



Submission in response to ACCC
Draft Decision Report

**Domestic Mobile Terminating Access
Service (MTAS) Declaration Inquiry**

PUBLIC VERSION

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Contents

Section 1. Overview	3
Re-declaration of voice termination promotes the LTIE	3
Declaration of SMS termination promotes the LTIE	3
Section 2. Re-declaration of voice MTAS	5
Identifying the relevant markets	5
Declaration will promote the LTIE	5
Section 3. Declaration of peer-to-peer SMS termination	8
Declaration of SMS termination will promote the LTIE	8
Changes to the service description are required	11
Appendix A. Service description changes	12

Section 1. Overview

- 1.1 Optus welcomes the opportunity to comment in response to the Australian Competition and Consumer Commission's (ACCC) Draft Decision (the Draft Report) on the Domestic Mobile Terminating Access Service (MTAS) Declaration Inquiry. The current MTAS Declaration expires on 30 June 2014.
- 1.2 Optus supports the ACCC's recommendations that:
 - (a) The MTAS continue to be declared for a further five year period to 30 June 2019; and
 - (b) The MTAS service description be altered to include mobile voice termination services and short message service (SMS) termination services.

Re-declaration of voice termination promotes the LTIE

- 1.3 The MTAS has been a declared service since 1997. The ACCC most recently considered the declaration of the MTAS in 2009 when it concluded that declaration was in the long term interest of end users (LTIE). The MTAS is an essential bottleneck service — callers cannot reach end-users on other mobile networks without access to the MTAS. Optus agrees that declaration is necessary to ensure that mobile network operators (MNOs) do not use the monopoly MTAS to deny connectivity or to impose unreasonable terms and conditions.
- 1.4 Further, re-declaration of MTAS would promote competition in the downstream retail mobile market and the fixed-to-mobile (FTM) call market. The re-declaration of the service combined with cost-based pricing would promote any-to-any connectivity and efficient investment in and use of infrastructure.

Declaration of SMS termination promotes the LTIE

- 1.5 Optus supports the proposal to include the peer-to-peer SMS termination service within the MTAS service description.
- 1.6 Optus considers that the same analysis that justifies declaration of voice MTAS applies to SMS termination. MNOs have exclusive control over the termination of SMS traffic on their network. There is no alternative to the use of the SMS terminating service to deliver peer-to-peer SMS. MNOs have the incentive and ability to impose above cost pricing to damage the interests of other MNOs. The ACCC has identified that SMS termination exhibits many of the same characteristics of mobile voice termination.¹
- 1.7 MNOs have exercised monopoly power over the termination of SMS on their networks. The SMS termination rate has remained unchanged for a number of years at inefficiently high levels. [CiC] Optus submits that this must change.
- 1.8 In response to end-users' demands, Optus has introduced a number of plans in the market that allow for unlimited SMS. All of Optus' current contract plans include unlimited SMS within the bundle. But the current SMS termination rate is imposing a financial penalty far in excess of the cost incurred by the terminating network. This does not promote the LTIE.
- 1.9 Declaration of peer-to-peer SMS will promote the LTIE for a number of reasons:

¹ ACCC, 2013, MTAS Draft Decision, s.5.1.

- (a) First, declaration combined with cost-based pricing, will promote competition in the wholesale market on individual mobile networks for SMS termination. This service cannot be bypassed if end-users want to send an SMS to an end-user on another network.
- (b) Second, declaration will promote competition in related downstream mobile retail markets, including the market for bundled mobile services. Irrespective of the precise retail bundles defined, declaration combined with cost-based SMS termination rates will increase the ability of MNOs to compete in the downstream retail mobile market by removing inefficient costs that reduce the amount of value included within bundled products.
- (c) Third, data-based over-the-top (OTT) messaging services are not in the same market as SMS as they do not allow end-users to by-pass SMS termination service to deliver messages to all phones. However, if it were assessed to be in the same market, declaration would still promote competition in the supply of messaging services by enabling suppliers of SMS (MNOs) to compete against data-based OTT providers.
- (d) Fourth, declaration of an essential bottleneck service is likely to encourage the economically efficient use of and investment in infrastructure. Without regulation, MNOs have the ability and incentive to set above cost SMS termination prices and that the potential disassociation between price and costs is likely to distort consumption decisions and lead to an inefficient use and investment in telecommunications infrastructure.

1.10 Optus supports the declaration of peer-to-peer SMS termination service in order to ensure that the termination rate imposed reflects the efficient cost of providing the service. Optus considers, however, that more thought should be given to the drafting of the service description to accurately capture the peer-to-peer SMS termination service. This should reflect the service definitions in current interconnection agreements between the MNOs. Optus' suggested changes are included in Appendix A.

Section 2. Re-declaration of voice MTAS

- 2.1 Optus agrees with the ACCC's view that mobile voice termination should continue to be declared. Declaration of mobile voice termination will promote the LTIE. It will allow access prices to become more closely aligned with the underlying costs of providing the services and promote competition in the relevant markets.

Identifying the relevant markets

- 2.2 The ACCC considers that the relevant markets for voice termination were the same market identified in the 2009 MTAS declaration inquiry, which includes:
- (a) Wholesale mobile voice termination services;
 - (b) Retail mobile services; and
 - (c) Retail fixed-to-mobile services.
- 2.3 The ACCC considers MNOs continue to have exclusive control over access to end-users on their network and because of this only an MNO can terminate a voice call on its own network.² Optus agrees with this view and the conclusion that re-declaration of MTAS would promote competition in the market for wholesale mobile voice termination services.
- 2.4 Submissions generally agreed that the level of competition in the fixed-to-mobile market has not materially improved since 2009 and that this market is still not effectively competitive. The ACCC also concluded that the fixed line voice market is highly concentrated with Telstra having a 66% retail market share.

Declaration will promote the LTIE

- 2.5 Optus has shown that the justification for the removal of MTAS regulation has substantially lessened since the last inquiry in 2009. Each MNO will continue to have a monopoly over the termination of voice calls on its network. This may result in operators using this market power to damage competition in related downstream markets. Due to the two-sided nature of telecommunications markets, where competition in related downstream markets is strong, monopoly rents accrued in the wholesale MTAS market will be competed away to the ultimate benefit of end-users. The level of competition in related downstream markets is therefore an important factor when assessing whether declaration of MTAS promotes the LTIE.
- 2.6 In 2009, the ACCC concluded that extending the MTAS declaration for five years was in the LTIE. Notably, that :
- (a) Promotion of competition — continuing declaration, when coupled with an appropriate pricing principle, generates a closer association of prices with the underlying cost than would exist in the absence of declaration and that this in turn, promotes a greater level of competition in related markets.

² ACCC, 2013, MTAS Draft Decision, s.4.1

- (b) Any-to-any connectivity — continuing declaration prevents any possibility of a carrier, and in particular a new entrant, being refused access to the mobile termination services of other operators.
 - (c) Economically efficient investment in infrastructure — continuing declaration of an essential bottleneck service such as the MTAS is likely to encourage the economically efficient use of and investment in infrastructure. Without regulation, MNOs have the ability and incentive to set above cost MTAS prices and that the potential disassociation between price and costs is likely to distort consumption decisions and lead to an inefficient use and investment in telecommunications infrastructure.³
- 2.7 Optus submits that the above views are still relevant and continued declaration of the MTAS is in the LTIE. Market evidence shows that the level of competition in related downstream retail markets have not improved sufficiently since 2009 to prevent exploitation of the monopoly power in the wholesale MTAS market.
- 2.8 Optus submits, therefore, that the MTAS declaration should continue to apply for the next five years. This is in line with the ACCC’s recognition “*that a five year term provides a regulatory certainty which facilitates investment decisions.*”

Promote competition

- 2.9 Optus agrees with the assessment of the ACCC that declaration of MTAS would promote competition in the related wholesale and retail markets.
- 2.10 In relation to the specific market impacted:
- (a) Optus agrees that declaration will ensure that reasonable terms and conditions are set for the wholesale market for voice termination;
 - (b) Optus agrees that the level of competition has reduced since 2009, with Telstra extending its market power in the mobile market. Further, Telstra’s market position is likely to continue due to its share of mobile EBITDA and NBN-related payments, which enable Telstra to outspend its competitors on network investments while maintaining profitability.
 - (c) Optus agrees that the FTM market has not sufficiently changed to warrant the ACCC altering its previous assessment of the level of competition and the benefits of MTAS declaration to the FTM market. Moreover, the vertical integration of the dominant FTM provider and dominant mobile provider results in a substantial risk that Telstra would use MTAS to damage competition in the FTM market.
- 2.11 For these reasons, Optus agrees with the assessment that continual declaration of MTAS “*will promote competition in both downstream markets for mobile retail services and fixed voice services*”.⁴

Any-to-any connectivity

- 2.12 The ACCC considers that any-to-any connectivity is promoted by re-declaration as it prevents any possibility of a carrier, and in particular, a new entrant, being refused access to the

³ ACCC, *Mobile Terminating Access Service: An ACCC final report on reviewing the declaration of the mobile terminating access service*, May 2009, p.1

⁴ ACCC, 2013, MTAS Draft Decision, s.4.1

mobile termination services of other operators, in the case where a commercial agreement cannot be reached. While the ACCC expects interconnection to remain in place absent declaration, MNOs could exercise their monopoly power to impose unreasonable terms and conditions.⁵

- 2.13 Optus agrees with these views that continuing declaration of MTAS “*is necessary to achieve any-to-any connectivity*”.⁶

Encouraging efficient investment in and use of infrastructure

- 2.14 Optus agrees with the ACCC’s assessment that re-declaration of the MTAS, combined with efficient cost-based pricing, is consistent with encouraging efficient investment in and use of infrastructure.

Legitimate commercial interests of access providers

- 2.15 Optus agrees with the ACCC’s assessment that re-declaration of the MTAS, combined with efficient cost-based pricing, is consistent with commercial interests of access providers.

⁵ ACCC, 2013, MTAS Draft Decision, .4.2

⁶ ACCC, 2013, MTAS Draft Decision, .4.2

Section 3. Declaration of peer-to-peer SMS termination

- 3.1 Optus supports the draft decision to amend the MTAS service description to include peer-to-peer SMS termination. In the 2009 Declaration Inquiry, SMS termination was not included on the basis that SMS termination services were still exhibiting significant growth; were subject to ongoing commercial agreements; and there have been no demonstrable market failure.⁷ These reasons however are no longer valid. The growth of SMS termination services has slowed in recent quarters and despite ongoing commercial negotiations, MNOs have not been successful in lowering SMS termination rates.
- 3.2 Optus therefore submits that the inclusion of peer-to-peer SMS termination in the MTAS service description will promote the LTIE.

Declaration of SMS termination will promote the LTIE

- 3.3 Optus supports the ACCC's view that the declaration of peer-to-peer SMS termination will promote the LTIE. Declaration of peer-to-peer SMS termination will promote competition in the relevant markets, promote any-to-any connectivity and encourage the efficient use of and investment in infrastructure.
- 3.4 Optus also agrees with the assessment that there are two relevant markets:
- (a) Wholesale market for termination of SMS on individual mobile networks; and
 - (b) Retail market for mobile services.
- 3.5 These markets, and the level of competition, are discussed below.

Wholesale market for termination of SMS

- 3.6 Optus agrees that there are separate markets for the termination of SMS on individual mobile operators' networks. The same analysis that gives rise to this outcome for voice termination applies for SMS termination. Namely, the sending party's network *must* use the SMS termination service of the receiving party's network in order to successfully send an SMS to the receiving party. The sending party's network cannot avoid this service in the presence of a non-transitory increase in the price of SMS termination.
- 3.7 Some submissions have argued that SMS termination faces competition from data-based OTT messaging services. Optus will discuss the implications of this for the retail market in the next section. With regards to the wholesale market for SMS termination services, it is not possible for the sending party's network to utilise data-based OTT services to send an SMS to another network and avoid paying the SMS termination rate. There are no supply side alternatives.
- 3.8 This view is further supported by the lack of price movement in the wholesale SMS termination market. If it was correct that data-based OTT services were a competitive option to SMS termination, one would expect to see price reactions and other competitive responses from MNOs that supply SMS termination. This has not happened. It is evident from the SMS termination rate that these services have not placed an effective constraint on MNOs. **[CiC]** There has been no incentive for MNOs to reduce their SMS termination rates.

⁷ ACCC, Final report on reviewing the declaration of the MTAS, May 2009, p.11

- 3.9 The current SMS termination rate is also significantly above the cost incurred to provide SMS termination. Termination network cost models worldwide all show that one minute of voice uses the same network elements as at least 432 SMS.⁸ If MNOs supplying wholesale SMS termination services faced competitive pressure, one would expect that the current excessive monopoly rents would be competed away.
- 3.10 Optus submits that there is a wholesale market for the termination of SMS on individual mobile operators' networks. These markets do not face competition and MNOs are accruing significant monopoly rents. Declaration would, combined with cost-based pricing, therefore promote competition in the provision of wholesale SMS termination service on individual MNO's networks.

Downstream retail mobile services market

- 3.11 The provision of wholesale SMS termination services impact competition in the related downstream mobile-to-mobile SMS market — that is, the retail market for the provision of peer-to-peer SMS services. SMS services are sold within a bundle of other mobile services, namely mobile voice services. The ACCC observed:

... the market within which retail SMS are provided is the same market as in which other mobile services, including voice and data services, are supplied. This is because these services are generally sold as part of a single bundle of complementary mobile services.⁹

- 3.12 Optus largely agrees with this view. However, Optus submits that the identification of the retail bundled mobile products is not as accurate as it could be. As identified by the ACCC, the use of mobile data and smartphones is not pervasive throughout the whole market (less than half of mobile users use a data connected smartphone).¹⁰ Whereas the SMS/voice bundles applies to all GSM subscribers, representing around 92% of all Australians. As such, Optus submits that the ACCC should identify two bundled products: a SMS/voice bundle; and a SMS/voice/data bundle. As the ACCC correctly highlighted, not all retail mobile subscribers have an active data subscriber or a smartphone to be able to take advantage of mobile data connections.
- 3.13 Optus submits below that competition in both these bundle markets will be promoted by the declaration of SMS termination, together with cost-based SMS termination rates. The identification of one downstream retail mobile services market; or two bundled markets (voice/SMS and voice/SMS/data) does not therefore impact on the conclusion that declaration of SMS termination promotes competition in related downstream markets.
- 3.14 Optus agrees with the ACCC that above-cost SMS termination rates limits the ability of MNOs to compete in the downstream retail mobile market by imposing inefficient costs and reducing the amount of value included within bundled products.
- 3.15 **[CiC]**

⁸ ACCC, 2013, MTAS Draft Decision, s.5.1

⁹ ACCC, 2013, MTAS Draft Decision, s.5.1

¹⁰ ACCC, 2013, MTAS Draft Decision, s.5.1. The ACCC quoted ACMA data showing that 42% of Australians used a smartphone compared to 92% of Australians using a mobile phone.

- 3.16 [CiC]¹¹
- 3.17 [CiC]
- 3.18 [CiC]
- 3.19 Optus therefore agrees that *“there is evidence that high SMS termination prices are impacting the mobile retail plans available to consumer sand that declaration of the service couples with cost based pricing is likely to improve competition in this market.”*¹²
- 3.20 Even if the arguments that the level of competition between SMS and data-based OTT services were sufficient so that declaration would not promote competition for the demand of messaging services is correct, it does not hold that declaration does not promote competition between suppliers of messaging services. That is, inefficiently high SMS termination rates prevent MNOs from using the SMS messaging service to compete against data-based OTT providers. This supply-side bottleneck — caused by above cost SMS termination rates — would be addressed through the declaration of SMS termination services, combined with cost-based pricing.
- 3.21 In conclusion, Optus finds that the inclusion of SMS termination service within the MTAS Declaration would promote competition in the downstream retail market for bundled mobile services. This result does not alter whether the ACCC identifies one bundled market; or two bundled markets (i.e. SMS/voice bundle and SMS/voice/data bundle). Optus therefore agrees with the proposal to amend the MTAS service description to include peer-to-peer SMS termination. Optus agrees that without declaration:
- (a) Prices charged for peer-to-peer SMS termination will remain high;
 - (b) This places unjust high costs on plans with unlimited SMS; and
 - (c) Charges to SMS in other plans remain inefficiently high.¹³
- 3.22 It is clear therefore, that there is sufficient evidence to warrant the ACCC to include SMS termination within the MTAS as it promotes the LTIE.

Promotion of any-to-any connectivity

- 3.23 Optus supports the ACCC’s view that declaration of peer-to-peer SMS termination will promote any-to-any connectivity by ensuring that access to SMS termination services is not denied to any other party.¹⁴

Encouraging efficient investment in and use of infrastructure

- 3.24 Optus reiterates its view that by declaring peer-to-peer SMS termination, prices for peer-to-peer SMS termination will become more closely aligned with the efficient costs of providing the service, thereby promote the efficient use of and investment in infrastructure.

¹¹ [CiC]

¹² ACCC, 2013, MTAS Draft Decision, s.5.1

¹³ ACCC, 2013, MTAS Draft Decision, s.5.2

¹⁴ ACCC, 2013, MTAS Draft Decision, s.5.3

Legitimate commercial interests of access providers

- 3.25 Optus agrees with the ACCC's assessment that declaring peer-to-peer SMS termination, combined with efficient cost-based pricing, is consistent with commercial interests of access providers.

Changes to the service description are required

- 3.26 Optus notes that the introduction of cost based termination rate may increase the risk of unwarranted commercial and other premium-service type messages. The current SMS termination rate helps to deter these types of unwarranted bulk commercial, SPAM and other premium-service type messages. A significant increase in these types of unwarranted bulk SMS could impose significant quality of service constraints on existing connectivity between MNOs such as congestion and customer experience issues.
- 3.27 Optus however submits that in declaring SMS termination, the ACCC should make it clear that only peer-to-peer SMS termination is to be declared. In other words, SMS originating from subscribers of an Australian digital mobile network operator (this includes authorised wholesale partners such as MVNOs). This approach is consistent with the ACCC's description of SMS services in the Draft Report. The ACCC notes that a SMS *"allows a mobile user to send text message to other mobile users"*.¹⁵ The ACCC further notes that the SMS wholesale service are *"services provided by one MNO to another MNO"*.¹⁶ The ACCC also notes that *"SMS termination has many of the same characteristics as mobile-to-mobile voice termination services."*¹⁷ Optus agrees with these observations and proposes changes to the MTAS service description to give effect to these intentions.
- 3.28 This is consistent with the approach taken by the New Zealand Commerce Commission (NZCC). The NZCC ruled that SMS termination regulation should only apply to SMS that originate from a cellular mobile telephone network. Other forms of SMS that originate from the internet, machine-to-man and machine-to-machine are excluded from the MTAS Standard Terms Determination as the NZCC considered them to be outside the scope of the regulated SMS service. The reduction of the New Zealand SMS termination rate from NZD 9.5c to NZD 0.06c applied to SMS originating from a subscriber on a mobile telephone network and that has an associated MTAS reply path.¹⁸
- 3.29 [CiC]
- 3.30 Optus submits that this can be achieved through amending the service description of MTAS. Optus' proposed changes are outlined in Appendix A.

¹⁵ ACCC, 2013, MTAS Draft Decision, s.5.2

¹⁶ ACCC, 2013, MTAS Draft Decision, s.5.2

¹⁷ ACCC, 2013, MTAS Draft Decision, s.5.2

¹⁸ NZCC 2011, Executive summary of Standard Terms Determination for the designated services of the mobile termination access services (MTAS) (fixed-to-mobile voice (FTM), mobile-to-mobile voice (MTM) and short messaging services (SMS)) decision 724, <http://www.comcom.govt.nz/dmsdocument/7904>

Appendix A. Service description changes

MTAS Declaration service description - 2009

The domestic mobile terminating access service is an access service for the carriage of voice calls and short message service (SMS) messages from a point of interconnection, or potential point of interconnection, to a B-Party directly connected to the access provider's digital mobile network.

Definitions

Where words or phrases used in this Declaration are defined in the *Competition and Consumer Act 2010*, or the *Telecommunications Act 1997* or the *Telecommunications Numbering Plan 1997*, they have the meaning given in the relevant Act or instrument.

Other definitions

A-Party is the end-user from whom a telephone call is made or an SMS message is sent.

B-Party is the end-user to whom a telephone call is made or an SMS message is sent.

Digital mobile network is a *telecommunications network* that is used to provide *digital mobile telephony services*.

Point of interconnection is a location which:

(a) is a physical point of demarcation between the access seeker's network and the access provider's digital mobile network, and

(b) is associated with (but not necessarily co-located with) one or more gateway exchanges of the access seeker's network and the access provider's digital mobile network.

Short message service (SMS) is the provision of messages, ~~representing an alphanumeric sequence of text, limited up to 160 characters of text using spare capacity in the voice signalling channel of a mobile network~~, which:

a) is sent:

- a. using an A-Party's mobile phone or handset that has been allocated a Mobile Number in the Access Seeker's digital mobile network or, in the case of transited calls, a third party licenced carrier whom the Access Seeker has a transiting arrangement; and
- b. using the text functionality of the A-Party's mobile phone or handset and associated with a reply path with the A-Party's Mobile Number; and

b) is made to a Mobile Number that has been allocated to a mobile phone or handset in a digital mobile network in Australia operated by the Access Provider.