

DIGICEL (PNG) LIMITED

Submission to NICTA

**Public Inquiry into the Potential Declaration of Domestic Mobile and
Fixed Termination Access Services**

30 November 2022

*This submission is provided to NICTA for the purpose of the current public inquiry
only and may not be used for any other purpose*

A. Executive Summary

1. On 21 October 2022, NICTA published a Discussion Paper on its website titled *Public inquiry into the potential declaration of Domestic Mobile and Fixed Termination Access Services* by which it has proposed to make a recommendation to the Minister to declare “*wholesale domestic fixed termination access service (DFTAS); and domestic mobile terminating access service (DMTAS)*”.
2. The Discussion Paper states that submissions on the Discussion Paper “*must be received by noon Friday 4th, November 2022*” (original emphasis), i.e. within a period of less than two weeks from the date of publication of the Discussion Paper. While we note that the deadline for submissions was subsequently extended to 30 November 2022, the initial period specified by NICTA immediately raises questions about whether this purported “consultation” is genuine or whether NICTA has already predetermined the outcome of this matter.
3. Digicel’s concerns about the nature of the purported consultation are only heightened in circumstances where NICTA’s apparent sole reason for proceeding with the Public Inquiry is that:

“NICTA’s alternative approach to interconnection charges has, unfortunately, not worked, despite allowing substantial time for the various operators to agree commercially on rates that reasonably reflect the cost of providing termination services. As well, no agreements have been submitted to NICTA for registration.”

4. No proper explanation has been provided to describe NICTA’s “alternative approach” or why it takes the view that it has “not worked”. In the circumstances, Digicel considers that such an explanation is warranted given that, current interconnection pricing in Papua New Guinea has been arrived at through commercial negotiation and there are no disputes between any interconnecting parties that Digicel is aware of.
5. Accordingly, Digicel is at a loss as to why NICTA is pursuing this matter at this time and why it is apparently the subject of such urgency.
6. Importantly, any decision by NICTA to recommend the declaration of a wholesale service is subject to the provisions of Part VI of the *National Information and Communication Technology Act 2009* (“**Act**”) which provides, *inter alia*, that before it may make a recommendation to the Minister to declare a wholesale service, NICTA must be satisfied that all of the declaration criteria specified in Section 128 of the Act (“**Declaration Criteria**”) will be met.
7. As NICTA will appreciate from prior proceedings, the Declaration Criteria are not mere guidelines; they are mandatory statutory requirements, all of which must be demonstrably

be met before NICTA can make a recommendation to the Minister to declare a wholesale service.

8. In addition to the Declaration Criteria, any recommendation must also satisfy the Objectives and Regulatory Principles that are enshrined in Sections 2 and 3 of the Act. In particular, any proposed regulation must recognize the effectiveness of market forces in promoting consumer welfare and that any regulatory measures must be proportionate and no more burdensome than necessary to achieve their stated regulatory objectives.
9. In Digicel's submission these requirements provide a very high threshold for intervention. Importantly, the burden of proof is on NICTA to show that the recommended declaration of a wholesale service would meet the strict requirements of the Act. In particular, it would be insufficient for NICTA to proceed with a declaration on the basis of a belief or without cogent evidence and analysis to support its views.
10. Unfortunately and with respect, this standard has not been met. For example, NICTA has not provided any evidence or analysis whatsoever to support its apparent conclusion that interconnection charges do not reasonably reflect costs, or that there are issues in respect of negotiating and concluding interconnection agreements between service providers.
11. Nor has any evidence or analysis been provided to support NICTA's conclusions in relation to the relative costs and benefits of intervention, and no evidence is provided to support an actual need for regulatory intervention or that such intervention would meet the strict requirements of the Act. In Digicel's submission, declaration is inappropriate and unnecessary at this time and will not result in the declaration criteria being met.
12. Finally, NICTA has created confusion about the ambit of the proposed declaration. At Section 3.1.8 of the Discussion Paper, NICTA states:

"The declaration was not gazetted, and not implemented, because of the concerns that the matter would be tied up for an inordinate period in court. Instead, the approach described in Section 2.2 of this Discussion Paper is proposed. The issue of terminating charges for calls that originate outside Papua New Guinea is being deferred to another review at another time. NICTA has not changed its view about regulation of these services in accordance with the Part VI Division 3 of Part VI of the Act. The immediate focus is on termination on fixed and mobile call services that originate within Papua New Guinea".

13. This statement is, at best, unclear and ambiguous for the following reasons:
 - a. Firstly, it is not clear what is meant by the sentence *"Instead, the approach described in Section 2.2 of this Discussion Paper is proposed"* as Section 2.2 of the Discussion Paper does not appear to include any proposals.
 - b. Secondly, it is not clear what NICTA means by its statement that it *"has not changed its view about regulation of these services in accordance with the Part VI Division 3 of Part VI of the Act"*.

- c. Thirdly, NICTA's statement that *"The issue of terminating charges for calls that originate outside Papua New Guinea is being deferred to another review at another time. ... The immediate focus is on termination on fixed and mobile call services that originate within Papua New Guinea"* does not fully reconcile with *Annex B – Draft Declaration of Wholesale Voice Call Termination Services on Individual Fixed and Mobile Networks* ("**Draft Declaration**") which still includes "for the avoidance of doubt language" in Sections 6(2) and 8(2). If NICTA's true intention is to defer the issue of terminating charges for calls that originate outside Papua New Guinea to another review at another time, there would not be any need to include either of those Sections in the Draft Declaration.
14. For the avoidance of doubt, Digicel remains firmly of the view that seeking to regulate inbound international calls would be unlawful. While we appreciate that NICTA may hold a different view, we are very concerned that NICTA still appears to be relying on a purported decision by the ICT Appeals Panel that was made on or about 15 May 2015 to support its position¹. This is despite NICTA being well aware that, at the time the purported decision was made, the ICT Appeals Panel was not properly constituted and its purported decision was made without proper jurisdiction. We note that that undisputable fact has not been addressed in the Discussion Paper.
15. If it is NICTA's intention to recommend a declaration that only relates to calls that originate and terminate within Papua New Guinea, then it should clearly and unambiguously state that to be the case.

¹ See Section 3.1.6 of the Discussion Paper

B. Introduction

16. The purpose of this submission is to respond to the issues raised by the National Information and Communication Technology Authority ("**NICTA**") in its Discussion Paper that was published on 21 October 2022 titled *Public inquiry into the potential declaration of Domestic Mobile and Fixed Termination Access Services* ("**Discussion Paper**").
17. Digicel looks forward to being able to review and comment on any submissions being made by other parties and to seeing a draft decision from NICTA prior to any recommendations being made to the Minister.
18. NICTA's preliminary view is that mobile terminating access service ("**MTAS**") and fixed terminating access service; ("**FTAS**") should not be recommended to the Minister for declaration in accordance with his powers under Section 130 of the Act.
19. Before NICTA can consider the recommendation of a particular wholesale service for declaration, it must establish whether that wholesale service is lawfully capable of regulation under the terms of the Act. Only then can it make an assessment of the relative merits of such a declaration.
20. Relevantly, a decision by NICTA to recommend the declaration of a wholesale service is subject to the provisions of Part VI of the Act which provides, *inter alia*, that before it may make a recommendation to the Minister to declare a wholesale service, NICTA must be satisfied that all of the declaration criteria specified in Section 128 of the Act ("**Declaration Criteria**") will be met. Importantly, the Declaration Criteria are not mere guidelines but are mandatory statutory requirements that must *all* demonstrably be met before NICTA can make a recommendation to the Minister to declare a wholesale service.
21. In addition to the Declaration Criteria, any recommendation must also satisfy the Objectives and Regulatory Principles that are enshrined in Sections 2 and 3 of the Act. In particular, any proposed regulation must recognize the effectiveness of market forces in promoting consumer welfare and that any regulatory measures must be proportionate and no more burdensome than necessary to achieve their stated regulatory objectives.
22. In Digicel's submission these requirements provide a very high threshold for intervention. Importantly, the burden of proof is upon NICTA to show that the recommended declaration of a wholesale service would meet the strict requirements of the Act. In particular, it would be insufficient for NICTA to proceed with a declaration on the basis of a belief or supposition and without cogent evidence and analysis to support its views.
23. Digicel has therefore considered the services that have been proposed for declaration in the light of the Declaration Criteria and the other requirements of the Act and has provided below its detailed views in relation to those services.

C. Ambit of the Proposed Declaration

24. At Section 3.1 of the Discussion Paper, NICTA has sought to explain the current status of the regulation of MTAS and FTAS, particularly as it relates to the regulation of inbound international calls.
25. In doing so, NICTA apparently retains the view that inbound international calls are susceptible to regulation under Part VI of the Act and has cited a purported decision of the ICT Appeals Panel in 2015 (“**Purported Decision**”) to support its position.
26. While NICTA then goes on to state that *“The issue of terminating charges for calls that originate outside Papua New Guinea is being deferred to another review at another time ... The immediate focus is on termination on fixed and mobile call services that originate within Papua New Guinea”*, its statements on the lawfulness of regulating inbound international calls cannot go unaddressed. This is for the following reasons:
 - a. NICTA is well aware that, at the time the Purported Decision was made, the ICT Appeals Panel was not properly constituted and the Purported Decision was made without proper jurisdiction. Yet that undisputable fact has not been addressed in the Discussion Paper.
 - b. NICTA has not undertaken or shared any independent legal analysis supporting its incorrect view that inbound international calls are susceptible to regulation under Part VI of the Act; and
 - c. NICTA has chosen not to reflect any of the detailed legal analysis and submissions that have been made on the issue and which clearly show that the regulation of inbound international calls would be *ultra vires*.
27. With the greatest respect, NICTA’s approach is not becoming of an independent regulator that has an express duty to act transparently.
28. To be clear, and for reasons that include (but are not limited to) those that are set out below, inbound international calls are not permitted to be the subject of a declaration under Part VI of the Act and any attempt to include them as a part of the definition of a declared service would be unlawful.
29. This is because the regulation of incoming international calls that have originated outside of PNG is not open to NICTA by reason of the proper interpretation and application of the Act insofar as it defines the terms *“interconnection”* and *“any-to-any connectivity”*. These terms are *only* relevant to the supply of domestic interconnection services to enable communication between the *retail customers* of the two networks in Papua New Guinea that are interconnected.
30. Furthermore, by reason of the definition of the terms *“access”* and *“access seeker”*, a proper interpretation of the Act would conclude that *only* access seekers are entitled to

the regulatory privileges and protections that arise as a result of a service being declared. Section 125(1) of the Act defines the terms access and access seeker in the following way:

“(1) For the purposes of this Part —

- (a) “access”, in relation to a declared service, is a reference to access by an access seeker **in order that the access seeker can supply retail services**; and*
- (b) anything done by an operator licensee in fulfilment of a non-discrimination obligation is taken to be an aspect of access to a declared service.” (emphasis added)*

31. Section 136 of the Act provides the specific obligation that an access provider must provide access to a declared service to an access seeker. However, this obligation is again clearly constrained to the provision of the declared service to an access seeker in order that the access seeker can provide *retail services*. Specifically, Sections 136(3) and 136(5) provide:

“(3) An access provider shall, if requested to do so by an access seeker

- (a) supply an active declared service to the access seeker **in order that the access seeker can provide retail services...***
(emphasis added)

and

“(5) If an access provider owns or controls any facilities then the access provider shall, if requested to do so by an access seeker —

- (a) permit interconnection of those facilities with the facilities of the access seeker for the purpose of enabling the access seeker to be supplied with active declared services **in order that the access seeker can provide retail services...***
(emphasis added)

32. There can be no argument that NICTA would be acting in excess of its jurisdiction should it attempt to recommend the declaration of a service that is not contemplated by the Act. Similarly, no good legal argument has been provided by NICTA as to why it considers inbound international calls are capable of being subject to regulation under Part VI of the Act.

33. However, notwithstanding NICTA’s stated view that inbound international calls may be regulated under Part VI of the Act, Digicel acknowledges NICTA’s apparent position that inbound international calls should not be the subject of this proceeding. Specifically, Section 3.1.8 of the Discussion Paper states:

*“The declaration was not gazetted, and not implemented, because of the concerns that the matter would be tied up for an inordinate period in court. Instead, the approach described in Section 2.2 of this Discussion Paper is proposed. **The issue of terminating charges for calls that originate outside Papua New Guinea is being deferred to***

another review at another time. NICTA has not changed its view about regulation of these services in accordance with the Part VI Division 3 of Part VI of the Act. The immediate focus is on termination on fixed and mobile call services that originate within Papua New Guinea".

34. However, even this statement is, at best, unclear for the following reasons:

- a. Firstly, it is not clear what is meant by the sentence "*Instead, the approach described in Section 2.2 of this Discussion Paper is proposed*" as Section 2.2 of the Discussion Paper does not appear to include any proposals.
- b. Secondly, it is not clear what NICTA means by its statement that it "*has not changed its view about regulation of these services in accordance with the Part VI Division 3 of Part VI of the Act*".
- c. Thirdly, NICTA's statement that "*The issue of terminating charges for calls that originate outside Papua New Guinea is being deferred to another review at another time. ... The immediate focus is on termination on fixed and mobile call services that originate within Papua New Guinea*" does not fully reconcile with Annex B – Draft Declaration of Wholesale Voice Call Termination Services on Individual Fixed and Mobile Networks ("**Draft Declaration**") which still includes "for the avoidance of doubt language" in Sections 6(2) and 8(2). If NICTA's true intention is to defer the issue of terminating charges for calls that originate outside Papua New Guinea to another review at another time, there would not be any need to include either of those Sections in the Draft Declaration.

35. If it is NICTA's intention to recommend a declaration that only relates to calls that originate and terminate within Papua New Guinea, then it should clearly and unambiguously state that to be the case.

D. Compliance with the Declaration Criteria and Regulatory Principles

36. Digicel submits that NICTA has not introduced any evidence or analysis to support its view that the proposed declaration would satisfy the Declaration Criteria or would otherwise be consistent with the requirements of the Act.

37. a decision by NICTA to recommend the declaration of a wholesale service is subject to the provisions of Part VI of the Act which provides, *inter alia*, that before it may make a recommendation to the Minister to declare a wholesale service, NICTA must be satisfied that all of the declaration criteria specified in Section 128 of the Act ("**Declaration Criteria**") will be met. Importantly, the Declaration Criteria are not mere guidelines but are mandatory statutory requirements that must *all* demonstrably be met before NICTA can make a recommendation to the Minister to declare a wholesale service.

38. NICTA's assessment of the proposed declaration against the Declaration Criteria amounts to less than two pages of prose that is entirely devoid of any evidence or actual analysis.

39. Had any such actual analysis been undertaken, legitimate questions would have been raised as to:
- a. Whether it is safe to assume that the proposed “relevant market” is indeed relevant in the light of the strong competition that service providers now face from OTT voice apps that are provided by international Internet Giants and others;
 - b. Whether any domestic service provider has SMP or whether there is really “*a material risk of harm to the development of effective competition in the downstream retail services markets and to consumer’s long-term interests*” as has been asserted at Section 3.3.2 of the Discussion Paper. This is particularly relevant in the knowledge that, despite there having been no MTAS or FTAS declaration in effect since at least 2019, new interconnection agreements have still been able to be concluded and termination rates have still declined;
 - c. Whether NICTA’s statement at Section 3.4.2 of the Discussion Paper are anything more than mere conjecture. NICTA has not identified any current instances of “distortion” or “serious damage” to “*competition in the relevant downstream retail markets*” (which also have not been identified) or to investment. Nor has NICTA identified how this distortion or damage may occur in future or even what it means by its sweeping statement “*If the terms inordinately favour the access provider, uneconomic investment in access seeker facilities may well result*”;
 - d. Whether there is any reasoned basis to accept NICTA’s assertions at Section 3.4.3 of the Discussion Paper that the proposed declaration would promote competition in some, as yet undefined, retail services market; and
 - e. Whether there is any factual basis for the implied allegation in Section 3.4.4 of the Discussion Paper that termination charges are excessive and that access seekers are currently being required to take more services or a greater service than they require.
40. In the absence of any actual evidence or analysis to support its assertions and in the light of the clear evidence that interconnection agreements continue to operate without any apparent issue, Digicel submits that NICTA cannot properly be “*satisfied that all of the declaration criteria would be met by the [proposed] declaration*” as is required under Section 129(1) of the Act.
41. Moreover, in addition to the Declaration Criteria, any recommendation must also satisfy the Objectives and Regulatory Principles that are enshrined in Sections 2 and 3 of the Act. In particular, any proposed regulation must recognize the effectiveness of market forces in promoting consumer welfare and that any regulatory measures must be proportionate and no more burdensome than necessary to achieve their stated regulatory objectives.
42. In Digicel’s submission, these requirements provide a very high threshold for intervention. Importantly, the burden of proof is upon NICTA to show that the recommended declaration of a wholesale service would meet the strict requirements of the Act. In particular, it would be insufficient for NICTA to proceed with a declaration on the basis of a belief or supposition and without cogent evidence and analysis to support its views.

43. This is particularly the case given there are already commercial arrangements in place for the provision of those services and have been for more than a decade.
44. In addition, a new interconnection agreement was negotiated between Digicel and Vodafone earlier this year. This was able to be completed without any apparent difficulty or need for recourse to NICTA for the resolution of any dispute.
45. Importantly, under the terms of those arrangements, the price for the MTAS has declined from 26 toea per minute to its current level of 7.25 toea per minute which is consistent with or below international cost-based (LRIC+) benchmarks for the service².
46. There is no reason to believe, and no evidence has been adduced to support a view that, these commercial arrangements will not continue to endure or that, where justified, further reductions in the price for the MTAS will not occur.
47. For these reasons, this Declaration Criteria have not been shown to be met and the proposed declarations cannot lawfully be recommended to the Minister.

E. Conclusion

48. Digicel confirms its view that any proposed declaration must meet all of the requirements of the Declaration Criteria and otherwise be in accordance with the Act.
49. Digicel further confirms its view that those requirements establish a high threshold for any intervention.
50. In Digicel's submission, the proposal to declare MTAS and FTAS on the terms that have been proposed does not meet this high threshold and should not be declared.
51. Digicel welcomes the opportunity to comment on the submissions of other parties and looks forward to continuing to discuss these issues with NICTA as the Public Inquiry progresses.

² An international benchmarking analysis undertaken for Digicel by Dr Aaron Schiff in May 2018 concluded that the LRIC+ cost estimate for mobile termination was (at that time) 8.7 toea per minute. This analysis has previously been provided to NICTA and a further copy may be made available should NICTA so desire.