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Australian Competition and Consumer Commission  
**BY EMAIL: Sarah.Danos@accc.gov.au**

Dear Ms Danos

### **Mobile Terminating Access Service declaration review – 2013**

We act for Message4U Pty Ltd (**Message4U**). We have received instructions to make the following submission on behalf of our client Message4U in response to the ACCC's draft decision regarding the MTAS declaration (**the Draft Decision**).

Message4U strongly agrees with, and supports, the Draft Decision. In particular Message4U supports:

- the ACCC's preliminary view that the MTAS declaration should be extended; and
- the ACCC's preliminary view that the MTAS service description should be varied so that it applies to the termination of SMS messages and not just to the termination of mobile voice calls.

Message4U believes that the proposed service description included in Appendix A of the Draft Decision (**the Updated Service Description**) is appropriate and will promote the long term interests of end users (LTIE). However, Message4U notes that Optus, in its submission in response to the Draft Decision<sup>1</sup> (**the Optus Submission**), has proposed amendments to the Updated Service Description (**the Proposed Amendments**). Message4U does not believe that the Proposed Amendments are merited or that they will promote the LTIE as well as the Updated Service Description. The purpose of this letter is to provide the reasons for this view.

The remainder of this letter sets out:

- why the Updated Service Description is important to Message4U;
- an overview of the Proposed Amendments;
- why Message4U believes the ACCC should reject the Proposed Amendments; and
- why the ACCC should consider this letter.

<sup>1</sup> Submission in response to ACCC Draft Decision Report Domestic Mobile Terminating Access Service (MTAS) Declaration Inquiry Public Version February 2014

## 1. Why the Updated Service Description is important to Message4U

Message4U provides business SMS messaging solutions which allow its clients to communicate with customers and staff in a simple and economical way. Message4U's SMS messaging solutions are aimed at facilitating business communication in a cost-effective and time saving manner. The primary uses of Message4U's service include appointment reminders, staff rostering and online security passwords. An example of the service Message4U provides is an SMS appointment reminder for a dentist or hairdresser.

Currently, the MTAS service description only applies to voice calls. It does not apply to the termination of SMS messages. However, the ACCC has formed the preliminary view that the MTAS service description should be broadened to include the termination of SMS messages. This preliminary view is based on the following observations which are expressed in the Draft Decision.<sup>2</sup>

- it appears that SMS termination is an essential bottleneck service for which there are no substitutes; and
- there are indications that SMS termination rates have not changed for many years, commercial negotiations have been unsuccessful in lowering these rates, and that SMS termination prices are inefficiently high.

Message4U agrees with these observations and Message4U agrees that they justify the MTAS service description being broadened to include the termination of SMS messages.

Message4U's core business requires it to have the ability to terminate SMS messages on a mobile network that Message4U does not own or control. This means that, in essence, Message4U faces the same bottleneck<sup>3</sup> that the ACCC has identified in the Draft Decision. Message4U is hopeful that a regulated cost-based SMS termination price will flow through to downstream service providers, including Message4U, and stimulate competition and achieve lower prices for end users in downstream markets, including the downstream markets that Message4U operates in. Message4U believes that such an outcome will promote the LTIE.

## 2. Overview of the Proposed Amendments

In the Optus Submission, Optus makes the following statement (footnotes omitted):<sup>4</sup>

*The current SMS termination rate is also significantly above the cost incurred to provide SMS termination. Termination network cost models worldwide all show that one minute of voice uses the same network elements as at least 432 SMS. If MNOs supplying wholesale SMS termination services faced competitive pressure, one would expect that the current excessive monopoly rents would be competed away.*

<sup>2</sup> Draft Decision at section 5.1.

<sup>3</sup> Note that where Message4U uses the term 'bottleneck' in this submission, the term is used in its economic sense - i.e. the bottleneck in question has natural monopoly characteristics.

<sup>4</sup> Optus Submission, at paragraphs 3.9 and 3.10.

*Optus submits that there is a wholesale market for the termination of SMS on individual mobile operators' networks. These markets do not face competition and MNOs are accruing significant monopoly rents. Declaration would, combined with cost-based pricing, therefore promote competition in the provision of wholesale SMS termination service on individual MNO's networks.*

For ease of expression, this statement will be referred to as the **SMS Declaration Justification**. Message4U fully agrees with the SMS Declaration Justification. Message4U submits that the SMS Declaration Justification supports the Updated Service Description. However, Optus goes on to make the following statement (footnotes omitted):<sup>5</sup>

*Optus notes that the introduction of cost based termination rate may increase the risk of unwarranted commercial and other premium-service type messages. The current SMS termination rate helps to deter these types of unwarranted bulk commercial, SPAM and other premium-service type messages. A significant increase in these types of unwarranted bulk SMS could impose significant quality of service constraints on existing connectivity between MNOs such as congestion and customer experience issues.*

*Optus however submits that in declaring SMS termination, the ACCC should make it clear that only peer-to-peer SMS termination is to be declared. In other words, SMS originating from subscribers of an Australian digital mobile network operator (this includes authorised wholesale partners such as MVNOs). This approach is consistent with the ACCC's description of SMS services in the Draft Report. The ACCC notes that a SMS "allows a mobile user to send text message to other mobile users". The ACCC further notes that the SMS wholesale service are "services provided by one MNO to another MNO". The ACCC also notes that "SMS termination has many of the same characteristics as mobile-to-mobile voice termination services." Optus agrees with these observations and proposes changes to the MTAS service description to give effect to these intentions.*

*This is consistent with the approach taken by the New Zealand Commerce Commission (NZCC).*

It is on the basis of this statement that Optus seeks the Proposed Amendments. The Proposed Amendments are set out in Appendix A of the Optus Submission. The effect of the Proposed Amendments would be to restrict the MTAS declaration, insofar as it applies to the termination of SMS messages, to SMS message that originate from a mobile telephone network. Other forms of SMS message such as SMS messages that originate from the internet, machine-to-man and machine-to-machine (**the Excluded SMS Messages**) would be outside the scope of the MTAS service description and therefore not subject to regulation.

### 3. Why Message4U believes the ACCC should reject the Proposed Amendments

Optus' position appears to be that notwithstanding the SMS Declaration Justification, network operators should continue to have the ability to charge monopoly rents for the termination of Excluded SMS Messages because such an outcome would:

- deter spam and and premium rate SMS messages and help prevent congestion;

<sup>5</sup> Ibid, at paragraphs 3.26 to 3.28.

- be consistent with the ACCC's description of SMS services in the Draft Decision; and
- be consistent with the approach taken by the New Zealand Regulator (the Commerce Commission).

Message4U submits that none of these reasons (either alone or together) justify the ACCC adopting the Proposed Amendments. Each of these reasons will be considered in turn.

### ***Deterring spam and premium rate SMS messages and preventing congestion***

There are three distinct issues to consider. Firstly there is the issue of spam. Secondly, there is the issue of premium rate SMS messages. Thirdly, there is the issue of congestion.

#### ***Spam***

As regards spam, it is crucially important for the ACCC to appreciate that simply because an SMS message does not originate from a mobile telephone handset (i.e. it is an Excluded SMS Message) does not mean it is spam. Message4U's services involve the use of Excluded SMS Messages but do not involve sending spam. The following are examples of the services provided by Message4U:

- emergency notifications (e.g. bushfire warnings from the CFA);
- hospital outpatient reminders;
- internet banking authorisation confirmations;
- a notification of an approaching taxi;
- flight and public transport delay and cancellation notices; and
- appointment reminders for a variety of services including for example hairdressers and dentists.

These services are valued by consumers and businesses alike. The value of these services to consumers and businesses should not be trivialised or underestimated. For example, a study in the UK concluded that an outpatient reminder service of the type provided by Message4U contributed to a reduction of 25% to 28% in missed outpatient clinic appointments, which translated to national cost savings of more than £150 million per year. In addition, the reduction in missed appointments was also found to be likely to have clinical benefits as well<sup>6</sup> Message4U submits that adopting an approach that removes all Excluded Messages from the scope of the MTAS in order to deter spam is far too crude a way of dealing with spam because it will also capture the above legitimate and useful services. Requiring providers of these services to pay monopoly rents for SMS termination is likely to unnecessarily limit the availability of these services by artificially inflating the prices charged for these services which are

<sup>6</sup> See *Text Message Reminders of Appointments: A Pilot Intervention at Four Community Mental Health Clinics in London* available at: <http://ps.psychiatryonline.org/article.aspx?articleID=433008>

ultimately borne by end users. Message4U submits that such an outcome clearly does not promote the LTIE.

A better way to deal with spam is through the use of specific regulation such as under the *Spam Act 2003*. In this regard, it is relevant to note that Australia's spam laws are seen as world leading as the following statement by the Australian Communications and Media Authority confirms:<sup>7</sup>

*Australia's Spam Act 2003 has been repeatedly held up as a model for spam legislation around the world. The Australian Communications and Media Authority (ACMA) believes this is because the Act has proven effective against professional spammers within the reach of Australian jurisdiction, while appropriately balancing the rights of business and consumers in relation to legitimate electronic marketing.*

Furthermore, the problem of SMS spam needs to be put into a wider context of spam as a whole. In this regard, it should be noted that MMS and SMS spam accounted for less than 4% of spam complaints, reports and enquiries received by the Australian Communications and Media authority in 2012/13.<sup>8</sup>

Given the existence of spam specific regulation, Message4U submits that there is clearly no need for the ACCC to consider distorting the orthodox principles of access regulation<sup>9</sup> in order to deter spam. Even if the current regulation of spam was defective (which Message4U submits is not the case), the appropriate response would be to fix that regulation and not deal with the issue through access regulation which is not the appropriate regulatory vehicle to deal with any issues relating to spam.

#### Premium Rate SMS Messages

As regards premium rate messages, Message4U wishes to make the following points:

- Message4U's core services described above do not involve premium rate SMS services.<sup>10</sup>
- There is no reason in principle why premium rate SMS services per se should be discouraged, it is end users being misled about premium rate services that is the problem that needs to be dealt with and there is an industry code that has been specifically developed to deal with this problem.<sup>11</sup> Complaints about breaches of this industry code can be made to the Telecommunications Industry Ombudsman (TIO).
- In 2012/13, complaints about premium rate mobile services accounted for only 1.2% of all complaints received by the TIO and the number of complaints about premium rate mobile services received by the TIO has been steadily decreasing since 2009.<sup>12</sup>

<sup>7</sup> Australian Communications and Media Authority Submission to the Spam Act Review available at: [ACMA.gov.au](http://ACMA.gov.au)

<sup>8</sup> Australian Communications and Media Authority Annual Report 2012/13, at pp.97, 98 available at: <http://www.acma.gov.au/theACMA/Library/Corporate-library/Corporate-publications/annual-report-2012--13>

<sup>9</sup> i.e. principles that require the regulation of the SMS termination bottleneck in order to promote the LTIE

<sup>10</sup> Message4U does provide some premium rate services but only rarely, one example being its 'Tram Tracker' service that enables a consumer to check the time of the next tram.

<sup>11</sup> The Mobile Premium Services Industry Code C637:2001

<sup>12</sup> Telecommunications Industry Ombudsman 2012-2013 Annual Report, at p.24.

In light of these points, the same conclusion as with spam is appropriate - i.e. there is clearly no need for the ACCC to consider distorting the orthodox principles of access regulation in order to deal with any problems that arise from premium rate SMS messages.

### Congestion

As regards congestion, Message4U notes that Optus has not provided any evidence that such congestion is currently occurring, or would occur if the Updated Service Description is implemented. In this regard, Message4U notes that in response to end-users' demands, Optus has itself introduced a number of plans in the market that allow for unlimited SMS messages,<sup>13</sup> an action which is likely to increase the volume of SMS messages and therefore add to any potential congestion. In light of this, Message4U questions the extent to which congestion is actually a concern for Optus. Furthermore, Optus' concerns about Excluded Messages leading to increased congestion need to be considered in the context of SMS messages using a tiny proportion of the amount of network capacity that is used by a voice call. As noted by Optus, termination network cost models worldwide all show that one minute of voice uses the same network elements as at least 432 SMS messages.<sup>14</sup> In other words, there would need to be a very big increase in SMS messages to cause network congestion on a mobile network that has been designed to carry voice traffic.

Message4U believes that Excluded Message traffic constitutes approximately 5% of total SMS traffic with 95% being Person to Person SMS, meaning any increase in Excluded Message traffic would constitute a drop in the ocean. Furthermore Person to Person SMS traffic is inherently lumpy with peak periods such as New Years Eve requiring carriers to have infrastructure capacity to cope with massive spikes – suggesting there is in fact very considerable unused infrastructure capacity during normal work hours when most Excluded Message traffic is sent.<sup>15</sup>

Even if evidence of congestion existed, allowing the MNO's to retain monopoly power over the termination of Excluded SMS Messages is not an appropriate way to deal with the problem in a manner that would best promote the LTIE as it would likely deter efficient investment in infrastructure that would otherwise occur to deal with the problem. In other words the approach to congestion that best promotes the LTIE is to undertake appropriate investment in infrastructure rather than take an approach that will retain monopoly power leading to the artificial inflation of the cost of services that are of considerable value to businesses and consumers.

### ***The ACCC's description of SMS services in the Draft Decision***

Optus' assertion that the ACCC intended to exclude the Excluded SMS Messages from the scope of the MTAS declaration is wholly reliant on implications from isolated statements in the Draft Decision (which Message4U assumes were not intended to be subject to a level of scrutiny that is usually reserved for statutes). This assertion is

<sup>13</sup> Ibid at paragraph 1.8.

<sup>14</sup> Optus submission, at paragraph 3.9.

<sup>15</sup> See for example: <http://www.smh.com.au/digital-life/mobiles/mobile-networks-gear-up-for-flood-of-new-years-eve-text-messages-20131231-30429.html>

obviously inconsistent with the Updated Service Description (i.e. if the ACCC's intention was to exclude Excluded SMS Messages from the scope of the MTAS declaration, then why didn't it draft the Updated Service Description accordingly?). Furthermore, Message4U submits that removing Excluded SMS Messages from the scope of the MTAS service description, even if it was the ACCC's intended approach, would not only be perverse as a matter of regulatory policy as discussed above but it would also be wrong as a matter of principle. This is because the MTAS is about termination to a mobile network. Therefore, there is no reason in principle why the MTAS service description should be restricted in scope to like for like originating services. If such a principle was necessary, then it would apply with equal force to the termination of voice services and the application of this principle would demand that voice services that originate on a fixed line network be excluded from the MTAS service description because there is no like for like originating service involved. Clearly, such an outcome is absurd. Message4U submits that an outcome that leads to Excluded SMS Messages being excluded from the MTAS service description is, as a matter of principle, equally absurd.

### ***The approach taken by the New Zealand Commerce Commission***

Message4U notes that in making its assertion that excluding Excluded SMS Messages from the MTAS service description is consistent with the approach taken by the New Zealand regulator, Optus relies on NZCC 2011, *Executive summary of Standard Terms Determination for the designated services of the mobile termination access services (MTAS) (fixed-to-mobile voice (FTM), mobile-to-mobile voice (MTM) and short messaging services (SMS)) decision (the Commerce Commission Decision)*.<sup>16</sup>

The relevant extract of the Commerce Commission Decision states as follows (emphasis added):<sup>17</sup>

#### ***Service description***

*The Commission has determined that the MTAS services covered by the MTAS STD should:*

- *not include domestic transit or transport services, as these are available commercially and do not need to be included in the scope of the MTAS STD; and*
- *only include web to text SMS that originate from a cellular mobile telephone network and have an associated MTAS reply path. Other forms of SMS, such as SMS that originate on the internet, machine to man and machine to machine SMS, have been excluded from the MTAS STD as these are outside the scope of the regulated SMS service.*

Note that for clarity the MTAS service that is the subject of the Commerce Commission Decision will be referred to as **the NZMTAS**. Message4U submits that it is important to note the following points about the Commerce Commission Decision:

- The Commerce Commission had no power to review the service description for the NZMTAS when it made the Commerce Commission Decision (the

<sup>16</sup> Ibid at paragraph 3.28.

<sup>17</sup> Commerce Commission Decision, at p.8.

Commerce Commission Decision was concerned with terms and conditions of access and, as such, is broadly equivalent to an ACCC access determination).

- During the earlier public inquiry into the declaration of the NZMTAS, it appears that little, if any, consideration was given to whether it was desirable in order to better promote the LTIE to exclude the Excluded SMS Messages from the scope of the NZMTAS declaration.<sup>18</sup> In other words it appears that excluding the Excluded SMS Messages from the scope of the NZMTAS service description may not have been a conscious objective but may have occurred inadvertently.

In light of these points, Message4U believes that the Commerce Commission Decision does not assist with this matter and no weight should be given to it by the ACCC. Furthermore, with due respect to the Commerce Commission, just because an unfortunate regulatory outcome has occurred in one jurisdiction does not provide a cogent basis for repeating the same mistake in Australia, particularly where the result has an adverse effect on competition and is contrary to the LTIE.

### ***Conclusion***

For the reasons given above, Message4U submits that:

- there is a clear need to regulate the termination of SMS messages in order to better promote the LTIE and Message4U and Optus are in full agreement on this point; but
- contrary to Optus' view, the Proposed Amendments should be rejected because they are bad both as a matter of principle and as a matter of regulatory policy.

#### **4. Why the ACCC should consider this letter**

Message4U acknowledges that submissions in response to the Draft Decision closed on 14 February 2014. However, Message4U submits that it could not reasonably have foreseen the issues that Optus raised regarding the Proposed Amendments at the time Message4U was considering the Draft Decision. Therefore, it was not possible for Message4U to provide its input on those issues prior to considering the Optus Submission. In light of this, Message4U respectfully submits that in order to make a fully informed and robust decision, the ACCC should give full consideration, and

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<sup>18</sup> The documents relating to this public inquiry are available at: <http://www.comcom.govt.nz/regulated-industries/telecommunications/defining-scope-of-regulation/mobiletomobiletermination/>



appropriate weight, to this letter. Message4U has no objections to this letter being published in full on the ACCC's website.

Yours sincerely  
**THOMSON GEER**

A handwritten signature in black ink, appearing to read 'TD', with a horizontal line extending to the right.

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