commission's findings in the 2019 MTAS declaration inquiry final report¹⁰. It also adds further weight to Pivotel's submission that declaration of MTAS for SMS will promote competition and any-to-any connectivity.

- 3.2 However, Pivotel disagrees with Telstra's suggestion that OTT alternatives such as in-app messaging are viable substitutes for A2P SMS because they ".....*don't require customers to have the same third-party messaging platforms installed on their device – just the app from the business they are looking to engage with*"¹¹.
- 3.3 There is simply no reasonable basis for the Commission to assume that in the next 3-5 years, customers will have a multitude of separate apps for all of the businesses they communicate with on a daily basis particularly where many of those businesses are small and medium businesses and some of their customers may be disadvantaged, vulnerable or elderly. Secondly, as previously identified¹², reliance upon an application necessitates access to a smartphone, reliable data coverage and the ability to operate it. This in turn disadvantages elderly or vulnerable consumers and the impecunious. It also disadvantages those consumers in regional and remote Australia that may not have reliable data coverage.
- 3.4 Telstra's references to examples in Asia and China (WeChat) and Rich Communications Services (RCS) emphasise the lack of viable alternatives in the Australian market. Whilst WeChat is widely used in China and amongst the Chinese diaspora, it is limited to that geography and population. It has also been identified by the Australian government as having potential security concerns.
- 3.5 Pivotel would also like to refer the Commission to paragraph 7.53 and Table 4 of its original submission, which refers to analysis from Omdia regarding how Australian consumers interact with businesses. [REDACTED].
- 3.6 Pivotel also questions the veracity of Telstra's claims that the Analysis Mason report supports the view that third party messaging apps will be a credible substitute to A2P SMS over time as the "*price per message is generally cheaper than for A2P SMS messaging*"¹³ and that the development of RCS will, enhance that substitutability.
- 3.7 Conveniently, Telstra overlooks a number of statements from the same Analysis Mason report, which support Pivotel's view that OTT messaging apps are *not* a credible substitute for A2P SMS in Australia. In particular, Analysis Mason states that:
- *SMS is, and will remain, in a strong position in Australia, Canada, France, New Zealand, Sweden and the USA. In these countries, no competing service has more than 60% penetration of users.*
 - *A significant degree of uncertainty continues to surround RCS; it will likely remain largely irrelevant in most countries and to most businesses. The technology significantly improves messaging experiences compared to SMS, but adoption is low. Apple has stated it will not adopt RCS technology, limiting its reach.*
- 3.8 These statements from Analysis Mason accord with Pivotel's own experience and its view, as expressed at paragraph 7.35 of its original submission, that OTT messaging

¹⁰ MTAS Declaration Inquiry (Final report) 2019 pages 2 and 36.

¹¹ Telstra's supplementary submission to the declaration inquiry (dated 27 October 2023), page 3.

¹² Pivotel submission dated 28 July 2023, para 7.8 and 7.38.

¹³ Telstra's supplementary submission to the declaration inquiry (dated 27 October 2023), page 4.

applications are *not* a true substitute for A2P SMS given there is no application in Australia that has significant levels of penetration¹⁴.

4. INNOVATION AS A DRIVER OF GROWTH

4.1 Pivotel agrees with Telstra that innovation can be a driver of growth. Pivotel also agrees with Telstra's observation that "A2P SMS will continue to be one of the primary forms of communication between businesses and their customers, with continued volume growth"¹⁵.

4.2 However, innovation will not occur without competition. Wholesale charges that are on average [REDACTED] higher than the charges when the service was declared are likely to stifle innovation, not promote it. While Telstra and other national MNOs, who benefit from the higher charges, may be *able* to introduce additional services, smaller operators at all layers of the market (including A2P aggregators and service providers) that are forced to bear the cost of termination will consequently be less likely to innovate. Without this competition, it is in turn less likely that the beneficiaries of rents will have sufficient incentives to innovate themselves.

4.3 Telstra also points to the increased use of MMS (albeit without supporting evidence). Pivotel is aware that A2P MMS is only in its infancy in Australia and MNOs have only recently started offering this as a commercial service. Pivotel considers that many of the challenges experienced for A2P SMS also apply in relation to MMS and Pivotel would be open to the MTAS service definition being expanded to include termination of MMS.

5. BARRIERS TO SWITCHING

5.1 Contrary to Telstra's assertion, there are significant barriers to service providers switching between off-net and on-net supply.

5.2 As Pivotel explained in its original submission at paragraph 7.95, it is not feasible for many service providers to negotiate on-net supply with each MNO given scale considerations and administrative burdens.

5.3 Symbio provides a good illustration of this problem in its submission where it states that:

*Absent declaration, Symbio would be required to enter into direct commercial negotiations with the other service providers. Declarations greatly assist in contributing to a level playing field for all participants in the industry. In Symbio's experience, smaller or newer players are at a disadvantage in any commercial negotiations with the large market players by virtue of their size.*¹⁶

5.4 Similarly, Voxbone expressed the view that:

¹⁴ Paragraph 7.35 states inter alia: "Indeed, Whatsapp's overall penetration rates in Australia remain comparatively low compared to other jurisdictions at 32.9% as at April 2022."¹⁴ [REDACTED]

¹⁵ Telstra's supplementary submission to the declaration inquiry (dated 27 October 2023), page 5.

¹⁶ Symbio Holdings submission dated 25 July 2023, p.1 – 2.

“Voxbone’s recent experience in expanding its mobile offer in Australia in collaboration with non-mobile network operators has proven difficult due to the market barriers posed by MNOs in the country”¹⁷

5.5 In addition, [REDACTED].

5.6 If off-net termination ceases to be viable (as is likely in a future without declaration), service providers will be forced to contract with all of the larger MNOs for on-net services. Some will be unable to do so, and others will only be able to do so on unreasonable terms. End-users and consumers will suffer as a result.

6. TELSTRA’S CLAIMS ON WILLINGNESS TO PAY

6.1 Telstra make a number of assertions regarding customers’ “willingness to pay” excessive charges for SMS termination which appear self-serving and do little to advance the proposition that competition and efficiency will not be enhanced by declaration.

6.2 Telstra asserts (without evidence) that it is “*preferable to continue to leave the prices for SMS termination to commercial negotiation between the various suppliers and acquirers, a process that has worked successfully post the removal of declaration*”¹⁸. From Telstra’s perspective that may well be true. Telstra has been able to earn monopoly rents in excess of [REDACTED] higher than the price when the service was subject to a final access determination. It is not true for smaller MNOs, A2P aggregators and service providers who have no choice but to bear and/or pass-through these costs.

6.3 Telstra then claims that prices at both the retail and wholesale layers should reflect the value of those services to end users and their “willingness to pay” rather than the cost of supply. That is disingenuous (at best) in circumstances where the ACCC has previously concluded that MNOs have a monopoly over SMS termination services on their own networks and HoustonKemp has concluded that there are limited substitutes to A2P SMS¹⁹. In that context, service providers have no choice but to pay. As Houston Kemp concluded in its expert report:

In a future without declaration, each major MNO has the ability to set A2P SMS termination charges substantially above a competitive, cost-based level without losing substantial sales, because:

- a. SMS termination services are an essential input for off-net A2P SMS services; and*
- b. MNOs have monopoly control over the provision of wholesale on-net A2P SMS services on their respective networks.²⁰*

6.4 Houston Kemp’s conclusions also call into question Telstra’s blithe claims that: “*any prospect of a supplier gaining market power in the dynamic A2P SMS market is likely to motivate other firms to innovate and to send signals for new firms to seek entry.*”

¹⁷ Voxbone (now bandwidth Inc) submission pg.1.

¹⁸ Telstra’s supplementary submission to the declaration inquiry (dated 27 October 2023), page 6.

¹⁹ Houston Kemp report dated 27 July 2023, paragraphs 68 and 170.

²⁰ Houston Kemp report dated 27 July 2023, paragraphs 22 and 194.

*Any position of market power is likely to be merely transitory and not inimical to competition, instead to be what invites it.*²¹

6.5 As referred to above, the ACCC has previously concluded that MNOs have a monopoly for SMS termination services on their own networks. Telstra also has an estimated market share of 44% of the retail mobile services market (as of 2021)²² and significant advantages over the other MNOs in terms of mobile coverage (particularly in regional and rural Australia). Both of these factors make it extremely unlikely that Telstra's market power in the provision of MTAS (or mobile services more generally) is likely to be "merely transitory".

7. SCAM SMS AND THE LTIE

7.1 Pivotel agrees with Telstra's conclusion that it is not necessary for the ACCC to reach a view on whether the declaration of MTAS for SMS would make it easier or harder for MNOs to combat scam. However, it rejects Telstra's assertion that "*what the ACCC must determine is whether the redeclaration of SMS termination by the MNOs is likely to promote the LTIE by reducing levels of scam/spam SMS, for the reasons put forward by the proponents of redeclaration*"²³. Like a number of other statements in Telstra's submissions, this mischaracterises the test for declaration.

7.2 The ACCC need only be satisfied of three things to declare MTAS for SMS. First, that it is likely to promote competition. Second, that it is likely to promote any-to-any connectivity, and third that it is likely to promote economic efficiency. Nowhere, in law or policy, is there a requirement that the ACCC be satisfied that declaration is likely to reduce the levels of spam/scam SMS.

7.3 Pivotel also rejects Telstra's unsubstantiated assertion that redeclaration would "*restrict MNO flexibility to take measures to deter bad actors from using their networks to send scam SMS using legitimate routes*"²⁴. If this were correct, it would be equally true for MTAS for Voice which is also the target of scam (and in fact incurs significantly more losses for consumers than SMS). Strangely, though Telstra does not oppose declaration of MTAS more broadly.

7.4 Declaration of MTAS for SMS will not affect an MNOs ability (or obligation) to comply with the requirements of the Reducing Scam Calls and SMs Code. Nor will it affect an MNO from complying with any future obligations as part of the proposed Sender ID registry. As the ACCC knows, the provisions of the Code are being rigorously enforced by the ACMA. That enforcement and the proposed new measures are far more likely to impact on the reduction of scam SMs than anything done by the ACCC in connection with this inquiry.

²¹ Telstra's supplementary submission to the declaration inquiry (dated 27 October 2023), page 9.

²² Public inquiry into the declaration of the domestic transmission capacity service, fixed line services and domestic mobile terminating access service – Discussion Paper Figure 5.1.

²³ Telstra's supplementary submission to the declaration inquiry (dated 27 October 2023), page 9.

²⁴ Telstra's supplementary submission to the declaration inquiry (dated 27 October 2023), page 9.