



**Public Consultation on Guidelines on Wholesale
and Retail Services (Demarcation)**

RESPONSE TO COMMENTS REPORT

7 July 2022

1. Purpose of this Report

This Response Report sets out NICTA's responses to the main comments that interested parties have included in their submissions on the draft Guidelines on Wholesale and Retail Services (Demarcation).

NICTA has considered carefully all submissions and comments received before finalising and promulgating the Guidelines.

Submissions received from interested parties have been posted on NICTA's website, redacted where appropriate at the request of the authors to protect from disclosure information claimed to be confidential.

The Annex to this Report only considers main comments in submissions. However, all comments have been welcomed and considered carefully by NICTA.

2. Consultation Process

NICTA commenced a public consultation on the draft Guidelines on 5 November 2021 and provided for an initial period of 4 weeks and 2 days (to 5 December 2021) for receipt of submissions from interested parties. At the request of the industry this period was extended to 10 December 2021.

In line with normal practice, NICTA has posted copies of all submissions on its website.

Submissions were received from:

- Digicel (PNG) Limited ("Digicel")
- Independent Competition and Consumer Commission ("ICCC")
- Telikom Limited ("Telikom")

NICTA thanks all of the organisations who made submissions. Their contribution to the process and to improving ICT regulation in PNG is appreciated.

Annex: Summary of Key Comments received in Submissions

| Item | Issue / subject reference | | Summary of comment | Summary of NICTA response |
|------------|---|--------|--|---|
| A: Digicel | | | | |
| 1 | Impact on RIO considerations under Section 142 of the Act | Page 1 | <p>“Digicel welcomes the proposed Guidelines and strongly supports their early introduction as a means to clarify NICTA’s approach to issuing operator licences and to its consideration of pricing practices relating to declared wholesale services.”</p> <p>Digicel proposes “the inclusion of a statement confirming that NICTA will take into account a Licensee’s retail pricing practices for relevant resale services when considering whether or not to accept or reject a proposed Reference Interconnection Offer (RIO) pursuant to its functions and powers under Section 142 of the [Act]”.</p> | <p>Digicel’s support is appreciated.</p> <p>NICTA appreciates the comment about assessment of proposed RIOs, and where such retail practices are a relevant consideration for accepting or rejecting a proposed RIO (in terms of the criteria in Section 142 of the Act), NICTA would take them into account.</p> <p>However, the Guideline is about clarifying the demarcation between wholesale and retail services, rather than other, likely separate, regulatory functions, and therefore NICTA prefers not to add the statement suggested by Digicel to the Guidelines.</p> |
| B: ICCC | | | | |
| 2 | Consumer complaints | Page 2 | <p>The ICCC noted that the Draft Guideline “outlines and distinguishes clearly between the wholesale and retail segment of the industry”.</p> <p>“Although section 4.10 briefly states the intervention of ICCC for any anticompetitive conduct within the market or unfair pricing of the wholesale access services, it should also extend to cover any consumer complaints relating to the services offered.”</p> | <p>ICCC’s support for the Guidelines is appreciated.</p> <p>NICTA agrees with the proposed reference to consumer complaints being included in section 4.10 of the Guidelines and this will be added in the final version.</p> |

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| C: Telikom | | | | |
| 3 | Telikom's submission - overall | | Telikom has commented in its submission on each of the clauses in the draft Guidelines. | With one or two exceptions, this Response Report only addresses those changes in relation to which Telikom has expressed disagreement or has offered comments that call for a NICTA response. |
| 4 | Guidelines, Clause 1.1 - Introduction | Page 1 | Telikom considers that “overall, under the Draft RIO context, the guideline is still not clear and does not address the concerns raised by Telikom on demarcations by Retail and Wholesale customers who have operator licences and who can make the request for access to the Wholesale access services.” | The purpose of the Guidelines is to make clear what the basis of demarcation is in the Act, and the consequences of that. Implementation and enforcement actions are required by wholesale service providers and NICTA, and the Guidelines are intended to assist those actions. |
| 5 | Guidelines, Clause 1.2 – following the Guidelines | Page 1 | Telikom notes that “market players must be consulted for their views before NICTA adopts any different approach on occasions that require such”. | NICTA must operate in accordance with the Act, and that means that it must consider the criteria in the Act in relation to any matter before determining how best to proceed. The Act does not contemplate or permit NICTA to bind itself, for example, by creating Guidelines. This is the reason that Clause 1.2 is stated in the way that it is. If circumstances occur in which some adjustment is needed to the guidelines, the changes will be subjected first to public consultation. In the event of individual cases, confidentiality considerations may not allow for wider consultation before a decision is made. |
| 6 | Guidelines, Clause 1.4(d) | Page 2 | Telikom considers that Clause 1.4(d) lacks and explanation on why some alternative approaches that have been suggested are not sustainable. | The context makes it sufficiently clear that the reasons might vary, but all have in common that they are inconsistent with the definitional scheme in the Act. |

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| | | | Telikom also considers that the Guideline might have outlined alternative approaches to demarcation. | NICTA disagrees. The point of the Guideline is to explain the interpretation of the Act by NICTA and the consequences for regulatory administration, not to canvass incompatible alternatives or possible legislative amendments. This comment also applies to Telikom's comment on clause 4.6 at page 6 of its submission. |
| 7 | Guidelines, Clause 1.4(e) | Page 2 | Telikom "takes from Clause 1.4(e) that any licensed operator in PNG including Telikom as a Retail Service Provider (RSP) can also provide wholesale services declared or otherwise". | NICTA cautions against such an interpretation in relation to "any licensed operator". Regard must be had to the licence category and to the specific terms and conditions of each licence. |
| 8 | Guidelines, Clause 2.3 – definition of 'wholesale service' in the Act | Page 3 | Telikom considers that Clause 2.3 of the Guidelines (which stresses that the Act is quite clear and explicit in relation to definition of 'wholesale service') "to be superficial and misguided". | NICTA disagrees. Clause 2.3 is necessary to stress that what is required by the Act is clear. Telikom may disagree with the Act and consider that there are better approaches. However, NICTA's role is to interpret and administer the Act. |
| 9 | Guidelines, Clause 2.4 – a service is only wholesale if sold to a licensed operator | Page 3 | Telikom considers the clause might be interpreted (mistakenly) "to mean that an unlicensed customer can approach the wholesale service provider for the wholesale service as a retail customer and be charged at the wholesale" rate. | NICTA disagrees. NICTA has reconsidered the clause carefully and cannot see how anybody could interpret it the way that Telikom suggests. The clause does not mention prices at all. |
| 10 | Guidelines, Clause 2.6 – Act definitions are complete | Page 4 | Telikom considers that "other additional criteria should be considered depending on the interpretations of the provisions in the NICT Act, such as in the definitions." | NICTA disagrees. The point of Clause 2.6 is to confirm NICTA's interpretation that the definitions of 'wholesale' and 'retail' in the Act are intended to be complete, and that |

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| | | | | they are not dependent on interpretations of other terms and definitions. NICTA considers there is no room at law for the approach that Telikom seems to be advocating. |
| 11 | Guidelines, Clause 2.7 | Page 4 | <p>Telikom seems to be suggesting that technical characteristics might be used to delineate wholesale and retail services in some cases (such as in the services covered by DataCo's RIO) but not in others.</p> <p>"Every wholesale service has a different market and must be defined or specified accordingly."</p> | <p>NICTA disagrees. The definitional scheme in the Act makes it clear that the technical characteristics of a service are never the basis on which the service should be considered to be a wholesale service or a retail service.</p> <p>NICTA disagrees. Whatever the patterns of demand and the market characteristics for a wholesale service, what makes the service a wholesale one is the same in all cases – namely, that it is sold to a licensed operator for use in that operator's retail services.</p> |
| 12 | Guidelines, Clause 4.2 – declaration of wholesale services | Page 5 | "For clause 4.2, the service specific pricing principles could be subject to a more rigorous review of the specific services determined in the access provider's service offers such as the RIO." | This comment relates to the content of service specific pricing principles, if any, that accompany or follow the wholesale service declaration process. This is a matter for consideration when service specific pricing principles are established and reviewed. In what ways additional rigour might be brought to the process is a matter that Telikom might wish to consider and propose in that context. |