

# **Pivotel response to the ACCC's Draft Report**



16 February 2024

Public Version

# Submission on the draft report into the declaration of the domestic transmission capacity service, fixed line services and domestic mobile terminating access service.

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## 1. EXECUTIVE SUMMARY

- 1.1 Pivotel Group Pty Limited (“**Pivotel**”) welcomes the opportunity to respond to the Australian Competition and Consumer Commission’s (“**Commission**” or “**ACCC**”) draft report on the public inquiry into the declaration of the domestic transmission capacity service (“**DTCS**”), fixed line services and domestic mobile terminating access service (“**MTAS**”) (the “**Draft Report**”).
- 1.2 At a high level, Pivotel endorses and supports the initial conclusions reached by the Commission in the Draft Report. In particular, Pivotel agrees with the Commission’s draft decision to declare MTAS for a further five years, and to amend the service description to include the termination of A2P SMS. Pivotel considers that the declaration of A2P SMS is in the long-term interests of end-users (“**LTIE**”) because it will promote competition and economic efficiency in the downstream markets for A2P SMS services in circumstances where the take up of A2P SMS continues to rise and there are no genuine substitutes, particularly for time-critical applications such as two-factor authentication (“**2FA**”).
- 1.3 While Pivotel agrees with many of the ACCC’s comments about the lack of competition on regional and rural DTCS routes and supports the progressive deregulation of routes from NBN Co points of interconnection where there are multiple fibre operators, it has concerns that the ACCC’s proposed amendments to the competition criteria to deregulate ESAs where there are only two providers (i.e. Telstra plus one) may not promote the LTIE. However, Pivotel substantially agrees with the ACCC’s draft decisions in relation to other fixed-line services.

## 2. WHOLESALE ADSL

- 2.1 Pivotel supports the ACCC’s draft decision to extend the declaration of wholesale ADSL for a further period of 5 years, given the number of Australians that still rely upon ADSL services for access to the internet.
- 2.2 Pivotel agrees that extending the declaration of ADSL will promote the LTIE by promoting competition in the retail fixed broadband market, and encouraging the economically efficient use of, and investment in, infrastructure.
- 2.3 In its initial submission, Pivotel considered that it would be appropriate to extend the declaration for a limited period of 3 years, given the decline in demand for ADSL and the growing number of alternative broadband services in the market. However, Pivotel accepts that extending the declaration for 5 years would give businesses “*a more certain operating environment through ensuring continuity of service supply*”.<sup>1</sup>

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<sup>1</sup> Draft Report, page 28.

2.4 Pivotel agrees that, over time, it is possible that alternative services (e.g., Low Earth Orbit satellites services) will become substitutes for ADSL (provided that they can be delivered at comparable prices), but that regulation is needed in the short-term to promote competition outside the NBN fixed line footprint.<sup>2</sup>

### **3. FIXED ORIGINATING ACCESS AND FIXED TERMINATING ACCESS SERVICES**

3.1 Pivotel supports the ACCC's draft decision to extend the declaration of the fixed voice interconnection services (i.e., the fixed terminating access service and fixed originating access service) for a further period of 5 years, given that many consumers still rely on a fixed line service for voice calls.

3.2 Pivotel agrees that there are no viable substitutes for any of the interconnection services, and that declaration is likely to foster competition by limiting the exercise of market power by network owners.<sup>3</sup> In the absence of declaration, larger network owners could exercise their market power to deny interconnection or impose excessive charges that persuade end-users to move to larger networks.<sup>4</sup>

3.3 Extending the declaration will promote any-to-any connectivity and the efficient use of (and investment in) infrastructure. Critically, declaration will ensure 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.<sup>5</sup>

3.4 Pivotel also agrees with the ACCC's preliminary position not to combine the FTAS and MTAS service descriptions. As set out in its original submission,<sup>6</sup> Pivotel does not consider that it is technically feasible to combine the services in this way, at least not at this stage. It also considers that arriving at cost-based pricing for a combined fixed and mobile service would be extremely challenging.<sup>7</sup>

### **4. MOBILE TERMINATING ACCESS SERVICE (VOICE)**

4.1 Pivotel supports the ACCC's draft decision to extend the declaration of MTAS for voice for a further 5 years. As acknowledged by each of the national MNOs, MNOs retain a monopoly over the connection of services to their customers and therefore have the ability and incentive to raise prices above cost absent regulation. In addition, as the ACCC has recently found, Australia's mobile markets remain less than perfectly competitive, and it is therefore imperative that regulation of this kind remain in place.<sup>8</sup>

4.2 Pivotel agrees with the ACCC's assessment of the relevant markets for the purposes of this inquiry, namely the wholesale markets for mobile voice termination services, the retail market for fixed voice services and the retail mobile services market. As set out above, Pivotel agrees that there are no close substitutes for wholesale voice termination services because each MNO has exclusive access to its directly connected customers on its network. In the retail markets, particularly for mobile services, demand for mobile voice calls has remained resilient and over-the-top ("**OTT**") voice services are not a credible substitute because these services are

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<sup>2</sup> Draft Report, page 4.

<sup>3</sup> Draft Report, page 5.

<sup>4</sup> Draft Report, page 36.

<sup>5</sup> Pivotel's initial submission to the declaration inquiry, page [1.12].

<sup>6</sup> Pivotel's initial submission to the declaration inquiry, para [5.3].

<sup>7</sup> Ibid.

<sup>8</sup> See the ACCC's submission to the Treasury – Competition Taskforce Merger Reform (Consultation Paper), page 66.

not ubiquitous, and are less accessible to regional users, as well as the elderly and socially disadvantaged.

- 4.3 As the ACCC has identified, the retail mobile services market remains dominated by the three national MNO's. It is also quite telling that the national MNOs charge significantly higher prices than either their own sub-brands or the MVNO's.<sup>9</sup> This suggests that, in Australia (unlike some European markets), MVNOs do not provide a significant competitive constraint on infrastructure-based operators.<sup>10</sup><sup>11</sup><sup>12</sup> Prices charged by the national MNOs have also increased at above inflationary levels during the period 2020-21 to 2022-23, and yet their market share remains relatively stable.<sup>13</sup>
- 4.4 In the absence of declaration, the national MNOs would have the ability and incentive to increase the pricing of this essential input to the detriment of end-users, smaller operators and potential new entrants.
- 4.5 Pivotel accepts that the ACCC may be correct in concluding that *“there is no substitute to the provision of wholesale mobile voice termination on different networks, and as such declaration could not promote competition in these markets”*.<sup>14</sup> However, Pivotel considers that this is largely immaterial given the clear requirement to ensure “continued access to this service” to promote competition in the retail mobile services market and the retail market for fixed voice services.
- 4.6 The ACCC considers that the effect of continued declaration on efficient investment in infrastructure may be more limited given its finding that voice traffic only represents about 1% of overall mobile traffic. Pivotel recognises that some types of mobile traffic or network usage, such as video streaming, are data intensive in comparison to voice calling. However, Pivotel queries whether an assessment based solely on percentages of data used is appropriate for determining whether declaration is in the LTIE. For example, it ignores the continued importance of mobile voice communications in Australia, considering the number of Australians that continue to rely on mobiles for calling and the continued increase in mobile voice traffic overall.<sup>15</sup> When viewed in this light, Pivotel considers that continued declaration of the mobile voice termination service *will* promote the efficient use of, and investment in, communications infrastructure by preventing incumbent operators from charging monopoly rents for the termination of calls on their networks. In addition, as the ACCC has frequently acknowledged in other contexts, economic efficiency will likely be promoted where regulation promotes competition.
- 4.7 Pivotel does not have a firm view on whether it is necessary to amend the service description to refer to termination on a mobile number rather than a digital mobile network. On the one hand, it welcomes changes intended to ensure that access providers cannot avoid the operation of standard access obligations by claiming that calls terminated when their customers are using WiFi networks fall outside the declared service. On the other hand, it has

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<sup>9</sup> Draft report, figure 4.2.

<sup>10</sup> For example, a [report](#) by Grant Thornton has previously concluded that, in the UK, *“It is widely accepted that ‘MVNO’ is now the 5th option from a customer choice point of view, has real influence in relation to service innovation and value for money, and is able to better represent certain segments that the UK MNOs struggle to penetrate”*.

<sup>11</sup> A [report](#) published by the Body of European Regulators for Electronic Communications titled “BEREC Report on Post-Merger Market Developments - Price Effects of Mobile Mergers in Austria, Ireland and Germany” previously identified that the MVNO and service provider market share in Germany was 19.2% as of 2017 (based on revenue).

<sup>12</sup> [Telecompaper](#) has reported that, at the end of Q1 2023, the MVNO's in the Netherlands accounted for a 31.6% market share of mobile sims in the country.

<sup>13</sup> Draft report, figure 4.1.

<sup>14</sup> Draft report, page 47.

<sup>15</sup> Draft report, page 42.

some doubts that the current service description would not capture those call cases in any event, given the existing definition of “digital mobile network” is cast broadly, and the absence of any reference to a radio access network. However, Pivotel makes some comments on the proposed variation to the service description to include A2P SMS in section 5 below.

## **5. MOBILE TERMINATING ACCESS SERVICE (A2P SMS)**

- 5.1 Pivotel welcomes the ACCC’s draft decision to vary the service description for the MTAS to include A2P SMS termination services. Pivotel appreciates the thorough and principled manner in which the ACCC has considered and assessed the evidence put in support of, and against, declaration. It also recognises that the ACCC has not simply relied on the submissions of industry participants, but has undertaken further research on A2P SMS markets itself. This helps ensure that the declaration process is robust and substantially increases the likelihood of the correct decision being made.
- 5.2 Pivotel considers that declaration of A2P SMS termination for a five-year period will promote competition in both wholesale and retail A2P SMS service markets and encourages efficient investment in, and use of, infrastructure.
- 5.3 As the ACCC has recognised, declaration will facilitate competition in the downstream markets identified by the ACCC (both wholesale and retail) and will reduce costs for end-users while also allowing access seekers to more efficiently allocate their resources towards their own networks and infrastructure. As previously submitted, Pivotel has experienced the national MNO’s significantly increase the cost of providing off-net termination since MTAS for SMS was last declared, with average increases being [REDACTED]. This is ample evidence that, absent declaration, MNOs have the ability and incentive to substantially increase prices for termination above cost in a manner that cannot promote competition or efficiency.

### *Limiting declaration to A2P SMS*

- 5.4 While Pivotel originally submitted that the ACCC should vary the service description for the MTAS to include the termination of *all* SMS messages, it accepts that the regulation of A2P SMS alone may promote the LTIE to an even greater extent. Put another way, Pivotel submits that declaration of SMS termination and A2P SMS termination both promote the LTIE, but that declaration of A2P termination alone is likely to promote it to a greater extent.
- 5.5 In part, this is because, as HoustonKemp identify in their expert report, OTT services may be a viable substitute for P2P SMS but are not a substitute for A2P SMS.<sup>16</sup> OTT services do not provide for any-to-any connectivity (unlike SMS) and many OTT platforms e.g. Zoom and Microsoft Teams are actively incorporating SMS capabilities into their solution.

### *ACCC’s approach to market definition*

- 5.6 Pivotel understands why the Commission has taken the preliminary view that there are separate markets for P2P and A2P SMS and separate wholesale markets for P2P and A2P SMS termination services. As set out above, the HoustonKemp report dealt primarily with the state of competition in A2P SMS markets (both retail and wholesale) and, although it did not expressly reach the view that there were separate wholesale and retail markets, concluded that the benefits to competition would largely be limited to A2P SMS markets. To a significant extent, this is due at the retail layer to the lack of effective substitutes for A2P SMS, particularly in time-critical applications such as 2FA. At the wholesale termination services

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<sup>16</sup> HoustonKemp report to the ACCC’s discussion paper, para [61].

layer, it also results from the significant differences in the way in which access providers charge for A2P termination (whether expressly or by way of an “unbalanced traffic” proxy).

*Lack of close substitutes for A2P SMS*

- 5.7 Pivotel agrees with the ACCC’s preliminary findings that there are no close substitutes for A2P SMS in the retail market for the purpose of business to consumer communications, particularly for time-sensitive applications. This conclusion is supported by the evidence cited in the HoustonKemp report, and the Commission’s additional research on A2P SMS markets. Pivotel agrees with the ACCC’s view that A2P SMS is “one of the predominant means by which businesses communicate with consumers”<sup>17</sup> and the “single most important method for multi-factor authentication in Australia”.<sup>18</sup> That is likely to remain the case for at least the next 5 years.
- 5.8 Pivotel’s business experience confirms the ACCC’s view that 2FA and the generation of one-time passwords (“**OTPs**”) is a particularly significant use case. It’s experience also accords with the ACCC’s finding that 2FA is a significant driver for growth in the total volume of A2P messages sent, which has grown by 51% between 2019 and 2023.<sup>19</sup> [REDACTED]
- [REDACTED] SMS holds significant advantages over other delivery methods for 2FA and OTP use cases. These include its ubiquity, reliability, speed of delivery and ease of access on the move (particularly for those consumers that do not have email access on their mobile devices).
- 5.9 If, as is being contemplated, the Australian Government moves towards sector-specific industry codes to combat scam, Pivotel considers that use of A2P SMS to provide for 2FA is likely to become even more deeply entrenched as code participants seek to expand upon their usage of security measures.

*RCS is not a substitute for A2P SMS*

- 5.10 The ACCC has invited stakeholders to comment upon the significance of developments in relation to the use of Rich Communications Services (“**RCS**”). Pivotel agrees with the Commission’s preliminary conclusion on RCS that it “does not currently have information to suggest that these alternative options will reach significant penetration among mobile subscribers such as to result in a transition away from A2P SMS within the next 3 to 5 years”.<sup>22</sup> In the absence of that information, it would be unsafe to conclude that RCS is a substitute for A2P SMS.
- 5.11 In addition, Pivotel considers that certain attributes of RCS mean that it may never be a genuine substitute for A2P SMS. These include:
- RCS messaging is data dependent – it requires access to reliable broadband connectivity. This makes it less reliable for remote and rural users. This can also lead to a lag in the time it takes for a message to be delivered, particularly where messages

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<sup>17</sup> Draft report, page 67.

<sup>18</sup> Draft report, page 67.

<sup>19</sup> Draft report, page 6.

<sup>22</sup> Draft report, page 67.



*They also incentivise investments and innovation by market participants in response to end-user preferences.”<sup>27</sup>*

- 5.17 In a future with declaration (allowing for a subsequent Final Access Determination setting regulated rates for A2P SMS termination), downstream service providers in both wholesale and retail markets will be able to more efficiently allocate scarce resources and apply these to investing in infrastructure that benefits their end-users. Pivotel agrees that declaration of A2P termination will provide more certainty to operators that critical inputs (i.e., A2P SMS termination services) will be provided on regulated terms, which will promote investment in infrastructure and innovation.
- 5.18 In relation to the ACCC’s preliminary view that SMS represents a negligible proportion of overall traffic on mobile networks, Pivotel refers to its submissions regarding the ACCC’s similar conclusions on voice services at paragraph 4.6 above. Pivotel queries whether it is appropriate to view this issue based solely on the amount of data consumed by messages given the critical importance of 2FA and OTP to the safe and reliable functioning of the economy.

#### *Targeted measures for combatting scam traffic encourage the efficient use of infrastructure*

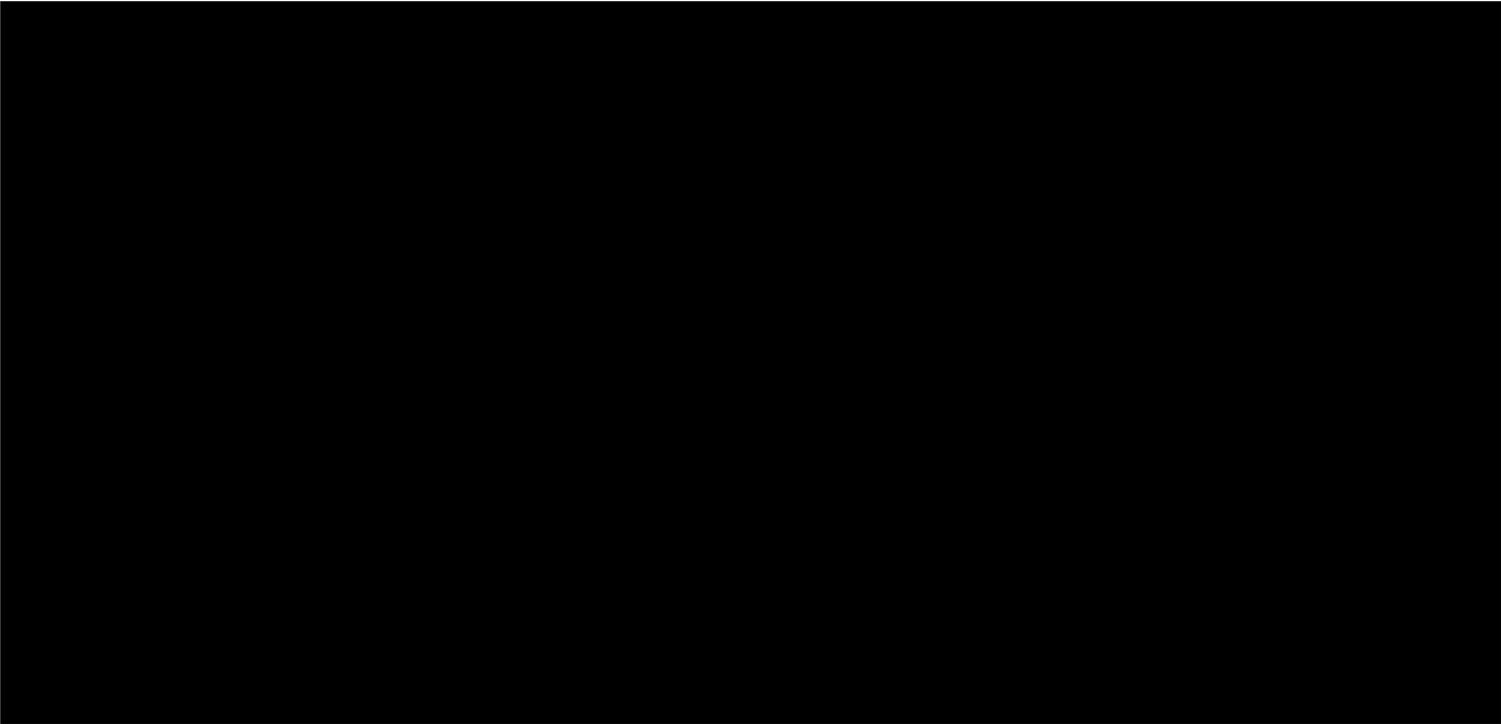
- 5.19 In the Draft Report, the Commission reaches a number of preliminary conclusions regarding industry efforts to combat scam SMS traffic. In particular, the Commission expressed the view that *“raising commercial prices is a blunt tool to deal with the scam issue as it is not targeted at scam traffic and can in fact result in overall inefficient use of infrastructure by suppressing legitimate use. The ACCC considers that targeted measures to detect and combat scam are likely more effective in promoting efficient use of infrastructure”*.<sup>28</sup>
- 5.20 Some of the factors that it raised in support of this conclusion are:
- raising A2P SMS prices is not an appropriate way to deter scam traffic as it also deters legitimate traffic;
  - declaration will not affect the technical ability of the mobile network operators to monitor or filter scam traffic;
  - price is not the key determinant for scammers in sending traffic; and
  - telecommunications service providers have existing obligations to monitor and deter scam traffic.
- 5.21 Pivotel agrees with the Commission’s initial view and the reasoning upon which it is based. As Pivotel previously submitted, 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.<sup>29</sup> In any event, Pivotel remains firmly of the view that increasing the cost of SMS termination does not reduce fraudulent activity but rather forces bad actors onto grey routes rather than legitimate SMS channels.
- 5.22 Interestingly, having regard to the reporting obligations under the Reducing Scam Calls and SMS Code, Pivotel considers that the volumes of scam traffic sent via legitimate A2P SMS paths remains very low relative to the public data reported by the MNOs (provided that originating CSPs comply with their verification obligations). This further suggests that the increases in pricing since the service was last declared may have contributed to significant increases in sim-boxing and grey route traffic. [REDACTED]

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<sup>27</sup> Draft report, page 73.

<sup>28</sup> Draft report, page 74.

<sup>29</sup> See Pivotel’s initial submission to the declaration inquiry, para [7.77].



- 5.23 In addition, since Pivotel made its previous submissions on the Declaration Inquiry, Treasury released a further consultation into the introduction of mandatory industry codes to combat scam. These codes would initially apply to telecommunications providers, digital communications platform providers and banks. Pivotel has made submissions to the Treasury consultation and would be happy to share those submissions with the Commission if it would assist.
- 5.24 Pivotel also agrees that, if the Commission wishes to further explore what measures could be taken to support and facilitate industry activities to combat scams in the context of Part XIC of the CCA, then this is best considered as part of a Final Access Determination inquiry.

*Changes to the service description*

- 5.25 Pivotel submits that the proposed definition of an “Application-to-person SMS” may be too vague and, for that reason, susceptible to gaming. In particular, Pivotel considers that the reference to an “online interface” may not be sufficiently precise to capture all A2P SMS. Pivotel submits that greater certainty would be achieved by replacing the term “*online interface*” with “*application programming interface (“API”)*” or, providing a definition of “online interface” that expressly includes APIs.

*Final Access Determination*

- 5.26 Pivotel submits that it would be appropriate for the ACCC to provide some guidance on the likely timing of a public inquiry into the making of a final access determination for the MTAS, particularly if the ACCC decides to vary the service description to include termination of A2P SMS. In this regard, Pivotel refers to its submissions that the prices charged by the national MNOs for off-net termination have increased by  since the

service was last declared.<sup>30</sup> In circumstances where the ACCC considers that varying the service description will promote competition, the promotion of competition is likely to be greater when charges for the declared service move closer to the cost of production.

## 6. DOMESTIC TRANSMISSION CAPACITY SERVICE

- 6.1 Pivotel supports the ACCC's draft decision to extend the declaration of the domestic transmission capacity service ("DTCS") for a further 5 years. Pivotel agrees with the ACCC that declaration is likely to promote competition in relevant markets (particularly markets for mobile services) and the efficient use of, and investment in, infrastructure.
- 6.2 Pivotel also agrees with the ACCC's preliminary conclusions that extending the declaration of DTCS to capture mobile base station routes in certain geographic areas is likely to promote competition in the retail mobile market for mobile services,<sup>31</sup> and also that there continues to be limited competition in regional and remote locations.<sup>32</sup>
- 6.3 Pivotel considers that the evidence referred to by the ACCC that OTT providers and platforms are, in some cases, self-supplying transmission capacity services is of limited relevance to the Commission's assessment given the size of those operators means that the high up-front investment costs of building new infrastructure can be recovered over very high numbers of customers.
- 6.4 However, Pivotel has some reservations about the ACCC's preliminary conclusions regarding whether the declaration of the DTCS will promote any-to-any connectivity. In the Draft Report, the ACCC states that:

*The ACCC's preliminary view is that extending the declaration of the DTCS in the proposed, varied form will have limited, if any, impact on the achievement of any-to-any connectivity between end-users. This is on the basis that geographic areas where there is a monopoly provider of transmission capacity services will continue to fall within the DTCS. This ensures that the indirect effects of DTCS on any-to-any connectivity should be continued to be achieved.*<sup>33</sup>
- 6.5 In Pivotel's view, the ACCC may have mischaracterised the test as it appears to be comparing the future with the amended DTCS declaration against the future with the current DTCS declaration (which is sunsetting). It should be comparing the future with and without the proposed declaration, and in that light, considering whether the proposed declaration (and service description) promotes any-to-any connectivity as compared with no declaration.
- 6.6 Pivotel considers that extending the declaration of DTCS *will* promote any-to-any connectivity by enabling consumers to communicate with each other where receiving a similar service, and by ensuring that operators can offer the full suite of services to consumers.
- 6.7 Pivotel also acknowledges that its submissions regarding the desirability of greater attention being given to SLAs on response and repair times may be more appropriately dealt with as part of the Commission's consultation on a Final Access Determination.

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<sup>30</sup> See Pivotel's original submission to the Discussion Paper, para [7.22].

<sup>31</sup> Draft Report, page 90.

<sup>32</sup> Draft Report, page 82.

<sup>33</sup> Draft Report, page 91.

*Further consideration should be given to competition criteria changes*

- 6.8 Pivotel supports the ACCC's preliminary view that the exchange service area ("ESA") based methodology remains appropriate.
- 6.9 However, Pivotel has concerns that the ACCC's proposed amendments to the competition criteria to deregulate ESAs where there are only two providers (i.e. Telstra plus one) may not promote the LTIE. While it is true that submissions to inquiry have tended to focus on the harm to competition if monopoly routes in regional areas are not declared, Pivotel considers that the Telstra plus one criteria does not guard against potential oligopolistic pricing behaviour. This is of particular concern for smaller mobile operators.
- 6.10 As a result, Pivotel submits that further consideration should be given to the ACCC's preliminary view that ESAs with 2 providers of transmission services are sufficiently competitive as to be 'deregulated exchange service areas' for the purposes of the DTCS,<sup>34</sup> particularly since the ACCC states that it is "less clear to what extent competition would be promoted in areas where there are at least 2 providers of transmission capacity services".<sup>35</sup>
- 6.11 Pivotel does support the ACCC retaining the current "3-provider" criteria for deregulation in relation to NBN POIs.

*Proposed amendments to DTCS service description*

- 6.12 Pivotel welcomes the ACCC's desire to amend the service description for the DTCS to ensure that it better reflects the commercial realities of the markets in which uncontended transmission capacity services are supplied. It also considers that the express references to "Layer-2" carriage services and Ethernet services above 10 Megabits per second will help ensure that services which may be argued to currently fall outside the declaration are captured.
- 6.13 Pivotel submits that it may be worth including language similar to that in the current service description regarding services provided via an online ordering tool and with enhanced service monitoring. It proposes inclusion of the following drafting in the service description to reduce the risk that access providers could avoid declaration by simply offering these as optional add-ons:
- ... and includes the provision of online ordering capabilities and enhanced service monitoring where those are commercially available.*

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<sup>34</sup> Draft Report, page 106.

<sup>35</sup> Ibid.