

DISCUSSION PAPER

Public inquiry into the potential renewal of the declarations of the domestic mobile/fixed terminating access services

Issued on 1st September 2014

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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.

The existing declarations of the domestic mobile terminating access service (DMTAS) and the domestic fixed terminating access service (DFTAS), which were deemed declarations under subsection 131(1) of the Act, are due to expiry on 31st December 2014. NICTA has initiated a public inquiry into whether or not one or both of those declarations should continue to be declared after December 2014 and, if so, the particular terms of the declaration(s). The terms of reference for this inquiry are provided at Annex A.

As set out in this discussion paper, NICTA staff's preliminary view on the key matters under inquiry is that:

- the relevant markets are the wholesale markets for voice call termination on individual fixed and mobile networks in PNG, and these markets are susceptible to ex ante regulation of significant market power (SMP);
- each network operator has SMP in the market for voice call termination on its own network and that position is potentially harmful to the development of effective competition in the downstream retail mobile services market and to the long-term interests of consumers;
- these circumstances warrant NICTA's consideration of the renewal of the declaration of the DMTAS and DFTAS;
- all of the declaration criteria would appear to be met by the renewal of the declaration of the DMTAS and DFTAS on terms consistent with those of the existing declaration (set out in Schedule 1 to the Act); and
- if the Minister was to renew the declarations of the DMTAS and the DFTAS then there will be a need for an amendment to be made to the *National Information and Communications Technology (Operator Licensing) Regulation, 2010* (the Licensing Regulations) to specify that the DMTAS and the DFTAS are 'designated interconnection services' for the purposes of the any-to-any connectivity obligation in section 137 of the Act.

A copy of the terms of the proposed declaration is provided at Annex B. The text of the proposed amendment to the Licensing Regulations is provided at Annex C.

NICTA invites written comments in response to these matters and draft documents. Submissions should be submitted via email to inquiry.submission@nicta.gov.pg and must be received by 12 noon Friday 26th September 2014.

2 BACKGROUND

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 *National Information and Communications Technology Act 2009* (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** 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 (s.136);
 - 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 (s.136);
 - supply the access seeker with ordering and provisioning and fault handling services that are equivalent to that which the access provider supplies to itself (s.136); and
 - supply the access seeker, if requested, with billing information necessary to enable the access seeker to supply retail services using the declared service (s.136).¹
- (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 have regard to any relevant model non-price terms and conditions it has previously specified (s.133) among other factors (s.149).

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

2.1 Declared services

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 of the Act. As per the terms of those deemed declarations, which are set out in Schedule 1 to the Act, these deemed declarations will expire on 31st December 2014.

The present inquiry is examining whether or not one or both of those declarations should be re-declared for a new period following their expiry and, if so, the particular terms of the new declaration(s).

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.

2.2 Submissions in response to this discussion paper

NICTA invites written submissions in response to the specific questions and 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 proposed conclusions of NICTA staff as set out in this discussion paper.

Submissions should be submitted via email to inquiry.submission@nicta.gov.pg and must be received by 12 noon Friday 26th September 2014.

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*, which are available from NICTA's Public Register. Any respondent that wishes to claim confidentiality over information that it submits in response to this discussion paper should follow the procedures described therein.

3 SUMMARY OF KEY PRELIMINARY FINDINGS

Consistent with well-established and accepted reasons and standard international regulatory practice, NICTA staff believe that:

- (a) The relevant markets are the wholesale markets for:
 - i. voice call and SMS/MMS termination on individual mobile networks in PNG; and
 - ii. voice call termination on individual fixed networks in PNG;
- (b) These markets are susceptible to ex ante regulation because each has high non-transitory barriers to entry and is 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;
- (c) Each network operator has significant market power (SMP) in the market for termination of calls/messages on its own network and that SMP is problematic as it poses a material risk of harm to the development of effective competition in the downstream retail mobile services market and to consumer's long term interests;
- (d) These circumstances warrant NICTA's consideration of the potential declaration of relevant wholesale services, namely:
 - i. the domestic mobile terminating access service (DMTAS); and
 - ii. the domestic fixed terminating access service (DFTAS).

4 PROPOSED TERMS OF THE DECLARATION

The proposed terms of the declaration of the DMTAS and the DFTAS are provided at Annex B. They are identical to the terms of the existing deemed declaration (set out in Schedule 1 to the Act) with two exceptions:

- the exclusion of the paragraph 1(2)(c) of Schedule 1 which states '[the service] is a designated interconnection service for the purposes of the any-to-any connectivity obligation', which is set out in section 137 of the Act; and
- the addition of a clause that, for the avoidance of doubt, makes it clear that the scope of both services includes the termination of the domestic component of calls (and messages in the case of the DMTAS) that have been originated outside of PNG (i.e. inbound international calls).

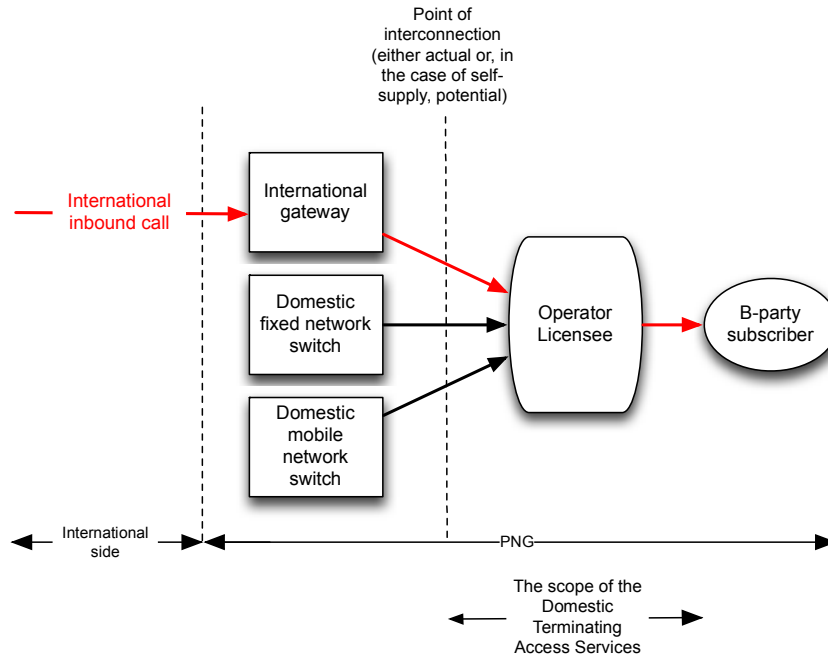
The text in paragraph 1(2)(c) is being excluded because the Act (in paragraph 137(3)(b)) provides a specific process for declared services to be made designated interconnection services. The deemed declarations achieved this same outcome through the terms of the declaration but given paragraph 137(3)(b) of the Act, it would not now be appropriate for these or any declared services to be made designated interconnection services through the terms of the declaration.

The addition of text clarifying that the scope of the services includes the termination of calls (and messages) that have originated outside PNG does not constitute a change to the effective terms of the declaration of either service and is proposed now only to clarify some licensees' misunderstanding of the scope and effect of the declaration of domestic terminating access services. As NICTA has noted on a number of occasions,² the source of a call (or message) is not a relevant consideration when examining the termination arrangements for calls within PNG. As shown in Figure 2, it does not matter whether a call originates on a fixed or mobile network in PNG or originates in another country and comes into PNG via an international gateway, the terminating access portion of the call is the same.³ (Further, the traffic routing and therefore the costs of the terminating access service should be the same regardless of where the call originates.)

² For example, in the discussion paper that accompanied the Public Inquiry into the need for declaration of certain wholesale services in international connectivity markets in September 2012, and in unrelated correspondence with licensees in April and May 2014.

³ Thus the price charged for the termination in PNG of an inbound international call after it passes through an international gateway facility of some kind should be consistent with the General Pricing Principles and cost-based. This applies regardless of whether the terminating access service is being supplied (a) by an Operator Licensee to another Operate Licensee, as is the case in the termination of a national call or the termination of an inbound international call that enters PNG via the second licensee's gateway; or (b) by an Operator Licensee to itself, as is the case in the termination of an inbound international call that enters PNG via that licensee's own gateway.

Figure 1: Scope of the domestic terminating access services



5 CONSIDERATION OF THE DECLARATION CRITERIA

NICTA staff have considered whether or not the declaration of the DMTAS and/or the DFTAS would be likely to satisfy the declaration criteria specified in section 128 of the Act. NICTA staff's preliminary conclusions are summarised in Figure 2. In short, NICTA staff believe that the declaration of both services would meet the declaration criteria.

Figure 2: Overview of NICTA staff's consideration of the DMTAS and DFTAS and the declaration criteria

Declaration criterion		DMTAS	DFTAS
A	That declaration will further the achievement of the objective set out in Section 124	<p>NICTA staff believe that the declaration of these services would indeed further the achievement of the objective of Part VI of the Act, relating to the promotion of effective competition and the promotion of economically efficient use of, and the economically efficient investment in, facilities and that this criterion would be met because:</p> <ul style="list-style-type: none"> • 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 retail markets; and • 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, reflecting inefficient investment in consequence. 	
B(i)	In relation to the competition objective, access or increased access to the wholesale service is necessary for the promotion of effective competition in at least one market other than the market for the wholesale service.	<p>NICTA staff believe that the declaration of these services would meet this criterion.</p> <p>Declaration of these services would help to promote competition in the retail mobile services market by:</p> <ul style="list-style-type: none"> • ensuring that the supply of a terminating access services cannot be denied to another network operator or downstream competitor; • 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 • 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. 	
B(ii)	In relation to the competition objective, the wholesale service is supplied in whole or in part via a facility that cannot feasibly be substituted, as a matter of commercial	<p>NICTA staff believe that the declaration of these services would meet this criterion.</p> <p>It is neither technically nor commercially feasible to terminate a call (or message) to an end-user of a telecommunications network except by using the facilities of the operator of that network. There are no substitutable facilities that enable termination.</p>	

Declaration criterion		DMTAS	DFTAS
	reality, via another facility in order to supply that wholesale service.		
C(i)	In relation to the efficiency objective, declaration would not materially compromise the incentives for efficient investment in any facility over which the wholesale service may be supplied.	<p>NICTA staff believe that the declaration of these services would meet this criterion.</p> <p>Declaration will better enable access seekers and, if necessary, NICTA to address circumstances in which an access provider seeks to impose excessive price 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 enables inefficient investment outcomes that might otherwise arise to be negated through regulatory intervention.</p>	
C(ii)	In relation to the efficiency objective, access or increased access to the wholesale service is technically feasible having regard to the specific factors identified in section 124(2)(a) of the Act	<p>NICTA staff believe that the declaration of these services would meet this criterion.</p> <p>The technical feasibility of a network operator supplying terminating access is beyond doubt and has been a fact in PNG for many years.</p>	
C(iii)	In relation to the efficiency objective, in the case of wholesale services that are facility access services, increased access to the wholesale service would avoid inefficient replication of underlying facilities that may be efficiently shared.	<p>This criterion is not applicable as these services are network services, not facilities access services, in accordance with the respective definitions in the Act. In the case of terminating access services the access is to directly-connected customer services, not to specific access such as nominated towers or ducts. Conveyance and routing of the call once it has been handed over at the point of interconnection is a matter for the access provider.</p>	

6 DESIGNATED INTERCONNECTION SERVICES

As noted above, under the terms of the deemed declarations, both the DMTAS and the DFTAS are currently designated interconnection services for the purposes of the any-to-any connectivity obligation in section 137 of the Act. However, given the Act provides (in paragraph 137(3)(b)) a specific process by which declared services can be made designated interconnection services, it would not be appropriate either service (if re-declared) to be made designated interconnection services simply through the terms of the declaration.

NICTA staff believe that it is essential that if the DMTAS and/or DFTAS are declared that they are made designed interconnection services for the purposes of section 137 of the Act. It is clear from subsection 137(3) of the Act and also the very nature of the any-to-any connectivity obligation that the Act that terminating access services are the type of service that the Act envisages would be made designated interconnection services. Further, the any-to-any connectivity obligation fundamentally applies to voice and related complementary services (such as SMS in the case of mobile telephony services) rather than to access to data and it precisely these services that the DMTAS and DFTAS are intended to cover.

A proposed draft amendment to the *National Information and Communications Technology (Operator Licensing) Regulation, 2010* (the Regulations), which would make the DMTAS and DFTAS designated interconnection services, is provided at Annex C for comment. If NICTA decides to recommend the declaration of the DMTAS and/or DFTAS to the Minister, it will be accompanied by a recommendation that the Minister consider a draft amendment to the Regulations along the lines of that at Annex C.

ANNEX A: INQUIRY TERMS OF REFERENCE

Under the authority of section 127(2)(a) of the National Information and Communications Technology Act 2009 (the Act), NICTA has decided to inquire into and report on whether the domestic mobile terminating access service and/or the domestic fixed terminating access service should continued to be declared services under section 130 of the Act following the expiry of the existing declarations of those services on 31 December 2014.

In doing so, NICTA will:

- (a) analyse the extent of competition in the markets for call termination on each mobile network and on each fixed network;
- (b) consult with the Independent Consumer and Competition Commission, operator licensees, and any other relevant parties or government agencies;
- (c) form a view as to whether or not those markets are effectively competitive; and, if any is not effectively competitive,
- (d) consider whether the declaration by the Minister of any particular wholesale service or services in those markets—in particular the domestic mobile terminating access service and the domestic fixed terminating access services—would satisfy the declaration criteria specified in section 128 of the Act;
- (e) determine whether or not NICTA should recommend to the Minister that one or more wholesale services in those markets be declared, or continued to be declared, under section 130 of the Act; and, if such a recommendation should be made,
- (f) specify the recommended terms of the declaration(s) and the recommended expiry date(s) for the declaration(s).

ANNEX B: DRAFT TERMS OF THE PROPOSED DECLARATION

WHOLESALE SERVICE DECLARATION NO. [1] OF 2014

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 [month] 2014

Minister

[DRAFT—Not for signature]

WHOLESALE SERVICE DECLARATION NO. [1] OF 2014

PART I - PRELIMINARY

1. Name of declaration

- (1) This declaration is the *Wholesale Service Declaration No. [1] of 2014*.

2. Commencement and expiry

- (1) This Declaration commences on 1st January 2015.
(2) This Declaration expires on 31st December 2019.

3. Interpretation

- (1) In this Declaration, unless the contrary intention appears:

“**Act**” means the *National Information and Communications Technology Act, 2009* and includes any regulations made under that Act; “**call**” means a continuous communication;

“**call**” means a continuous communication;

“**cell**” means the geographic area served by a base station;

“**B-party**” means a retail customer located in Papua New Guinea to whom a call is made;

“**fixed network**” means a network that is not a mobile network;

“**mobile network**” means a network that:

- (a) 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
- (b) 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
- (c) enables calls to continue without interruption when such apparatus moves between cells;

“**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.

- (2) Each of the following terms used in this Declaration has the meaning given to it by the Act:
- (a) access provider
 - (b) access seeker
 - (c) communication

- (d) facilities
- (e) facilities access service
- (f) interconnection
- (g) network
- (h) network service
- (i) retail customer
- (j) wholesale service

PART II – DECLARATION OF WHOLESALE SERVICES

4. Declaration

- (1) The following wholesale services are hereby declared:
 - (a) the domestic mobile terminating access service (DMTAS); and
 - (b) the domestic fixed terminating access service (DFTAS).

5. Service description—DMTAS

- (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 to realise any-to-any connectivity.
- (2) For the avoidance of doubt, the domestic mobile terminating access service applies to the termination of calls and short messaging services on mobile networks situated Papua New Guinea regardless of whether those communications were originated in Papua New Guinea or in another country.

6. Service description—DFTAS

- (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 to realise any-to-any connectivity.
- (2) For the avoidance of doubt, the domestic fixed terminating access service applies to the termination of calls on fixed networks situated in Papua New Guinea regardless of whether those communications were originated in Papua New Guinea or in another country.
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**ANNEX C: DRAFT AMENDMENT TO THE LICENSING REGULATIONS TO
MAKE THE DMTAS AND DFTAS DESIGNATED INTERCONNECTION
SERVICES**

***NATIONAL INFORMATION AND COMMUNICATION
TECHNOLOGY (OPERATOR LICENSING) AMENDMENT
REGULATION, 2014 (NO. [1])***

Statutory Instrument No. [xx] of 2014

I, Michael Ogio, Governor-General of the Independent State of Papua New Guinea, make the following Regulation under the *National Information and Communications Technology Act 2009*.

Dated [month] 2014

MICHAEL OGIO
Governor-General

[DRAFT ONLY — NOT FOR SIGNATURE]

1. Name of regulation

- (1) This Regulation is the *National Information and Communication Technology (Operator Licensing) Amendment Regulation, 2014 (No.[1])*.

2. Commencement

- (1) This Regulation commences on the day it is signed.

3. Amendment of the *National Information And Communication Technology (Operator Licensing) Regulation, 2010*

- (1) Schedule 1 amends the *National Information and Communication Technology (Operator Licensing) Regulation, 2010*.

Schedule 1 **Amendment**

[1] After section 25

insert

26 DESIGNATED INTERCONNECTION SERVICES.

(1) The following declared services are designated interconnection services –

- (a) the domestic mobile terminating access service; and
 - (b) the domestic fixed terminating access service.
-