



## DISCUSSION PAPER

# **Public inquiry into the potential declaration of Domestic Mobile and Fixed Termination Access Services**

*Issued on 21<sup>st</sup> October 2022*

# Contents

- 1 EXECUTIVE SUMMARY.....2**
- 2 BACKGROUND .....3**
  - 2.1 THE LEGISLATIVE REGIME .....3
  - 2.2 CURRENT SITUATION IN RELATION TO TERMINATING ACCESS SERVICES .....4
  - 2.3 THE INQUIRY AND DECLARATION PROCESS .....4
  - 2.4 SUBMISSIONS IN RESPONSE TO THIS DISCUSSION PAPER .....6
- 3 THE MARKETS FOR WHOLESALE VOICE CALL TERMINATION ON INDIVIDUAL FIXED AND MOBILE NETWORKS .....7**
  - 3.1 BACKGROUND.....7
  - 3.2 RELEVANT MARKET .....8
  - 3.3 COMPETITIVE ASSESSMENT .....8
  - 3.4 CONSIDERATION OF THE PROPOSED WHOLESALE SERVICE DECLARATION.....8
  - 3.5 PRELIMINARY CONCLUSIONS .....9
- ANNEX A: PUBLIC INQUIRY TERMS OF REFERENCE .....10**
- ANNEX B – DRAFT DECLARATION OF WHOLESALE VOICE CALL TERMINATION SERVICES ON INDIVIDUAL FIXED AND MOBILE NETWORKS.....11**

# 1 EXECUTIVE SUMMARY

The *National Information and Communications Technology Act 2009 (the Act)* provides for NICTA to conduct public inquiries into whether or not particular wholesale services should be made ‘declared services’ by the Minister. An operator licensee that supplies a declared service must comply with particular non-discrimination obligations. The terms and conditions of supply of a declared service must be consistent with the general pricing principles specified in the Act and the service-specific principles that must be specified by NICTA for each declared service. NICTA may also be called upon to arbitrate a dispute between two operator licensees regarding the terms and conditions of supply of a declared service.

NICTA has decided to conduct a public inquiry to consider the declaration of the following wholesale telecommunications services:

- wholesale domestic fixed termination access service (DFTAS); and
- domestic mobile terminating access service (DMTAS).

The terms of reference for this inquiry are provided at Attachment A.

As set out in this discussion paper, NICTA staff’s preliminary view is that DFTAS and DMTAS should be recommended to the Minister for declaration.

NICTA invites written comments in response to these preliminary conclusions.

The question that NICTA would encourage submissions to address in the case of each wholesale service is whether there is agreement or disagreement with the assessment that NICTA has made and the reasons for that view. In addition submissions might consider whether there are other wholesale services, or alternative wholesale service definitions, that NICTA should have considered and whether those services should be declared or not.

Submissions should be submitted via email to [inquiry.submission@nicta.gov.pg](mailto:inquiry.submission@nicta.gov.pg) and must be received by **noon Friday 4<sup>th</sup>, November 2022**.

## 2 BACKGROUND

### 2.1 The legislative regime

2.1.1 Operator licensees may, at any time, supply wholesale services to other operator licensees under terms and conditions that are commercially agreed. In addition a regulated wholesale access regime is provided for in Part VI of the Act. Under that regime:

- (a) NICTA may, following an inquiry, recommend to the Minister that certain wholesale services should be made **declared services**;
- (b) The supply of declared services is subject to the **general pricing principles** specified in the Act and also to **service-specific pricing principles** that are determined by NICTA;
- (c) Access providers (i.e. operator licensees) that supply declared services are required to comply with certain **non-discrimination obligations** under s.136 of the Act in relation to their supply of declared services (unless exempted). This means that an access provider must:
  - supply the declared service to, and interconnect relevant facilities with, any access seeker that requests such;
  - supply the declared service and associated interconnection services to access seekers with a technical and operational quality of service equivalent to that which the access provider supplies to itself;
  - supply the access seeker with ordering and provisioning and fault handling services that are equivalent to that which the access provider supplies to itself; and
  - supply the access seeker, if requested, with billing information necessary to enable the access seeker to supply retail services using the declared service.<sup>1</sup>
- (d) The **terms and conditions** on which an access provider fulfils its non-discrimination obligations are to be commercially agreed between the access provider and the access seeker. An access provider may also set out terms and conditions in a **reference interconnection offer (RIO)**. A RIO must be approved by NICTA;
- (e) NICTA may specify **model non-price terms and conditions** relating to the supply of a declared service (s.133);
- (f) In the event that an agreement on the terms and conditions relating to an access provider's fulfilment of its non-discrimination obligations cannot be reached, the terms and conditions of access will be as set out in any relevant RIO that the access provider has submitted to NICTA and which NICTA has accepted (s.138). In the absence of both an agreement and a RIO, the terms and conditions of access are those determined by NICTA through **arbitration** (s.138). In making such a determination, NICTA must

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<sup>1</sup> Section 21 of the *National Information and Communications Technology (Operator Licensing) Regulation, 2010* specifies the required billing information.

have regard to any relevant model non-price terms and conditions it has previously specified (s.133) among other factors (s.149).

## **2.2 Current situation in relation to terminating access services**

2.2.1 On 19 February 2019 the Minister accepted recommendations by NICTA to declare a number of wholesale access services including:

- mobile terminating access service; and
- domestic fixed terminating access service.

These services differed from the services which are the subject of the present Discussion Paper, in that they were not confined to domestic services and included the termination of calls on fixed and mobile networks irrespective of whether the calls originated in Papua New Guinea or overseas.

2.2.2 At the time, Digicel PNG Limited (“Digicel”) disputed whether calls that originated outside of Papua New Guinea satisfied all of the criteria for declaration. After considering the situation NICTA determined on a different approach in relation to these services. It decided not to Gazette the relevant determination, and, as a result, the determination did not come into effect. Instead, NICTA encouraged licensed operators to agree on terminating interconnection charges commercially that reasonably reflected costs and to formalise the arrangements via bilateral agreements that could be registered with NICTA.

2.2.3 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.

2.2.4 NICTA therefore has reverted to the original approach of declaration by the Minister. If the Minister declares the services, NICTA will proceed to establish specific pricing principles in which terminating access charges are prescribed.

## **2.3 The inquiry and declaration process**

2.3.1 NICTA may only recommend that the Minister declare a particular wholesale service if NICTA is satisfied that such a declaration would satisfy all of the declaration criteria set out in section 128 of the Act as follows:

The “declaration criteria” are as follows –

- (a) that declaration of the wholesale service will further the achievement of the objective of this Part as set out in Section 124; and
- (b) specifically, in relation to the competition objective, that –
  - (i) access or increased access to the wholesale service (as a consequence of declaration) is necessary for the promotion of effective competition in at least one market other than the market for the wholesale service; and

- (ii) the wholesale service is supplied in whole or in part via a facility that cannot feasibly be substituted, as a matter of commercial reality, via another facility in order to supply that wholesale service; and
- (c) specifically, in relation to the efficiency objective, that –
  - (i) declaration would not materially compromise the incentives for efficient investment in any facility over which the wholesale service may be supplied; and
  - (ii) access or increased access to the wholesale service (as a consequence of declaration) is technically feasible having regard to the specific factors identified in Section 124(2)(a); and
  - (iii) in the case of wholesale services that are facilities access services, increased access to the wholesale service would avoid inefficient replication of underlying facilities that may be efficiently shared.

2.3.2 The objective of Part VI of the Act, as set out in section 124, is as follows:

- (1) The objective of this Part and Part VII of this Act is to –
  - (a) promote effective competition in markets for ICT services in Papua New Guinea, to be known as the “competition objective”, subject to –
  - (b) promoting the economically efficient use of, and the economically efficient investment in, the facilities by which ICT services may be supplied, to be known as the “efficiency objective”.
- (2) In determining the extent to which a particular thing is likely to further the achievement of the efficiency objective, regard shall be had (without limitation) to all of the following matters –
  - (a) whether it is technically feasible for the relevant ICT services to be supplied, having regard to –
    - (i) the technology available or likely to become available; and
    - (ii) the reasonableness of the costs involved; and
    - (iii) the effect of supplying the ICT services on the integrity, operation or performance of other ICT services or facilities; and
  - (b) the legitimate commercial interests of the access provider in supplying the ICT services, including the ability of the access provider to exploit economies of scale and scope; and
  - (c) the incentives for investment in the facilities by which the ICT services may be supplied, including the risks involved in making the investment.

2.3.3 Before NICTA may consider whether or not the declaration of a particular service would satisfy the declaration criteria it must first identify suitable candidate services for consideration. Although some potential wholesale services are envisaged in the Act itself,<sup>2</sup> NICTA staff have used the market analysis process to identify suitable candidate wholesale services. The approach to the definition of ICT service markets and the analysis of competition within those markets is set out in NICTA’s *Market Analysis Guidelines*.<sup>3</sup>

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<sup>2</sup> For example, in subsection 131(7) of the Act.

<sup>3</sup> Available at [http://nicta.gov.pg/images/consultative\\_papers/2016/market\\_analysis/Market-Analysis-Guidelines---FINAL.pdf](http://nicta.gov.pg/images/consultative_papers/2016/market_analysis/Market-Analysis-Guidelines---FINAL.pdf)

2.3.4 In the following chapter, NICTA staff have examined the market for wholesale voice call termination on individual fixed and mobile networks and considers the potential declaration of DMTAS and DFTAS. The preliminary conclusion, subject to the consideration of industry and other stakeholder submissions in response to this Discussion Paper, is that NICTA should recommend declaration of both services by the Minister.

2.3.5 A draft declaration instrument covering both DMTAS and DFTAS is provided at Annex A.

## **2.4 Submissions in response to this discussion paper**

2.4.1 NICTA invites written submissions in response to the issues raised in this discussion paper from any interested parties. Arguments and assertions (as distinct from statements of opinion) should be supported with evidence and data, particularly if they are contrary to the current understanding or tentative conclusions set out in this discussion paper.

2.4.2 Submissions should be submitted via email to [inquiry.submission@nicta.gov.pg](mailto:inquiry.submission@nicta.gov.pg) and must be received by **noon Wednesday 02<sup>nd</sup>, November 2022**.

2.4.3 Copies of all submissions received will be published on NICTA's Public Register consistent with the requirements on NICTA under subsection 229(3) of the Act. Claims for confidentiality over any written information submitted to NICTA in response to this public consultation process are governed by section 44 of the Act. Under section 44 of the Act, NICTA ultimately determines whether or not it will accept a claim for confidentiality and exclude from publication the information that is subject to that claim. The process for claiming confidentiality is set out in the *Guidelines on the submission of written comments to public consultations and public inquiries*. Any respondent wishing to claim confidentiality in relation to information that it submits in response to this discussion paper should follow the procedures described therein.

### **3 The markets for wholesale voice call termination on individual fixed and mobile networks**

#### **3.1 Background**

- 3.1.1 The domestic mobile terminating access service (*DMTAS*) and the domestic fixed terminating access service (*DFTAS*) were deemed to be declared services upon the commencement of the Act in accordance with section 131. As per the terms of those deemed declarations, which are set out in Schedule 1 to the Act, the deemed declarations expired on 31<sup>st</sup> December 2014.
- 3.1.2 NICTA reviewed the markets for DMTAS and DFTAS in 2014, concluding that the requirements for declaration continued to apply in these services. Hence the deemed declarations were extended until 31<sup>st</sup> December 2019.<sup>4</sup>
- 3.1.3 Even though that Declaration still has almost two years before expiration, it is now time for a further review to confirm the ongoing requirement for declaration of these services. It is convenient to review that Declaration as part of this more general review of wholesale services.
- 3.1.4 In 2012, NICTA conducted a public inquiry into the need for declaration of certain wholesale services in international connectivity markets. In that inquiry NICTA expressed its concern ‘about the relatively high costs of calling into PNG compared to other countries in the region and the potential that such costs have to suppress the volume of international call traffic into PNG and consequently the associated welfare benefits of high service level adoption.’
- 3.1.5 As a remedy to this situation NICTA’s 2014 recommendation to the Minister sought to clarify that the definition of previously declared DMTAS and DFTAS included the terminating segments of inbound international calls. The practical effect of that decision would have been to reduce call termination rates for inbound international calls, with the probable impact of reducing the retail prices for those calls in correspondent countries, and hence boosting call volumes, trade and, ultimately, welfare.
- 3.1.6 However, NICTA’s recommendation to the Minister was disputed by Digicel and referred to the ICT Appeals Panel, which upheld NICTA’s authority to include international services within the definition of the declared services, but ruled *inter alia* that:

*... rather than describing the terms of the new recommended Declaration as one which “clarifies” that communications originating outside Papua New Guinea were part of the prior Declaration, NICTA should have proposed a variation to the particular terms of the existing declaration and provided in its report reasons and conclusions as to why that variation was desirable.*

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<sup>4</sup> Section 2(2) of Wholesale Service Declaration No 1 of 2015, published in National Gazette of 27 March 2015.

- 3.1.7 In a subsequent review of the terminating access services in 2018, NICTA examined the justification for such a variation in the existing Declaration as directed by the ICT Appeals Panel. NICTA subsequently recommended, and the Minister agreed on 19 February 2019, that a declaration extending to calls origination outside Papua New Guinea was justified.
- 3.1.8 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.

## **3.2 Relevant Market**

- 3.2.1 The relevant market for the purposes of the declaration now under consideration is for terminating access services on fixed and mobile networks in relation to calls that originate within Papua New Guinea.

## **3.3 Competitive assessment**

- 3.3.1 Call termination markets are susceptible to ex ante regulation because they have high non-transitory barriers to entry and they are not trending towards being effectively competitive. Further, ex post control by the *Independent Consumer and Competition Act 2002* would of itself be insufficient to address the market failures concerned.
- 3.3.2 Each network operator has a substantial degree of market power (*SMP*) in the market for termination of calls/messages on its own network. *SMP* is problematic as it poses a material risk of harm to the development of effective competition in the downstream retail services markets and to consumer's long-term interests.

## **3.4 Consideration of the proposed wholesale service declaration**

- 3.4.1 The proposed terms of the declaration of the DFTAS and the DMTAS are set out in the draft declaration at Annex D.. NICTA considers that the proposed declaration will further the achievement of the objective of Part VI of the Act, relating to the promotion of effective competition (*the competition objective*), the promotion of economically efficient use of, and the economically efficient investment in, facilities by which ICT services may be supplied (*the efficiency objective*).
- 3.4.2 The declaration of DFTAS and DMTAS is necessary to achieve the competition objective because:
- (a) being monopoly services there is no adequate restraint imposed on service providers not to set terminating access rates and establish other terminating access terms that might distort or seriously damage competition in the relevant downstream retail markets; and

- (a) inappropriate terms set under effective monopoly conditions for terminating access will distort competition and related investment. If the terms inordinately favour the access provider, uneconomic investment in access seeker facilities may well result.

3.4.3 Declaration of these services would also help to promote competition in the retail services market by:

- (a) ensuring that the supply of a terminating access services cannot be denied to another network operator or downstream competitor;
- (b) requiring prices for the supply of terminating access services to be cost-based, thereby minimising the potential for excessive pricing that leads to allocative inefficiencies; and
- (c) minimising the potential and incentive for above-cost termination charges to be combined with price discrimination in the application of the wholesale charges between on-net and off-net calls to foreclose competition through tariff-mediated network effects.

3.4.4 The declaration of DFTAS and DMTAS will achieve the efficiency objective because declaration will better enable access seekers and, if necessary, NICTA to address circumstances in which an access provider seeks to impose excessive prices or other terms which reflect its market power. For example, if the terms for terminating access seek to require the access seeker to take more services or a greater service than it requires, that would result in inefficient investment. This would not compromise incentives for efficient investment and would actually enable inefficient investment outcomes that might otherwise arise to be negated through regulatory intervention.

## **3.5 Preliminary conclusions**

3.5.1 NICTA proposes to conclude that:

- (a) there are separate national markets for wholesale call termination on each individual fixed and mobile network and that each network operator has a position of substantial market power in respect of the market for call termination on its own network; and
- (b) the declaration of the DFTAS and DMTAS on the proposed terms set out in Annex D would satisfy the declaration criteria.

## **ANNEX A: PUBLIC INQUIRY TERMS OF REFERENCE**

Under the authority of section 127 of the *National Information and Communications Technology Act 2009 (the Act)*, NICTA has decided to inquire into and report on whether certain wholesale services in Papua New Guinea, namely Domestic Fixed Terminating Access Service (DFTAS) and Domestic Mobile Terminating Access Service (DMTAS) should be declared under section 130 of the Act. In doing so, NICTA will:

- (a) analyse the extent of competition in domestic telecommunications markets within Papua New Guinea; and
- (b) form a view as to whether or not those markets are effectively competitive; and, if any is not,
- (c) consider whether the declaration by the Minister of any particular wholesale service or services in that market would satisfy the declaration criteria specified in section 128 of the Act; and
- (d) determine whether or not NICTA should recommend to the Minister that DFTAS and DMTAS, or one of them, be declared under section 130 of the Act; and, if such a recommendation should be made, and
- (e) specify the recommended terms of the declaration(s) and the recommended expiry date(s) for any such declaration(s).

The Public Inquiry will commence on Friday October 21<sup>st</sup>, 2022 and conclude by end of November 2022. A Discussion Paper for the Public Inquiry as required under Section 232 of the Act has been posted on the NICTA website, [www.nicta.gov.pg](http://www.nicta.gov.pg).

## Annex B – Draft Declaration of Wholesale Voice Call Termination Services on Individual Fixed and Mobile Networks

### WHOLESALE SERVICE DECLARATION NO. 1 OF 2022

*National Information and Communications Technology Act 2009*

The MINISTER FOR COMMUNICATIONS AND INFORMATION TECHNOLOGY makes this declaration under section 130 of the *National Information and Communications Technology Act 2009*.

Dated [DATE]

The Hon. TIMOTHY MASIU, MP

Minister for Communications and Information Technology

### PART I – PRELIMINARY

#### 1 Name of Declaration

This Declaration is *Wholesale Service Declaration No. 1 of 2022*.

#### 2 Commencement

- (1) This Declaration commences on 1<sup>st</sup> ..... 2022 or 30 calendar days after the date on which it is notified in the National Gazette, whichever is the later (*the Commencement Date*).
- (2) This Declaration expires on the day before the fifth anniversary of the Commencement Date unless it is varied or revoked earlier in accordance with section 130 of the Act.

#### 3 Revocation

*Wholesale Service Declaration No. 3 of 2019* is hereby revoked.

#### 4 Definitions

- (1) Subject to subsection (2), unless the context otherwise requires, terms used in this Declaration have the same meaning as in the Act.
- (2) In this Declaration, unless the context otherwise requires:
  - (a) **Act** means the *National Information and Communications Technology Act, 2009* and includes any regulations made under that Act;
  - (b) **call** means a continuous communication;
  - (c) **cell** means the geographic area served by a base station;
  - (d) **B-party** means a retail customer located in Papua New Guinea to whom a call is made;
  - (e) **fixed network** means a network that is not a mobile network;
  - (f) **mobile network** means a network that:

- (i) comprises multiple base stations that transmit and receive radiocommunications to and from apparatus of a B-party located in a cell associated with each base station; and
  - (ii) detects the customer equipment within which the cell is located and causes the base station in that cell to transmit and receive calls to and from that customer equipment; and
  - (iii) enables calls to continue without interruption when such apparatus moves between cells.
- (g) **point of interconnection** is a location in Papua New Guinea which is a physical point of demarcation between the access seeker's network and the access provider's network.

NOTE: The following terms are defined in the Act:

- Access Provider
- Access Seeker
- Communication
- Facilities
- Facilities Access Service
- Interconnection
- Network
- Network Service
- Retail Customer
- Wholesale Service

## **PART II – DOMESTIC MOBILE TERMINATING ACCESS SERVICE**

### **5 Declaration of service**

The domestic mobile terminating access service is hereby declared.

### **6 Service description**

- (1) The domestic mobile terminating access service:
  - (a) is a network service for the carriage of any combination of:
    - (i) voice communications; and/or
    - (ii) short messaging services,from a point of interconnection, or potential point of interconnection, to any B-party connected to the access provider's mobile network; and
  - (b) includes such facilities access services as are necessary to enable the access seeker to interconnect its facilities to the facilities of the access provider at points of interconnection.
- (2) For the avoidance of doubt, the domestic mobile terminating access service applies to the termination of calls and short messaging services on a mobile network situated Papua New Guinea where those communications originated inside Papua New Guinea.

## **PART III – DOMESTIC FIXED TERMINATING ACCESS SERVICE**

### **7 Declaration of service**

The domestic fixed terminating access service is hereby declared.

## **8 Service description**

- (1) The domestic fixed terminating access service:
  - (a) is a network service for the carriage of any combination of voice communications from a point of interconnection, or potential point of interconnection, to any B-party connected to the access provider's fixed network; and
  - (b) includes such facilities access services as are necessary to enable the access seeker to interconnect its facilities to the facilities of the access provider at points of interconnection.
- (2) For the avoidance of doubt, the domestic fixed terminating access service applies to the termination of calls on a fixed network situated in Papua New Guinea regardless where those communications originated inside Papua New Guinea.