

Submission to the ACCC's Communications Sector Market Study Draft Report

December 2017

Macquarie Telecom Group (MTG) welcomes the opportunity to make this submission to the Australian Competition and Consumer Commission (ACCC) in response to the ACCC's Communications Sector Market Study Draft Report (Draft Report) of October 2017. Since its entry into the Australian communications sector more than 25 years ago, MTG has been a strong advocate for the promotion of effective competition as the key to ensuring that the long-term interests of consumers are best served. In this context, MTG welcomes the ACCC's initiative to undertake this market study of the communications sector with a view to ensuring that “... *only regulations necessary to address market failure, promote competition and protect consumers are in place.*”¹

The Draft Report is comprehensive and addresses a vast range of issues and concerns of which many directly impact MTG's business activities. Various proposed actions, proposed recommendations and draft findings are presented in the Draft Report. MTG's response to the Draft Report is intended to address those actions, recommendations and findings which MTG considers to be “high priority” on the basis of the impact on its business activities.

The matters that MTG wishes to address arising from the Draft Report forms the structure of this submission. Accordingly, this submission is presented under the following headings which reflects their order of importance:

- NBN wholesale aggregation
- Wholesale MVNO
- Spectrum management
- NBN service pricing
- Fixed services
- Internet interconnection
- SMS service declaration
- Dark fibre

¹ Draft Report, p 11.

- Cloud services

NBN Wholesale Aggregation

MTG welcomes the acknowledgement in the Draft Report that the NBN wholesale aggregation market is an area of concern for competitiveness and that the development of this “... wholesale market to date is not as advanced as might be expected ...”². MTG reiterates the fundamental concern expressed by non-integrated retail service providers (RSPs) which is that there is no national aggregator that offers RSPs NBN services from all NBN points of interconnection (POIs). As such, it is neither economic or practical for such RSPs to provide services to end customers with multiple geographic locations especially where some such locations are in regional areas.

The Draft Report proposes three actions to address the acknowledged concerns with NBN wholesale aggregation. These actions are reproduced below together with MTG’s comments on each.

Proposed Action 7

*We will consult on the need to obtain information from industry via a record keeping rule to monitor the supply of wholesale aggregation services to determine whether regulatory intervention is required. To the extent the market does not evolve, and the information we collect points to a lack of competition, we will consider (following further consultation) the publication of competitive benchmarking information.*³

MTG welcomes and supports the first part of this proposed action as it will provide the ACCC with relevant information concerning an evident market failure with a view to possible regulatory intervention. However, MTG urges the ACCC to implement this action without delay as the market failure is already evident and is negatively impacting MTG’s business activities and broader sector competition. In addition, if it is implemented, MTG also welcomes and supports the second part of this action as it will provide market participants with relevant information which would not otherwise be available. Again, MTG urges the ACCC to implement this action without delay.

² Draft Report, p 15

³ Draft Report, p. 21

Proposed Recommendation 8

In the absence of a genuinely competitive wholesale aggregation market NBN Co should consider provision of transitional products or pricing measures, for no longer than the NBN build period that facilitate the entry of smaller or niche service providers to provide a further competitive dynamic.⁴

MTG generally supports this proposed recommendation as it provides the possibility that the services that non-integrated RSPs like MTG require may be provided by NBN Co for at least a temporary period. However, MTG has some practical concerns with this proposed recommendation including the following:

- it is unclear how this proposed recommendation would be enforceable by the ACCC; and
- *prima facie* there seems little commercial incentive for NBN Co to develop new services to serve a relatively small part of the market for a limited time period.

MTG remains concerned that the failure of the NBN wholesale aggregation market to develop is already having a detrimental impact on MTG's business activities and broader sector competition. MTG considers that urgent action is required in the remainder of the NBN build period to address this situation and to ensure that at the end of this period a sustainable market solution is in place. As such, MTG urges the ACCC to pursue this recommendation and that NBN Co takes the necessary action for its implementation.

Proposed Action 9

We will examine the supply of transmission services to NBN Points of Interconnection (POIs) as part of the Domestic Transmission Capacity Service (DTCS) declaration and Final Access Determination.⁵

MTG supports this proposed recommendation as it provides the possibility that those transmission services which form part of the DTCS definition may continue to be declared services at various NBN POIs. Moreover, this proposed action will mean that the ACCC will continue to commit resources to the examination of competition at NBN POIs. However, MTG notes that the current DTCS declaration remains in force until 31 March 2019. As such, this proposed action has limited practical effect to address the current concerns with market failure.

As discussed above, the Draft Report notes concerns with the inability of a NBN wholesale aggregation market to develop and proposes three actions to address

⁴ Draft Report, p. 22

⁵ Draft Report, p. 22

these concerns. While MTG in principle welcomes these proposed recommendations and actions they provide very little practical comfort for non-integrated RSPs which are currently constrained in their capacity to compete with larger RSPs for retail customers.

Wholesale MVNO

MTG has had commercial relationships with all three mobile network operators (MNOs) and is among the largest and most experienced mobile virtual network operators (MVNOs) in Australia. As such, MTG considers that it is well informed and can express authoritative views on issues concerning wholesale MVNO services.

The Draft Report addresses various aspects of competition in the supply of wholesale MVNO services. MTG wishes to comment on three specific matters as follows:

- assertion of “no significant complaints”;
- capacity for service differentiation; and
- the need for declaring a wholesale mobile access service.

Assertion of No Significant Complaints

The Draft Report states the following:

“MVNOs negotiate access prices and terms and conditions directly with MNOs and there has been an absence of significant complaints about these prices or conditions.”⁶

MTG refutes the assertion that “*there has been an absence of significant complaints about these prices or conditions*”. MTG characterises its experience in negotiating wholesale MVNO services as excessive pricing, limited service offerings and delayed services offerings.

MTG contends that it has long made known its concerns with MVNO wholesale services to the ACCC on many occasions through successive mobile terminating access service (MTAS) service declaration inquiries and MTAS pricing reviews. In addition, MTG has also taken its concerns directly to the ACCC with a competition complaint⁷.

⁶ Draft Report, p 84

⁷ See for example, ‘MacTel complains to ACCC about “monopolistic” Telstra’, CRN, July 2014

www.crn.com.au/news/anger-rises-over-telstra-wholesale-access-389139?eid=4&edate=20140704&utm_source=20140704&utm_medium=newsletter&utm_campaign=daily_newsletter

MTG notes that in the absence of regulated MVNO access prices, the regulated MTAS rate serves as a fundamental reference point for negotiating MVNO access pricing. With regard to excessive pricing, MTG notes its response to the ACCC's draft MTAS Final Access Determination (FAD) in 2011 – more than six years ago. In particular, MTG states:

“Macquarie wishes to have noted its shock at the failure of the ACCC to lower regulated rates to a level nearing that which would promote competition and enhance consumer outcomes. Despite the ACCC having frozen the MTAS rate for the past 4 and half years at a level the ACCC's own analysis indicates is twice an even “upper bound of cost”, and despite the ACCC making clear in past inquiries and findings that it expected to move MTAS to a level aligned with international benchmarks and cost modelling, the draft MTAS FAD merely delivers yet again, on-going monopoly rents to mobile network operators.”⁸

Aside from excessive pricing, MTG notes that MNOs typically offer MVNOs a service with a reduced geographic network coverage compared to the MNOs' own retail offerings. In addition, MNOs did not offer 3G services or 4G services to MVNOs until well after the MNOs had built substantial customer bases for these services, thereby reducing competition not only in the mobile services market but more broadly. MTG and other non-MNO market players lost market share as the growing importance of mobile services rendered their commercial offers to enterprises non-competitive. That is, fewer customers were willing to be supplied with slower legacy mobile services.

MTG also notes that in a submission to the ACCC in 2013 regarding MTAS declaration it stated:

[The review of the MTAS service description is] “ ... necessitated by the MNOs pricing such services above their underlying cost and on unreasonable terms.”⁹

Capacity for service differentiation

The Draft Report makes the following draft finding concerning wholesale MVNO services.

Draft Finding - There appears to be some competition in the supply of wholesale MVNO services. However, it is currently unclear what ability MVNO customers have to differentiate services.¹⁰

⁸ www.accc.gov.au/system/files/MAS%20-%20Macquarie%20submission%20to%20the%20MTAS%20Draft%20FAD%20-%2024%20October%202011%20-%20PUBLIC.pdf

⁹ www.accc.gov.au/system/files/PUBLIC%20Macquarie%20Telecom%20Submission%20to%20the%20Declaration%20Inquiry%20Discussion%20Paper.PDF

¹⁰ Draft Report, p. 90

MTG supports this draft finding. MTG submits that throughout successive wholesale MVNO service negotiations, the flexibility for MVNOs to offer service differentiation has been reigned in. That is, restrictions imposed by MNOs on pricing and service provision effectively dictate the service offerings that MVNOs can offer to their retail customers. In addition, MTG welcomes the ACCC's commitment to explore industry views concerning wholesale MVNO service functionality that limit the wholesale offering.¹¹

The Draft Report commits the ACCC to explore constraints on MVNO service differentiation arising from the use of e-SIMs. Specifically, proposed action 25 in part states:

Proposed action 25

We will:

- *explore concerns regarding restrictions associated with the e-SIM model which are impeding the ability of Mobile Virtual Network Operators (MVNOs) to compete with the mobile network operators¹²*

MTG welcomes and supports this proposed action as it offers the potential to remove a constraint on MVNOs imposed by MNOs which negatively impact competition and as a result does not serve the interests of consumers.

The uptake of e-SIM technology in handset devices is likely to be a leveller of competition between MNOs and MVNOs, especially if the barrier for switching networks is reduced.¹³ The proliferation of e-SIMs in smartphone devices could be used to create a 'spot market', with remote provisioning technology allowing the device to dynamically switch between several networks according to cost, congestion and signal strength compared with standard SIMs. This process could be managed by the users themselves, but is more likely to be managed by a third-party intermediary such as an MVNO.¹⁴

Other industry commentators share this view, with one stating that "eSIMs also create the possibility of 'spot markets' emerging in which eSIM devices will effectively 'multi home' on several networks at once and dynamically switch between them according to pre-defined criteria such as cost, congestion and/or signal strength."¹⁵

MVNOs that take advantage of this business model would clearly facilitate mobile sector competition. MTG considers that the ACCC should support such enhanced

¹¹ Draft Report, p. 88

¹² Draft Report, p. 26

¹³ <http://telcohub.io/how-can-embedded-sim-disrupt-mobile-telecom-business/>

¹⁴ Richard Feasey, *Uncoupling again: the impact of the eSIM on the mobile industry*, September 2015, page 3. Available at www.fisp.org.uk.

¹⁵ Ibid

mobile competition in Australia giving the growing importance of mobile broadband services. MVNOs contracting with several network operators could offer a tariff selection without disclosing to the consumer which network is providing the connectivity. The customer could then be 'auctioned' dynamically among network operators for a period of time, with electronic profiles switched among operators seamlessly for the consumer.¹⁶

MTG would highlight that one industry consultant has undertaken an assessment of the possible new entrants in Europe. It considers that they come from a wide range of sectors and that some have already made initial investments and are currently testing initial services (see Exhibit 1 below).

Exhibit 1: Identification of possible new entrants in Europe



Source: Mucke Sturm Company, June 2017

The need for declaring a wholesale mobile access service

MTG has long been an advocate for the declaration of a wholesale access service for MVNOs.¹⁷ MTG believes that MVNOs produce positive outcomes for consumers in terms of wider choice through pricing and service innovation (provided wholesale service offerings are not constrained). However, MTG submits that the reliance on commercial negotiation as opposed to regulated access in the Australian environment where market power clearly favours the MNOs relative to the MVNOs, the benefits to consumers of MVNOs have not been fully captured.

¹⁶ www.mckinsey.com/industries/telecommunications/our-insights/e-sim-for-consumers-a-game-changer-in-mobile-telecommunications

¹⁷ See for example, Presentation by Matt Healy at CommsDay, Melbourne Congress 2013, www.slideshare.net/CommsDay/macquarie-telecoms-matt-healy

MTG considers that the declaration of wholesale MVNO services (and the subsequent setting of regulated prices) would be conducive to the promotion of competition and would be in the long-term interests of consumers. In particular, such declaration is justified on the following grounds:

- regulation would overcome the market power imbalance which constrains commercial negotiations between MVNOs and MNOs;
- regulation would ensure that terms and conditions of wholesale service supply are reasonable and would allow flexibility for retail service differentiation; and
- regulation would create an environment of confidence and certainty conducive to sustainable business investment.

Accordingly, MTG reiterates its past calls for the ACCC to commence a public inquiry which would consider whether to declare wholesale MVNO services.

Spectrum Management

With regard to spectrum management MTG wishes to provide comments in relation to the following:

- the relevant draft finding and proposed recommendation in the Draft Report; and
- the reservation of spectrum in future spectrum allocations for use by MVNOs.

Draft Finding and Proposed Recommendation

The Draft Paper makes a draft finding and proposed recommendation concerning spectrum management.¹⁸ These are reproduced below together with MTG's views.

Draft finding

Spectrum allocation and management is increasingly important for communications markets. The value of spectrum lies in the economic and social benefits it supports, rather than in any revenue return to the Budget. The Government's proposed new radiocommunications regulatory framework does not explicitly recognise the impact of spectrum allocation and assignment on competition and efficiency in downstream retail markets.¹⁹

¹⁸ These issues were also explored by the Chairman of the ACCC Rod Sims in his presentation *Evolution or revolution? Why competition matters for 5G*, Radcoms 2017, 1 November 2017.

¹⁹ Draft Report, p. 186

Proposed Recommendation 27

The ACCC strongly recommends that the radiocommunications regime explicitly recognise, and do more to promote, competition in relevant markets.²⁰

MTG agrees with and supports the above draft finding and proposed recommendation on the basis that the efficient and effective use of scarce radiofrequency spectrum is a prerequisite of national governments that seek to protect and serve their national interests in line with global and regional practices.

Australia has for many years been at the forefront of global and regional nations that have promoted effective and efficient spectrum management and adopted and implemented a range of related regulatory reforms. Arguably, Australia's position of leadership in this area has been eroded in recent years. For example, India is leading the way in spectrum trading and spectrum sharing, and Hong Kong and Singapore are leading the way in spectrum reservations for MVNOs. MTG submits that the institutional structure of the regulation of Australia's communications sector may explain some of this erosion.

While the ACCC has responsibility for the economic regulation of the communications sector, the Australian Communications and Media Authority (ACMA) has responsibility for spectrum management. This has meant that Australia's spectrum resources have been managed independently of the regulation of the communications sector. This situation is contrary with practice in other leading global and regional jurisdictions such as the United Kingdom, Singapore, the USA and Hong Kong.

MTG accepts that Australia's existing institutional arrangement for overall communications sector regulation may not be ideal and that this is unlikely to change. However, MTG submits that greater collaboration between the ACCC and the ACMA on matters involving competition and market analysis would be beneficial in terms of effective regulatory interventions. This could be achieved through, for example, short-term secondment of ACCC staff to the ACMA. Accordingly, MTG urges the ACCC to consider how it can work more closely with the ACMA to promote effective communications sector regulation.

Reservation of Spectrum in Future Allocations for Use by MVNOs

As discussed earlier in this submission, MTG considers that the benefits that MVNOs can provide to consumers is not being fully realised in Australia. In addition to declaring wholesale MVNO services, MTG believes that benefits to competition and

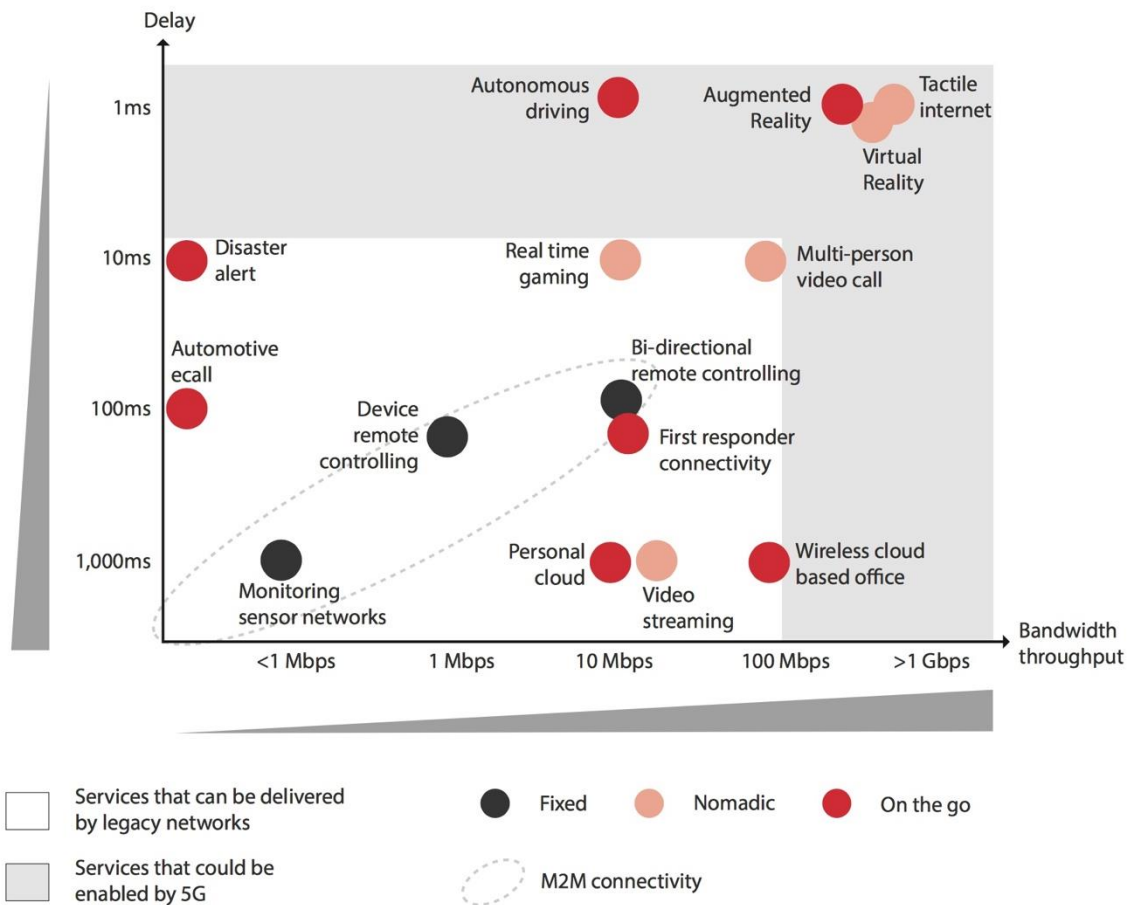
²⁰ Draft Report, p. 186

ultimately benefits to consumers would be promoted through reserving a portion of spectrum in future spectrum allocations for the sole use of MVNOs or mandating that all 5G spectrum be subject to an MVNO requirement. In particular, it is noted that the ACMA is currently consulting with industry on its proposal to release spectrum in the 3.6 GHz and mmWave band via auctions. Such spectrum is intended to make provision for the delivery of advanced 5G services in line with global developments.

MTG believes that a portion of this spectrum should be reserved for MVNO use and/or the entire 5G spectrum allocation could be subject to new rules facilitating MVNO access. There are global precedents for such access being imposed in spectrum licences including in Spain, Hong Kong, Thailand, and Malaysia.

This could, for example, be achieved by providing a licence condition that requires the successful MNO to provide wholesale MVNO services based on network slicing which addresses the bandwidth and latency requirements of potential 5G use cases (see Exhibit 2 below) subject to appropriate terms and conditions. MTG notes that in a connected world if certain original equipment manufacturers (OEMs) such as car manufacturers or utilities MUST have 5G connectivity then they may end up paying considerably more for such access from MNOs than their "slice" of network resources would suggest was warranted. Auctioning 5G spectrum with an MVNO obligation attached should safeguard against this.

Exhibit 2: Bandwidth and latency requirements of potential 5G use cases



Source: GSMA Intelligence, 2014²¹

NBN Service Pricing

As noted in the Draft Paper, the pricing of NBN services has attracted significant attention in the market study²². There are two proposed recommendations and a proposed action on this matter set out in the Draft Paper²³. These are reproduced below together with MTG's comments.

Proposed recommendation 3

We strongly encourage NBN Co and service providers to continue to engage constructively to address issues raised about NBN wholesale access pricing within the existing regulatory framework. This is essential if there are to be

²¹ GSMA Intelligence, *Understanding 5G: Perspectives on future technological advancements in mobile*, December 2014

²² Draft Paper, p. 123

²³ Draft Paper, p. 133

improved outcomes for NBN Co, service providers and consumers. We have delayed our decision on varying NBN Co's Special Access Undertaking (SAU) in order to give NBN Co and service providers flexibility to continue their discussions in relation to pricing.

Proposed action 4

We will carefully examine any outcome of NBN Co's pricing consultation, including the need for consequential changes to NBN Co's Special Access Undertaking (SAU) or other regulatory response to promote positive outcomes for consumers and the market generally.

Proposed recommendation 5

In the medium term, and depending on future developments, the Government consider whether NBN Co should continue to be obliged to recover its full cost of investment through its prices. We consider further work could be done by the ACCC and the Department of Communications and the Arts to examine this issue and in particular possible options that may provide NBN Co greater flexibility regarding its cost recovery objectives for example, direct budget funding arrangements for non-commercial services, debt relief measures or an asset revaluation.

MTG supports in principle these proposed recommendations and proposed action. NBN Co is engaging with service providers with regard to service pricing and MTG is actively engaged in this process. While this process is active MTG does not consider it appropriate for MTG to provide detailed comments on this matter as part of this submission. However, MTG wishes to note that it remains concerned with the existing NBN service pricing structure.

In addition, MTG has inherent concerns with the consultation process adopted by NBN Co. MTG submits that NBN Co's *raison d'être* of providing wholesale only, open access services, has not been observed in its approach to consultation with industry on this (and other) matters. That is, NBN Co's bi-lateral consultation process is inherently non-transparent. For example, MTG considers that NBN Co's discussion paper on its pricing consultation and the submissions that it has received from industry should be made public. While some information in submissions may be commercial in confidence MTG submits that this can be managed through NBN Co adopting similar arrangements to those used by the ACCC which are well established and understood by industry.

MTG further submits that NBN Co's non-transparent consultation process on pricing has important implications for the ACCC. It is noted that the ACCC has suspended its decision on varying NBN Co's SAU while this consultation is in process. MTG submits that the ACCC must be satisfied that any outcome on pricing resulting from this process which is promulgated by NBN Co is sufficiently robust. Otherwise any decision subsequently made by the ACCC on NBN Co's SAU may be based on improper grounds.

Fixed Services

MTG provides voice and data services to its corporate and government customers using fixed network infrastructure. In so doing, MTG provides consumers a choice of service provider. MTG is essentially able to offer consumers such choice through the long-established regime which provides service providers such as MTG regulated access to Telstra's fixed network infrastructure.

Against this background, MTG welcomes the views expressed in the Draft Report on the need for continued regulated access to Telstra's copper network. In particular, the Draft Report states:

*"... the need for regulation of originating and terminating access services will continue. These regulations are independent of the underlying network technology and are needed to prevent large service providers from exploiting network effects."*²⁴

While MTG accepts that Telstra's copper network is being progressively de-commissioned as the NBN is rolled out, MTG remains strongly of the view that regulated access to Telstra's copper network is fundamental to serving the needs of its customers. Further, MTG submits that any unwinding of regulation in this area would be harmful to competition and detrimental to the interests of consumers. This is because of Telstra's ubiquity in the fixed services market and the absence of an incentive for Telstra to supply wholesale services to its retail competitors.

Internet Interconnection

MTG provides internet access services to its corporate and government customers. MTG provides such services through transit agreements with other operators.

With regard to Internet Interconnection, the Draft Report sets out two draft findings, a proposed recommendation and a proposed action. These are reproduced below together with MTG's comments.

²⁴ Draft Report, p. 46

Draft Finding

Transit costs in Australia, while declining on a unit basis, appear to be relatively high compared to other jurisdictions such as Europe and the United States. Furthermore, domestic and international transit product prices are converging and we are observing small networks exchanging some domestic traffic at overseas interconnection points.²⁵

MTG notes this draft finding and considers that the exchange of domestic traffic at overseas interconnection points is a result of the increasing cost pressures that RSPs face. Further, MTG considers this practice to be impractical given that due to latency, there is an inevitable negative impact on service quality.

Draft Finding

Telstra, TPG, Optus and Verizon (TTOV) are collectively relatively unconstrained in determining their price level and structure in the supply of transit services and appear to enjoy a degree of market power in relation to access to their networks. Australia's geographic isolation, which makes international transit an inferior substitute, is likely to be one reason for this.²⁶

MTG agrees with and supports this draft finding. MTG has raised its concerns with the "gang of four" peering arrangement with the ACCC on many occasions in the past. MTG submits that the arrangement is a cartel which is prohibited under the *Competition and Consumer Act 2010* and as such the ACCC should exercise its appropriate responsibilities. MTG believes that the "gang of four" arrangement is a cartel because it is an agreement between a group of businesses which fixes prices to protect the profits of the members of the group.

MTG is deeply concerned that the ACCC has failed to take action against the "gang of four" arrangement even though it first reviewed the arrangement in 2004 – thirteen years ago. MTG considers that it is no coincidence that the "gang of four" arrangement has absorbed the impact of the emergence of mainstream broadband services and withstood enormous competitive pressures from global players such as Facebook and Google. That is, the cartel has been enormously successful for its members in terms of protecting their market shares, repelling competition and achieving the outcomes on which it was founded. MTG submits that this is an indictment on the ACCC and its failure to act on this matter.

Proposed Recommendation 11

²⁵ Draft Report, p. 103

²⁶ Draft Report, p. 103

Telstra, TPG, Optus and Verizon (TTOV) should maintain on their website a comprehensive set of criteria and any other relevant policies to which they have regard when assessing peering requests from other networks. This would provide prospective peering parties some guidance on the criteria they are required to meet with each of the TTOV networks.²⁷

MTG supports this proposed recommendation as it promotes a degree of transparency for what MTG submits is a secret and illegal arrangement. However, as MTG considers the "gang of four" arrangement an illegal cartel, MTG believes that the ACCC should be taking much stronger action. In addition, MTG is concerned that there is no discussion in the Draft Paper on how the ACCC proposes to enforce this proposed recommendation. Especially since, it is arguable that TPG's membership of the "gang of four" will provide material advantages to its launch of MNO services in Australia.

Proposed Action 12

We will assess and report on whether access to internet interconnection services is available on competitive terms to support effective competition in downstream markets, with a particular focus on the market for the supply of services to corporate customers.²⁸

MTG supports this proposed action as it will involve investigating an arrangement which MTG believes to be illegal.

SMS Service Declaration

MTG notes with some concern the proposed action in the Draft Report concerning the on-going regulation of SMS terminating services. This is reproduced below.

Proposed action 2

We will examine the messaging services market to determine the need for ongoing regulation of SMS termination services in our next regulatory review of the mobile terminating access service.²⁹

MTG's concern with this proposed action is threefold. First, there is essentially no rationale set out in the Draft Report for making this proposed action. The very brief discussion in the Draft Report preceding this proposed action concerns the competitive impact of OTT messaging services on SMS messaging services.

²⁷ Draft Report, p. 22

²⁸ Draft Report, p. 22

²⁹ Draft Report, p. 47

However, until the ACCC imposes obligations for communication messaging applications to be interoperable in a manner consistent with the principle of "any-to-any" interoperability, then such OTT messaging apps are not substitutes for SMS but merely complementary services.³⁰

Second, while MTG notes that the ACCC considers that OTT messaging services do provide a competitive constraint on SMS messaging services, MTG submits that this has nothing whatsoever to do with the rationale on which the ACCC decided to regulate SMS messaging services in 2014.

In its Final Decision on the MTAS Declaration Inquiry of 2014³¹, the ACCC justified its decision to regulate SMS messaging services on the basis of the MNO's monopoly power. In particular, the ACCC states:

"... each MNO has a monopoly over the provision of SMS termination services on their network. The ACCC considers that in the absence of declaration, this monopoly power gives MNOs the ability and incentive to either deny access or set unreasonable terms of access to the service."

Third, it seems to have been forgotten that the MNOs were charging MVNOs like MTG a 200 times mark-up on SMS prices before the ACCC's intervention – this is hardly the indicator of a competitive market.³²

In summary, MTG submits that the MNO's monopoly power which was evident in 2014 remains unchanged today as does the rationale for regulatory intervention. As such, there is no apparent logical or rational basis on which the ACCC could bring into question the on-going regulation of SMS messaging services at this time.³³ Just because the MNOs do not like and have never liked the MTAS FAD applying to SMS is insufficient.

MTG looks forward to participating in the ACCC's next regulatory review of the mobile terminating access service. As that review will need to deal with the planned shut-off of 3G services in Australia starting in 2020³⁴ it is important to highlight that SMS over IP (i.e., LTE) was fully specified by the 3GPP in Release 7 (released Q4,

³⁰ Refer to Scott W Minehane, WPC, *Evolution of Access and Interconnection Services: The brave new world of access regulation in the app economy*, Presentation to World Access and Interconnection Forum (WAIF), 21 November 2017, page 13

³¹ www.accc.gov.au/system/files/MTAS%20declaration%20inquiry%20final%20decision%20report.pdf

³² MTG submission to ACCC, *Mobile terminating access service: Final access determination Draft decision*, 5 June 2014

³³ MTG notes that even where there SMS prices are not regulated, such as in Europe, the evolution of wholesale SMS termination rates is extensively monitored in most cases by national regulatory agencies. See BEREC, *Termination Rates at the European level, January 2017*, 1 June 2017, BoR (17)101, page 23. In markets, such as India that do regulate wholesale SMS prices, the regulated prices are considerably lower than Australian regulated SMS prices. See TRAI, *The Short Message Services (SMS) Termination Charges Regulation 2013*.

³⁴ See Telstra's announcement of November 2016 summarised in www.finder.com.au/telstra-is-already-planning-for-the-death-of-3g

2007) and SMS becomes more critical given *inter alia* its use for emergencies³⁵ and its use for cybersecurity by banks, software companies etc for two-factor authentication.

Cloud Services

MTG is a provider of cloud services, managed hosting and operates secure data centres to service its corporate and government customers. The Draft Report makes a draft finding in respect of cloud services which is reproduced below.

“Draft Finding

The collection, storage and use of data by cloud service providers and concerns about ‘vendor lock-in’ may raise potential competition and consumer protection concerns for cloud services.”³⁶

MTG observes that the Draft Report provides little if any discussion to support this draft finding. As such, MTG would like to understand the rationale behind this draft finding before considering whether to make any comments on this matter.

MTG notes with interest the observation in the Draft Report that “... *cloud services both internationally and in Australia are dominated by global providers such as Amazon, Salesforce and Microsoft.*”³⁷. While the Draft Report notes the dominance of such global providers, the ACCC has failed to consider the significant competitive implications that arise.

In particular, Australian domestic operators such as MTG face a substantial competitive disadvantage when competing with global operators. This arises because global operators are able to engage in base erosion and profit shifting (BEPS) practices which effectively enable them to avoid paying taxes in Australia on profits earned on their Australian business activities.³⁸ Through transfer pricing, global operators are able to shift their profits from tax paying jurisdictions to non-tax paying jurisdictions. Domestic operators like MTG are inherently not structured to engage in BEPS practices.

MTG notes that it paid tax on its profit to the Australian Government in the year ending 30 June 2017.³⁹ In addition, MTG also paid to the Australian Government an annual carrier licence charge (ALCL) and a telecommunications industry levy (TIL).

³⁵ For example, about 7.4 million SMS were sent on 1 December 2017 to warn of the potential flooding alert in Victoria.

³⁶ Draft Report, p. 115

³⁷ Draft Report, p. 115

³⁸ See recent ATO Corporate Tax Transparency release. Available at <https://data.gov.au/dataset/corporate-transparency>

³⁹ MTG, Annual Report 2017

In total, such payments are in the vicinity of 2 to 3 per cent of MTG's total revenue. As such, MTG submits that it faces an immediate 2 to 3 per cent pricing disadvantage whenever it competes with global operators. In a highly competitive market this pricing differential can determine whether business is won or lost. Accordingly, MTG urges the ACCC to explore the competitive implications arising from the dominance of global operators in the cloud services market in its final report.

Dark Fibre

The Draft Report sets out a draft finding and a proposed action concerning dark fibre. These are reproduced below together with MTG's comments.

Draft Finding

The market for dark fibre services appears to be relatively concentrated with only two active larger suppliers and a small number of providers supplying more niche services, limiting competition in the supply of these services, including to NBN POIs.⁴⁰

MTG agrees with this draft finding. It is MTG's experience that there is limited availability of dark fibre at NBN Co POIs which constrains RSPs like MTG from obtaining the infrastructure that they require in order to offer services to their retail customers. Moreover, MTG considers that the limitation of dark fibre is not simply confined to NBN POIs. That is, many of Australia's fixed network operators continue to build fibre directly to customer premises which if made available to RSPs on commercial terms would promote competition and serve the interests of consumers.

Proposed Action 10

We will consult on the need to obtain information from industry via a record keeping rule to monitor the supply of dark fibre services to determine whether any regulatory intervention is required.⁴¹

MTG supports this proposed action as it may result in the provision of mandated supply of wholesale services. MTG considers that such a record keeping rule may expose the availability of dark fibre and the inability or unwillingness of its owners to make dark fibre available on commercial terms to RSPs. MTG submits that the regulated supply of dark fibre would improve the capacity of RSPs to provide services to customers.

⁴⁰ Draft Report, p. 98

⁴¹ Draft Report, p. 22

Matt Healy

National Executive, Industry and Policy