

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



28 July 2023

Public version

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1. EXECUTIVE SUMMARY

- 1.1 Pivotel Group Pty Limited (“**Pivotel**”), Australia’s fourth Mobile Network Operator (“**MNO**”) welcomes the Australian Competition and Consumer Commission (“**Commission**”) public inquiry into the declaration of the domestic transmission capacity service (“**DTCS**”), fixed line services and domestic mobile terminating access service (“**MTAS**”).
- 1.2 Regulation of bottleneck services remains important to promote competition and any-to-any connectivity in telecommunications markets that still exhibit high levels of concentration at the infrastructure layer, particularly in regional and rural Australia. Although operators continue to embrace new technologies including Cloud and virtualisation of certain network elements, the incumbent fixed line and mobile networks continue to have the ability and the incentive to price services above efficient cost where not constrained by regulation.
- 1.3 Pivotel does not intend to comment on all of the nine declared services listed in the Commission’s Discussion Paper published in May 2023 (the “**Discussion Paper**”). It has limited its comments in this submission to the following services:
 - 1.3.1 Domestic transmission capacity service;
 - 1.3.2 Fixed originating access service;
 - 1.3.3 Fixed terminating access service;
 - 1.3.4 Wholesale Asymmetric Digital Subscriber Line (ADSL) service; and
 - 1.3.5 Domestic mobile terminating access service including both voice and SMS.
- 1.4 Pivotel considers that redeclaration of each of these services for a minimum of three years (and in some cases longer) to be in the Long-Term Interests of End-Users (“**LTIE**”) as defined in Part XIC of the *Competition and Consumer Act 2010* (“**CCA**”) because it will promote competition at the wholesale and retail layer, increase economic efficiency and, most importantly, promote any-to-any connectivity by helping to ensure that all Australians no matter where they live or work, have access to telecommunications services.
- 1.5 It is important to recognise that, in a very real sense, network operators retain a monopoly over the termination of calls and messages to each of their directly connected users. Even though, in the case of fixed-line services, many end-users have now been transitioned to the NBN, a significant number of Australians in regional and rural areas continue to rely on Telstra’s copper network. Access to mobile networks is now more important than ever given how frequently they are used to receive calls and messages. Pivotel also considers that some changes to service descriptions may be desirable to enhance the technology neutrality of certain declared services. These changes will be discussed further below.

Domestic transmission capacity service

- 1.6 Pivotel considers the declaration of domestic transmission capacity service remains in the LTIE and that DTCS should be declared for a further five-year period.
- 1.7 While Pivotel proposes some amendments to the DTCS service description, Pivotel considers that the ACCC's current approach of declaring services where there are fewer than 3 competing infrastructure providers and based on assessing the level of infrastructure-based competition at the ESA level, continues to strike an appropriate balance between the interests of access-seekers and access-providers.
- 1.8 Declaration of DTCS promotes competition both in the market for DTCS itself but, more importantly, in downstream fixed-line and mobile services markets that rely upon backhaul as a crucial input. Declaration of the DTCS also promotes any-to-any connectivity particularly for end-users in regional or remote parts of Australia serviced by routes which would otherwise lack competition or may not be economically viable. Finally, declaration of DTCS promotes economic efficiency by ensuring that service providers can obtain access to bottleneck infrastructure on reasonable terms and do not need to duplicate effort where it is unprofitable to do so.
- 1.9 Without declaration, Pivotel considers that it is likely Telstra's dominance in rural and regional areas will be further entrenched to the detriment of consumers and the market more generally.
- 1.10 Pivotel considers that the current service description should be amended to ensure that it captures symmetric transmission services that are functionally-equivalent to the DTCS, to ensure that they are provided in accordance with the Commission's Final Access Determination. Otherwise, providers of the DTCS such as Telstra will continue to prioritise and aggressively market other services with superior or equivalent functionality but refuse to supply them in accordance with the FAD.

Fixed originating access and fixed terminating access services

- 1.11 Pivotel's considers that the declarations of both Fixed Originating Access Services ("**FOAS**") and Fixed Terminating Access Services ("**FTAS**") should be extended for a further period of five years. However, if the Commission reaches a view that the progress of migration to the NBN justifies a shorter declaration, Pivotel would not object to that.
- 1.12 Declarations of both FTAS and FOAS are in the LTIE because they promote each of the statutory preconditions. Any-to-any connectivity is promoted by ensuring that *all* end-users (including those connected to legacy copper networks) can communicate with other end-users on similar or different fixed and mobile networks. Declaration of these services also promotes competition in downstream wholesale and retail markets for the provision of fixed voice and broadband services and for mobile services. This is particularly important given large carriers may have a significant presence across multiple markets and, in the absence of declaration, their ability to increase prices for the interconnection of fixed services would harm competition across those markets.
- 1.13 Those consumers that are likely to be harmed in the absence of declaration will be those that still rely exclusively upon fixed voice services or those that have access to less reliable mobile services. Invariably, this means that the harm will fall disproportionately on the elderly and/or impecunious, and those in remote and regional communities.

Wholesale ADSL

- 1.14 Pivotel considers the declaration of Wholesale ADSL should be extended for a further three years. Given the progress of the NBN rollout and the emergence of potential substitutes including improved satellite broadband services and 5G, Pivotel considers that this shorter period of redeclaration would be appropriate.
- 1.15 As at March 2023, 128,709 Australians still relied upon DSL services for access to the internet¹. Many of those consumers would be located in regional and rural Australia and would be adversely affected in a future without redeclaration given the cost of alternative services.

Mobile Terminating Access Service ('MTAS')

- 1.16 Pivotel is firmly of the view that the declaration of the domestic MTAS should be extended for a further five years and varied to include for the termination of SMS. In respect of the declaration of MTAS for SMS, Pivotel relies upon the independent expert report prepared by Luke Wainscoat and Zoe Odgers of Houston Kemp, which concludes that declaration will promote competition and efficiency in a range of wholesale and retail markets associated with the supply of A2P messaging services. Their report further concludes that these outcomes will be in the long-term interests of end-users. The Houston Kemp report is **attached** at Attachment [1].
- 1.17 Declaration of the domestic MTAS will promote competition at the infrastructure and services (wholesale and retail) layers, is essential for any-to-any connectivity in respect of both voice and messaging services, and will promote productive, allocative, and dynamic efficiency by ensuring that crucial network inputs are priced at or near efficient cost (with flow on benefits for end-users) and by encouraging innovative new services which meet the communications needs of Australians.
- 1.18 Pivotel sees no real reason to distinguish between termination of calls and SMS on mobile networks, particularly in a world where people increasingly use messages to communicate. Both services use the same network infrastructure and in both cases Australia's three largest networks have a monopoly over termination of calls and messages on those networks. Nevertheless, given that MTAS for SMS is not currently declared, Pivotel will separately consider the arguments for declaration of voice and SMS services.
- 1.19 Pivotel considers that the declaration of MTAS for voice to be in the LTIE because it will promote:
- a) competition in wholesale and downstream retail markets for fixed and mobile voice services by ensuring that large national MNOs cannot extract monopoly rents on essential inputs;
 - b) any-to-any connectivity by ensuring that consumers and businesses are able to make and receive calls, no matter where they live or work; and
 - c) the economically efficient use of communications infrastructure by which the services are provided by preventing incumbent mobile operators from charging monopoly rents for termination of calls on their networks. This in turn promotes productive, allocative and dynamic efficiency.
- 1.20 Without declaration, Pivotel considers that the national MNOs will increase termination rates above cost given that each MNO has the ability and incentive to do so because they have a

¹ ACCC: NBN Wholesale Market Indicators Report – March quarter 2023 report



monopoly over termination on their own networks (as the ACCC has previously acknowledged). This will have adverse impacts not only for small MNOs such as Pivotel and retail service providers (including MVNO's) but also for new and emerging technologies reliant upon those termination services.

- 1.21 Pivotel considers the declaration of MTAS for SMS to be in the LTIE because it will promote:
- a) competition in the wholesale markets for termination of SMS and in the downstream retail markets for Person-to-Person (“**P2P**”) and Application-to-Person (“**A2P**”) messaging services by ensuring that essential inputs are supplied at cost reflective prices;
 - b) any-to-any connectivity by ensuring that consumers and businesses are able to acquire and receive ubiquitous and cost-effective messages; and
 - c) the economically efficient use of communications infrastructure by which the services are provided by preventing incumbent mobile operators from charging monopoly rents for termination on their networks and offering businesses and consumers a wider choice of messaging services to fit their particular needs. This in turn will promote productive, allocative and dynamic efficiency.

2. ABOUT PIVOTEL

- 2.1 Pivotel operates a mobile and satellite telecommunications network as an Mobile Network Operator (“MNO”) pursuant to a carrier licence issued by the Australian Communications and Media Authority in accordance with the *Telecommunications Act 1997* (Cth) (“**Telco Act**”). It has points of interconnect in the Australian major capital cities and points of interconnect internationally in Auckland, Los Angeles, and New York.
- 2.2 The Pivotel group comprises Pivotel Group Pty Limited and its wholly owned subsidiaries including but not limited to Pivotel Satellite Pty Limited, Pivotel Mobile Pty Limited and Pivotel Communications Pty Limited. For the purposes of this submission, they are referred to severally and collectively as “Pivotel”.
- 2.3 Pivotel has demonstrated a willingness to invest in networks in regional and rural Australia and is active in most States. In particular, Pivotel has been a successful participant under the Regional Connectivity Program and has built (or is building) a number of community networks in NSW and Western Australia that are co-funded by State or Federal Governments, as well as privately funded 4G networks in the mining and agriculture sectors. It is this regional expertise, that gives Pivotel a unique perspective on the importance of network infrastructure and access to regional and rural communities and a deep understanding of the threat that monopoly networks present throughout the telecommunications supply chain.

3. LEGAL BASIS FOR DECLARATION

- 3.1 Pursuant to section 152AL(3) of the Competition & Consumer Act 2010 (“**CCA**”), the Commission may declare a specified ‘eligible service’ to be a declared service if:
- (a) the Commission has held a public inquiry under Part 25 of the Telco Act about a proposal to make the declaration; and
 - (b) the Commission has prepared a report about the inquiry under section 505 of the Telco Act; and
 - (c) the report was published during the 180-day period ending when the declaration was made; and

- (d) the Commission is satisfied that the making of the declaration will promote the LTIE of carriage services or of services provided by means of carriage services.

3.2 The Discussion Paper represents the commencement of such a public inquiry.

3.3 In order to declare an eligible service under section 152AL (3), the Commission must be satisfied that the declaration will promote the LTIE. Under section 152AB of the CCA, the Commission must have regard to the following objectives:

- (a) promoting competition in markets for listed services;
- (b) achieving any-to-any connectivity; and
- (c) encouraging economically efficient use and investment in infrastructure.

3.4 In determining whether a particular thing is likely to promote competition, the Commission must, per section 152AB(4), consider the extent to which that thing would remove obstacles to end-users of listed services gaining access to listed services.

3.5 In order to meet the objective of achieving any-to-any connectivity, each end user supplied with a carriage service that involves communications between end users must be able to communicate by means of that service with each other end user supplied with the same or similar service, irrespective of whether the end-users are connected to the same telecommunications network.

3.6 In determining whether a particular thing encourages the efficient use of infrastructure, the Commission should consider: (i) whether it is, or is likely to become technically feasible for the services to be supplied and charged for; (ii) the legitimate commercial interests of the suppliers including their ability to exploit economies of scale; and (iii) the incentives for investment in infrastructure by which the services are supplied or any other infrastructure by which the services are capable of being supplied.

3.7 The manner in which these objectives would be met for the LTIE for each of the declared services referred to at paragraph 1.3 above are set out in our submission below.

4. DOMESTIC TRANSMISSION CAPACITY SERVICE

4.1 Pivotel considers that the declaration of the Domestic Transmission Capacity Service ('DTCS') should be extended for a further five years. DTCS remains a crucial input to the delivery of fixed and mobile services to all Australians, particularly those in remote and rural areas where there are limited alternatives to Telstra's backhaul network. Absent declaration of DTCS, incentives for investment will be reduced and wholesale and retail prices will increase.

4.2 Pivotel also considers that the Commission should continue to adopt the current methodology for the exempting of certain DTCS from regulation based on the number of competing providers in an exchange service area ('ESA') given that it has proven relatively robust and easy to implement.

4.3 Pivotel contends that extending the declaration of DTCS will promote:

- 4.3.1 competition for the supply of DTCS and in downstream markets that rely on transmission services (e.g., mobile services). Pivotel agrees with the ACCC's assessment that, absent regulation, Telstra will have the ability to determine terms

of access in sections of its transmission network and may limit the supply of transmission services;

- 4.3.2 any-to-any connectivity by enabling consumers to communicate with each other where receiving a similar service. In the absence of declaration, there is a real risk that for routes that lack competition, access will be curtailed or offered on uncompetitive terms ensuring that other operators cannot offer the full suite of services to consumers. This is particularly true for tail transmission and in regional and rural areas.
- 4.3.3 the economically efficient use of, and investment in, communications infrastructure by facilitating access to the incumbent's infrastructure, and continuing to encourage investment in infrastructure that supports services in downstream markets.
- 4.4 Pivotel considers that extending the declaration of the DTCS in areas where there are fewer than 3 competing infrastructure providers is vital to promote the long-term interests of end-users (particularly in regional and rural areas).
- 4.5 Pivotel also considers that the ACCC's use of the competition assessment method, which assess the level of infrastructure-based competition at the ESA level, remains appropriate.
- 4.6 However, the current service description should be amended to ensure that it captures symmetric transmission services that are functionally-equivalent to the DTCS, to ensure that they are provided in accordance with the Commission's Final Access Determination. Otherwise, providers of the DTCS such as Telstra will continue to prioritise and aggressively market other services with superior or equivalent functionality but refuse to supply them in accordance with the FAD. The reasons for this are set out at paragraphs 4.22 to 4.27 below.
- 4.7 Transmission services remain a fundamental input for telecommunications service providers, and it's critical that the ACCC continues to regulate the supply of DTCS to ensure that vertically integrated and dominant players aren't able to abuse their market position. As a smaller MNO that operates fixed wireless and mobile networks (including in rural and regional areas), it is critical that Pivotel and other similar services providers have access to transmission services (i.e., mobile backhaul) on reasonable terms. This allows Pivotel to compete in downstream markets for the supply of fixed and mobile services, and to collaborate as a neutral host providers. This remains critical as consumers in rural, regional and remote areas in Australia continue to describe their experiences of poor coverage, congestion, and lack of choice in provider.² Pivotel seeks to address these concerns in part through establishing community-based networks which are reliant upon interconnection.
- 4.8 The continued growth in data consumption, reflected in providers' ongoing investment in transmission and national fibre backhaul,³ also underlines the ongoing need for effective regulation in this area.
- 4.9 As a telecommunications provider that has delivered connectivity solutions to regional, rural, and remote customers since 2003, Pivotel understands the challenges associated with providing quality telecommunications services in these areas. These challenges are more pronounced for smaller telecommunications providers, such as Pivotel, which increases the need for effective regulation to promote competition, any-to-any connectivity, and the efficient use of (and investment in) infrastructure.
- 4.10 The ability to acquire transmission services (and to carry traffic or data between two locations) continues to be a critical input for various downstream markets including mobile services,

² ACCC Report on preliminary findings, Regional Mobile Infrastructure Inquiry (18 April 2023) pg.4.

³ https://www.accc.gov.au/system/files/22-71RPT_Communications%20Market%20Report_FA.pdf para 2.2.2.

fixed wireless access services, broadcasting services, and corporate and government voice and data services.

- 4.11 The state of competition in markets for the supply of DTCS differs by geographic area. Pivotel recognises that there is competition on some metropolitan, inter-capital, and urban transmission routes, where the existence of several providers of DTCS acts as a limit on anti-competitive behaviour. The DTCS only regulates certain routes, and transmission services on routes that are sufficiently competitive are deregulated.
- 4.12 However, Pivotel considers that it would be wrong to characterise the nature of the DTCS market as competitive, particularly in regional and rural areas. Notwithstanding that there are four national transmission carriers (Telstra, Vocus, TPG and Optus), Telstra remains the dominant provider of transmission services across Australia. Telstra's "extensive" network of regional fibre results from its role as a former statutory monopoly.⁴ As the ACCC points out in the Discussion Paper, Telstra's fibre network covers the continent and has a strong presence in regional and remote areas. In fact, Telstra is the only operator of transmission networks in many regional and rural areas.
- 4.13 Similarly, while the ACCC is correct that other carriers are investing in tail-end infrastructure in urban centres, Pivotel considers that the overwhelming majority of regional and remote routes that include a tail-end remain beholden to Telstra. Given the complexity in deregulating some but not all of these within a given region, Pivotel considers that all routes that include a tail-end should be re-declared.
- 4.14 As the ACCC explained in its Reasons for Determination in the Telstra/TPG merger application, all three MNOs rely on Telstra's fibre network in regional areas to some extent, with Telstra's network providing capacity for Optus and TPG mobile sites (in addition to Telstra sites).⁵ Also, three of the national carriers (Telstra, TPG and Optus) are vertically integrated, which increases the risk of anticompetitive behaviour and potential impact on downstream markets.
- 4.15 Telstra's capacity to supply nationwide transmission services, and its monopoly on many links or routes (together with the sunk cost of its infrastructure), means it has significant market power in markets for the supply of DTCS in Australia. The absence of effective regulation would present a significant risk to competition, including in downstream markets that rely on reasonable access to transmission services. It's also evident that the barriers to entry to providing transmission services are extremely high given the capex intensive requirements and the inefficiency associated with carriers duplicating infrastructure.
- 4.16 Pivotel agrees with the ACCC's assessment that, absent regulation, Telstra will be able to set terms of access in parts of the network and could have incentives to limit the supply of transmission services to its competitors (i.e., facilitate anti-competitive and abusive behaviours). This would directly impact Pivotel, as an MNO that relies on access to transmission services for its mobile network (i.e., mobile backhaul) on reasonable terms. The ACCC has previously noted that backhaul is likely to be the most substantial restriction to smaller MNOs competing in regional areas.⁶ Recently, the ACCC's preliminary findings in the Regional Mobile Infrastructure Inquiry found that MNOs face significant costs to increase rural, regional, and remote coverage.⁷

⁴ See para 6.49 of the ACCC Reasons for Determination – Application for merger authorisation lodged by Telstra and TPG
⁵ See para 6.48 of the ACCC Reasons for Determination – Application for merger authorisation lodged by Telstra and TPG.

⁶ ACCC: Competition limits advice for 1800 MHz spectrum in regional areas paragraph 3.4.2.

⁷ ACCC Report on preliminary findings, Regional Mobile Infrastructure Inquiry (18 April 2023), page 40.

- 4.17 The ability of Telstra to set terms of access and restrict the supply of services would also impact investment incentives for infrastructure that supports services in downstream markets (in circumstances where an operator or provider is constrained in obtaining transmission services). Ultimately, this would only serve to undermine the long-term interests of end users, who would be deprived of valuable services, and the benefits of increased competition, in downstream markets.
- 4.18 On the other hand, Pivotel considers that extending the declaration is likely to encourage investment in infrastructure that supports services in downstream markets (e.g., for the supply of mobile services) and continue to promote the efficient use of the incumbent's infrastructure.
- 4.19 Pivotel reiterates that it's vital that the ACCC extend the declaration of DTCS and continue to regulate transmission services. Pivotel does consider that the ACCC should give consideration to imposing SLAs on response and repair times. Pivotel has experienced a number of long-term outages on rural and remote transmission links which adversely affects the services provided to consumers in those regions and increases the cost of supply as satellite backhaul must be deployed as a redundancy measure. In Pivotel's experience, incumbents may generally favour their own services and networks in a manner which undermines competition.

What are relevant developments in markets and impacts of developments in the sector (e.g., NBN)?

- 4.20 Pivotel recognises the market developments that have taken place since the previous declaration, such as continued investment in transmission infrastructure, completion of the NBN (including the shifting of traffic on to NBN points of interconnection), and the introduction of NBN business grade services. Pivotel considers that to the extent that NBN services are a legitimate substitute for transmission services, these should be factored in when considering what services should be declared. However, this does not mean that DTCS should not be declared at all.
- 4.21 The Discussion Paper identifies that, as a result of the migration to the NBN, transmission services in many local exchanges will likely be decommissioned. Pivotel considers that further analysis is required to assess the impact of these exchanges being decommissioned, particularly in regional and outer metro areas where alternative transmission infrastructure may be limited and where Telstra has significant fibre assets.

Is the current service description still appropriate? Does it continue to reflect the transmission services most commonly acquired in the market? If not, what needs to change?

- 4.22 Pivotel considers that the current service description should be modified to cover services that are functionally-equivalent to the DTCS. Such changes will ensure that equivalent services to the DTCS are provided on non-discriminatory terms and in line with the pricing set out in a Final Access Determination. Put simply, the current regulatory framework for DTCS is prone to being gamed and exploited by dominant providers of transmission services such as Telstra.
- 4.23 Pivotel has faced challenges in securing access to adequate transmission services on reasonable terms, particularly in more sparsely populated regions where the lack of options for access seekers (and ineffective competition) is more apparent. For example, Pivotel relies on access to transmission services (i.e., backhaul) for its regional community networks, including in Western Australia at Mt Barker and Wickepin (which both remain regulated ESA's).⁸⁹ These networks connect homes and buildings to the Internet, enable the use of IoT

⁸ For further information see Pivotel, *Pivotel Regional Networks* (available at <https://www.pivotel.com.au/products/pivotel-regional-networks>).

⁹ See Table 2 of the current domestic transmission service description. The only deregulated regional ESAs in Western Australia are Pinjarra (Baldivis, Medina, Pinjarra and Rockingham).

technologies, and facilitate smart device applications (e.g., Pivotel's voice and SMS service, PATT™).

- 4.24 Initially, Pivotel procured transmission services for its regional networks in Western Australia from Telstra. However, in its most recent offering, Pivotel was only able to procure a transmission service from Telstra at a low bandwidth (around 54 MB/s) at comparatively high rates. Pivotel requested a higher bandwidth offering but was informed that there was no additional bandwidth available.
- 4.25 As a result of these challenges, Pivotel eventually switched to a third-party managed services provider, which procures transmission capacity from Telstra. Pivotel was able to purchase a Telstra Managed Lease Line (MLL) service with increased bandwidth (200 MB/s) from this reseller at a rate significantly lower than that offered by Telstra. This demonstrates how supply of the DTCS is prone to being gamed by dominant providers. Ultimately, this places at risk smaller operators that rely on access to transmission services on reasonable terms. It will also impact more vulnerable portions of the population, including end-users in remote areas that rely upon Pivotel's community networks.
- 4.26 Despite the changes made to the DTCS service description following the ACCC's previous inquiry, Telstra continues to provide services in a manner that inhibits customers from purchasing the regulated DTCS service. For example, Telstra may not offer particular services, such as reporting services, as part of its DTCS offering. Rather it offers similar transmission services (e.g. Ethernet) at higher rates and claims they are not subject to regulation.
- 4.27 The Discussion Paper refers to NBN Co's business grade "Enterprise Ethernet" services.¹⁰ Pivotel considers that these services could be used for other purposes such as mobile backhaul although NBN Co does not currently permit this. Pivotel encourages the ACCC to consider how best to ensure that NBN Co's Enterprise Ethernet service can be made available to access-seekers in a way that promotes competition and efficiency by ensuring that services which are fully or partially substitutable for the DTCS are available on cost-reflective terms and conditions.

Is the competition assessment method still appropriate?

- 4.28 Pivotel considers that the ACCC's use of the competition assessment method is still appropriate. It also maintains that it's still appropriate to use the legacy concept of a "exchange service area" ('ESA') to measure the level of transmission infrastructure, and to assess whether there are three independent transmission providers at the ESA. It also considers that, in the absence of an obvious alternative, the published list of ESA's on Telstra's website remains a useful benchmark for measuring the level of competing fibre infrastructure at particular locations across Australia¹¹. However, Pivotel considers that the definition of ESA in the ACCC service description should be amended so as to simply refer to the list of ESA's published by the ACCC given that many of the Telstra local exchanges have now been decommissioned and are no longer "served by a traditional local exchange".

¹⁰ Discussion Paper, page 17.

¹¹ <https://www.telstra.com.au/consumer-advice/customer-service/regional-service-performance>

5. FIXED ORIGINATING AND TERMINATING ACCESS SERVICES

- 5.1 Pivotel proposes to address the declaration of both Fixed Originating Access Services (FOAS) and Fixed Terminating Access Services (FTAS) jointly in this submission.
- 5.2 Pivotel considers that the declaration of both FOAS and FTAS should each be extended for a further period of five (5) years, and then subject to a further review. Alternatively, if the Commission is of the view that the current speed of migration to the NBN warrants a slightly shorter period of declaration, Pivotel would not object to this.
- 5.3 While Pivotel considers that there may come a time when the ACCC could treat MTAS and FTAS under a single service description. Pivotel does not believe that this is technically feasible at this point in time. Nor does it consider that it will promote the LTIE given the potential uncertainty and opportunities for gaming it may create. In addition, Pivotel considers that in a subsequent final access determination for a combined service, it would be extremely difficult to price the service in a manner that accurately reflects the cost of termination on different networks. As a result, any pricing methodology would be inherently susceptible to error and prone to gaming by network operators. Pivotel would however welcome further analysis and an industry consultation during the course of the five-year period of redeclaration to see whether this may be workable in the future.
- 5.4 Pivotel considers that extending the declaration of FOAS and FTAS is critical to:
- 5.4.1 Achieve any-to-any connectivity since declaration will ensure that end-users are able to communicate on different networks;
 - 5.4.2 Promote competition in retail markets for the provision of fixed, bundled fixed voice and broadband services, and mobile voice services to end-users.
 - 5.4.3 Promote the efficient use of Telstra's remaining copper network.
- 5.5 The fixed originating access service ('FOAS') and fixed terminating access service ('FTAS') are used to allow the connection of voice calls between end-users on different networks (and involve at least one call to or from a geographic number).
- 5.6 Pivotel recognises the increased use of mobiles and over-the-top services ('OTT') for voice calls. However, as the ACCC recognises, there is still a group of consumers that are dependent on fixed line services (including carrier-grade and best-efforts VoIP services) for voice calling. ACCC data on Telstra's Customer Access Network ('CAN') indicates that, as of 31 March 2023, there were 416,070 "voice only" services in operation. In addition to this, the number of "voice only" and "voice and DSL" services stands at over half a million, and there are approximately 543,917 total services still in operation on Telstra's CAN. It's evident that many consumers still rely on a fixed line service for voice calls.
- 5.7 In addition, the growing range of CaaS and CPaaS providers including, those offering hosted PBX and call centre services, and OTT applications that include voice break out functionality, often use fixed line numbers to provide ubiquitous two-way calling services. In the absence of declaration, providers of these services may not be able to procure termination of calls and messages on *all* end-users at prices reflecting the efficient cost of supply.
- 5.8 Pivotel agrees with the ACCC's comments that "*fixed line voice services remain critical for some vulnerable consumers and businesses who require access to a reliable and affordable service*".¹² Fixed line voice services are particularly important for consumers in regional and remote areas, as well as for parts of the population that are disadvantaged or vulnerable, such

¹² ACCC Discussion Paper, page 35.

as the elderly. As recognised in the Discussion Paper, the older population is more likely to use both mobile and fixed voice services.

- 5.9 Pivotel's view is informed through its experiences in regional and rural communities, having built or being in the process of building community networks in a number of States.
- 5.10 Pivotel recognises that the use of OTT voice services by younger generations in Australia is increasing. However, the take up of OTT voice services by older Australians is significantly less (at just 35% for the age cohort 65-74).¹³ Regional consumers are also less likely to use OTT voice services.¹⁴ OTT services rely upon reliable internet connectivity and both parties to a call having access to the same application/service.

Should the declaration be extended?

- 5.11 Pivotel considers that extending the declaration for FOAS and FTAS will promote the long-term interests of end users.
- 5.12 The interconnection services continue to be important wholesale inputs for retail providers to supply voice services (both in fixed-line and mobile markets). The FOAS facilitates the carriage of voice calls from a geographic number in an access provider's network to a point of interconnection ('**POI**'), whereas the FTAS facilitates the carriage of a voice call from a POI to a party that's called using a geographic number on the access provider's network.
- 5.13 The FTAS service is required for operators to terminate calls on the fixed network. FOAS is relevant to the provision of the "special services" such as 13/1300 and 180/1800 numbers.
- 5.14 The declaration of FOAS and FTAS will support any-to-any connectivity by ensuring that customers can make and receive calls irrespective of the network used. As the ACCC recognises,¹⁵ a provider of a retail voice service has no choice but to acquire a termination service for "off-net" calls (i.e., calls to an end-user on a different network). In essence, any-to-any connectivity can't be achieved without these services.
- 5.15 The declaration of both FOAS and FTAS will also serve to promote competition in retail markets for the provision of fixed voice services (and bundled fixed voice and broadband services).
- 5.16 Without regulation, Pivotel considers that larger providers would be incentivised to discriminate against smaller service providers and retail competitors. A dominant provider may be able to offer interconnection services on unreasonable or unrealistic terms (or refuse to supply these services altogether). As the ACCC recognised in the final decision of its fixed line telecommunications service declaration inquiry (2018),¹⁶ a dominant provider of fixed voice services could increase prices for origination of calls on its network to special numbers that terminate on a smaller network (in circumstances where a smaller network uses the special services - 13/1300 and 180/1800 numbers - and needs to acquire originating access from the larger provider).
- 5.17 Also, as the ACCC has discussed,¹⁷ there is a significant risk that a provider of FTAS with market power would have the incentive to increase prices for termination on its fixed network (e.g., for mobile calls). This may also impact smaller mobile networks that rely on their ability to terminate calls on fixed networks on reasonable terms. In essence, a provider with market

¹³ ACCC Discussion Paper, page 35.

¹⁴ ACCC Discussion Paper, page 35; ACMA, Communications and media in Australia – How we communicate (Executive summary and key findings), page 3.

¹⁵ Discussion Paper, page 33.

¹⁶ ACCC, Fixed line telecommunications services declaration inquiry (final decision – 2018) para 6.1.3.

¹⁷ ACCC, Fixed line telecommunications services declaration inquiry (final decision – 2018), paragraph 6.1.3.

power could exercise their competitive advantage in respect of interconnection services, in the mobile market. Without access to an essential input to supply voice services, smaller providers of fixed voice and mobile services could be limited in their ability to offer competing services to consumers. This would harm competition in the market for fixed voice and mobile services, as well as bundled fixed voice and broadband services.

- 5.18 Increased costs for interconnection services would also constitute an inefficient use of the remaining network infrastructure owned by Telstra. Ultimately, the consumers that are still reliant on fixed line voice services, including those in regional and remote areas and the elderly, would suffer.
- 5.19 Pivotel also agrees with the ACCC's previous concerns that denying interconnection or raising charges could persuade end users to move networks to carriers with market power (or indeed discourage them from contracting with smaller providers or new entrants).¹⁸
- 5.20 By contrast, extending the declaration would ensure that service providers can continue to interconnect with other networks on reasonable terms and provide competitive services to consumers. This means that providers can compete on price and service quality, and consumers are provided with more choice. This would serve to promote competition in retail markets for the provision of fixed voice services, bundled fixed voice and broadband services, and mobile networks, but also ensure the efficient use of Telstra's copper network infrastructure.

6. WHOLESALE ADSL SERVICE

- 6.1 Pivotel also considers that the declaration of the Wholesale Asymmetric Digital Subscriber Line ('**WADSL**') should be extended for an initial period of 3 years.
- 6.2 Pivotel considers that extending the declaration of ADSL is important to promote the long-term interests of end-users, particularly in regional and rural areas. However, it also recognises that migration to the NBN, together with other potential substitutes in regional areas such as Low Earth Orbit ('**LEO**') satellite services, may over-time make declaration of WADSL unnecessary. For that reason, it proposes a slightly shorter period of declaration in this case.
- 6.3 Declaration would ensure competition in markets for the supply of fixed-line broadband services to end-users. In the absence of regulation, retail service providers ('**RSPs**') would likely face impediments to competing and there would be no competitive limit on Telstra. It would also promote the economically efficient use of Telstra's DSL infrastructure.
- 6.4 A decision to extend the declaration would give retail service providers ('**RSPs**') and end-users further time to move from DSL infrastructure to alternative services if they decide to do so. This is particularly important considering the limitations of some alternative broadband services currently available in the market (e.g., LEO satellite networks). Further time is needed to allow for these services to evolve into viable substitutes (e.g., through increased investment). Furthermore, LEO networks are not presently equipped to contend.
- 6.5 The WADSL service enables RSPs to purchase a wholesale telecommunications service from Telstra without needing to install their own infrastructure at a Telstra exchange, which allows RSPs to compete in providing fixed-line broadband services to end-users.
- 6.6 Pivotel recognises that the demand for ADSL has declined with the completion of the NBN rollout, and migration of broadband services to the NBN. However, there are still a number of consumers in Australia that make use of ADSL services. As of March 2023, the ACCC

¹⁸ ACCC, Fixed line telecommunications services declaration inquiry (final decision - 2018), paragraph 6.3.3.

reported that there were still 128,709 DSL services in use.¹⁹ ADSL services will continue to be useful to these consumers. The Discussion Paper points out that, while ADSL services continued to decline between 2019 and 2022, it was still one of the most popular non-NBN broadband services.

- 6.7 As the ACCC points out, rates of disconnection have typically been much slower in regional and remote areas, and many of the consumers that remain on copper services are located in regional and remote areas. As a leading provider of communications solutions in rural and remote environments, Pivotel understands the challenges in delivering communication solutions in these areas, which increases the need for effective regulation.
- 6.8 Considering the number of customers that still use ADSL services, Pivotel considers that it is important for WADSL to be re-declared, so that access seekers are able to acquire the WADSL service on fair terms and at a reasonable cost (with prices reflective of efficient costs).
- 6.9 In Pivotel's view, Telstra's ADSL infrastructure continues to be an important bottleneck. As the ACCC recognises²⁰, Telstra enjoys the unique position where it is both the supplier of fixed line infrastructure to access seekers in wholesale markets (which provide retail services to end-users), but also offers retail products its customers. This means that, in the absence of declaration, Telstra will have the ability to raise prices, impose restrictive terms of access on service providers, or limit its service quality. Telstra will be incentivised to preference itself in the provision of ADSL services, which would be detrimental to access seekers and ultimately, end-users.
- 6.10 An ACCC decision to extend the declaration will continue to encourage the efficient use of Telstra's DSL infrastructure. In Pivotel's view, extending the declaration would also provide certainty for those end-users that continue to use ADSL services, particularly in regional and remote areas.
- 6.11 Notwithstanding this, Pivotel recognises that demand for ADSL has declined in recent years, with the completion of the NBN and the growing number of alternative broadband services available in the market. Pivotel therefore considers it is appropriate to extend the declaration for a limited period of 3 years. This will allow end-users time to move from DSL infrastructure to alternative services if they decide to do so and the service can be redeclared if that appears to be in the LTIE.

Pivotel's views on alternative broadband services available in the market

- 6.12 In the Discussion Paper, the ACCC points to a range of alternative solutions that are available for customers seeking a broadband service, such as the NBN, fixed line superfast broadband services, mobile and wireless services, and/or low Earth orbit satellites ('LEO').
- 6.13 Pivotel suggests that the ACCC consider the limitations of some internet services. In particular, Pivotel considers that there can be a lack of *effective* substitutes outside the NBN fixed line footprint, particularly in regional and rural areas. In contrast, ADSL continues to be a reliable service.
- 6.14 More specifically, in Pivotel's view, traditional (i.e., GSO) satellite broadband services such as Sky Muster are not always effective substitutes in regional and remote areas. Pivotel agrees with the ACCC's comments that satellite broadband service can be limited by data caps, latency problems and compromised performance. The NBN's "Sky Muster" satellite service can only provide modest download speeds, and consumers have suffered from internet

¹⁹ <https://www.accc.gov.au/by-industry/telecommunications-and-internet/national-broadband-network-nbn-access-regulation/nbn-wholesale-market-indicators-report/march-quarter-2023-report>

²⁰ Discussion Paper, page 25.

outages and satellite beam congestion. In 2022, an extended outage took place that caused hundreds of customers to have no internet service for a fortnight.²¹ The service has also been criticised for congestion on “clogged-up” satellite beams, which lead to Labor announcing its intention to work with NBN to reduce some of this congestion and increase data allowances for Sky Muster users.²² This demonstrates that the Sky Muster satellite service is simply not an effective substitute for other broadband services in regional and remote areas. As the demand for bandwidth increases, it will become even more difficult for the Sky Muster satellite service to compete. NBN’s recent request for information from LEO satellite operators appears to be an acknowledgement of this as it seeks to engage with the industry to see whether that can be incorporated into the NBN satellite footprint²³.

- 6.15 Pivotel’s views are supported by an online survey conducted by the Australian Communications Consumer Action Network in 2021²⁴, which was directed at consumers’ experience of their ADSL service for those who had either satellite or fixed wireless technology at their premises. The results demonstrated that 62% of respondents did not intend to switch to NBN satellite or fixed wireless technology. The results indicated “*that consumers generally do not consider a satellite or fixed wireless connection to be of equivalent quality to their current ADSL service due to reliability, speed, latency and cost issues*”.²⁵ There was a sentiment from consumers that, while ADSL was slow, it was the best option available considering satellite’s limitations. Respondents to the survey indicated that connection to an ADSL service was “*essential and necessary*”.
- 6.16 Pivotel recognises that the services provided by LEO satellite networks services are emerging as *potential* substitutes and, in some circumstances, can provide improved upload and download speeds. However, LEO technology is relatively new and has not been fully tested in the market. The cost of obtaining these services is significantly higher compared to other services (including service and connection prices). For example, Starlink internet plans reportedly cost around \$139 per month, and consumers are also required to pay for hardware, shipping, and handling fees.²⁶ At present, the standard retail price for a Starlink terminal is \$924. Considering the current cost of living pressures that the ACCC has cited in its priorities for 2023-24, these costs mean that the services are simply out of reach of many Australians in regional and rural areas. There are also real questions around Starlink’s capacity limits.
- 6.17 Pivotel is aware that Starlink has entered into an agreement with Optus for straight to mobile connectivity. While this will enable consumers to avoid purchasing costly Starlink hardware, it remains to be seen how this service will be priced by Optus, whether it will be affected by capacity constraints and what performance limitations will be experienced. Furthermore, the service is not intended to roll out voice or data connectivity until late 2025.
- 6.18 Pivotel also agrees with the ACCC’s comments on LEO satellite networks that “*there are some price and quality differences when compared to the legacy fixed line services*”.²⁷ Pivotel therefore suggests that the ACCC give further consideration to whether satellite technologies and other broadband services are effective substitutes, particularly for consumers in regional and rural areas.

²¹ <https://www.itnews.com.au/news/nbn-co-claims-progress-in-fortnight-long-sky-muster-internet-outage-574409>

²² <https://www.itnews.com.au/news/labor-wants-to-tackle-sky-muster-satellite-beam-congestion-577956>

²³ <https://www.nbnco.com.au/corporate-information/media-centre/media-statements/nbn-co-exploring-connectivity-solutions-with-low-earth-orbit-satellite-providers>

²⁴ <https://www.accc.gov.au/system/files/ACCAN%20-%20Submission%20to%20WADSL%20declaration%20inquiry.pdf>

²⁵ <https://www.accc.gov.au/system/files/ACCAN%20-%20Submission%20to%20WADSL%20declaration%20inquiry.pdf>

²⁶ <https://www.whistleout.com.au/Broadband/Guides/Starlink-Australia-Everything-you-need-to-know>

²⁷ Discussion Paper, page 22.

6.19 Pivotel reiterates that the declaration of the wholesale ADSL should be extended for a further 3 years. At the conclusion of which, industry and the ACCC should have a better view of whether satellite-based services are emerging as genuine substitutes.

7. MOBILE TERMINATING ACCESS SERVICE

7.1 Pivotel considers that the continued declaration of MTAS for voice remains in the LTIE. It also considers that declaration should be extended to cover SMS (both P2P and A2P).

7.2 Declaration of MTAS (for voice and SMS) should be for a period of five (5) years. Unlike with certain of the fixed line services, this is not a case where directly connected customers are transitioning from legacy networks to a new broadband network. To the contrary, mobile networks are increasingly becoming the preferred means of communication for calls, messages, and other media. As a result, there is no reason for a shorter declaration period.

7.3 Declaration is in the LTIE because it will promote:

- a) competition in the wholesale markets for termination of voice calls and SMS and in the downstream retail markets for Person-to-Person (“P2P”) and Application-to-Person (“A2P”) messaging services by ensuring that essential inputs are supplied at cost reflective prices;
- b) competition in the mobile services market and wholesale voice interconnection market by ensuring that large national MNOs cannot abuse their market power to charge monopoly rents on an essential input and paving the way for emerging technologies, regional carriers or VoIP providers and messaging providers;
- c) any-to-any connectivity by ensuring that consumers and businesses are able to acquire and receive ubiquitous and cost-effective messages and calls, no matter where they live or work; and
- d) the economically efficient use of communications infrastructure by which the services are provided by preventing incumbent mobile operators from charging monopoly rents for termination of calls or messages on their networks and offering businesses and consumers a wider choice of messaging services to fit their particular needs. This in turn will promote productive, allocative and dynamic efficiency.

7.4 Pivotel’s proposed amendment to the Commission’s current service description for Domestic Mobile Terminating Access is located at Annexure 1 of this submission.

Declaration of MTAS for voice remains in the LTIE

7.5 As previously identified by the ACCC, MNO’s have a monopoly on termination of traffic on their own networks.²⁸

7.6 MTAS is relevant not only for mobile-to-mobile calls but also fixed-to-mobile calls. Thus declaration of MTAS supports any-to-any connectivity with 35.6% of Australians still retaining a fixed landline.²⁹ In addition, to the extent that the call origination is occurring via OTT or other software based applications on laptops, tablets or other devices, these calls equally require access to termination on mobile networks to achieve any to any connectivity and to continue to exert competitive constraints on traditional networks.

²⁸ ACCC, Domestic Mobile Terminating Access Service Declaration Inquiry (Final Report – 2019).

²⁹ ACMA “How Australians make voice calls at home” snapshot to March 2022. Link [attached](#)

- 7.7 Mobile voice communication is also essential in its own right. 63% of Australians only use a mobile for voice calls.³⁰ They don't have a fixed voice service at home. Indeed, since 2015, the amount of Australians who only have a mobile for voice calls at home has more than doubled.³¹ OTT services such as Whatsapp or Facebook Messenger are not substitutes. They do not come with a number and require that both parties to the call have reliable broadband connectivity and access to the same OTT service. To that extent, they cannot promote any-to-any connectivity. To the extent that some OTT applications (e.g., Microsoft Teams) have a capability to make calls to fixed and mobile services, these services are also reliant on access to MTAS for voice on reasonable terms. Continued regulation of MTAS for voice encourages innovation and competitive outcomes as OTT providers are given price and access certainty and are not at risk of monopolistic behaviour by the MNOs.
- 7.8 In addition, OTT services have proven to be less accessible to vulnerable communities and the elderly. For example, consumers in regional areas are less likely to use an app for voice calls (43%) compared to consumers in metropolitan areas (57%).³² The lack of accessibility to OTT services for the elderly is shown by the fact that only 35% of those aged 65-74 use these services for voice calls.³³ In comparison, up to 68% of those aged 18-24 make use of OTT services for voice calling.³⁴
- 7.9 Pivotel recognises that recent years have seen an increase in the number of providers offering new and disruptive services, such as communications platform as a service (“CPaaS”) and communications as a service (“CaaS”) providers offering hosted PBX and call centre services. Additionally, some OTT applications (e.g., Microsoft Teams) have a capability to make voice calls. Pivotel does not consider these services to be substitutes for mobile voice communications. This is amply demonstrated by the extremely high levels of penetration of mobile services in Australia and the number of Australians that continue to rely on mobiles for calling.
- 7.10 In any event, the prevalence of new communications services makes no difference to the fundamental basis for the declaration of MTAS. It is still the case that a very large number of both calls *and* messages (even those originating on OTT applications and other communications services) need to be terminated on a mobile device. Furthermore, each MNO continues to have a monopoly over termination of calls and messages on their own network, irrespective of how calls or messages are originated. The success of new communications services (e.g., OTT services) and their ability to compete in respect of the provision of voice/SMS services relies on access to critical inputs (such as the ability to terminate traffic on non-discriminatory and reasonable terms). In this way, continued regulation of MTAS will only serve to encourage innovation, the growth of OTT services and competitive outcomes.
- 7.11 Telstra, in particular, continues to have a significant market share in the mobile services market, particularly in remote and regional areas where Telstra may be the only reliable option for consumers (as the Commission has identified in both the regional infrastructure inquiry and the TPG-Telstra authorisation decision)³⁵. In the absence of declaration of MTAS for voice, Pivotel considers that there remains a risk that Telstra, in particular, will exercise this market power to impose unreasonable pricing or conditions on other MNOs wishing to interconnect with it. This will hamper competition and any-to-any connectivity, while making it difficult for new entrants or smaller operators seeking to establish community networks.

³⁰ ACMA “How Australians make voice calls at home” snapshot to March 2022.

³¹ Ibid

³² ACMA “[Communications and media in Australia: How we communicate – Executive summary and key findings](#)”, December 2022 pg.3

³³ Discussion paper, page 35

³⁴ Discussion paper, page 35

³⁵ See para 6.64 of the ACCC Reasons for Determination – Application for merger authorisation lodged by Telstra and TPG and ACCC Report on preliminary findings, Regional Mobile Infrastructure Inquiry (18 April 2023).

- 7.12 If MTAS for voice ceased to be a declared service offered at a regulated price, then the wholesale price will increase and there will be inevitable impacts on end-users of fixed-line and mobile services, which rely on MTAS as a crucial input. There is also a risk that MNO's could withhold termination services or charge monopoly rents for calls originating from OTT applications (as Pivotel has experienced with SMS). The consequences of this will be a foreclosing of the market for potential new entrant MNOs, and a likely increase in the pricing offered to consumers in the retail market. Pivotel has experienced these consequences following the cessation of declaration of MTAS for SMS. This is not in the LTIE.
- 7.13 In the Discussion Paper, the Commission states that:

As of 2023, the vast majority of mobile plans include unlimited standard national calls and person-to-person SMS. This means that the cost to consumers of SMS and national calls is effectively zero.

Pivotel disagrees with this statement. The cost to consumers of SMS and national calls is not zero notwithstanding the existence of plans that contain unlimited minutes (or SMS). Indeed, mobile plans (both pre-paid and post-paid) offered by the national MNOs are increasing in cost at above-inflation levels. The existence of 'unlimited' plans like these is a result of declaration, or in the case of SMS, the threat of re-declaration. This should not however be taken for granted particularly when the national MNO's hold 92% of the retail mobile market between them³⁶. Indeed, Optus recently announced plan prices would increase by as much as 60 percent³⁷. While Telstra has also increased the cost of its prepaid plans above inflation³⁸.

- 7.14 Even if retail pricing had remained constant, an increase in termination charges would hamper allocative efficiency and innovation. Rather than reducing the prevalence of scam as the large MNO's have (perhaps self-servingly) alleged, this will only increase the risk of scam by reducing incentives for innovative technical solutions designed to combat it.
- 7.15 While there has rightly been a great deal of scrutiny over scam SMS and steps taken to combat that, the fact remains that far greater losses from scam originates via phone calls or mobile applications. While Scamwatch found that volumes of SMS scams for 2022 had surpassed volumes by phone (75,946 to 57,691), reported losses for phone scams are significantly higher than those for SMS (\$129,694,883 to \$26,815,795). Losses incurred via mobile applications scams are also considerably higher than those for SMS (totalling \$67,242,518)³⁹.
- 7.16 MNO's and MVNO's should be investing in scam detection and filtering technology rather than paying inflated wholesale costs for a monopoly service that does not accurately reflect the cost of supply.

Is the service description still appropriate?

- 7.17 Pivotel considers that the MTAS service description and, in particular, the definition of PoI should be amended to capture IP interfaces as well as physical points of interconnection. This is necessary given that carrier networks are increasingly IP-based and without change the current description could allow for gaming.

³⁶ Discussion Paper, Figure 5.1.

³⁷ <https://www.afr.com/rear-window/optus-jacks-up-bills-while-cheering-for-tpg-and-telstra-deal-failure-20230622-p5dikq>

³⁸ <https://www.afr.com/companies/telecommunications/telstra-hikes-pre-paid-mobile-prices-by-20pc-more-increases-to-come-20230428-p5d3zz>

³⁹ Scamwatch "Scam Statistics 2022 – Delivery Method"

MTAS for SMS

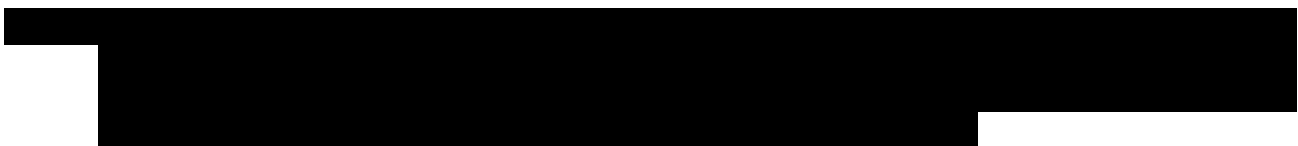
7.18 The need for declaration of MTAS for SMS is most keenly felt in the A2P SMS market. However, Pivotel considers that it should also extend to P2P SMS as, in practice, the method of delivery of both types of SMS by the MNOs is identical.

7.19 When MTAS for SMS was last declared by the Commission the price set out in the Commission’s Final Access Determination (“FAD”) was 0.03 cents per message with no distinction between A2P and P2P. The three national MNOs have already imposed, or proposed, termination charges vastly in excess of that amount for A2P messages. This is on top of significant price increases by two of the three in April 2020 and June 2021. The MNO’s have cited various justifications for these increases which, in Pivotel’s view, do not withstand scrutiny.



In Pivotel’s view, this will have a chilling effect on competition and represents an attempt by Optus to abuse the monopoly that it has over terminating traffic on its own mobile network.

7.20 It is important to recognise that the SMS terminating access service provided in respect of A2P and P2P messages is functionally the same. Furthermore, the way in which it is charged for by the large national MNOs is basically the same irrespective of whether the message was originated on a mobile device or by a software application such as an Application Programming Interface (“API”). An API is simply an innovative new tool which enables businesses to contact their customers in a more timely and efficient way than by physically creating multiple messages on a mobile device. Importantly, once the message crosses the point-of-interconnect (“PoI”) with the terminating MNO, it is treated exactly the same irrespective of whether it originated on a mobile device or an API. It follows that there is no legitimate basis for suggesting that the cost of terminating an A2P message is higher than for terminating a P2P message.



[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]

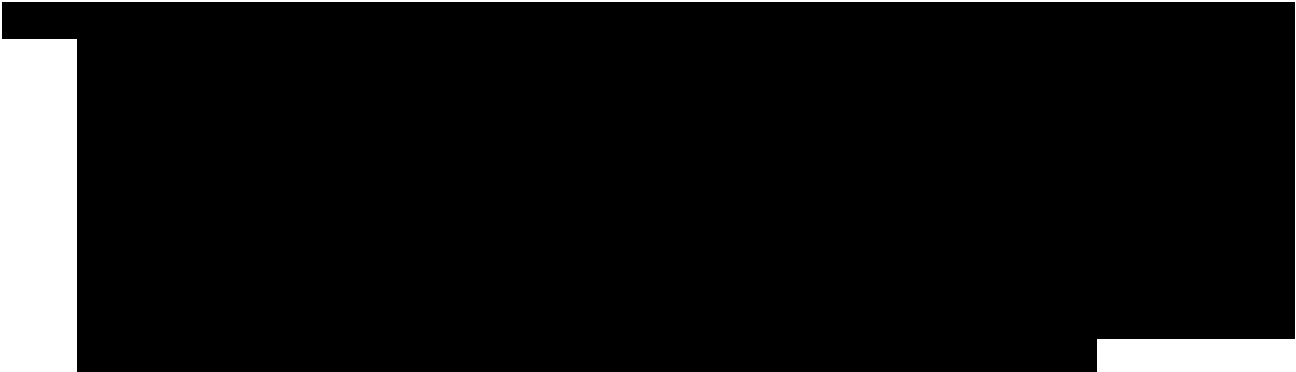




7.22 On the assumption that the prices determined by the Commission in the 2015 FAD (which commenced on 1 January 2016) were reflective of the efficient cost of supplying MTAS for SMS, it is impossible to be satisfied that prices which are, on average, [REDACTED] higher are similarly cost reflective only six years later. This is particularly so given that the cost of capital has remained relatively constant since then. There is no difference in the underlying cost that an MNO incurs associated with terminating P2P messages on its network as distinct from A2P messages. This is unsurprising given that the same SMS termination service is being provided in both cases.



The increase is intended to deliberately target A2P traffic and has the effect of punishing MNOs which have a higher proportion of that traffic, including because of their success in the wholesale and, in some cases, retail A2P messaging services markets. [REDACTED]



7.26 It is hard to see the vastly increased charges for terminating unbalanced (i.e. A2P) SMS traffic as anything more than an attempt to extract monopoly rents by incumbent national MNO's.



This, in turn, is presumably because they have either been less successful in competing with MNOs such as Pivotel in the wholesale A2P market or have not seen the need to compete given the ability to extract monopoly rents in the absence of declaration.

- 7.27 Furthermore, when the Commission previously decided to let the declaration of MTAS for SMS lapse, it also stated that any attempt to deny Pivotel access to SMS termination services on reasonable terms, particularly if undertaken by the three other MNO's together, would raise serious concerns under the CCA and would warrant further investigation by the Commission.⁴⁴ Importantly, the Commission's statement made no distinction between P2P and A2P SMS. Nor should it, given that the termination service is the same in both cases (as the ACCC's previous service description made clear).
- 7.28 Pivotel considers the price increases imposed by each of the other MNOs constitutes an attempt to deny Pivotel access to MTAS for SMS on reasonable terms given that the proposed pricing is manifestly above the cost.

Relevant Markets

7.29 In the Discussion Paper, the Commission identifies the following markets:

- Mobile services market (the “**retail mobile market**”);
- Wholesale voice interconnection services (the “**wholesale market**”)
- Person to person SMS (the “**P2P market**”); and
- Application- to-person SMS (the “**A2P market**”).

7.30 In the Domestic Mobile Terminating Access Service Declaration Inquiry - Final Report 2019 (the “**2019 Report**”), the Commission considered the markets relevant to the question of whether declaration of SMS termination was in the LTIE to be:

- the wholesale market for SMS termination services;
- retail market for messaging services; and
- downstream market for application-to-person (A2P) SMS services.

7.31 There is considerable overlap between the markets identified in the Discussion Paper and those in the 2019 Report (with the inclusion of a new “mobile services market”).

7.32 Pivotel agrees with the Commission that there is a separate market for P2P SMS. However, with regard to A2P SMS, Pivotel draws the Commission's attention to the report by Houston Kemp which identifies 4 separate markets “*within which to examine the competitive effects of declaration of the MTAS for SMS*”. These are:

- *the supply of A2P SMS termination services offered by each MNO for delivery of messages to subscribers on their respective networks;*
- *the supply of wholesale A2P SMS services for the delivery of A2P messages on a single network currently offered as off-net services or on-net services by MNOs to SMS aggregators;*

⁴⁴ Section 5.1.3 Domestic Mobile Terminating Access Service Declaration Inquiry – Final Report.

- *the supply of wholesale aggregated A2P SMS services for delivery of A2P messages across all networks offered by some MNOs and SMS aggregators to retail A2P service providers; and*
- *the supply of retail A2P SMS services currently offered by MNOs, SMS aggregators and other A2P service providers to end-users, such as small, medium and large enterprises, in Australia.*⁴⁵

7.33 Pivotel concurs with Houston Kemp’s assessment.

7.34 In relation to wholesale markets, SMS termination services are still required for an MNO to provide SMS (both P2P and A2P) to end users on another MNO’s network. As the Commission itself has previously concluded, each MNO has a monopoly over termination of calls and messages on their own network.⁴⁶ This is for the simple reason that a person can only receive a call or message once it has been terminated on that person’s mobile device by the carrier to whom the end-user is directly connected. Irrespective of the extent (if any) to which Over-the-top (“OTT”) and VoIP or Cloud-based services are substitutable for SMS and traditional voice calls, the fact remains that only one operator can ultimately terminate the SMS message or voice call. Moreover, as set out at paragraphs 7.38 and 7.75 below, OTT services have not proven to be substitutes for A2P SMS even if they may be partial substitutes for P2P SMS.

7.35 A key reason for this is that OTT applications require both end-users (as that term was considered in the 2019 Inquiry to apply for the purposes of the A2P market) and consumers to have the same application, whether that is an end-user’s own application or an OTT messaging application such as WhatsApp, Messenger or WeChat. End-users cannot reliably expect that their consumers will use one single OTT application given the myriad on offer and thus still rely upon SMS. Indeed, Whatsapp’s overall penetration rates in Australia remain comparatively low compared to other jurisdictions at 32.9% as at April 2022.⁴⁷ Perhaps more importantly, the percentage share of A2P SMS traffic lost to Whatsapp within Oceania is extremely low at [REDACTED] and will only rise to [REDACTED] by 2027⁴⁸. Superiority of SMS, for A2P communications in particular, is confirmed by the rapid growth in traffic set out at paragraph 7.51 below.

7.36 In these circumstances, it is difficult to see how Whatsapp for Business or similar OTT applications could credibly be seen as a substitute.

7.37 Houston Kemp have expressed the 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. Given these features and the trends in the use of A2P SMS in Australia, we expect that a five to 10 per cent increase in the retail price of A2P SMS from the competitive level by a hypothetical monopolist would be profitable because it would not give rise to a significant amount of demand-side substitution to alternative A2P messaging services. As such, we do not consider those alternative messaging services as being in the retail market.”*⁴⁹

⁴⁵ Houston Kemp report on Effect of declaration on competition in A2P SMS markets para.124.

⁴⁶ Sections 4.1.3 and 5.1.3 Domestic Mobile Terminating Access Service Declaration Inquiry – Final Report.

⁴⁷ Statista <https://www.statista.com/statistics/1311229/whatsapp-usage-messaging-app-users-by-country/>

⁴⁸ [REDACTED]

⁴⁹ Houston Kemp report on Effect of declaration on competition in A2P SMS markets para.170.

7.38 In addition, OTT services are not available to the percentage of the population who do not have (or cannot afford) reliable access to mobile data. OTT services will continue to be less accessible to disadvantaged communities and older people. By way of example, while smartphone usage in Australia now sits at 94%⁵⁰ the percentage of older people (65+) that use an app to send a message sits at 53%, while this falls to 37% of those 75 years and over. Similarly, regional users of messaging applications sit at only 67%. Accordingly, Pivotel considers that SMS, particularly for A2P services will continue to be the main method of communication for end-users with their consumers. OTT services will, at best, be a complementary service used in conjunction with SMS.

7.39 Furthermore, services that the Discussion Paper equates with OTT services including Zoom and Microsoft Teams⁵¹ are beginning to offer SMS functionality (in addition to the phone and video services they currently offer). Zoom has already launched its local SMS service⁵². These services are not substitutes for P2P SMS (or mobile voice calls), but rather the introduction of SMS on these services points to them being complementary services. These services will also require network termination and there is a real risk that if declaration of MTAS for SMS is not made, then innovation, efficiency and any-to-any connectivity will be stifled. In short, these services are also beholden to the monopoly power of the national MNO's.

HOW A2P SMS IS PROVIDED

7.40 In order to support the Commission's understanding of the way in which A2P SMS is provided and the various operators involved, Pivotel has prepared the diagram in Figure 1 below:

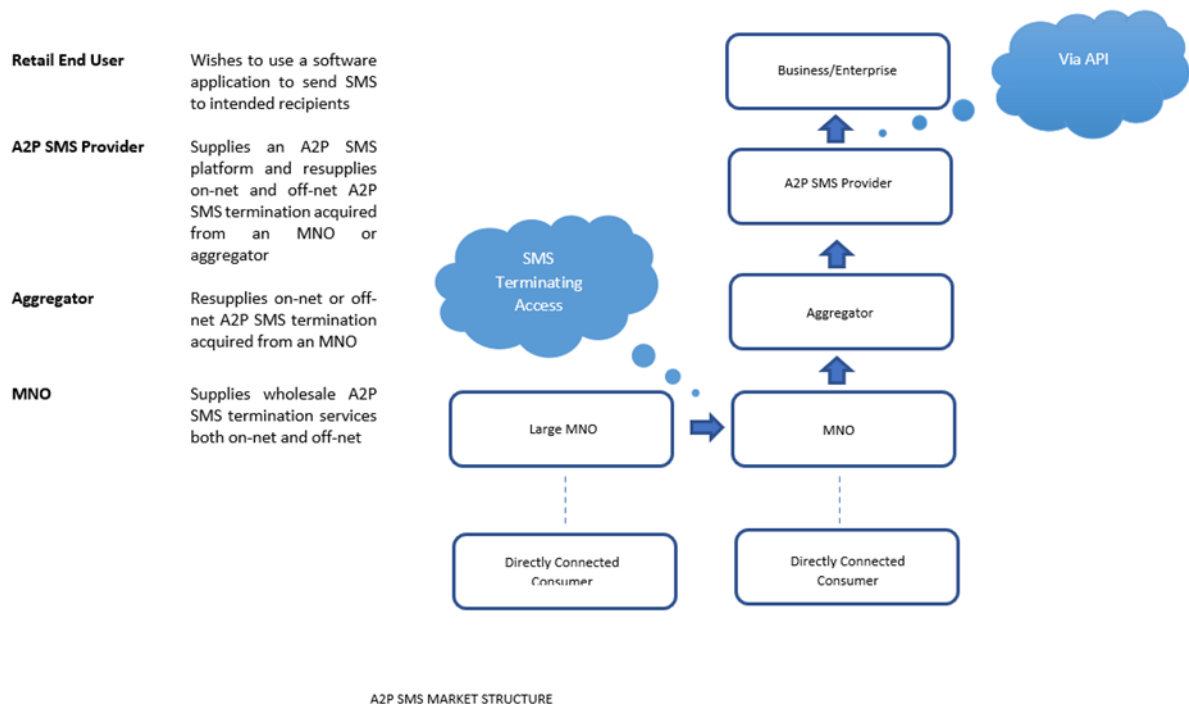


Figure 1 – the A2P Market

7.41 An MNO has the mobile telecommunications infrastructure and network to deliver SMS to consumers. This can occur in two ways in the case of A2P SMS:

⁵⁰ ACCC Report: Communications and media in Australia: How we communicate as at June 2021.

⁵¹ Discussion Paper p.35.

⁵² <https://support.zoom.us/hc/en-us/articles/14821281195661-Zoom-Phone-support-for-SMS-for-Australia>

- (a) *“On-net” supply*: An MNO delivers SMS to a directly - connected consumer’s device.
- (b) *“Off-net” supply*: To supply wholesale A2P services the MNO must acquire SMS termination services from the “on-net” MNO which controls access to its directly - connected consumers.

7.42 Pivotel has been a key player in the wholesale market by providing off-net SMS services to SMS aggregators and service providers. In order to do so, Pivotel had entered into interconnection agreements with the other large national MNOs which enabled SMS termination on their respective networks.

7.43 A2P SMS providers and aggregators occupy the middle layer of the supply chain. They operate as intermediaries between end – users and MNO’s. A2P SMS providers operate platforms into which A2P SMS content and contact database can be input. They provide the SMS to the MNO for delivery to recipients. An aggregator acquires wholesale SMS termination services from MNO’s and re-supply those services to their customers which may be smaller aggregators or larger end-users with their own internal messaging platforms. This middle layer has supported continuing growth in the A2P market by enabling APIs to be embedded in the systems used by small and medium businesses to communicate with their customers.

7.44 End-users: are comprised of small, medium and large businesses that communicate with consumers via SMS. Some large end-users may have their own internal platforms to prepare and initiate delivery of an SMS (enabling them to bypass the middle layer of the supply chain). SMS communications are frequently used to provide appointment/reservation reminders, delivery notifications, medical prescriptions, welfare checks, two factor authentication, electronic receipts, password resets and marketing.

7.45 The importance of A2P SMS as a means of communication and the efficiency benefits that it brings cannot be understated. By way of example, during the Covid-19 pandemic, telehealth consultations emerged as a means of alleviating the pressure on our health system. Telehealth consultants were able to send an A2P message to a patient containing their prescription thus minimising the strain across the medical supply chain. Similarly, delivery notifications and the ability to confirm availability for a delivery bring considerable productivity and efficiency benefits not only for the business relying upon them but also for consumers.

Legal basis for declaration of MTAS for SMS

7.46 For the reasons set out in this submission, Pivotel is firmly of the view that:

- (a) MTAS for SMS is an eligible service within the meaning of section 152AL. Indeed, any conclusion to the contrary would be unusual given the Commission’s previous declaration of this service; and
- (b) Declaration of MTAS for SMS is in the LTIE as it promotes competition in markets for P2P and A2P messaging, enhances any-to-any connectivity and promotes the efficient use of infrastructure by means of which the services are provided.

Commission has the power to vary existing declaration

7.47 As section 152AO of the CCA makes clear, the Commission has the power by virtue of section 33(3) of the AIA in conjunction with section 152AL of the CCA to vary an existing declaration. Section 152AO also provides that the Commission may vary an existing declaration without holding a public inquiry where the variation is of a minor nature in accordance with Procedural Rules made by the Commission pursuant to section 152ELA of the CCA.

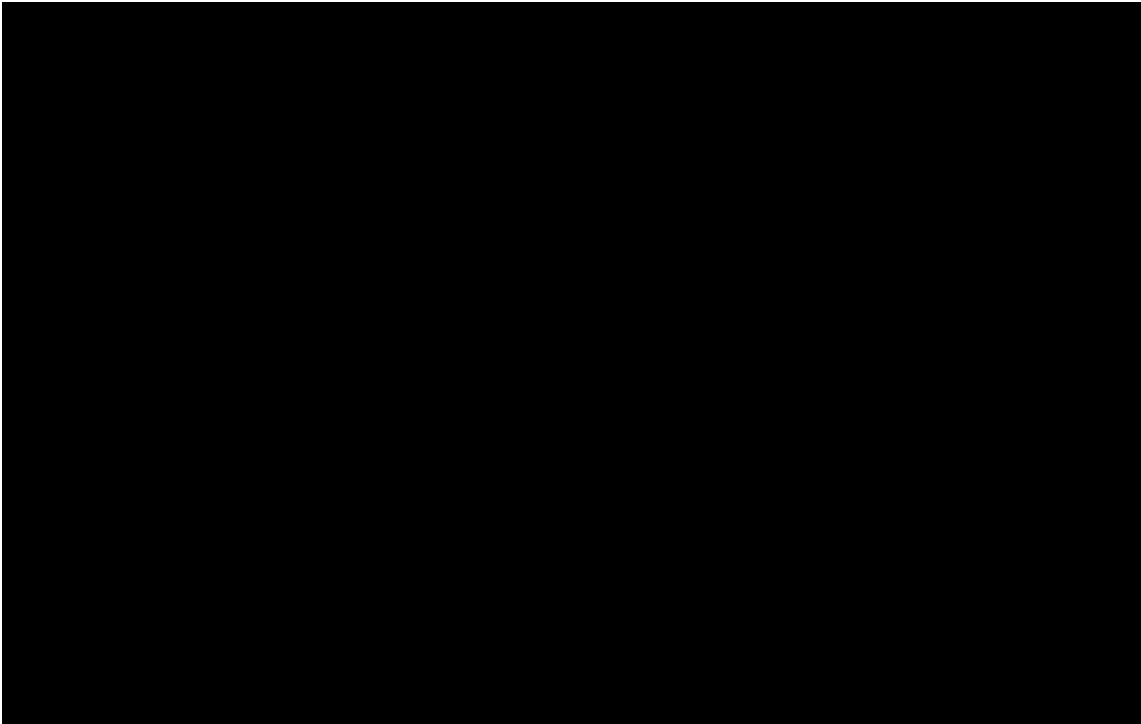
7.48 Pivotel considers the position that the SMS termination services is an eligible service to be non-contentious given the service has previously been declared in 2014 and was, until 2019, subject to access obligations. Notwithstanding this, for completeness Pivotel submits that:

- the service description for MTAS for SMS set out in the 2015 Declaration remains appropriate;
- MTAS for SMS is a listed carriage service within the meaning of the Telco Act because it is a carriage service between points in Australia;
- if declared, it would be an ‘active’ declared service as it is currently being provided by a number of MNO’s in Australia;
- since 2019, the service has not been subject to access obligations;
- as set out in this submission, including at paras 7.19 – 7.28 and 7.56, Pivotel is finding it extremely difficult to obtain access to the service on reasonable terms; and
- despite the predictions made by the ACCC when it allowed the declaration to lapse, there has been dramatic growth in demand for SMS termination services consistent with the growth in markets for P2P and A2P messaging. This is set out in further detail in the paragraphs and table below which demonstrate that OTT services have not had a significant impact on the growth of A2P SMS.

[REDACTED]

[REDACTED]

[REDACTED]



7.51 Pivotel’s customers in turn offer downstream services to end-users in both the P2P market and the A2P market. Since the Commission last considered the declared status of SMS termination services in the 2019 Report, evidence shows demand for A2P has risen considerably, as illustrated by the graph below, which tracks Pivotel’s A2P SMS traffic since 2016. The total volumes of A2P SMS delivered in Australia rose from 9.2 billion in 2019 to 13.9 billion in 2023 and is likely to increase even further to 16.6 billion in 2027.⁵⁴



⁵⁴ Discussion Paper, page 48. The figures cited are broadly consistent with data provided to Pivotel by Mobile Squared.

[REDACTED]

[REDACTED]

[REDACTED]

7.52 In part, Pivotel considers that this growth has been exacerbated by the Covid-19 pandemic which has led to less face-to-face interaction between end users and their customers. Pivotel also submits that SMS is a truly ubiquitous service and that this is unlikely to change over the next 4 years⁵⁵. Indeed, the respected specialist TMT consultancy, Omdia (formerly Ovum) predicted last year that global A2P SMS revenue would continue to grow strongly until at least 2026 and overtake P2P message revenue in the Asia-Oceania (including Australia) region, and other regions, by 2023. ⁵⁶ Locally, the total revenue for A2P SMS increased from \$475 million in 2019 to \$540 million in 2023, and revenues from A2P SMS will likely surpass P2P revenue by 2027.⁵⁷

7.53 Analysis undertaken by Omdia also concluded that:⁵⁸

- (a) Australian consumers are increasingly undertaking two-way interactions with businesses via A2P SMS;
- (b) of selected markets, Australia has the lowest proportion of online consumers who send a message to a business using a messaging app.
- (c) Australian online consumers typically interact with customer care teams using SMS, email and voice (as illustrated by Table 4 reproduced below).

[REDACTED]

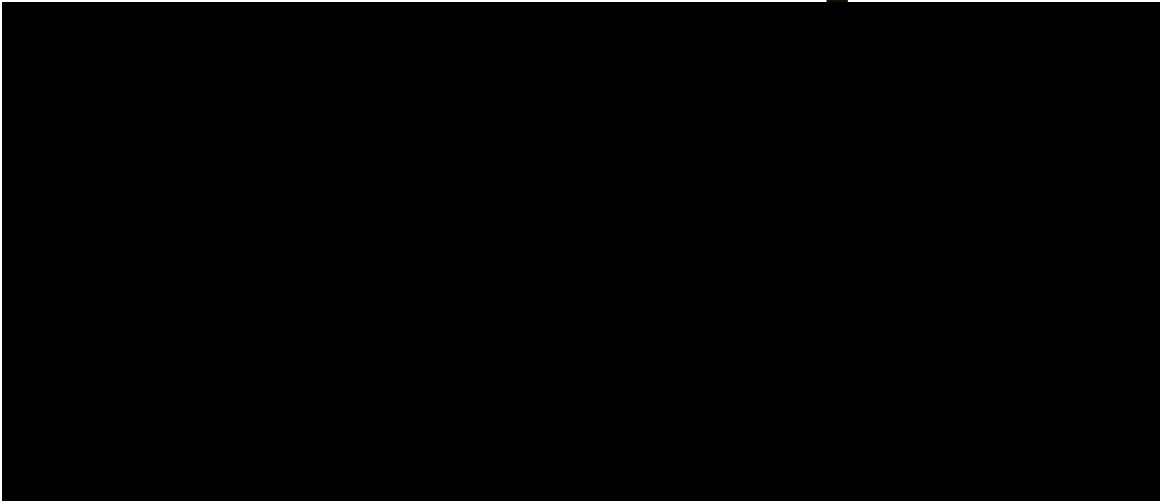
[REDACTED]

⁵⁵ [REDACTED]

⁵⁶ Omdia Report: Mobile Messaging Traffic and Revenue Forecast Report 2021-26.

⁵⁷ Discussion paper, paragraph 5.34 page 48.

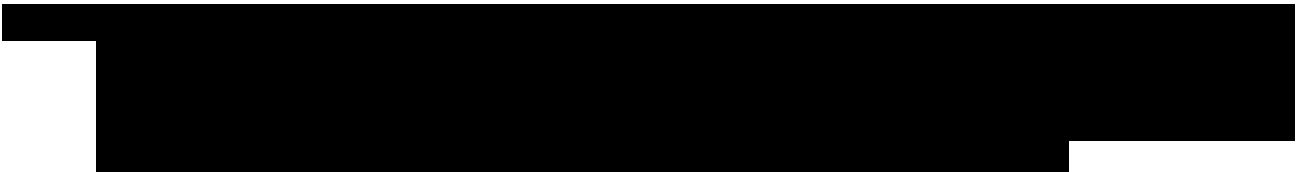
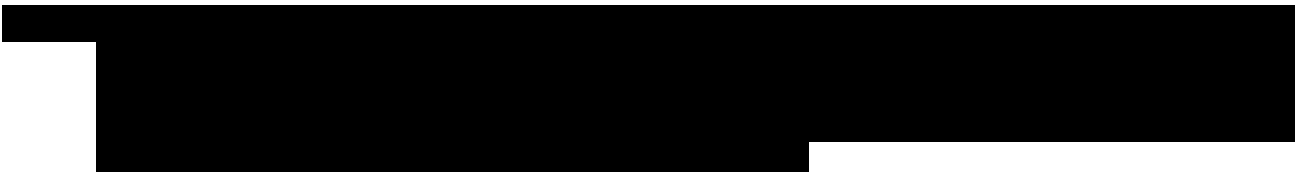
⁵⁸ [REDACTED]



Long term interests of end-users

- 7.54 The Commission has traditionally assessed whether declaration of eligible service (in the case, MTAS for SMS) will promote LTIE by applying a “future with and without” test to each of the factors in section 152AB.⁵⁹ To assist the Commission’s consideration, Pivotel has considered the likely effects over the next 3 – 5 years on the markets set out above if MTAS for SMS was declared versus the maintenance of the status quo (i.e. no declaration).
- 7.55 For the purpose of this analysis, Pivotel considers that “end-users” in the downstream markets include both individual consumers in the P2P market, and, in the A2P market, enterprises and businesses (including government departments) that rely upon A2P SMS messaging to communicate with consumers. In the A2P market, small and medium businesses are particularly reliant upon SMS as a means of informing customers of upcoming appointments and providing two-factor authentication to minimise the risk of fraud.

Future Without declaration of MTAS for SMS



⁵⁹ Section 5.1.2, A guideline to the declaration provisions for telecommunications services under Part XIC of the Competition and Consumer Act 2010.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- 7.59 Pivotel considers that these provisions are anti-competitive and designed to restrict innovative new entrants and competition more generally.
- 7.60 Without contractual certainty regarding supply of essential inputs, it is extremely difficult for Pivotel and other access seekers to access capital and plan for future network investment. This harms competition and economic (particularly dynamic) efficiency and is contrary to the LTIE.
- 7.61 As set out above and as previously accepted by the Commission, each of the national MNOs has a monopoly over the provision of SMS termination services on its own network.⁶⁰ As a result, A2P service providers (including aggregators and MNO's) servicing end users wishing to deliver messages to consumers directly connected to a particular MNO network have no alternative but to pay the termination rates charged. Unfortunately, the nature of the relevant markets make them unique in that Pivotel cannot simply refuse to acquire services at that price and instead take the service from another MNO (who typically refuse to offer a transit service and may be offering MTAS at significantly lower rates) as this will deprive both Pivotel's customers and Optus customers who wish to send and receive A2P (and potentially P2P communications) and will ultimately undermine the basic principle of any-to-any connectivity.
- 7.62 Any increase in charges for MTAS for SMS adversely affects end-users sending SMS off-net and disproportionately harms end-users using smaller MNO's. It also diminishes the prospect of any new market entrant seeking to launch as an MNO given it will increase barriers to entry, provide uncertainty over wholesale costs and drive customers towards large established MNOs. It will also harm those A2P aggregators and A2P service providers that do not have sufficient scale or resources to negotiate directly with each individual national MNO to terminate on-net. Pivotel submits this will likely hamper competition by foreclosing opportunities for smaller providers and forcing end-users to rely solely upon large A2P aggregators or service providers. There is perhaps also a broader question as to why the large national MNO's appear more inclined to eliminate off-net SMS traffic (and the competition it introduces at the wholesale layer) by inflating prices rather than competing. The Commission previously observed that a substantial price difference between off-net and on-net A2P SMS termination likely limited competition both in the wholesale A2P SMS market and downstream A2P market.⁶¹
- 7.63 Initially, some part of these increased SMS termination charges could be passed on to A2P providers and aggregators (who would then likely increase the charges to end-users). As set out above, many of those end-users are small and medium businesses which are increasingly

60 Para 5.1.1 of the 2019 Report.

61 MTAS Declaration Inquiry Final Decision Report para 7.1.2.3.

reliant on these services to contact their customers in an efficient and user-friendly way. It is hard to see such an outcome promoting the LTIE. However, before long, small MNOs such as Pivotel would be forced out of the market once they were unable to provide “off net” SMS at a price that was competitive with the rates charged by the large national MNO’s for “on-net” SMS. This would obviously be detrimental to Pivotel’s overall business but, more importantly from the Commission’s perspective, would irreparably harm the competitive process by removing a leaner and more efficient participant from the downstream wholesale and retail markets.

- 7.64 Pivotel further anticipates that in a future without declaration, the large MNO’s will continue to inflate wholesale SMS termination rates beyond the existing levels over the next 3-5 years. To date, Pivotel considers that the only disincentive to inflate wholesale pricing even further has been the risk of *ex-ante* regulation in the form of re-declaration. Pivotel understands that the MNOs were aware of Pivotel’s push for re-declaration of MTAS for SMS in 2022 and considers that this may have restrained the MNOs increasing wholesale SMS termination rates even further. In the absence of such threat, it is likely that pricing will increase at least for A2P or unbalanced traffic (and likely for P2P SMS as well). Ultimately, this will impact upon demand and use cases for small and medium businesses and efficiency gains will be lost. In the alternative, the only option for affected parties such as Pivotel will be *ex-post* antitrust litigation which is expensive and inefficient.
- 7.65 The Houston Kemp report reaches similar conclusions at paragraphs 21 to 24.
- 7.66 Pivotel understands that in other jurisdictions that have not set a regulated access rate, prices increased significantly and remained relatively constant with MNO’s being unwilling to compete⁶². As a consequence, the use cases for A2P SMS messages are more limited⁶³. Conversely, New Zealand’s Commerce Commission conducted its own “Final Decision on Mobile Termination Access Services” in September 2020 and concluded that MTAS for both voice and SMS should remain regulated, with a determined rate for SMS of 0.06cents per message.
- 7.67 Unlike the large national MNO’s, which, terminate more or less the same amount of messages as they send, small MNO’s such as Pivotel are unable to absorb these costs and must either pass them on to service providers and aggregators or exit the market. This would in turn remove the most significant constraint on the ability of large national MNOs to increase the charges for on-net SMS where each MNO has a monopoly. This is clearly contrary to the LTIE as it reduces:
- competition in markets for the supply of A2P SMS; and
 - productive and allocative efficiency by forcing end-users to under-acquire A2P SMS; and pay excessive prices for those they do acquire.

Ultimately this also harms any-to-any connectivity as it deprives end-users from an efficient and ubiquitous means of communicating with their customers.

- 7.68 The adverse impacts are by no means limited to small MNO’s such as Pivotel. A2P service providers (and aggregators) similarly operate at low margins and will also be unable to absorb these costs. Accordingly, they will either need to substantially increase their charges, exit the market, or attempt to contract with each MNO. Houston Kemp’s report concludes at paragraph 23 that the price for on-net services would also increase. However, that is an

⁶² Pivotel understands that in Germany, the wholesale SMS termination rate is 5.5 euro cents per message and has been since 2000 notwithstanding significant technological advances.

⁶³

economically inefficient outcome for the reasons set out in paragraph 7.95 below and there is little or no incentive on the larger MNO's to provide service to small aggregators on reasonable terms and conditions.

7.69 The table below tracks the A2P traffic volumes and Pivotel's charges to A2P service providers and aggregators for off-net SMS since the 2019 Report. Based upon the latest proposed rates offered by the three national MNO's, access seekers, such as Pivotel, would need to substantially increase their charges in order for the service not to be provided at a loss. For the reasons set out above, this is ultimately not sustainable and would result in an artificial decline in the volume of A2P messages which would be productively and allocatively inefficient, particularly in circumstances where end-user demand has continued to increase (as can be seen from the table below). Importantly, that increase has occurred notwithstanding the increased charges for "unbalanced" SMS termination levied by each of

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

7.70 In 2014, when SMS was declared and pricing was subsequently regulated following the FAD in 2016, the effect was that Pivotel was able to enter the A2P SMS market as a fourth MNO. This quickly had a positive impact on pricing as acknowledged by multiple respondents to the Draft Report.⁶⁴ Upon Pivotel's entry into the market, the pricing of A2P messaging quickly fell to 2 cents per message, whereas prior to the declaration in 2014, Pivotel understands that the minimum price was 4 cents per message on-net and 9 cents per message off-net.

7.71 Pivotel has already observed a reduced level of competition in the retail mobile market more generally. As noted in the Commission's Communications Market Report 2020-21⁶⁵, retail market share for mobile phone services outside of the three national MNOs has shrunk from 13% at the time the Commission last considered the MTAS declaration to 9% in 2020-21. The Commission also observed an increase in prices (albeit with increased data allowances). If end-user costs increase, whether as a result of (i) off-net termination rates increases being passed on; or (ii) MNO's seeking monopoly rents for on-net services following a shift away

⁶⁴ Submissions acknowledging the positive impact that Pivotel's entrance to the market had on pricing or service included BIC, Bill Chaser, EngageAustralia, InfoBio, IntelliMessaging, and Reach Data.

⁶⁵ ACCC, Communications Market Report 2020-21, page 28.

from off-net, this will likely result in wholesale and retail A2P prices increasing (or at best, remaining the same). In a time of escalating costs of living, unjustified price increases which bear no relation to the underlying cost of providing the services, will be disadvantageous not only to end-users but likely to the consumers which they serve.

- 7.72 The Houston Kemp report reaches similar conclusions at paragraph 254.
- 7.73 In its Discussion Paper, the Commission suggests that “*Following deregulation, retail pricing of person-to-person SMS services does not appear to have changed, with the vast majority of available mobile plans including unlimited SMS allowances*”.⁶⁶ However, Pivotel questions the accuracy of this statement. While it is true that many pre and post-paid mobile phone plans contain unlimited SMS allowances, the pricing of plans has increased or is in the process of increasing markedly. As set out above, Optus recently announced plan prices would increase by as much as 60 percent⁶⁷. While Telstra has also increased the cost of its prepaid plans above inflation⁶⁸. Moreover, it could simply be the case that the major MNOs are insufficiently constrained by MVNOs and other wholesale operators and are therefore able to cross-subsidise the cost of providing SMS with rents earned from voice services and subscriptions.
- 7.74 Without declaration, the most significant constraint on the ability of, and the incentive for, large national MNO’s to increase the cost to end-users of delivering A2P messages to their customers will be lost. This will reduce competition and adversely impact economic efficiency and any-to-any connectivity for the reasons set out above. OTT services may be partial substitutes for P2P SMS but are not substitutes for A2P SMS for the reasons set out in paragraph 7.35. In significant part this is because A2P SMS does not depend upon the message recipient acquiring a particular App. Moreover, if OTT services were close substitutes, A2P messaging volumes would have fallen rather than increased.
- 7.75 OTT messaging applications do not further the objective of achieving any-to-any connectivity because of the lack of interconnectivity between applications. This is illustrated by Table 3 showing the significant growth in A2P SMS traffic carried by Pivotel since the 2019 Report. In addition, OTT messaging apps, while not having an obvious charge to consumers, are not free. Since the 2019 Report was issued, the ACCC’s Digital Platforms Inquiry Final Report acknowledges that digital platforms that operate OTT messaging services derive benefit from the data obtained from consumers. Consumers pay for these services by sacrificing their personal information and details about their preferences. SMS does not require consumers to relinquish control over their data. Since 2019, concerns to consumers over privacy and a broader understanding of the value of data have increased. This is, at least with Australia, in large part due to the work of the Commission.
- 7.76 Without declaration, Pivotel also considers that the LTIE will be harmed as Pivotel will be unable to economically or efficiently invest in and use its infrastructure. Pivotel has led the way in developing filtering services to prevent scam calling. Pivotel first implemented its solution in March 2019. Investment in these solutions comes at a significant cost and remains an ongoing exercise as scams become more sophisticated. Increased access charges for SMS termination services will mean that Pivotel and other access seekers ultimately have less to invest in the reliability of their networks and in research and development to combat scams or network threats. Pivotel acknowledges that scam calling (and SMS) leads to the inefficient use of resources: the best way to address this is through proper investment in filtering and other technology-based solutions through industry working groups (such as Communications

⁶⁶ Discussion Paper, page 44.

⁶⁷ <https://www.afr.com/rear-window/optus-jacks-up-bills-while-cheering-for-tpg-and-telstra-deal-failure-20230622-p5dikq>

⁶⁸ <https://www.afr.com/companies/telecommunications/telstra-hikes-pre-paid-mobile-prices-by-20pc-more-increases-to-come-20230428-p5d3zz>

Alliance) in conjunction with the government's recent initiative to launch an SMS Sender ID registry. Indeed, in the absence of declaration, it would seem possible that delivery of scam or spam SMS is likely to proliferate as senders seek to avoid termination charges by sending SMS via grey routes.

- 7.77 In the Discussion Paper, the Commission acknowledges that during the 2019 Inquiry “*some parties raised concerns that the regulation of SMS termination (and consequent regulated pricing of SMS termination) had led to an increase in spam and scam traffic. Those parties argued that higher prices for SMS termination would lower the economic incentives of spam/scam operators*”.⁶⁹ Pivotel rejects this argument and would contend that the period post-declaration of MTAS for SMS has seen an unprecedented increase in the volume of scam SMS. As noted above, Pivotel considers that much of the scam traffic comes via grey routes (i.e. routes which avoid incurring a termination fee such as via international bypass and SIM-boxing) and is precisely because of the cost of sending traffic via legitimate routes. MNO's such as Pivotel have anti-scam filtering products in place that is designed to identify and block scam SMS carried over its network. Grey route SMS traffic can bypass this technology. Furthermore, the suggestion that increasing the wholesale cost of a good is beneficial because it reduces the incentive for fraudulent activity seems anathema to the nature of competition and innovation.
- 7.78 Moreover, scam SMS still represents a very small proportion of the overall volume of A2P SMS traffic in Australia. By way of example, Mobile Squared calculate the total volume of A2P SMS in Australia in 2022 at [REDACTED], while the total number of reported Scam SMSs was 75,946, representing [REDACTED] of overall traffic. Even allowing for underreporting of losses or scam traffic which did not incur a loss, the volume of scam SMSs in Australia is low⁷⁰.
- 7.79 Pivotel has reviewed the submission made by Frontier Economics on behalf of Vodafone in the 2019 Inquiry. Frontier's basic proposition was that, since scam SMS had increased since the ACCC's declaration of MTAS for SMS in 2014, the ACCC should not redeclare the service. Otherwise (according to Frontier) scam SMS would only increase. Yet Frontier failed to provide a single shred of evidence that the alleged increase in scam SMS was *caused by* the 2014 declaration. It simply *assumed* that the apparent correlation could be attributed to causation. From a methodological perspective, this is entirely unsatisfactory and should be disregarded by the ACCC. It is well established that correlation does not equate to causation.
- 7.80 The Frontier Report also fails to address the key issues contributing to the increase in scam SMS including sophisticated foreign threat actors and increased reliance on grey route traffic (which will only increase further if “legal” termination of SMS is avoided by scammers due to MNO's extracting monopoly rents). Frontier's conclusions have also proven to be demonstrably wrong, with the volume of reported scam SMS having increased significantly post-declaration⁷¹.
- 7.81 As noted above, this is in part because scammers will generally look to the lowest cost option for sending SMS. Grey route traffic seeks to avoid paying the interconnection charge that would otherwise be payable and is estimated to account for approximately [REDACTED]

⁶⁹ Discussion Paper, page 44.

⁷⁰ [REDACTED]

⁷¹ ScamWatch reports that in 2020 the year after declaration ended (2020) the volume of scam SMS was 32,337 and reported losses totalled \$3,091,790, while for the year 2022, the volume of reported scam SMS had risen to 79,835 with reported losses totalling \$28,560,789.

[REDACTED] of the total volume of A2P SMS traffic in Australia⁷².

7.82 MobileSquared prepared the graph shown below in its Global A2P SMS report based upon modelling that it had conducted⁷³. The graph illustrates that an increase in the wholesale rate of termination significantly impacts the percentage of grey route traffic⁷⁴.



7.83 Grey route SMS traffic also increases inefficiency for a number of other reasons. Firstly, not all legitimate end users will be aware that their messages are being sent via grey routes, some aggregators or A2P service providers send SMS messages using a blended rate that comprises a mix of white and grey route traffic in order to bring their costs down. Secondly, grey route messages are more likely to be of poor quality or fail to be delivered. This is because grey route messages are often subject to delay, may not support delivery reporting or the use of sender IDs and do not support the use of all characters.

7.84 Scam SMS is best addressed via initiatives such as the proposed Sender ID registry proposed by the Federal Government and the ACMA's ongoing enforcement of the *Reducing Scam Calls and SMS Code*⁷⁵. Indeed, when the United States introduced its own Campaign Registry in 2020, which enables brands and campaign service providers to be verified prior to sending A2P messages, the volumes of grey route SMS are estimated to have fallen significantly.⁷⁶

⁷² [REDACTED]

⁷⁵ Since January 2023, the ACMA has issued Directions to Comply with the Reducing Scam Calls and SMS Code to Modica, Phone Card Selector Pty Ltd, Infobip Information Technology Pty Ltd and Sinch Australia Pty Ltd

⁷⁶ [REDACTED]

- 7.85 In short, declaration of MTAS for SMS and regulated pricing that is set to reflect the cost of supply will assist in minimising the use of grey routes and this combatting scams. This promotes economic efficiency and is in the LTIE. It also allows market participants such as Pivotel to invest funds in tools to combat scam on their network such as enhanced SMS firewalls and filtering solutions such as that referred to at paragraph 7.76 above.
- 7.86 As the ACCC recognised in the 2019 Report, both competition and economic efficiency are promoted when the price of the essential input (in this case MTAS for SMS) reflects the efficient cost of supply.⁷⁷ Pivotel finds it extremely difficult to accept that an average increase in charges of approximately [REDACTED] could be remotely cost reflective.
- 7.87 When MTAS for SMS was declared, the Commission set the price to reflect what it considered to be the actual cost of providing the SMS termination service. This was estimated (with the help of WIK Consult) by separately estimating both the conveyance cost and the SMS specific costs, which resulted in a cost of 0.028 cents per message. The price was then rounded up and set at 0.03 cents.
- 7.88 The MTAS for SMS rates being proposed by the large national MNO's are (as set out in Tables 1 and 2) approximately [REDACTED] higher than that which the Commission set. Given that inflation has been at all-time lows for most of the intervening period (even allowing for more recent increases in inflation) and advances in technology are, if anything, likely to reduce the cost of supply MTAS for SMS, it is difficult to conceive how such a large increase can be reflective of the cost of supplying the service. Rather, Pivotel submits, it likely reflects large national MNO's intention to seek monopoly rents for A2P SMS termination on their networks.
- 7.89 If the declaration is varied in the manner requested by Pivotel such that MTAS for SMS is redeclared, Pivotel submits that the previous charge of 0.03 cents per message would almost certainly overcompensate MNOs for the cost of supply.

Future with declaration of MTAS for SMS

- 7.90 Importantly, the Commission does not need to be satisfied that declaration itself would increase competition (or economic efficiency). Rather, it must simply be satisfied that it would be creating:
- “the conditions or environment for improving competition from what it would be otherwise. That is to say, the opportunities and environment for competition given declaration, will be better than they would be without declaration”.*⁷⁸
- 7.91 In many respects, the benefits of declaration have already been (at least partially) demonstrated, although these were not fully realised because of the decision to allow the declaration to lapse. The Commission has previously taken the view that, declaration of MTAS for SMS had the intended effect of promoting competition in relevant downstream markets⁷⁹ and bringing SMS termination rates down towards cost furthering the LTIE. With the benefit of hindsight, it now appears that the Commission's decision to allow the previous declaration to sunset did not promote the LTIE for the reasons set out in this submission.
- 7.92 If MTAS for SMS is declared, Pivotel expects that the access charges for MTAS for SMS would fall closer to the efficient cost of supply on each MNO's network. That in turn is likely to result

⁷⁷ Para 5.3 of the 2019 Report.

⁷⁸ *Sydney International Airport* [2000] ACompT 1 at para [106].

⁷⁹ Section 5 of the 2019 Report.

in the cost of providing off-net SMS falling closer to the cost of supply, thereby promoting competition at the wholesale and retail layers. This is precisely what began to occur when the 2014 Declaration was made, and the subsequent FAD came into effect in 2016. Pivotel submits that in addition to fostering competition in the wholesale market and providing aggregators and service providers in the A2P market with the choice to procure more of their services off-net, cost benefits are likely to be enjoyed by end users particularly in the A2P market. Parties would also benefit from greater price certainty that would likely follow declaration.

- 7.93 At the time of the 2019 Report, the Commission suggested that cost benefits from declaration of MTAS for SMS may not have been passed on to other service providers and end-users downstream. Pivotel remains of the view that the 2014 Declaration led to a significant reduction in costs for many service providers, A2P and P2P end-users. Pivotel considers that the positive submissions lodged during the Final Report reflect this, as does the significant growth of the A2P market until now.
- 7.94 The declaration of MTAS for SMS would also promote any-to-any connectivity. If MTAS for SMS is declared, smaller access seekers, that cannot rely upon the economies of scale that come with a significant market share, will be guaranteed access to termination services on reasonable terms. As the Commission has previously acknowledged, each MNO has a monopoly over termination services on its own network. If large MNO's deny access to SMS termination on reasonable terms [REDACTED], this will effectively squeeze smaller operators out of the market and force end-users (or their service providers) to exclusively deal with the large national MNO's. Declaration ensures that despite this monopoly, any-to-any connectivity is maintained and promoted.
- 7.95 In the A2P market, it would be theoretically possible for all aggregators and A2P service providers to negotiate on-net service provision with each MNO and thus achieve any-to-any connectivity (indeed, the Commission's Discussion Paper points to this finding arising under the 2019 Report). However, in practice this imposes significant administrative burdens on service providers and aggregators who would need to either contract with each MNO separately or engage an aggregator or one MNO to engage with the others on their behalf. Such an outcome would not promote productive or allocative economic efficiency. Furthermore, it is likely to force end-users to engage exclusively with large aggregators or A2P service providers that have sufficient scale to deal directly with MNO's and is likely to foreclose competition squeezing out smaller service providers or potential new entrants. Smaller A2P service providers will simply be unable to negotiate competitive wholesale arrangements with MNOs and will be unable to compete with larger combined aggregators/service providers. Pivotel is aware of industry participants that the national MNO's have refused to supply interconnect services to.
- 7.96 In a future with declaration, these risks are substantially reduced.
- 7.97 With declaration, efficient use and investment in infrastructure will also be promoted. Productive efficiency will be promoted by ensuring that wholesale charges for SMS termination services will be closer to cost of production, and the cost of providing on-net services. While this benefits end users in the downstream P2P market and A2P market by reducing their own costs (as was seen following the FAD), it will also enable access seekers to better allocate their resources towards investment in their network and supporting research and development to minimise network threats and scam calling. SMS scams have recently (in 2022) surpassed phone scam to represent the most common contact mode for scams but have substantially less reported losses compared to scams by phone, email, Internet, mobile

applications and social networking scams.^{80 81} In addition, SMS scam volumes include SMS delivered via grey routes, which are sent to avoid incurring A2P termination charges. Efficient investment coupled with the work of industry groups will enable operators to further combat scam SMS, including delivery of scam or spam SMS via grey routes. As noted at paras 7.84 above, similar initiatives to the proposed sender ID registry (such as the Campaign Register in the United States) have been shown to reduce grey route traffic significantly which is a major source of scam SMS. This will have both allocative and dynamic efficiency gains, which will ultimately benefit not only end users in down-stream markets and serve the LTIE, but also end-consumers.

7.98 The ACCC's Part XIC Declaration Guidelines (drawing on the previous Australian Government Guide to Regulation) states at paragraph 3.5 that:

- *Regulation should not be the default option for policy makers and that the option offering the greatest net benefit should always be the recommended option.*
- *Regulation should be imposed only when it can be shown to offer an overall net benefit.*
- *The cost burden of new regulation must be fully offset by reductions in existing regulatory burden, noting that regulatory cost offsets may be met over time rather than requiring these to be offset at the point of decision for each proposal.⁸²*

7.99 As a result, Pivotel considers that it is important to consider not only the significant benefits of declaration of MTAS for SMS, but also any costs associated with regulation.

7.100 Pivotel believes that the cost of declaring MTAS for SMS is negligible. There are several factors that are relevant in reaching this conclusion:

- An adjacent market (MTAS for voice) is currently a declared service and is likely to be redeclared. Indeed, the retail (and wholesale) services reliant upon these inputs, SMS and mobile voice services, are frequently bundled services in offerings to consumers and enterprise customers.
- Until 2020, MNO's had supplied MTAS for SMS as a declared service at a rate determined under a final access determination. The MNO's that participate in the market are largely unchanged (save for the completion of Vodafone and TPG's merger). The cost to MNO's of adjusting to regulation are therefore minimal.
- The risk of the Commission making an incorrect decision, either on the underlying decision to declare or in calculating the cost of supplying the service as part of any final access determination, is relatively low. This is due to the fact that the service has previously been declared, and that events since then such as the proliferation of scam and wholesale price increases have proven the central arguments previously advanced against declaration of MTAS for SMS to have been incorrect. Furthermore, considerable effort was previously applied in determining the cost of supply of MTAS for SMS. This can be used to assist the Commission in making any future FAD.

⁸⁰ Scamwatch "Sam Statistics 2022 – Delivery Method"

⁸¹ ACCC Report: Targeting scams: Report of the ACCC on scams activity 2022

⁸² Part XIC Declaration Guidelines – August 2016 paragraph 3.5

Annexure 1 – Proposed service description

Service description

Domestic Mobile Terminating Access Service

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

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 **or virtual interface or** 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 **or routers** ~~of in~~ the access seeker's network and the access provider's digital mobile network.

Short message service (SMS) is the provision of messages up to 160 characters of text using capacity in the voice signalling channel of a mobile network.

* deleted words have a strikethrough

Attachment 1: Houston Kemp Report

Refer to separate document