

Response to Telstra's submissions on the Draft Report



15 March 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**”) wishes to respond to certain claims made by Telstra in its recent submission to the ACCC’s Draft Report (“**Draft Report**”) in the public inquiry into the declaration of the domestic transmission capacity service, fixed line services and domestic mobile terminating access service (“**the Declaration Inquiry**”).
- 1.2 Any defined terms in this submission have the meaning set out in Pivotel’s earlier submissions.
- 1.3 In summary, Pivotel considers that:
 - Telstra has continued to mischaracterise the test for declaration. In particular, there is no requirement that the ACCC be satisfied that market failure has already occurred in order for it to declare a service.
 - Telstra has not provided any new evidence that there are credible substitutes for A2P SMS termination in Australia. The ACCC’s analysis remains correct.
 - The ACCC must decide, based on the evidence before it, whether declaration will promote competition and efficiency over the next 3-5 years. The HoustonKemp report has independently reached the view that competition and efficiency will be promoted by declaration. Pivotel considers that to be the correct view because, without declaration, the national MNOs will have the ability and incentive to raise prices for A2P SMS termination so as to foreclose wholesale and retail competition.
 - International comparisons are of limited utility given differences in regulatory frameworks and market conditions. In any event, the Bahrain TRA’s decision was based on P2P (not A2P) messaging, making it of little to no relevance to this process. Telstra has also ignored developments in the UK, and the continued regulation of SMS termination in New Zealand.
 - The ACCC’s ex-post competition powers are not an appropriate way to deal with issues identified in the Draft Report. Pivotel’s inability to gain access to SMS termination on reasonable terms is not limited to its dealings with one specific MNO. Considering the irreparable harm that is likely to be caused to markets for A2P SMS without declaration, the only appropriate approach is for the ACCC to declare A2P SMS termination.

- Telstra has exaggerated the extent to which A2P traffic is inflated by bad actors, and the amount of scam SMS delivered using A2P SMS. Pivotel considers all of these issues can and should be dealt with by a combination of industry regulation as well as non-price terms and conditions in the ACCC's Final Access Determination.

- 1.4 On 11 March 2023, Pivotel requested confidential versions of Telstra's submissions in response to the Draft Report and stated that it was prepared to sign appropriate confidentiality undertakings. However, Telstra declined to provide Pivotel with a copy of its confidential submissions.
- 1.5 Pivotel also notes that, aside from the national MNOs and, to some extent, Sinch, there has been overwhelming support to amend the MTAS service description to include A2P SMS.¹

2. TELSTRA MISCHARACTERISES THE LEGAL TEST FOR DECLARATION

- 2.1 Telstra states that "*Regulation should only be introduced in instances where there is evidence of clear market failure that results in loss of consumer welfare.*"² It also does not consider that "*the threshold is met for establishing a need to declare A2P SMS termination in order to protect the LTIE*"³, and that declaration is not "*required to promote the long-term interest of end-users*" [emphasis added].⁴
- 2.2 These statements demonstrate that Telstra continues to mischaracterise the test for declaration.
- 2.3 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*".⁵ In determining whether declaration is in the LTIE, regard must be had to the extent to which declaration is likely to promote competition, achieve any-to-any connectivity, and encourage the economically efficient use of and investment in infrastructure.⁶
- 2.4 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...”*⁷ [emphasis added]

¹ See the submissions of Symbio, Aussie Broadband, Twilio, and Commpete to the Draft Report, as well as the submissions of Soprano and Virtutel to the Discussion Paper.

² Telstra's submission to the Draft Report, page 4.

³ Ibid, page 11.

⁴ Ibid, page 3.

⁵ CCA, section 152AL(3)(d).

⁶ CCA, section 152AB(2).

⁷ *Application by Chime Communications Pty Ltd (No 2)* [2009] at [19].

- 2.5 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 competition⁸) and efficiency in the future.
- 2.6 As stated in Pivotel’s earlier submissions,⁹ there is no requirement that the ACCC be satisfied that market failure has already occurred in order for it to declare a service.
- 2.7 Also, contrary to Telstra’s submissions, there is nothing in the CCA about “*protecting*” the long-term interests of end-users, nor is there a threshold for a establishing a “*need*” to declare a service.
- 2.8 In any event, there is ample evidence that the wholesale market for SMS termination services is neither competitive nor efficient, and that market failure *has* occurred. This is demonstrated by an average increase in SMS termination charges well in excess of 4000% since the service was last declared.

3. ALLEGED SUBSTITUTES FOR A2P SMS

- 3.1 Pivotel agrees with Telstra’s view that “*The rapid move to digital transactions and communications for many businesses and government services spurred on by the pandemic has seen the equally rapid increase in the use of A2P SMS to send authentication and verification codes such as One Time Passcodes (OTPs) to authenticate end-users...*”¹⁰
- 3.2 However, Pivotel strongly disagrees with Telstra’s argument that there are strong substitutes for A2P SMS termination.¹¹ Telstra has not provided any new evidence that there are credible substitutes for A2P SMS termination in Australia. Its submissions are heavily reliant on international case studies, which have little or no relevance to domestic markets for A2P SMS. The ACCC’s analysis that there are currently no close substitutes to A2P SMS in the retail market for B2C communications remains correct,¹² and is supported by the ongoing growth in volumes of A2P SMS delivered in Australia.¹³
- 3.3 Telstra also makes contradictory claims regarding the existence of substitutes for A2P SMS. On the one hand, it claims that increases in A2P SMS termination charges “*have been justified by the growth in the cost and value of this service since that time...*”,¹⁴ and that there has been both a “*rapid increase*” in the use of A2P SMS to send codes,¹⁵ and refers to an “*inflated spend*” on SMS messaging.¹⁶ On the other hand, it asserts that there are strong substitutes for A2P SMS. It is unlikely that both are true.

⁸ See *Telstra Corp Ltd (No 3), Re* (2007) 242 ALR 482 at paragraph [127].

⁹ See Pivotel’s response to Telstra’s supplementary submission, paras [2.5] and [2.6].

¹⁰ Telstra’s submission to the Draft Report, page 6.

¹¹ *Ibid*, page 4.

¹² Draft report, page 67.

¹³ See Pivotel’s original submission to the inquiry, para [7.51]; see the Draft Report, page 67.

¹⁴ Telstra’s submission to the Draft Report, page 4.

¹⁵ *Ibid*, page 6.

¹⁶ *Ibid*, page 7.

Telstra's claim that A2P SMS represents 1% of business messaging traffic in Australia is spurious

- 3.4 Telstra claims that the ACCC has underestimated the scope of competition from OTT services and providers in “business messaging”.¹⁷ It also states that A2P SMS represents only 1% of total business messaging traffic in Australia.¹⁸
- 3.5 However, Telstra has provided no evidence of the existence of retail or wholesale markets for “business messaging”. It simply asserts the existence of such a market. In Pivotel’s view, the vast majority of what Telstra refers to as “business messages” are P2P messages, and therefore not substitutable for A2P messages.
- 3.6 Pivotel has obtained updated data from Omdia, which, as Pivotel understands it, separates traffic for messaging apps used by businesses (excluding P2P messaging) from the total amount of messaging app traffic. It confirms that, once P2P messages are excluded, the total amount of traffic for messaging apps used by businesses in 2022 was about 1% of the overall figure quoted by Telstra for “business messages”.¹⁹ The Omdia data also confirms that, in 2022, estimated traffic for messaging apps used by businesses (excluding P2P messages), even when combined with RCS A2P, was dwarfed by A2P SMS traffic.²⁰ This is consistent with Omdia’s recent finding that:
- “The low use of messaging apps by Australian consumers to interact with organizations’ customer care teams suggests that Australian consumers – and businesses – are not ready to switch from SMS (and other channels, such as email). The fragmentation of messaging apps plays a role – for example, in Australia in 2022, 52% of online consumers mostly used Facebook Messenger on their mobile for messaging, 17% used WhatsApp and 14% used iMessage. This fragmentation makes it non-trivial for enterprises to effectively use messaging apps to reach their customers.”²¹*
- 3.7 It is also consistent with evidence from MobileSquared that the percentage share of A2P SMS traffic lost to Whatsapp within Oceania is extremely low at [REDACTED] and will only rise to [REDACTED] by 2027,²² and with evidence that Whatsapp’s overall penetration rates in Australia remain comparatively low compared to other jurisdictions.²³ It is also confirmed by Figure 5.3 in the ACCC’s Draft Report, which shows that consumers rarely use messaging apps (e.g. WhatsApp) and dedicated apps to communicate with customer care teams (at 3.5% and 6.5% respectively, on average).²⁴
- 3.8 Pivotel is not aware of any evidence that messaging applications (e.g. Whatsapp) are credible substitutes for A2P SMS, such as for two-factor authentication. As the ACCC

¹⁷ Telstra’s submission to the Draft Report, page 4.

¹⁸ Ibid.

¹⁹ Pivotel calculated this percentage based on updated Omdia data for traffic in 2022 (for messaging apps used by businesses, excluding P2P messaging), which is 6.04 billion, and the figure used by Telstra in its submission to the inquiry, which is 643,436 million or 643.436 billion.

²⁰ The updated Omdia data indicates that the volume of traffic for messaging apps used by businesses (excluding P2P messaging but including conversational chats) was 6.04 billion in 2022, with around 1 million for A2P RCS, whereas volumes for A2P SMS traffic were 12.21 billion in 2022. Omdia has also indicated that it has very limited data in respect of traffic for messaging apps used by businesses, as this data does not tend to be reported by tech companies.

²¹ Omdia, Telco messaging and messaging apps in Australia: Data and analysis for Pivotel (2024).

²² See paragraph 7.35 of Pivotel’s original submission to the inquiry, citing evidence from MobileSquared.

²³ See paragraph 7.35 of Pivotel’s original submission to the inquiry, citing evidence from Statista.

²⁴ Draft Report, Figure 5.3.

has identified, there are significant differences in the extent to which OTT services are substitutes for P2P and A2P messages. The figures quoted by Telstra, which are heavily dependent on P2P, are therefore irrelevant to determining whether declaration of A2P SMS termination will promote the LTIE. Omdia has also expressed the view that:

“...interactions between businesses and consumers on messaging apps tend to be more conversational compared to SMS, since businesses can send a number of automated responses via messaging apps as part of a single interaction. Given this, there is a disproportionately higher amount of messaging app traffic in our latest data (estimated at 6.04 billion messages in 2022). This is demonstrated by the very low interaction between businesses and consumers via messaging apps as indicated by our Consumer Insights Survey ...”²⁵

- 3.9 Telstra itself concedes that “*past growth in OTT has been mainly in mass consumer messaging (person-to-person or P2P)*”.²⁶
- 3.10 Telstra’s assertions that OTT messaging services are a close substitute for A2P SMS and the “*predominant form of business messaging in Australia*” are unfounded.²⁷ Telstra provides no evidence that OTT services are a substitute for A2P, merely that it is a substitute for P2P SMS, sent by people who may be businesspeople.

Telstra’s other claims around A2P SMS substitution also lack substance

- 3.11 In its submissions, Telstra selectively quotes from various articles and reports by professional services firms such as Deloitte and the Harvard Business Review,²⁸ which comment on the potential for other forms of messaging to progressively erode the market shares of A2P SMS. An example is the Harvard Business Review article which was prepared in conjunction with Google (which arguably has an interest in the conclusions reached) and it is almost five years old. The article’s predictions about messaging apps have also proven to be highly optimistic, given the evidence referred to above. In any event, the article also speaks to the ubiquity and popularity of SMS as it states that, “*SMS use for consumer marketing is still growing because it’s relatively inexpensive to set up and reaches almost all consumers*”.²⁹
- 3.12 When read in context, none of the reports or articles cited by Telstra advance much beyond mere speculation about the extent of substitution. Even where they do, they point to timeframes such as “*2030*” which are beyond the current inquiry. A good example of speculative claims is the Deloitte article which states that “*As of 2024, usage of passkeys could be modest; by 2030 usage may become higher as it could supplant TFA.*”³⁰ [emphasis added]. The Deloitte article itself says that one-time passwords are often sent within a text message, citing an article which states that “*77% of accounts use SMS (texting) as their two-factor authentication (2FA)*”.³¹ This supports the ACCC’s findings that A2P SMS “*appears currently to be the single most important method for multi-factor authentication in Australia*”.³²
- 3.13 By contrast, Pivotel and HoustonKemp have relied upon detailed empirical data and forecasts provided by independent specialist organisations, such as MobileSquared.

²⁵ [REDACTED]

²⁶ Telstra’s submission to the Draft Report, page 4.

²⁷ Ibid, page 5.

²⁸ Ibid, see footnote 12 and pages 6-8.

²⁹ See the Harvard Business Review [article](#), page 4.

³⁰ See the Deloitte [article](#).

³¹ See the Zippia [article](#) which is linked in the Deloitte article.

³² Draft Report, page 67.

The ACCC has also undertaken further empirical studies.³³ In those circumstances, Pivotel considers that Telstra's claims of new evidence should be given little weight.

Telstra's claims around substitutes for A2P SMS for appointment reminders

- 3.14 Telstra seeks to rely on a case study of the NHS as evidence of the “*ability and incentives for larger enterprises to move many of their users to in-app notifications for appointment reminders*”.³⁴
- 3.15 There is a hint of desperation in Telstra's search for examples of A2P SMS substitutes. In isolation, the existence of a trial in a different jurisdiction (with a unique customer base) is of little to no probative value. In addition, when it comes to the use of in-app notifications, it simply cannot be expected that all businesses will communicate with their customers this way (given the need for consumers to download a myriad of apps for all the businesses they interact with, but also given that many businesses are not in a position to develop their own apps and instead rely upon SMS to reach customers).
- 3.16 Moreover, even companies with dedicated apps (i.e. apps that a business has created for supplying services or communicating with consumers, such as the Commbank app or ANZ app) also make use of A2P SMS, for example to send security codes.³⁵ This indicates that OTT applications are (at best) a complementary service used in conjunction with A2P SMS. Telstra also agrees that “*businesses are likely to view some communications methods as complementary*”.³⁶
- 3.17 It's also important to remember that the key consequence of declaration will be that A2P SMS termination is supplied at or close to efficient cost, and subject to whatever protections the ACCC considers appropriate in its FAD. If OTT applications are genuinely superior, this will in no way impair their ability to compete at the retail layer, particularly as many of them are provided by large and extremely wealthy digital platforms. It will simply require them to do so on a level playing field.
- 3.18 A good example of the variety of unsubstantiated claims and speculation in Telstra's submission is its statement that it expects “*off-the-shelf*” appointment booking apps to grow in attractiveness and uptake.³⁷ Telstra refers to Hot Doc, a patient engagement platform, which it says supports access to over 21,000 doctors in Australia and is used by eight million active patients. However, Telstra neglects to mention that, while Hot Doc appointment reminders can be sent via either SMS, email, or push notification,³⁸ the vast majority of its patients (71%) want reminders sent to them via SMS.³⁹ Again, this supports the ACCC's preliminary view that there are no close substitutes for A2P SMS in the retail market for B2C communications.⁴⁰

³³ See e.g. Draft Report, page 66.

³⁴ Telstra's submission to the Draft Report, page 9.

³⁵ See Commbank's [website](#) and ANZ's [website](#).

³⁶ See Telstra's submission to the Draft Report, pages 5-6.

³⁷ Ibid, page 9.

³⁸ See Hotdoc's [webpage](#), “Getting Started with Reminders”.

³⁹ See Hotdoc's [webpage](#), “Reminders”; another good example of speculation on the part of Telstra is its claim that ““*Customer insights suggest that benefits to end-users of alternatives to A2P SMS appointment reminders such as in-app notifications may also help to drive increased adoption*”.” [emphasis added]; see Telstra's submission on page 9.

⁴⁰ Draft report, page 67.

Telstra's claims around figure 5.3 in the Draft Report

- 3.19 Pivotel also rejects Telstra's claim that the data in Figure 5.3 of the Draft Report supports the conclusion that there are substitutes for A2P SMS.
- 3.20 Put simply, the data in Figure 5.3 overwhelmingly supports the ACCC's findings that there are no close substitutes to A2P SMS in the retail market for B2C communications, because:
- A2P SMS is the most popular method for receiving verification or authentication codes (55%), appointment reminders (50%), and emergency/public service announcements (32%). For most use cases, consumers prefer SMS and email.
 - In relation to appointment reminders, the next most preferred method of communication is significantly lower (email at 23%), with other forms of communications used even more scarcely (e.g. social media at 6%, messaging apps at 3%, and dedicated apps at 4%).
 - Recent data and analysis obtained from Omdia indicates that Australia has the lowest proportion of online consumers who send a message to a business using a messaging app (of selected markets); that for most use cases, Australian online consumers prefer SMS and email; and that A2P SMS will generate the "lion's share" of revenues in Australia to 2027.⁴¹ Figure 5.3 shows that consumers rarely use messaging apps (e.g. WhatsApp) and dedicated apps to communicate with customer care teams (at 3.5% and 6.5% on average, respectively).
 - Data from Omdia shows that the use of SMS for most customer care functions has increased since 2019.⁴²
 - In relation to verification or authentication codes, the next most preferred method of communication is email (34%) with other forms of communication rarely used for this purpose (e.g. social media at 6%, messaging apps at 4%, and dedicated apps at 5%).
 - A2P SMS is a widely used method of communication for several other use cases, including to receive; service notifications (38%), alerts about new services or upgrades (34%), and information on offers and discounts (29%).

References to banking "experiments"

- 3.21 Finally, Telstra relies upon alleged "experiments" by Australian banks with OTT "business messaging" apps.⁴³ Put simply, this cannot be regarded as evidence that OTT apps are (or will be) genuine substitutes for A2P SMS. Telstra also ignores the fact that the use of A2P SMS is prevalent in the banking sector, particularly to communicate security codes to customers,⁴⁴ which supports the ACCC's draft conclusions that SMS is the "most popular method for time-sensitive uses such as multi-factor

⁴¹ Omdia, Telco messaging and messaging apps in Australia: Data and analysis for Pivotel (2024), which includes reference to Omdia's "Digital Consumer Insights 2022" survey.

⁴² Pivotel compared Omdia data from 2019 and 2022.

⁴³ Telstra's submission to the Draft Report, page 8.

⁴⁴ All four banks currently use SMS, for example to communicate security codes to customers. See Commbank's [website](#), ANZ's [website](#), Westpac's [website](#), and NAB's [website](#).

authentication".⁴⁵ It also supports the view that OTT applications are (at best) a complementary service used in conjunction with A2P SMS.

- 3.22 Telstra also argues that enhanced interoperability of WhatsApp and Messenger with other platforms will accelerate the strength of substitutability between A2P SMS and other forms of messaging.⁴⁶ However, it ignores evidence provided by Pivotel that that WhatsApp's overall penetration rates in Australia remain low,⁴⁷ and the percentage share of A2P SMS traffic lost to WhatsApp within Oceania is extremely low.⁴⁸ Telstra itself concedes that "*it may still take some time for arrangements with other messaging platforms to be established*".⁴⁹ It also ignores the reality that OTT messaging services are not ubiquitous and are less accessible to regional users, the elderly, and socially disadvantaged.

RCS is not a substitute for A2P SMS

- 3.23 Telstra claims "*downstream competition from OTT messaging services including RCS*" will limit the ability of MNOs to raise prices.⁵⁰ However, Telstra has failed to provide any evidence that RCS will reach significant penetration in the short-medium term and will result in a transition away from A2P SMS. By contrast, Pivotel has provided evidence that RCS will only account for a relatively small number of users in the future, even allowing for Apple's entrance into the market.⁵¹
- 3.24 Telstra also ignores the limitations of RCS discussed in Pivotel's previous submissions,⁵² including that it is data dependent and requires users to have RCS-enabled devices. In any event, key components of the RCS business messaging are controlled by MNOs, making it unlikely an RCS termination service would constrain the pricing of SMS termination services. Pivotel also understands that Telstra shut down its RCS service in 2022,⁵³ which is hardly a ringing endorsement of its viability as a substitute for A2P SMS.

4. TELSTRA'S CLAIMS REGARDING COMPETITION IN THE A2P SMS MARKET

- 4.1 The ACCC must decide, based on the evidence before it, whether declaration will promote competition and efficiency over the next 3-5 years. The historic level of competition in retail markets is relevant to, but in no way determinative of, that decision. The HoustonKemp report has independently reached the view that competition and efficiency will be promoted by declaration.⁵⁴ Pivotel considers that to be the correct view because, without declaration, the national MNOs will have the ability and incentive to raise prices for A2P SMS termination so as to foreclose wholesale and retail competition. The MNOs conduct to date, by raising termination charges by [REDACTED] on average, demonstrates a willingness to use their market power and demonstrates that the margins of MNOs are increasing

⁴⁵ Draft report, page 66.

⁴⁶ Telstra's submission to the Draft Report, page 11.

⁴⁷ See paragraph 7.35 of Pivotel's original submission to the inquiry, citing evidence from Statista.

⁴⁸ See paragraph 7.35 of Pivotel's original submission to the inquiry, citing evidence from MobileSquared.

⁴⁹ Telstra's submission to the Draft Report, page 11.

⁵⁰ Telstra's submission to the Draft Report, page 11.

⁵¹ See Pivotel's response to the ACCC's Draft Report, para [5.12].

⁵² See Pivotel's response to the ACCC's Draft Report, para [5.11].

⁵³ Omdia, Telco messaging and messaging apps in Australia: Data and analysis for Pivotel (2024).

⁵⁴ See HoustonKemp's report to the ACCC's Discussion Paper, paras [27] and [30].

substantially, while margins for off-net A2P providers are being squeezed, thereby limiting their ability to compete.

- 4.2 Telstra makes a number of inaccurate and unsubstantiated claims to support its assertion that the A2P SMS market is currently competitive. A good example is Telstra's claims that "*the MNOs and Pivotel have strong incentives to continue to supply A2P SMS termination to each other on a commercial basis, as they have been doing since the service was deregulated in 2019*".⁵⁵
- 4.3 These claims run contrary to the conclusions reached by HoustonKemp regarding Telstra's ability and incentive to increase charges above efficient levels,⁵⁶ belie the history of negotiations between the parties, and take no account of the fact that Pivotel is entirely dependent on Telstra as the largest MNO for termination of messages. It also ignores the average increases in termination charges in excess of 4000% by the national MNOs since the service was last declared.
- 4.4 The vast increases in termination charges since the service was last declared, together with the constructive refusal to supply by the national MNOs [REDACTED] is sufficient proof of the competitive harm that Telstra refuses to acknowledge.
- 4.5 Telstra also argues that there is no market failure involved in prices for A2P SMS being based on the "*willingness to pay*" of consumers,⁵⁷ and that off-net services provide a competitive constraint on MNOs.⁵⁸ Telstra's submissions are disingenuous in circumstances where the ACCC has found that MNOs have a monopoly over SMS termination services on their networks,⁵⁹ where SMS termination services are an essential input for off-net A2P SMS services,⁶⁰ and where there are no close substitutes to A2P SMS in the retail market.⁶¹ Smaller MNOs, A2P aggregators and service providers simply have no choice but to pay and/or pass through increased charges.
- 4.6 Perhaps tellingly, Telstra refers to the ACCC's statement in 2019 that "*...it is likely that Pivotel will face higher wholesale prices for SMS termination*"⁶² but omits any reference to the ACCC's warning that followed "*...given the extremely low cost of SMS termination, any price increase that would effectively prevent any party (such as Pivotel) from competing in the A2P SMS market, may indicate anti-competitive conduct and warrant investigation under Part XIB of the CCA.*"⁶³
- 4.7 Telstra's claim that there is "*no evidence that extending the declared MTAS to include A2P SMS termination will advance the LTIE*"⁶⁴ and that there is no evidence "*redeclaration of A2P SMS termination services will promote competition...*"⁶⁵ also ignores the findings in the HoustonKemp report, which concludes that declaration will promote competition and efficiency in a range of wholesale and retail markets

⁵⁵ Telstra's submission to the Draft Report, page 12.

⁵⁶ See HoustonKemp's report to the ACCC's Discussion Paper, para [21].

⁵⁷ Telstra's submission to the Draft Report, page 12.

⁵⁸ Ibid, pages 12-13.

⁵⁹ See the ACCC's [Final Report](#) in the Domestic MTAS Inquiry (June 2019), page 27.

⁶⁰ See HoustonKemp's report to the ACCC's Discussion Paper, para [22].

⁶¹ See HoustonKemp's report to the ACCC's Discussion Paper, para [170] and the ACCC's Draft Report, page 67.

⁶² Telstra's submission to the Draft Report, page 12.

⁶³ See the ACCC's [Draft Report](#) in the Domestic MTAS Inquiry (2019). The ACCC reiterated in its [Final Report](#) that any attempt by the MNOs to refuse access on reasonable terms would raise serious concerns under the CCA and warrant investigation.

⁶⁴ Telstra's submission to the Draft Report, page 3.

⁶⁵ Ibid, page 4.

associated with the supply of A2P messaging services. It also plainly ignores the vastly increased SMS termination charges since the service was last declared. In a future without declaration, small MNOs like Pivotel will be unable to absorb increased SMS termination charges and will be forced to either pass them onto service providers and aggregators or exit the market. The adverse impacts will extend to A2P service providers (and aggregators) as they will be forced to increase charges, exit the market, or attempt to contract with each MNO at substantially inflated rates due to lack of competition.

Telstra's claim that it is appropriate to recover anti-spam costs at the wholesale layer

- 4.8 Telstra asserts that there are “substantial costs”⁶⁶ to establish MNO anti-spam systems, and that it is “*It is entirely appropriate for Telstra and other MNOs to seek to recover these costs through their commercially negotiated charges for A2P SMS termination.*”⁶⁷
- 4.9 However, Telstra’s submissions also ignore that Pivotel has significant incentives to address scam SMS and ensure it remains a trusted medium for both consumers and businesses (given its focus on providing off-net SMS services to aggregators and service providers). Pivotel’s commitment to addressing scam is demonstrated by its investments in scam blocking processes and systems and support of ongoing industry initiatives. The very low volumes of scam traffic reported to it by the national MNOs as required under the Scam Code is further evidence of the effectiveness of Pivotel’s commitment to reducing scam.
- 4.10 In addition, Pivotel has itself incurred significant costs in establishing anti-spam systems and participating in scam mitigation initiatives. These initiatives are set out below:
- **SecureSMS initiative:** Pivotel 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. [REDACTED]
 - **Reducing Scam Calls and SMS Code (“Scam Code”):** Pivotel was an active participant in the Communications Alliance working group that drafted the most recent version of the Scam Code.
 - **SMS SenderID Registry:** Pivotel 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:** Pivotel 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. Pivotel is currently the only MNO assisting to develop the application programming interface (“API”) for the system.
 - **National Anti-Scam Centre (“NASC”):** Pivotel has been an active participant in the NASC initiative and was the only MNO physically present at its founding

⁶⁶ Telstra’s submission to the Draft Report, page 12.

⁶⁷ Ibid.

meeting in 2023. Pivotel 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”)**: Pivotel 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**: Pivotel 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”)**: Pivotel has been an active member of the Taskforce since its inception. Of particular note was Pivotel’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.

4.11 The suggestion that Telstra should recover costs to establish anti-spam systems by extracting monopoly rents is not only anathema to competition and innovation, but it will also reduce incentives for smaller MNOs (such as Pivotel) to invest in solutions to combat scam, in circumstances where Pivotel also has an incentive (and incurs significant costs) to combat scams.

5. INTERNATIONAL PRECEDENT FOR SMS REGULATION

5.1 Telstra’s submission points to Bahrain and the EU as jurisdictions where SMS has been deregulated (or where regulation has not been recommended) and uses these examples to assert that the “*weight of international regulatory precedent has favoured deregulation of SMS termination*”.⁶⁸

5.2 Pivotel considers that international comparisons are of limited utility given differences in regulatory frameworks and market conditions.

5.3 In any event, the Bahrain TRA makes it clear that its decision was based on P2P (not A2P) messaging, making it of little to no relevance to this process. Critically, the TRA did not examine trends in A2P and bulk messaging traffic, and, in its own words, and conceded that it “*mostly focussed on P2P messaging services*”.⁶⁹ When concerns were raised by operators,⁷⁰ the TRA admitted that there had been growth in A2P messaging, and that demand trends for A2P SMS have evolved differently to P2P messaging in recent years.⁷¹

5.4 By contrast, Ofcom has expressly identified wholesale prices increases as an issue for its upcoming review on wholesale voice markets,⁷² and SMS termination continues to

⁶⁸ Telstra’s submission to the Draft Report, page 13.

⁶⁹ See the Determination of Dominance in the Mobile Termination Markets (issued by the Telecommunications Regulatory Authority in 2019), page 29.

⁷⁰ Ibid.

⁷¹ Ibid, pages 29-30.

⁷² See Pivotel’s submission to the inquiry re Ofcom’s letter to MNOs. Ofcom’s letter is available on its [website](#).

be regulated in New Zealand.⁷³ These examples put paid to Telstra's assertion that the weight of regulatory precedent has favoured deregulation.

- 5.5 Telstra also argues that the alleged lack of international precedent could “*markedly increase the risk of regulatory error for the price terms of any FAD, should the ACCC decide to regulate*”.⁷⁴ However, Telstra's claim ignores the fact that international benchmarking is only one of a number of methods the ACCC can employ to set a cost-based price for a regulated service. For example, when SMS termination was last declared, the ACCC decided to estimate the cost of the SMS termination service by determining the conveyance cost of SMS termination and then adding on the SMS specific cost.⁷⁵ In any event, these issues can be adequately dealt with when the Commission considers its Final Access Determination, assuming the service is declared.

6. THE ACCC'S EX-POST COMPETITION POWERS

- 6.1 Telstra states that the “*use of the ACCC's ex-post competition powers continues to be the best way to deal with any competition concerns which may arise in future in the A2P SMS market*” and that this is a “*far more proportionate and appropriate approach... in the absence of any indication of present market failure*”.⁷⁶
- 6.2 Telstra has a long history of pointing to the provisions in the CCA which allow the ACCC to bring proceedings on an “*ex-post*” basis.⁷⁷ Tellingly, the ACCC has never successfully brought proceedings against Telstra for a misuse of market power, and the last Competition Notice was issued in 2006.⁷⁸ That notice was subsequently revoked, and it was also found to be invalid following a legal challenge by Telstra.⁷⁹ Indeed, Telstra itself has previously noted that the “*ACCC has demonstrated a preference for using Part XIC to address competition concerns*”.⁸⁰ It is therefore unsurprising that Telstra would point to the ACCC's ex-post powers here. By comparison, the ACCC has a statutory duty in this case to form a view as to whether declaration will promote the LTIE. For the reasons set out in its submissions, Pivotal trusts that it will do so.
- 6.3 In addition, as stated in its previous submissions,⁸¹ Pivotal'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. Given the approximately [REDACTED] average increase in SMS termination charges since the service was last declared, and the irreparable harm that is likely to be caused to markets for A2P SMS without declaration, the *only* proportionate and appropriate approach is for the ACCC to declare A2P SMS termination.
- 6.4 In suggesting that the “*simple threat of regulation*” has meant the MNOs are open to negotiating access,⁸² Pivotal submits that Telstra ignores that the threat will disappear

⁷³ See Pivotal's original submission to the inquiry, para [7.66].

⁷⁴ Telstra's submission to the Draft Report, page 13.

⁷⁵ See the ACCC's [Final Decision](#) in the MTAS FAD (August 2015), page 32.

⁷⁶ Telstra's submission to the Draft Report, page 14.

⁷⁷ See, for example, Telstra's [submission](#) to the ACCC's Communications Sector Market Study Draft Report.

⁷⁸ See the ACCC's competition notices [register](#).

⁷⁹ See *Telstra Corp Ltd v Australian Competition and Consumer Commission (ACCC) (No 2)* (2007)

97 ALD 652 and the record of the Telstra line rental competition notice on the ACCC's [register](#).

⁸⁰ See Telstra's response to the Discussion Paper of the Review of the Part XIB telecommunications anti-competitive conduct provisions, page 6.

⁸¹ See Pivotal's response to TPG's supplementary submission, para [1.16].

⁸² Telstra's submission to the Draft Report, page 14.

if the ACCC decides not to vary the declaration in the manner proposed. The consequences of that are obvious.

7. SCAM SMS

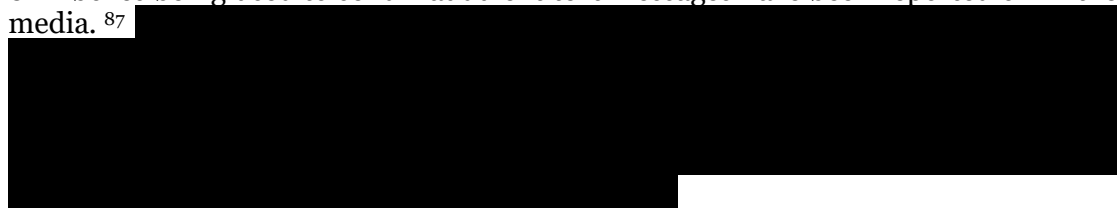
7.1 Telstra suggests that A2P traffic is being inflated by bad actors due to “*significant instances of A2P SMS fraud*” being detected,⁸³ but has exaggerated the extent to which A2P traffic is inflated by bad actors, and the amount of scam SMS delivered using A2P SMS.

7.2 A good example is Telstra’s reference to predictions that the artificial inflation of traffic (“**AIT**”) will have “*potential catastrophic consequences for MNOs*”.⁸⁴ However, it has provided no compelling evidence that the Australian market is impacted by AIT. In Pivotel’s business experience, AIT is not a material issue in Australia.

7.3 Telstra’s asserts that many “*scam messages are delivered using A2P SMS*”,⁸⁵ and refers to an ACMA media release about non-compliant SMS being sent by two telecommunications operators. However, the press release itself acknowledges that only a small proportion of those SMS were actually scam communications, and, in the case of one operator, the ACMA recognised that there is “*no evidence that scammers exploited its vulnerabilities*”.⁸⁶ In addition, in Pivotel’s experience, scam SMS passing through legitimate A2P SMS channels represents a very small proportion of the overall volume of scam SMS traffic, and that the ACMA’s enforcement of the Scam Code highlights that effective regulatory frameworks are in place to target scam SMS.

7.4 Notwithstanding this, Pivotel recognises the importance of combatting scam and actively supports industry initiatives to do so (see paragraph [4.18] above). It has also led the way in developing firewall services to target scam and provided submissions to the Government’s consultation on mandatory industry scam codes, which supported many of the recommendations. For that reason, it considers that the broader regulatory settings should promote the effective scam detection and blocking solutions in place to manage legitimate A2P SMS channels.

7.5 Unfortunately, rather than using A2P SMS, scammers and fraudsters rely heavily on SIM boxes and SIM farms. A SIM box allows a user to control multiple P2P SIM cards simultaneously. Scammers can then use these SIMs to exploit free or low-cost P2P messaging options that avoid legitimate channels. A number of alleged instances of SIM boxes being used to send fraudulent text messages have been reported on in the media.⁸⁷



7.6 Pivotel also considers that the volumes of scam traffic sent via legitimate A2P SMS paths remains very low relative to public data on reported scams. For example, according to the ACMA, telcos reported blocking over 106.7 million scam SMS from

⁸³ Telstra’s submission to the Draft Report, page 6.

⁸⁴ Ibid, page 7.

⁸⁵ Ibid, page 12.

⁸⁶ See the ACMA’s [press release](#).

⁸⁷ See e.g. an [article](#) from the ABC and an [article](#) from the Sydney Morning Herald, and stories aired by ‘A Current Affair’ (see [here](#) and [here](#)), which discuss alleged instances of fraudulent text messages being sent with the use of SIM boxes.

October to December 2023.⁸⁸ Whereas the total volumes of scam SMS reported by all the national MNOs to Pivotel in the same period was around [REDACTED].⁸⁹ Pivotel concludes from this data that the vast majority of scam SMS blocked by the national MNOs is *not* A2P SMS, but in fact derives from other sources such as SIM boxes and SIM farms. In any event, Pivotel considers all of these issues can and should be dealt with by a combination of industry regulation, such as the Reducing Scam Calls and SMS Code, and the various initiatives by the Department and ACMA to address scam (which Pivotel has been a key contributor to) as well as non-price terms and conditions in the ACCC's Final Access Determination.⁹⁰

- 7.7 Pivotel considers 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.

Exaggerated claims about AIT

- 7.8 Telstra claims that AIT could have catastrophic consequences and refers to an example of a supermarket incurring SMS fees as a result of fraudulent activity.⁹¹ This sort of issue may also be attributable to SIM boxing or SIM farms. In any event, surely Telstra cannot be suggesting that it would be appropriate to raise the price of A2P SMS to deter fraudulent traffic (even if this could deter legitimate traffic).
- 7.9 Put simply, neither Telstra nor any of the other national MNOs have provided any credible evidence linking increased prices for SMS termination to a reduction in scam or fraud. By contrast, Pivotel refers to HoustonKemp's report and its finding that "*...it is highly likely that scams are driven by causes other than declaration and its associated effects on prices*".⁹² Pivotel also endorses the ACCC's draft findings 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*".⁹³

8. MTAS SERVICE DESCRIPTION

- 8.1 While Pivotel does not share all of Telstra's concerns about the proposed changes to the service description, it would not object to the wording proposed by Telstra if the Commission decides that those submissions have sufficient weight.

⁸⁸ See the ACMA's [website](#), and also Pivotel's response to the Draft Report at para [5.22].

⁸⁹ See Pivotel's response to the Draft Report, para [5.22].

⁹⁰ See e.g. the Government's [consultation](#) on Mandatory Industry Codes. Pivotel would be happy to share its submissions with the Commission, if that would assist.

⁹¹ Telstra's submission to the Draft Report, page 7.

⁹² See HoustonKemp's additional report to the ACCC's Discussion Paper, para [44].

⁹³ Draft Report, page 74.