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David Lay
Assistant Director
Mobiles and Wireless Markets
Mobiles, Transmission and Consumer Branch
Australian Competition and Consumer Commission
William Street
Perth, WA, 60002

Email: telco.regulation@accc.gov.au

Public inquiry into the declaration of the domestic transmission capacity service, fixed line services and domestic mobile terminating access service - Pivotel Response to Public Submissions

Dear David

Pivotel wishes to respond to some of the submissions made by participants in the public inquiry into the declaration of the domestic transmission capacity service, fixed line services and domestic mobile terminating access service (“**the Declaration Inquiry**”).

Pivotel’s responses are limited to those areas where it believes that published submissions are either factually inaccurate or lack evidentiary support. Any defined terms in this submission have the meaning set out in Pivotel’s earlier submissions.

Inaccurate submissions regarding scam SMS

- 1.1 The large MNOs all contend that a decision not to declare MTAS for SMS has enabled, or will enable, them to better combat scam SMS.¹ Yet none of Telstra, Optus or TPG provide any evidence that the ACCC’s decision not to declare MTAS for SMS has caused a reduction in the number of scam SMS as compared with what would have been the case if the service had been declared. Moreover, in the period since the previous declaration of MTAS for SMS lapsed, there has been a significant *increase* in the volume of scam SMS. In those circumstances, the submissions by the large MNOs (which all benefit from higher termination charges) should be given little weight.
- 1.2 By contrast, Pivotel has provided:
 - an independent expert report which provides compelling evidence as to why declaration of MTAS for SMS is in the long-term interests of end-users; and

¹ Optus Submission, para 47 and 48; Telstra Submission, page 22. TPG Submission, page 7.

- evidence that scam SMS represents a small proportion of the overall volume of A2P SMS traffic in Australia,² and that many scam SMS enter Australia via “grey routes”.³
- 1.3 The prevalence of grey route traffic is likely to increase further in a future without declaration as the cost of termination via legitimate routes becomes prohibitive.⁴ The declaration of MTAS for SMS and regulated pricing that reflects the cost of supply will assist in minimising the use of grey routes and therefore combatting scams.
 - 1.4 For these reasons, Pivotel submits that the ACCC should have regard to the evidence provided in support of declaration and pay little (if any) regard to submissions which are not supported by objective evidence.
 - 1.5 Moreover, if SMS termination services continue to be unregulated and there is an increase in termination charges, this will only increase the risk of scam by reducing incentives for innovative technical solutions designed to combat scam. MNOs and MVNOs should be investing in scam detection and filtering technology rather than paying inflated wholesale costs.⁵ Declaration will allow market participants that are less well-resourced than the larger MNOs (e.g., Pivotel) to further invest funds in tools to combat scam.⁶ These are important methods of addressing scam alongside initiatives such as the proposed Sender ID registry and the ACMA’s ongoing enforcement of the *Reducing Scam Calls and SMS Code*.
 - 1.6 A good example of unsubstantiated assertions is Optus’ bald statement that “*the declaration of SMS in 2014, together with the material 99% reduction in the termination rate contributed to the proliferation of SMS scam messages.*”⁷ Optus has provided absolutely no evidence to support its claim and has simply *assumed* that an alleged increase in scam SMS was caused (at least in part) by declaration in 2014. Optus’ submission fails to recognise that other key issues, such as an increased reliance on grey route traffic or sophisticated foreign threat actors, may have contributed to an increase in scam SMS.
 - 1.7 Pivotel has also undertaken internal investigations, which confirm that scam SMS traffic transmitted down legitimate A2P channels is less than [REDACTED], supporting the argument that a significant number of SCAM SMS is transmitted over grey routes (i.e., routes which avoid incurring a termination fee).⁸ In a future with declaration where the cost of termination via legitimate A2P channels is closer to efficient cost there will be

² Pivotel Submission, 7.78.

³ Pivotel Submission, 7.81.

⁴ Pivotel Submission, 7.82.

⁵ Pivotel Submission, 7.14 and 7.16.

⁶ Soprano’s submission to the ACCC’s Discussion paper also states that it is important that A2P SMS pricing be regulated to prevent MNOs from arbitrarily increasing costs and to allow business to invest in better security and fraud prevention (see page 4).

⁷ Optus Submission, para 47.

⁸ Pivotel’s internal data indicates that the number of scam SMS blocked by Pivotel (or notified to Pivotel by the national MNOs in accordance with the Reducing Scam Calls and Scam SMS Industry Code C661:2022) is a small percentage of both the total SM traffic and the amount of scam SMS reportedly blocked by the MNOs. Pivotel calculated the total volume of messages received between June – August 2023 and the volumes of potential scam SMS notified by the MNOs or blocked by Pivotel during the same time period. Pivotel has then extrapolated this data and compared it to public statements regarding the volume of scam SMS blocked (including statements in the issue of Communications Day on 15 August 2023).

significantly less incentives to use grey routes. Rather, more traffic will be carried by MNOs with sophisticated systems in place to detect scam.

Alleged substitutes for the sending of A2P SMS

- 1.8 Telstra contends that potential substitutes for the A2P SMS include A2P SMS providers and aggregators buying on-net A2P SMS services from each individual MNO, over-the-top messages, in-app messages, emails, and phone calls.⁹ Similarly, TPG argues telephone calls, email, OTT messaging and in-app messages are all effective substitutes for A2P SMS.¹⁰ Optus argues that OTT messaging services (e.g., Facebook Messenger) have become effective substitutes for P2P SMS but, perhaps tellingly, make no reference to potential substitutes for A2P SMS.¹¹
- 1.9 Neither Telstra nor TPG provide compelling evidence in support of their contentions, and, in Pivotel's view, the parties grossly overstate the extent of viable substitutes for A2P SMS. By contrast, Pivotel refers to the extensive evidence in the MobileSquared report and independent expert report of HoustonKemp, which indicate that any substitution is limited at best and exists only at the margins.
- 1.10 Pivotel does not consider that there are viable substitutes for A2P messages. For example, as set out in Pivotel's submission, OTT services have not proven to be substitutes for A2P SMS even if they may be partial substitutes for P2P SMS.¹² A key reason is that A2P SMS does not depend upon the message recipient acquiring a particular App. OTT applications require both end-users and consumers to have the same application, and end-users cannot reliably expect that their consumers will use one single OTT application. Moreover Pivotel has provided evidence that:
- Whatsapp's overall penetration rates in Australia remain low (see paragraph 7.35 of Pivotel's submission).
 - The percentage share of A2P SMS traffic lost to Whatsapp within Oceania is extremely low (see paragraph 7.35 of Pivotel's submission).
 - A2P SMS traffic has grown rapidly (see paragraph 7.51 of Pivotel's submission).
- 1.11 In summary, it is difficult to see how Whatsapp for Business or similar OTT applications could credibly be viewed as substitutes. OTT services will also continue to be less accessible to disadvantaged communities and older people.¹³ Other submissions to the ACCC's Discussion Paper, including those by Soprano, Commpete and Aussie Broadband, also highlight the lack of effective substitutes for A2P messaging.¹⁴
- 1.12 Pivotel considers that the other substitutes referred to in Telstra's submission (including emails, and phone calls) are also not effective substitutes to A2P messaging. For example, as regards email, [REDACTED]. MobileSquared has previously explained that

⁹ Telstra Submission, page 21.

¹⁰ TPG Submission, page 6.

¹¹ Optus Submission, para 49.

¹² Pivotel Submission, para 7.34.

¹³ See Pivotel Submission, paragraph 7.38 which refers to the ACCC Report (Communications and media in Australia: How we communicate as at June 2021).

¹⁴ See Soprano's Submission, page 2, Commpete's Submission, page 5, and Aussie Broadband's Submission, page 2.

SMS has a higher view or engagement rate, whereas email is nowhere near as high.¹⁵ It notes that, although email has been around longer than SMS, “*as the use of mobile phones grows exponentially, SMS is becoming an undeniably convenient way for businesses to communicate with customers.*” Soprano’s submission to the ACCC also states that SMS is the preferred channel as compared to voice and email.¹⁶

- 1.13 Pivotal also refers to the independent expert report provided by HoustonKemp and the authors’ opinion that: “*there is likely to be a limited degree of demand-side substitutability between A2P SMS services and other A2P messaging services by consequence of the features of SMS that we describe in section 2.1.3 above, including its ubiquity across mobile handsets...*”¹⁷

Little (if any) incentive for MNOs to provide A2P SMS termination service on reasonable terms and conditions without declaration

- 1.14 Unsurprisingly, each of Telstra¹⁸, TPG¹⁹, and Optus²⁰ assert that there are limited incentives to refuse to provide SMS termination on reasonable terms. For example, TPG states that the market “*remains competitive and the dynamics do not necessitate regulation*”²¹ and that “*MNOs are interconnected and have no incentive to deny access to each other, new entrants, MVNOs or SMS aggregators, or to impose unreasonable terms and conditions of access...*”²² It also claims that there is “*no rent-seeking incentive for MNOs in the A2P market*”.²³
- 1.15 These assertions run contrary to recent attempts by the large MNOs (including TPG) to increase A2P termination charges to levels vastly exceeding the efficient costs previously determined by the ACCC. They are also at odds with the findings in the HoustonKemp report (referred to below).
- 1.16 Pivotal submits that, in the absence of declaration, MNOs have both the ability and the incentive to refuse to provide SMS termination on reasonable terms and conditions. In this regard, Pivotal refers to and relies upon the independent expert report of HoustonKemp and the authors’ opinion that “*In a future without declaration, MNOs are likely to raise A2P SMS termination charges above the cost of providing the service for at least some rival MNOs because they will have the ability and incentive to do so*”.²⁴
- 1.17 Moreover, when MTAS for SMS was last declared by the Commission, the price set out in the Commission’s Final Access Determination was 0.03 cents per message with no distinction between A2P and P2P. As detailed in Pivotal’s submission at paragraphs 7.19 – 7.26, the three national MNOs have already imposed (or proposed) termination charges vastly in excess of that amount for A2P messages (on top of significant price increases in 2020 and 2021).
- 1.18 In these circumstances, MNOs are clearly incentivised to refuse to provide SMS termination on reasonable terms in the absence of declaration, and self-serving assertions to the contrary should be rejected by the Commission out of hand. Aussie

¹⁵ See MobileSquared, “SMS vs Email: Which Channel Should You Choose? Available at:

<https://www.mobilesquared.co.uk/2023/06/29/sms-vs-email-which-channel-should-you-choose/>

¹⁶ Soprano Submission, page 2.

¹⁷ HoustonKemp report, para 170.

¹⁸ Telstra Submission, page 22.

¹⁹ TPG Submission, page 6.

²⁰ Optus Submission, para 49.

²¹ TPG Submission, page 6.

²² TPG Submission, page 7.

²³ TPG Submission, page 6.

²⁴ HoustonKemp report, para 21.

Broadband's submission raises concerns around wholesale SMS pricing and states that the "*current wholesale SMS pricing is as much as 100x the previously regulated SMS rate*".²⁵

- 1.19 Finally, TPG makes reference to the Discussion Paper's comment that prices for A2P SMS appear to have remained relatively stable following deregulation, and states that this may indicate MNOs have been unwilling or unable to leverage any monopoly over wholesale SMS termination on their respective networks. Pivotel refers to Clause 1.15 above and the independent expert report provided by HoustonKemp which finds that A2P SMS termination charges are likely to rise in a future without declaration.²⁶

Yours Sincerely

Peter Bolger

Chief Executive Officer

Pivotel Group

[REDACTED]

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²⁵ Aussie Broadband Submission, page 2.

²⁶ HoustonKemp report, para 21.