

Response to submissions of Optus, TPG and Sinch



19 March 2024

Public Version



Submission on the responses of Optus, TPG and Sinch to 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 wishes to respond to some of the submissions made by participants in response to the ACCC's draft report on the declaration of the domestic transmission capacity service, fixed line services and domestic mobile terminating access service ("**the Declaration Inquiry**").
- 1.2 This response addresses the submissions made by Optus, TPG and Sinch that were published on 27 February 2024.
- 1.3 Pivotel's responses are limited to the proposed declaration of MTAS for A2P SMS. In particular, those areas where it believes that published submissions are either factually inaccurate or lack evidentiary support.
- 1.4 Any defined terms in this submission have the meaning set out in Pivotel's earlier submissions.
- 1.5 The responses of Optus and TPG share a number of common themes yet do little to advance the respective positions that were expressed prior to the ACCC issuing its draft report.
- 1.6 Indeed, both Optus and TPG have largely sought to recycle arguments from the 2019 declaration inquiry, with little to no new evidence to support their claims. To the extent that both Optus and TPG have sought to proffer any supporting evidence, it is either general in nature and does not consider the specifics of the Australian market or is outdated and has been soundly discredited (as is the case with the 2018 Frontier Report relied upon by TPG).
- 1.7 Pivotel submits that each of the MNOs and Sinch are primarily concerned with maintaining advantages to their respective businesses inherent in the status-quo. For the MNOs, this enables them to continue to extract monopoly rents for the supply of mobile terminating access services for SMS and use them to subsidise less profitable services. Whereas Sinch's claim for preferring "*stability and predictability*" is mainly a reflection of its fear of competition from other aggregators and A2P service providers

in the downstream market for A2P services. Neither of the national MNO's nor Sinch seem really concerned with whether declaration is in the LTIE. They appear to be more concerned with protecting existing revenue streams. On the other hand, Pivotel has provided ample evidence including local and regional market data and independent expert reports from Houston Kemp which support the view that declaration is in the LTIE.

- 1.8 Both TPG and Optus correctly assert that it is not the role of the ACCC to protect the business model of any one company. Pivotel agrees with this. It is not the ACCC's role to pick winners or losers. However, both MNOs overlook that the vast majority of submissions made by non-MNOs about the Draft Report, across different layers of the supply chain, which support declaration of MTAS for A2P.¹
- 1.9 Given the similarities in the submissions of Optus, TPG and Sinch, Pivotel will address the following issues thematically:
- *Misunderstanding of the test for declaration:* each of the MNOs and Sinch appear to misunderstand the legal test for declaration as well as the distinct role of declaration and the final access determination.
 - *Market definition and MNO claims regarding potential substitutes for A2P SMS.*
 - *Scam SMS has nothing to do with declaration.*
 - *Declaration will not stymie innovation.*
 - *Competition in downstream markets.*
 - *Ex-post regulation is inappropriate for dealing with structural issues.*

2. MISUNDERSTANDING OF THE TEST FOR DECLARATION

- 2.1 Each of Optus, TPG and Sinch mischaracterise the test for declaration under Part XIC of the CCA. The reason for this is two-fold. Firstly, they misunderstand the basis on which a listed carriage service should be declared. This is demonstrated by the emphasis they place upon market failure. Secondly, they misunderstand the role of service declaration relative to a final access determination (“**FAD**”). There are a number of instances where submissions either propose that the service description should address issues that are more appropriately addressed as part of an FAD, or that suggest declaration will lead to some form of uncertainty, when non-price terms of an FAD can address any issues that the Commission identifies during the course of a FAD inquiry.

The basis for declaration is not market failure

- 2.2 The ACCC may declare an eligible service if it is satisfied that declaration “*will promote the long-term interests of end-users of carriage services or of services provided by means of carriage services*”.² In determining whether declaration is in the LTIE, regard must be had to the extent to which declaration is likely to promote competition,

¹ Submissions supporting declaration of MTAS for A2P SMS include Pivotel, Symbio, Aussie Broadband, Commpete, Virtutel, Soprano and Twilio.

² CCA, section 152AL(3)(d).

achieve any-to-any connectivity, and encourage the economically efficient use of and investment in infrastructure.³

- 2.3 The legal test is forward-looking and requires an assessment of what is likely to happen in the future. In relation to the section 152AB(2) of the CCA, the Australian Competition Tribunal has found that:

“Moreover, when it is recalled that the task at hand is forward-looking, requiring an assessment of what is likely to happen in the future, the Tribunal must... take particular care before it is able to reach the required conclusion (ie the requisite degree of satisfaction) that its decision (to grant an exemption) will result in a condition or environment for promoting competition and encouraging efficiencies...”⁴ [emphasis added]

- 2.4 It follows that the Commission must simply be satisfied on the balance of probabilities that declaration *will* promote competition (by enhancing the conditions or environment for improving competition⁵) and efficiency in the future.
- 2.5 As stated in Pivotel’s earlier submissions,⁶ there is no requirement that the ACCC be satisfied that market failure has already occurred in order for it to declare a service.

There is market failure

- 2.6 Optus’ suggestions that a viable solution to the issue of MNOs denying access on reasonable terms to termination services is for an originating MNO to procure services in the downstream market (effectively procuring on-net termination) strikes Pivotel as the very definition of market failure. Firstly, it suggests that the market for terminating access services does not operate efficiently. Secondly, it relies upon A2P SMS aggregators receiving more favourable terms than the originating MNO. Whereas, in a future without declaration, the MNOs can increase charges for wholesale services at will. Optus’ suggestion that Pivotel should simply buy on-net services from a third party if the price for interconnected services is too high is also a tacit admission of market failure⁷.
- 2.7 In response to the ACCC observation that ‘*prices for terminating A2P SMS are rising*’ Optus states that: “A change in commercial pricing is however not necessarily evidence of market failure – especially where the ACCC pricing intervention was so extreme”.⁸ Pivotel agrees that a change in pricing is not necessarily evidence of market failure, however Pivotel considers a price increase of [REDACTED] is clear evidence of market failure. In any event, the “extreme” pricing intervention referred to by Optus was simply the implementation of a cost-based price determined by an independent expert.⁹ The price determined by the ACCC included an RoI.

³ CCA, section 152AB(2).

⁴ *Application by Chime Communications Pty Ltd (No 2)* [2009] at [19].

⁵ See *Telstra Corp Ltd (No 3), Re* (2007) 242 ALR 482 at paragraph [127].

⁶ See Pivotel’s response to Telstra’s supplementary submission, para [2.5].

⁷ Optus submission dated 27 February 2024 para.53.

⁸ Optus submission dated 27 February 2024 para. 51.

⁹ WIK Consult report on Benchmarks for the Cost of the Mobile Termination Access Service in Australia.

Residual issues can be dealt with in FAD

- 2.8 TPG and Sinch both fail to distinguish between the matters that should be considered as part of the decision to declare (or not declare) and those that can be dealt with via a Final Access Determination.
- 2.9 By way of example, TPG supports the declaration of MTAS for voice. However, when arguing against the declaration of MTAS for SMS, TPG introduces a new claim for the first time during this Inquiry that:
- “the ACCC must include necessary conditions in its voice termination service description to allow MNOs to shut off bad actors and block scam traffic from entering Australia’s public mobile networks”.*
- 2.10 Pivotal submits that it is not the function of the service description to enable suspension or termination of access in the manner proposed by TPG. As discussed at paragraph 2.12 below, this issue can be addressed via non-price terms and conditions of a FAD.
- 2.11 Similarly, Sinch claim that *“declaration should have a ceiling price which ensures market stability and facilitates investment in key areas”*. Pivotal considers that any pricing would be set as part of a FAD Inquiry, not as part of this declaration process. Parties could then make submissions (and experts could be consulted) to set a price that reflects the cost of providing the service.
- 2.12 Both Optus and TPG claim that declaration will introduce uncertainty or otherwise constrain MNO’s ability to manage access disputes. Pivotal disagrees and considers these claims to be likewise unfounded. For example, TPG states that: *“declaration means MNOs would lose the ability to shut off interconnection for bad actors”*.¹⁰ Section 152BCA of the CCA already requires the ACCC to take into account the operational and technical requirements necessary for the safe and reliable operation of the service or network. Under the existing non-price terms of the current FAD, access providers have the ability to suspend access to the access provider’s network where the access seeker has delivered prohibited traffic onto the access provider’s network. Any future FAD Inquiry could therefore consider how best to address scam traffic, if the ACCC wished to do so beyond measures already being taken elsewhere across Government. Indeed, this approach has already been foreshadowed by the Commission in the draft decision.

3. ALLEGED SUBSTITUTES AND MARKET DEFINITION

OTT services are not viable substitutes for A2P SMS

- 3.1 Pivotal supports the ACCC’s preliminary view that there are currently no close substitutes to A2P SMS in the retail market for business-to-consumer communications.
- 3.2 Both Optus and TPG claim that SMS termination does not represent a bottleneck because substitutes for downstream services exist. However, neither MNO has provided any evidence to support these claims. Rather they settle for unsubstantiated

¹⁰ TPG submission section 4.2.

assertions or, in the case of TPG, rely upon undifferentiated global data without any attempt to consider the specifics of the Australian market.

3.3 Pivotal by contrast has previously provided empirical evidence that OTT services are not a substitute for A2P SMS even though they may be partial substitutes for P2P SMS. In addition, Pivotal has obtained the latest data sets from Omdia that will inform its 2024 reporting on SMS and Messaging Apps. In considering messaging app user numbers, it identifies over a dozen different mobile applications that are used for messaging.¹¹ The diverse range of applications that are used for OTT communications and the lack of interoperability between them means that OTT services cannot be considered a substitute for A2P SMS.

3.4 Furthermore, the most recent data from Omdia¹² identifies that there remains limited interaction between businesses and consumers by messaging apps across all use cases. In particular, those use cases with a time critical component:

How do you typically communicate with an organization's customer care team for the following instances? - Australia											
Responses	SMS	Email	Voice call	Video call	Web chat (with an agent)	Social media (e.g., Facebook)	Messaging app (e.g., WhatsApp)	Via a dedicated app	None of these	Grand total	spndents
Appointment reminders	50%	23%	11%	7%	6%	6%	3%	4%	15%	126%	1,006
Emergency/public service announcements	32%	25%	24%	7%	6%	8%	3%	3%	24%	132%	1,006
Make a payment/purchase	12%	23%	10%	5%	6%	5%	4%	22%	32%	119%	1,006
Provide feedback/answer customer surveys	17%	51%	8%	6%	7%	8%	4%	5%	20%	125%	1,006
Receive alerts about new services/upgrades	34%	48%	8%	5%	7%	6%	3%	2%	16%	130%	1,006
Receive information on loyalty programs	21%	58%	8%	6%	6%	8%	3%	4%	14%	129%	1,006
Receive information on offers and discounts	29%	55%	7%	7%	5%	8%	4%	2%	12%	130%	1,006
Receive service notifications (e.g., bill payment reminders, data usage alerts)	38%	55%	7%	6%	6%	5%	4%	4%	10%	133%	1,006
Receive verification or authentication code (e.g., for log-ins, transactions)	55%	34%	8%	5%	7%	6%	4%	5%	9%	132%	1,006
Track an order	21%	44%	5%	5%	6%	6%	4%	17%	16%	125%	1,006
Trouble-shooting/ technical support	12%	28%	36%	8%	17%	5%	3%	3%	15%	126%	1,006

Source: Omdia © 2022 Omdia

Omdia observes in its report that: “Messaging apps appear to be one of the communications channels least favored by Australian online consumers to engage with organizations’ customer care teams, with fewer than 5% doing so across a range of listed use cases. That compares to between 12-55% of Australian online consumers who use SMS across those same use cases”.¹³

3.5 Pivotal’s view that there is an absence of substitutes for A2P SMS is consistent with the opinion contained in the independent expert report provided by Houston Kemp, which concluded 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...”¹⁴

Houston Kemp also considered that:

“These characteristics imply that businesses are less likely to consider OTT services as an effective substitute for SMS because they are unlikely to be able to reach all customers or stakeholders using one alternative format or platform. This is particularly the case for some categories of A2P messages such as OTPs, and for

¹¹ These include Google Messages, Facebook Messenger, iMessage, WhatsApp, Instagram, Kakao Talk, Line, Skype, Snapchat, Telegram, Viber, Wechat.

¹² Data provided to Pivotal by Omdia titled “Omdia_Pivotal_Australia_SMS and Messaging Apps_Data_March2024_UPDATED_12 March 2024”.

¹³ Omdia_Pivotal_Australia_SMS and Messaging Apps_Data_March 2024.

¹⁴ Houston Kemp report para 170.

*businesses with diverse customer bases that are unlikely to have the same messaging platform installed on their devices”.*¹⁵

- 3.6 Furthermore, TPG’s claim that “*ample substitutes exist and business end-users have multiple alternatives to switch to if the A2P SMS channel becomes uncompetitive. Therefore, MNOs do not have the ability to raise termination rates to an extent that would harm end-users*”¹⁶ simply does not withstand scrutiny. MNOs have raised termination rates by an average of over 4000% since the declaration of SMS ended.

[REDACTED]

This is simply unsustainable, and Pivotal will be forced to either increase its prices or exit the market. To be clear, this is not simply an issue about Pivotal but directly affects the interests of all end-users of A2P SMS services. This is because in either event, the price of on-net services provided to A2P Aggregators and service providers will rise also, while smaller suppliers will be unable to access on-net supply arrangements with the large MNOs.

- 3.7 TPG has sought to rely upon data provided by Omdia including a table titled “Global telco messaging and messaging app revenue”¹⁷. Pivotal notes that this data looks at the broader messaging ecosystem worldwide and does not consider the specifics of the Australian market. Pivotal’s experience is that different territories have vastly different uptakes of OTT services.

[REDACTED]

[REDACTED]¹⁸

- 3.8 Conversely, where Omdia has undertaken research on the Australian market, the results demonstrate that messaging or dedicated apps are not a substitute for A2P SMS at all, and certainly not for time critical messaging such as OTPs and appointment reminders as demonstrated in the table contained in Figure 5.3 of the Draft Report.

- 3.9 TPG also seeks to rely upon ACMA data to demonstrate that OTT services are a substitute for A2P SMS. However, it is clear from the data relied upon that this is primarily focused on P2P SMS use cases (and OTT usage) and is irrelevant to the question of whether OTT apps can be said to be substitutes for A2P SMS. Indeed, in the table provided by TPG, the ACMA clearly states that “*Mobile calls, texts and messaging/calling apps were the main services used for personal purposes*” (emphasis added). TPG appears to be aware that the data they have relied upon does not support its central argument that OTT applications are a substitute for A2P SMS in acknowledging that “*While the ACMA’s data does not distinguish between peer-to-peer and B2C communications, it is clear the trend for OTT application usage is very high and increasing*”. This however points to another issue with both MNO’s submissions that each seeks to conflate A2P SMS and P2P SMS.

¹⁵ Houston Kemp expert report dated 27 July 2023, para.64.

¹⁶ TPG submission page 3.

¹⁷ TPG submission dated 27 February 2024 pg. 6.

¹⁸

[REDACTED]

MNO's ability to distinguish A2P and P2P SMS supports separate markets

- 3.10 Both TPG and Optus refer to A2P and P2P SMS interchangeably when it supports their arguments. Indeed, each go one step further and refer to “*markets for messaging (both retail and wholesale)*”.¹⁹ In doing so, neither MNO offers any supporting evidence nor makes any attempt to undertake a market definition. They simply assert the existence of such a market. Furthermore, Optus’ statements are contradictory as it later claims that the “*downstream market for A2P SMS is competitive*” despite its earlier claims of the existence of a broader wholesale market for messaging.
- 3.11 Pivotal also submits that there are further inconsistencies in Optus stating on the one hand that SMS termination is not a bottleneck service as there is sufficient competitive pressure from OTT messaging services in the broader retail market for messaging services, yet on the other hand, accepting that MTAS voice interconnection remains in the LTIE as there are no effective substitutes for voice calls for which MTAS remains an essential input. In Pivotal’s view, the position is the same for both voice and SMS. Declaration of both MTAS for voice and MTAS for A2P SMS is in the LTIE, in part because it will promote competition by ensuring that off-net calls and messaging exert a competitive constraint on the MNOs.
- 3.12 Optus acknowledges that a key development since the last declaration has been the ability of MNOs to distinguish A2P SMS from P2P SMS termination and explains how A2P SMS and P2P SMS differ functionally. It also refers to A2P SMS as “*business or enterprise A2P*”. In Pivotal’s view, this supports the ACCC’s argument that P2P SMS and A2P SMS should be treated as addressing separate markets rather than a single SMS market, let alone Optus’ “*broader messaging market*”.

RCS is not a credible substitute for A2P SMS

- 3.13 Optus also presents RCS as a substitute for A2P SMS²⁰. However, its submission appears to acknowledge that this is likely an issue for any future declaration inquiry as it concedes that RCS will increase over the next regulatory period rather than the current one.²¹
- 3.14 Indeed, while the Omdia data relied upon by TPG is global in nature, it does identify that RCS revenues in 2022 were only \$70 million worldwide and that RCS messaging has “*barely lifted off the ground*”.²² It is therefore unlikely that RCS will emerge as a substitute for A2P SMS in the next 3-5 years.

- 3.15 [REDACTED] Similarly, Juniper Research anticipate that, even allowing for Apple’s entrance into the RCS market, over the next two years the total number of active users of RCS will stand at 2.1B vs 9.3B of active users of A2P SMS.²⁴ .

¹⁹ Optus submission dated 27 February 2024 para 23.

²⁰ Optus submission para 65.

²¹ Optus submission para 76.

²² TPG submission dated February 2024 page.8.

²³ [REDACTED]

²⁴ See Juniper Research’s article at <https://www.juniperresearch.com/press/apple-s-rs-support-to-grow-rs-business-messaging-revenue-by-500-globally-in-two-years/>.

- 3.16 Pivotel does not consider that RCS is a substitute for A2P SMS. Indeed it may never become a competitive constraint for the reasons it expressed in its submission dated 27 February 2024 being that:
- RCS remains data dependent;
 - Users must have RCS-enabled devices;
 - RCS will increase costs for businesses and MNOs will retain monopoly access because they control significant elements of the service and message delivery.
- 3.17 Pivotel submits that the ACCC is correct in taking the view that the growth of RCS should be considered as part of the next declaration inquiry (and only then if its penetration increases significantly over the intervening period).

4. SCAM SMS HAS NOTHING TO DO WITH DECLARATION

- 4.1 Each of Optus, TPG and Sinch make ambit claims that declaration would encourage scam SMS because the cost of supply of SMS would fall. These claims largely repeat claims contained in their previous submissions, although the submissions made by TPG border on hyperbole.
- 4.2 Pivotel endorses the views of the Commission expressed in the Draft Report on the issue of scam. In particular, Pivotel agrees that:
- targeted measures to combat scams are more likely to encourage efficient use of infrastructure;
 - 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;²⁵ and
 - the issue of scam can be addressed as part of any FAD Inquiry.

Surprising claims made by TPG

- 4.3 TPG makes a number of other surprising assertions in its submission, including a claim that the ACCC should simply 'assume' causation. These claims do not withstand scrutiny. In particular, TPG claims: (i) to have provided compelling evidence that the 2015 decision to regulate A2P SMS accelerated the prevalence of scam SMS, and the ACCC did not dispute that evidence at the time; (ii) that the correlation between declaration and scam SMS is so strong *a positive case must be assumed unless proven otherwise*; and (iii) that the ACCC "*appears to accept that a causal relationship exists*".
- 4.4 In relation to (i) above, TPG appears to be referring to the report prepared by Frontier Economics in 2018. However, this report, and in particular its approach to causation, was comprehensively rejected by Luke Wainscoat and Zoe Odgers of Houston Kemp. They concluded that:

²⁵ Draft Report para 5.3.3.

“19. In our opinion, the analysis of Frontier Economics does not demonstrate that declaration of SMS termination services and the associated reduction in price for those services caused an increase in the volume of SMS spam or scams because:

(a) the Frontier Economics report uses unreasonable counterfactuals to estimate the effects of declaration on SMS spam and scams; and

(b) extending Frontier Economics’ analysis by a few years demonstrates that there is no correlation (let alone causation) between the declaration of SMS termination services and the volume of SMS scams.

20. In summary, SMS scam volumes have continued to increase substantially from 2015 to 2022 no matter what happens to the declaration of SMS MTAS.”

- 4.5 Tellingly, Houston Kemp also found that if Frontier’s analysis was extended by a few years, there is no correlation (let alone causation)²⁶.
- 4.6 The fact that the ACCC did not, in TPG’s view, dispute its report during a previous Declaration Inquiry is irrelevant to this present Declaration Inquiry.
- 4.7 Ironically, the only acknowledgement that TPG makes of the period following the expiry of declaration, is to submit that the problem with scam traffic is now enduring and that there is ‘no putting the genie back in the bottle’. This is hardly a ringing endorsement of its claims regarding the correlation between scam and declaration.
- 4.8 Pivotel does not consider that any implication can be drawn that the ACCC endorses the view that a causal relationship exists between declaration and a rise in scam traffic exists. On the contrary, the ACCC expressly states that it *“is not convinced that price is the key determinant for scammers in sending scam traffic in Australia, given the high potential payouts from victims”*.²⁷ The Commission’s view is supported by the conclusions of Houston Kemp which previously found that *“...it is highly likely that scams are driven by causes other than declaration and its associated effects on prices”*.²⁸
- 4.9 Moreover, while TPG is correct that text messages are the most reported contact method for scam traffic, this statement alone, overlooks that text message is the seventh highest source of losses to scam.²⁹ As Pivotel has previously pointed out, the losses incurred via mobile applications and phone scams significantly exceed those incurred from SMS.
- 4.10 Finally, Pivotel strenuously rejects the claims that there is “no incentive for middlemen operators like Pivotel to take similar action and do the right thing in the interest of Australian consumers”. Pivotel, as a licensed MNO, has exactly the same legal and regulatory obligations as each of the national MNOs, including in relation to compliance with the Reducing Scam Calls and SMS Code (which all carriers and CSPs are required to comply with). It also takes those obligations extremely seriously.
- 4.11 Pivotel has invested significant sums in addressing both scam calls and SMS to ensure it retains the trust of both consumers and its customers (both retail and wholesale).

²⁶ Houston Kemp report dated 9 November 2023 para 19.

²⁷ ACCC Draft Report para.5.3.3.

²⁸ Houston Kemp report dated 9 November 2023 para 44.

²⁹ Scamwatch statistics 2022.

The rigour with which it approaches scam prevention is highlighted by the very low volumes of scam traffic reported to it by the national MNOs.³⁰

4.12 Scam prevention initiatives include:

- **SecureSMS initiative:** Pivotal has spent over 3 and a half years developing an SMS authentication tool called “secureSMS”, which has been presented as a proof of concept to multiple industry and government bodies, and is now being actively used by a number of providers or companies.
- **Reducing Scam Calls and SMS Code (“Scam Code”):** Pivotal was an active participant in the Communications Alliance working group that drafted the most recent version of the Scam Code.
- **SMS SenderID Registry:** Pivotal is one of four MNO’s that are trialling and supporting the introduction of the SMS SenderID Registry, and have actively engaged in consultations, presenting potential models of the registry and proof of concept technology developed in-house.
- **Australian Financial Crimes Exchange’s (“AFCX”) Intel Loop:** Pivotal was the second MNO to join the AFCX’s “Intel Loop” initiative, which aims to assist organisations targeted by scammers to report verified scam communications and scam parameters directly to MNOs. Pivotal is currently the only MNO assisting to develop the application programming interface (“API”) for the system.
- **National Anti-Scam Centre (“NASC”):** Pivotal has been an active participant in the NASC initiative and was the only MNO physically present at its founding meeting in 2023. Pivotal also maintains representation in the Communication and Awareness Working Group under the NASC, working with industry to educate Australians about scams, and improve systems and processes for reporting scams.
- **Security and Fraud Alliance Forum (“Forum”):** Pivotal has, and continues to, take part in the Forum’s quarterly discussion. It has presented on SMS scam mitigation models and proof of concepts to members.
- **Proofpoint/Cloudmark Services Investment and Collaboration:** Pivotal invests heavily in its partnership with Cloudmark, a trusted leader in threat protection, to continually develop its ability to use their threat detection and scam filtering technologies.
- **Scam Telecommunication Action Taskforce (“Taskforce”):** Pivotal has been an active member of the Taskforce since its inception. Of particular note was Pivotal’s presentation on sender ID message verification technology, which was presented to the Attorney General’s Department and Department of Home Affairs (with the support of the Australian Cyber Security Centre). This led to changes to the *Telecommunications Act 1997* to allow for enhanced scam SMS screening.

Grey routes not a substitute for SMS

4.13 Despite Pivotal’s repeated submissions that there are no viable substitutes for A2P SMS³¹, Optus asserts that Pivotal endorses grey routes as a substitute for A2P SMS. Contrary to Optus’ claims, Pivotal does not consider grey route traffic to be a substitute

³⁰ Pivotal submission on draft report dated 27 February 2024 paragraph 5.22.

³¹ For example, Pivotal submission dated 22 September 2023 para. 1.10.

for SMS. Grey route traffic is prohibited by MNO's interconnect agreements and, in certain instances, may be illegal. It is also of inferior quality (i.e. slower and less reliable), and more prone to scam (and therefore unappealing to many A2P end-users including financial institutions). Importantly it is largely terminated by MNO's as P2P SMS and not A2P SMS as it is often generated by SIM boxes, which are essentially collections of SIM cards intended for individual users³².

- 4.14 As Pivotal has previously submitted, grey route traffic is estimated to account for approximately [REDACTED] of the total volume of A2P SMS traffic in Australia³³. This issue will only be exacerbated in a future without declaration as the incentive to avoid legitimate paths will be much greater.

5. DECLARATION WILL NOT STYMIE INNOVATION

- 5.1 Optus also claims that deregulation of MTAS for SMS has given MNOs the ability to differentiate between P2P and A2P SMS. Pivotal submits that this has nothing to do with regulation. Firstly, nothing in the previous service description for declaration of MTAS for SMS would have prohibited MNOs from differentiating between A2P and P2P SMS. Secondly, until now it is only Optus which has chosen to separate out A2P and P2P traffic, albeit for reasons that appear to Pivotal to have much more to do with extracting monopoly rents for the former than combatting scam.

- 5.2 Nor would the large national MNOs have been prohibited from introducing measures to combat illegitimate traffic in the event declaration of MTAS for SMS had continued. MTAS for voice has remained declared and MNOs are entitled to block scam voice calls. SMS is no different in that regard.

- 5.3 Finally, Optus claims that since declaration, the move from SS7 to SMPP has brought significant benefits and that "*introducing regulation to stymie innovation is unlikely to encourage further innovation*".³⁴ Yet Pivotal has been sending SMS via SMPP for termination on another MNO's network since 2016 i.e. while MTAS for SMS was still a declared service. In addition, Optus has not been hampered by the declaration of MTAS for voice in its equally innovative transition from SS7 to SIP trunks for voice interconnect. In any event, Pivotal points to Houston Kemp's findings that:

"Where competition is likely to be promoted in the wholesale A2P SMS markets, wholesale aggregated A2P SMS market and retail A2P SMS market in a future with declaration relative to a future without declaration, it follows that declaration is also likely to give rise to an increase in productive, dynamic, and allocative efficiency in those markets".³⁵

- 5.4 In addition, nothing in either the historic service description or the proposed service description would have prevented a technical shift from SS7 to SMPP.

³² See also Pivotal submission in response to Telstra's submission on the ACCC Draft Report para. 7.5.

³³ Datasets prepared by Mobile Squared estimated for 2022.

³⁴ Optus submission dated February 2024 para.91.

³⁵ Houston Kemp report dated 27 July 2023 para.30.

6. COMPETITION IN DOWNSTREAM MARKETS

- 6.1 While Sinch's submission contains some logical inconsistencies, it acknowledges that in downstream markets, the duration of contracts means that the impact of price changes in upstream markets takes time to flow through. Sinch states that:

*“the preference for long-term commercial deals by both MNOs and the resulting long-term deals with downstream customers means that pricing is less likely to fluctuate and decrease in the aggregator and A2P SMS provider space”.*³⁶

- 6.2 The concern raised by Sinch is that, in a future with declaration, price decreases will take time to flow through to downstream markets. Conversely, in a future without declaration, the adverse impacts of price increases in the market for terminating access services will also take time to flow through.

- 6.3 However, this submission is inconsistent with its claim that, in a future with declaration, aggregator and A2P SMS providers will not benefit from price decreases that occur upstream for the declared service. In any event Pivotal welcomes Sinch's acknowledging that pass-through will occur consistent with the views reached by Houston Kemp and orthodox economic principles.

- 6.4 Sinch also submits that:

*“...if the MTAS was re-regulated, MNOs such as Pivotal who “predominately supply off-net services in competition with the national mobile network operators” would have the ability to immediately offer low cost SMS to aggregators and A2P SMS providers who may not be equipped to operate responsibly in the Australian market.”*³⁷

- 6.5 Pivotal considers that Sinch's real concern may be that while it has committed to long-term contracts with MNOs, Pivotal will be in a position to pass on the benefit of a declared rate to Sinch's competitors, putting Sinch at a competitive disadvantage.

- 6.6 Sinch also points out that *“the reliance that Sinch has on MNOs means that bargaining power between the parties is, by its nature, unequal”*³⁸ and that it is *“vulnerable to the commercial conditions and pricing that MNOs will agree to”*.³⁹ It also states that its ability to negotiate pricing with MNOs is restricted *“due to the commercial realities such as that MNOs and other telcos are answerable to shareholders”*.⁴⁰ Pivotal agrees with all of these comments.

- 6.7 Sinch's submissions highlight the difficulties that A2P aggregators and A2P service providers will face in a future without declaration, in circumstances where the national MNOs may have little incentive to provide services to aggregators on reasonable terms and conditions. This is precisely why A2P SMS termination *should* be declared, so as to ensure that essential inputs are supplied at cost reflective prices.

³⁶ Sinch submission pg.3.

³⁷ Ibid.

³⁸ Ibid, page 2.

³⁹ Ibid.

⁴⁰ Ibid.

7. EX-POST REGULATION IS INAPPROPRIATE FOR DEALING WITH STRUCTURAL ISSUES

- 7.1 TPG claims that, rather than declaring the service under Part XIC, the Commission could commence a Part XIB investigation at a later date as a means of addressing market harms.
- 7.2 Pivotel submits that ex-post regulation, in this case the use of Part XIB, is not an appropriate solution for issues related to market structure. As Pivotel has previously identified, Pivotel’s inability to gain access to SMS termination on reasonable terms and conditions is not limited to its dealings with one specific MNO, with each of the three national MNOs having imposed termination charges vastly in excess of the previously regulated rate.⁴¹
- 7.3 The ACCC has correctly identified that the MTAS is a bottleneck service for the provision of SMS. In order for other MNOs or downstream market participants to bring action for anti-competitive conduct under Part XIB, it would likely need to bring actions against each of the MNOs. This is both inefficient and inappropriate. The ACCC itself acknowledges in its guidelines on Part XIB that “*Part XIC may be a preferable way of addressing a matter where structural issues are involved and the issuing of a competition notice will not resolve these issues*”. In addition, as TPG is well aware, the ACCC has not issued a competition notice under Part XIB since 12 April 2006.⁴²

⁴¹ Pivotel response to TPG’s supplementary submission para 1.16.

⁴² TPG submission on Treasury Laws Amendment (Competition and Consumer Reforms No. 1) Bill 2022: More competition, better prices dated 26 August 2022.