

5 May 2014

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Dear Ms O'Reilly

**Message4U Submission to the Commission's Domestic Mobile Terminating Access Service Declaration Inquiry – Telstra Response**

I refer to your email of 9 April 2014 notifying stakeholders that the Commission had received an additional submission in response to the report on the draft decision for the MTAS declaration inquiry from Thomson Geer on behalf of Message4U (**Thomson Geer submission**). This letter provides Telstra's response to some of the issues raised in the Thomson Geer submission.

As the Commission is aware, Telstra does not support the Commission's preliminary view in the Draft Decision that the MTAS service description should be varied to include SMS termination services. Telstra's position on this was outlined in our response to the Draft Decision, including compelling evidence of the widespread take up and usage of over-the-top (**OTT**) alternatives to SMS by consumers which operate as competitive substitutes for SMS services. Market developments that have occurred since Telstra's submission provide further support to this position.

In brief:

- Smartphone penetration continues to grow. The ACMA predicts that *"the proportion of smartphones will increase from an average of 78 per cent in 2013 to a saturation level of around 91 per cent in 2017."*<sup>1</sup>
- As smartphone penetration continues to grow (and, conversely the number of people with mobile devices for which SMS is the only messaging application continues to decline) the

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<sup>1</sup> ACMA and the Centre of International Economics, *The economic impacts of mobile broadband on the Australian economy*, p. 13

importance and perceived value of OTT application services to consumers is growing. For example, as part of their recent acquisition WhatsApp Facebook urged the FTC to consider the social messaging services provided by Facebook and WhatsApp in the context of the broader messaging market (i.e. including SMS).<sup>2</sup> This provides further evidence of the substitutability between SMS and OTT applications as well as the growing recognition that these services should be considered part of the same market for regulatory purposes.

- Mobile service providers and regulators globally continue to publicly recognise that OTT apps are a viable competitive alternative to mobile services that are increasingly having an impact on revenues, specifically those received from SMS services. In Singapore, for example, the Infocomm Development Authority (IDA) released figures showing that SMS messaging fell to a six-year low in 2013 despite an increase in mobile penetration.<sup>3</sup> SingTel acknowledged that this is due to the proliferation of OTT messaging apps.<sup>4</sup>
- OTT apps continue to grow in importance from a consumer perspective. As part of its annual array of technology, media and telecoms predictions, Deloitte forecasts that globally, mobile instant messaging services on mobile phones will carry more than double the volume of messages compared to SMS traffic in 2014.<sup>5</sup> Deloitte also indicated that *“[w]e would also expect [mobile instant messaging] services on mobile phones to continue to substitute not just for SMS, but for other forms of communication, from e-mail to phone calls.”*<sup>6</sup> Significantly, Deloitte also predict that the over-55 age bracket will see the fastest year-on-year smartphone penetration across developed markets.

Accordingly, Telstra urges the Commission to further consider the compelling evidence for substitutability and the competitive constraint upon SMS messaging flowing from the now prevalent OTT messaging applications. Over the next regulatory period these applications will become ubiquitous. End users are enjoying more innovation, more competition, greater choice and lower prices for messaging services. These dynamics will only intensify and apply to all mobile consumers in the near future. Given these market dynamics, and the risks associated with access regulation – including the risk of inadvertently deterring investment and innovation in adjacent markets and sub-markets – it is not in the Long Term Interests of End-Users (LTIE) for SMS termination services to be declared.

### **Application-to-person SMS messages**

Notwithstanding the clear case against the regulation of SMS termination, if the Commission nevertheless remains minded to declare SMS termination, Telstra reiterates its previous submission that the service description in the Draft Decision should be amended to expressly exclude application-to-person (A2P) SMS messages. This view was supported by the other mobile interconnecting carriers (Vodafone and Optus) in their most recent submissions. In this regard and for the reasons detailed below, Telstra disagrees with the submission from Thomson Geer on behalf of Message4U seeking the declaration of A2P SMS termination.

A2P SMS messages are distinct from person-to-person (P2P) SMS messages and have not been explicitly considered by the Commission as part of the Declaration Inquiry. The limited evidence gathered and preliminary conclusions made by the Commission in relation to P2P SMS messages cannot be applied to A2P – the outcomes are not comparable and Telstra submits that any proposal to include A2P SMS messages in the declaration of SMS

<sup>2</sup> <http://nypost.com/2014/04/08/ftc-gives-facebook-go-ahead-on-whatsapp-deal-source/>

<sup>3</sup> <http://www.ida.gov.sg/Infocomm-Landscape/Facts-and-Figures/Telecommunications/Statistics-on-Telecom-Services/Statistics-on-Telecom-Services-for-2013-Jul-Dec>

<sup>4</sup> <http://www.cnn.com/id/101453992>

<sup>5</sup> Communications Day, 31 January 2014, page 3.

<sup>6</sup> Ibid.

termination should, if the Commission considers it appropriate, be subject to a separate and more comprehensive inquiry process than has occurred to date.

As with the declaration of SMS termination as a whole, Telstra is concerned that the Commission has not conducted a sufficiently comprehensive assessment or economic analysis of the A2P SMS market or articulated compelling reasons why declaration of the service is in the LTIE. Telstra's concern is particularly pronounced in the context of A2P SMS given that interested parties cannot be said to have been afforded a sufficient opportunity to be heard on this issue and it is not clear that the Commission will be in a position to avail itself of and consider all information relevant to determining the appropriateness of including this form of SMS within the scope of the current declaration inquiry. A2P messages have not been raised at any point in the Commission's inquiry to date and the Thomson Geer submission comes only in response to stakeholder concerns about the breadth of the proposed service description and proposals that it be amended so that these messages are excluded.

As noted in previous submissions<sup>7</sup>, despite intervention across a range of mobile services, SMS termination is generally not regulated in other jurisdictions. Further, where SMS termination is regulated – such as in New Zealand – bulk SMS or A2P has been carved out of the service description.

Telstra does not agree with the points made in the Thomson Geer submission in relation to spam and the approach taken by the New Zealand Commerce Commission (NZCC). The Thomson Geer submission correctly notes that MMS and SMS spam currently account for less than 4% of spam complaints, reports and enquiries received by the ACMA. This is exactly the position the proposed exclusion of A2P SMS messages seeks to maintain. Including A2P in any declaration of SMS termination services increases the risk that SMS messages (such as those provided by Message4U) that will no longer be provided on a *commercial basis* will become more prevalent. Telstra is not aware of any evidence to suggest that the NZCC approach to excluding A2P SMS messages has had an adverse affect on competition, including in the bulk SMS segment.

A2P messages that are currently sent to mobile end-users are typically 'opt-in' SMS messages that are, as noted by Thomson Geer, high value for both the initiating business (e.g. banks) and the consumer. The current approach to negotiating termination rates for these services ensures that they reflect the value to businesses and consumers. This is critical as the market for these services is growing. Any risk of SMS spam may actually inhibit the growth of the legitimate A2P SMS sector by 'grouping' them with SMS messages that are considered to be unwanted or nuisance, thereby diluting their value.

The Thomson Geer submission claims that the approach taken by the NZCC in excluding A2P SMS is irrelevant – that the NZCC excluded A2P SMS messages "inadvertently" rather than as a "conscious objective" by not giving them explicit consideration during the initial public inquiry.<sup>8</sup> In its response to the Draft Decision, Telstra noted that the exclusion of A2P SMS in New Zealand followed concerns that inclusion of such services could significantly increase the risk of spam SMS messages as well the fact that they had not been explicitly considered by the NZCC as part of its inquiry into mobile termination services. Telstra's view is that the outcome in New Zealand was appropriate and mirrors the outcome that should occur here for analogous reasons. A specific inquiry in relation to the merits of regulating A2P SMS would,

<sup>7</sup> For example - Telstra Corporation Limited, Response to the Submissions of other Interested Parties on the Commission's Discussion Paper on the Review of the declaration of the Domestic Mobile Terminating Access Service, 8 August 2013

<sup>8</sup> Thomson Geer, Mobile Terminating Access Service declaration review – 2013, p.8

given the unique nature and commercial context of this form of SMS, be necessary before steps are taken to bring this form of messaging within the scope of any regulation.

Telstra submits that the current approach to the commercial negotiation of A2P SMS messages also distinguishes them from P2P SMS messages. These services are typically negotiated on a volume basis with wholesale termination charges that in many instances differ from than those applied to P2P SMS messages. There is no evidence to suggest that the approach to commercially negotiating A2P SMS messages is not working and no concerns have been raised about A2P SMS services in terms of the level of pricing or that mobile network operators are acting in any way to restrict or stifle access to A2P SMS termination services. There is also no evidence to suggest that consumer expectations relating to the volume or benefits of bulk SMS services is adversely affected or constrained by the current approach to commercially negotiating A2P SMS prices.

Thomson Geer suggests that the appropriate way to deal with spam SMS is through existing regulation such as the *Spam Act 2003*. In its response to the Draft Decision, Telstra acknowledged that the *Spam Act 2003* prohibits the sending of unsolicited commercial electronic messages. However, additional measures in relation to SMS would need to be implemented to ensure that SMS is afforded the same approach to consumer protection as other services covered by the Act. This is likely to increase the cost of regulation and costs to industry required to implement any changes. These costs are likely to outweigh the benefits of regulating this small segment of the SMS market (5% of total SMS traffic according to Thomson Geer although Telstra estimates this to be closer to 2-3%). It is also likely that domestic regulation or legislation will not address the risk of spam originating from international locations.

As stated above, Telstra maintains its position that the declaration of SMS termination services is unwarranted, unnecessary and would not be in the LTIE. Telstra considers that the declaration of any service must be in the LTIE and a last resort where other regulation (including competition law) and competitive constraints in related markets are not likely to be effective over the regulatory period in question. This is not the case with SMS termination services, which show no sign of market failure and are subject to competition from OTT applications. However, if the Commission is minded to declare SMS termination the service description in the Draft Decision should be amended to expressly exclude A2P SMS messages.

Please contact Justine Bond on (02) 8576 2736 should you have any queries in relation to the contents of this letter.

Yours sincerely



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