



RESPONSE TO COMMENTS REPORT

NICTA Response to Comments on the renewal of the Declarations of the Domestic Mobile Terminating Access service (DMTAS) and the Domestic Fixed Terminating Access Service (DFTAS)

27th October 2014

Background

NICTA released a Public Inquiry Discussion Paper on 1st September 2014 which set out for public comment a proposal to renew the declarations of the domestic mobile and fixed terminating access services. 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 expire on 31st December 2014.

The deadline for submissions by interested parties was 30th September 2014. This date was extended on request.

Three submissions were received, from:

- Bmobile on 2nd October 2014
- Digicel (PNG) Limited ("Digicel") on 3rd October 2014;
- ICCG on 9th October 2014; and
- Telikom PNG Limited ("Telikom") on 4th October 2014

Overall Response

The responses outlined in the table format below are the responses to comments by NICTA staff.

The submission from Digicel is the most detailed and is the longest at 17 pages – compared to 3-4 pages for the other two submissions. It is therefore convenient in this Response Report to examine the comments from Digicel first and then to address any additional issues raised by other respondents. In this way all of the issues raised by respondents to the Discussion Paper will have been covered.

All responses are appreciated by NICTA and all have been fully taken into consideration in the Decision and Inquiry Report.

It is important to note that nothing in the responses has caused NICTA staff to adopt any course other than to recommend the re-declaration of DMTAS and DFTAS.

| | Topic | Comment | NICTA Staff Response |
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| Digicel | | | |
| 1 | Nature of the original deemed declaration of DMTAS and DFTAS | p. 2 point 2: "Given that the original decision to declare the services was not made on the basis of the declaration criteria in Section 128, Digicel submits that NICTA has a special obligation to undertake its own thorough analysis before any recommendation for renewal can be made." | The Public Inquiry is being undertaken on precisely the basis that Digicel suggests. |
| 2 | Empirical analysis | p. 2 point 2: "Digicel is therefore concerned at the apparent assumptions and lack of analysis that is included in the Discussion Paper. There is no indication that any empirical analysis has been undertaken by NICTA, and no evidence other than a claim that it is <i>"consistent with well-established and accepted reasons and standard international regulatory practice"</i> has been provided to support NICTA's view of the markets that are relevant to this Inquiry." | Digicel's concerns are misplaced. NICTA staff have undertaken the analysis required by the Act. However it is well entitled to note international regulatory practice in doing so. The Discussion Paper provides an opportunity for respondents to examine the proposals from NICTA staff and also to put forward their own views, information and analysis on the substance of the proposals. |
| 3 | Evidentiary burden | p. 2 point 3: The "reversal of the burden of proof is, in Digicel's view inappropriate and contrary to the principles of natural justice and procedural fairness." | There is no reversal of any evidentiary burden in this matter. The Discussion Paper process is an opportunity for respondents to state their position and to provide whatever evidence they might have for those positions. It is appropriate that NICTA have especial regard to evidence and arguments that are contrary to the preliminary view outlined in the Discussion Paper. |
| 4 | Risks associated with wholesale regulation – regulatory neatness | p. 3 point 8: "Digicel submits that regulation should never be imposed for the sake of "regulatory neatness" or because it is assumed to be standard international practise." | There is no question of regulatory "neatness" in the approach that NICTA staff have set out or in what the Act has deemed until now, so this is an irrelevant consideration and is not related to international practice. |
| 5 | Impact of regulation on investment and innovation | p. 3 point 9: "One of the risks with ill-advised or inappropriate wholesale regulation is that the regulation becomes a disincentive to investment and innovation. ... If a regulator prematurely or inappropriately regulates wholesale access, it removes the incentive to invest in infrastructure both from the perspective of an access provider and an access seeker." | Clearly this is a possibility. However, returning to the specific declarations, these have been in place since 2010 when the Act came into effect and similar arrangements were in place before the inception of the NICTA. Digicel has undertaken substantial investments during that period. The point being made does not seem to have application given this recent history in PNG. |
| 6 | Extension of the scope of | p. 3 point 10: "NICTA is proposing not only to renew the existing | All of these points are incorrect. The declarations always covered |

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| | the existing declarations | declarations of DMTAS and DFTAS but also to extend their scope to apply to calls that have originated outside of Papua New Guinea. Not only is out of step with the wholesale declaration criteria ("WDC") set out in section 128 of the Act, this approach is contrary to the scheme of the Act and would be contrary to the Act's objectives and Government Policy." | the domestic element of calls originating overseas. The issue is discussed further below in response to specific points that have been raised by Digicel. |
| 7 | Commercial arrangements are in place and are sufficient | p. 3 point 11: "Digicel contends that a renewal of the declaration of DMTAS and DFTAS is unnecessary because there are already commercial arrangements in place for the provision of those services." | The Act encourages commercial arrangements in relation to interconnection but recognises that there is a wider public interest in the matter that may not be adequately protected by agreements between commercial parties. So the argument based on commercial arrangements, which may be changed at any time by the parties to them, cannot be an adequate disposal of the issues surrounding call termination. |
| 8 | Definition of Market | p. 6 point 18: "Market" is defined under the Act to mean: <i>"a market in the whole or any part of Papua New Guinea for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them"</i> That is, only markets within Papua New Guinea are relevant to WDC." | 'Market' is used in s 128 (b) of the Act to refer to the market in which the relevant wholesale service is provided and the other market for which declaration of the wholesale service is necessary for the promotion of effective competition. Both markets must be markets in PNG and, in the view of NICTA staff that applies in the present case. At the wholesale level the termination occurs in PNG and the market in which the termination service belongs is a PNG market. At the retail level the mobile service market includes both the origination of calls by, and the termination of calls to, mobile subscribers in PNG. |
| 9 | Standard of proof | p. 7 point 22: "The standard of proof in respect of each matter that NICTA must be satisfied of is very high and certainly much higher than merely considering that declaration would be <i>"likely to satisfy"</i> the WDC, or that NICTA staff <i>"believe"</i> , the declaration would meet the WDC, or that <i>"all of the declaration criteria would appear to be met"</i> (our emphasis)." | The standard is as stated in s 129 of the Act, namely that NICTA must be "satisfied that all of the declaration criteria would be met by the declaration, or continued declaration, of a wholesale service on particular terms." Nothing is gained by adding words to the statutory standard such as "very high". The phrases that were used in the Discussion Paper and which have attracted criticism from Digicel in its response are appropriate terms to encourage the views of potential respondents to be expressed and submitted. They do not change the standard in the Act, nor do they suggest in any way that NICTA is in doubt about that standard. |
| 10 | The candidate wholesale services | p. 10 points 34 – 36: "... Digicel does not consider that it is appropriate for NICTA to effectively extend the scope of those services to expressly include the termination of calls that have originated outside of Papua New Guinea simply on the basis that | It is appreciated that Digicel has a different view of this matter to NICTA and has done so for some time. For that reason the opportunity to make the matter even clearer has been taken in this review. |

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| | | <p>some of the same network facilities are used for the termination of those calls as those that are used for the origination and termination of domestically originated calls.”</p> <p>“The apparent difference in view about the intended scope and effect of the existing declaration of the DMTAS and DFTAS is not a “misunderstanding”. Nor, in Digicel’s submission, is the effect of the proposed additional text a “clarification”. Digicel submits that, if the legislators had intended the deemed declarations to apply to calls that originated outside of Papua New Guinea, the wording of the declaration would have expressly stated that to be the case.”</p> | <p>The terminating access service is the same service irrespective of where the call may have originated. The service at this point is entirely a domestic one, involving the conveyance of the call from one point in PNG to another in PNG.</p> <p>The definition of ‘interconnection’ in s 4 of the Act is clear enough. It states that “interconnection” “means the physical and/or logical linking of one network to another network to achieve any-to-any connectivity”. The definition of “any-to-any connectivity” is a general definition based on retail customers connected to different networks being able to send and receive communications to and from each other. The definition of “retail customer” in the same section of the Act is used to clarify the distinction with wholesale customers, and includes no requirement that retail customers must be situated in PNG for the purposes of the any-to-any connectivity requirement in the definition of “interconnection”. To borrow a line of argument from Digicel, such a limitation might have been expected if that was the policy intention of the Act in this context.</p> <p>Further, the definition of ‘any-to-any connectivity’ in the Act mentions ‘networks’, the definition of ‘networks’ mentions ‘network services’. Network services are services between two points, only one of which need be in PNG.</p> |
| 11 | <p>The Competition Objective – the terminating network operator’s monopoly in a CPNP environment</p> | <p>p. 11 point 38: “NICTA has erred by assuming that the markets that are relevant to the proposed intervention are:</p> <ul style="list-style-type: none"> • <i>i. voice call and SMS/MMS termination on individual mobile networks in PNG; and</i> • <i>ii. voice call termination on individual fixed networks in PNG</i>” (Emphasis added) <p>“This view has apparently been reached on the basis that NICTA considers it to be “consistent with well-established and accepted reasons and standard international regulatory practice”. NICTA then goes on to conclude as an inevitable consequence and matter of logic that “each network operator has significant market power (“SMP”) in the market for termination of calls/messages on its own network”. This “traditional” view of the world is not based on any actual evidence or analysis of the actual market in Papua New Guinea and, in Digicel’s view fails to take into account the rapidly changing communication habits of consumers. For example social networking and communication via the internet has exploded in recent years with many people preferring to use that form of communication as a substitute for voice calls or SMS/MMS</p> | <p>It is quite proper for NICTA staff to refer to well-established views and regulatory practice elsewhere.</p> <p>It has always been possible, and in many cases to be actually available, for originating subscribers to communicate either generally or electronically with their intended addressees by other means. Notwithstanding this it is well established that in those countries in which the calling party’s network pays (CPNP) the receiving party’s network for the cost of terminating calls (and PNG is one such country) that the only way in which the called party can be contacted via the service in question is through the network on which the called service is provided. In that sense the called party’s network (or the access provider) has a monopoly over this particular means of communication. It is not relevant that the calling party could use other means to contact the called party in some other way than via the chosen service.</p> <p>Digicel’s submission ignores the fundamental purpose of mandatory interconnection in support of any-to-any connectivity as serving the</p> |

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| | | services." | interests and amenity of end-users and customers who might otherwise have that amenity diminished in the absence of interconnection. To refer to other alternatives (such as Skype and Facebook) that may be open to the calling party is to canvas a reduction in customer amenity using the preferred service. In other words, it involves changing the policy on which any-to-any connectivity is based. |
| 12 | The related downstream market | <p>p. 12 point 39: "... NICTA appears to have concluded that the relevant downstream market is the <i>"retail mobile services market"</i>, although no analysis appears to have been undertaken to support such a conclusion. Interestingly no mention seems to have been made of the retail fixed services market which, at least for the sake of consistency should have been considered by NICTA.</p> <p>At p. 13 Digicel raises again the issue of whether 'market' as defined in the Act might include a market where the communication originates outside PNG.</p> | <p>Of course, in the case of the DFTAS the related downstream market is the market for retail fixed services. In the case of the DMTAS which is concerned with the termination of calls on mobile networks, whether sourced from fixed or mobile network services, the DMTAS is required to complete the full suite of retail mobile services being provided by the "access seeker".</p> <p>Comment and response at #10 above address the matter of inclusion in the DMTAS and DFTAS service definitions of the termination of traffic ultimately originating outside PNG.</p> |
| 13 | Criterion of being necessary for the promotion of effective competition in a market | <p>p. 13 point 41: "Once the relevant market has been defined, it is necessary to examine the effective competitiveness of this market, including an examination of:</p> <ul style="list-style-type: none"> • the appropriate metrics of the market in question; • sunk investment, proposed investment and investment incentives; • the conditions for rivalry; • the rivalry itself; and • other related factors affecting the relevant market" <p>p. 13 point 43: "... Digicel notes again that no actual analysis has been undertaken by NICTA and that recent developments in technology and consumer behaviour mean that old assumptions may no longer be a reliable indicator of future outcomes."</p> | <p>In fact the Act does not require examination in these terms at all, although NICTA staff readily conceded that in the case of access to certain types of wholesale services, it would be prudent to carry out such an examination as Digicel prescribes.</p> <p>The Discussion Paper already makes clear that in relation to each network the licensed operator is a monopolist as far as terminating access is concerned, and for the access to services directly connected to that network this situation will continue. These are the conditions of rivalry that Digicel is referring to in two of its points, and they are of overwhelming significance for the outcome of the review. It is noteworthy that NICTA has recently concluded a review of the retail mobile service market and found Digicel to have SMP in that market.</p> <p>See discussion immediately above. The monopoly arrangement referred remains in place and is likely to continue for the period that a declaration might be put in place. NICTA staff have already in this Response Report indicated that if there is a change from CPNP arrangements then the monopoly situation will cease. However that is unlikely since nobody is advocating it in PNG at this time.</p> <p>Of the many meanings offered by the Merriam Webster dictionary,</p> |

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| | | to define 'necessary' for the purposes of the phrase in s 128(b)(i) that access "is necessary for the promotion of effective competition in at least one other market" | <p>the sense of being "needed" or "required" would appear to best cover NICTA staff's understanding of the word in the context of s 129(b)(i). It is not the case that the term has a high threshold as stated by Digicel. In the sense of "needed" or "required" it is true to say that DFTAS and DMTAS are necessary for the completion of the suite of services that form the expectations of retail customers. These customers have an expectation that they will be able to call and be called without having to subscribe to multiple services. Retail service providers who do not meet those expectations, as a result of not being effectively and commercially sustainable interconnected with other networks will not be able to effectively compete in retail markets. S 129(b)(i) refers to effective competition in the related market. It is, of course, possible for one service provider to foreclose the market by denying sustainable termination services to its competitors. In that situation, the necessity for the service to be mandated through declaration will have been demonstrated, but too late to be effective.</p> |
| 14 | Facility cannot feasibly be substituted as a matter of commercial reality – competition objective criterion in s 129(b)(ii) | <p>p. 14 points 48 and 49: s 129(b)(ii) of the Act requires that wholesale services that are proposed to be declared must be supplied in whole or in part by a facility that cannot feasibly be substituted, as a matter of commercial reality, via another facility in order to supply that Declared Wholesale Service. Digicel says, in the case of DMTAS, that: "As a matter of fact, there are two geographically extensive mobile networks in Papua New Guinea. It is also a matter of fact that both mobile networks offer call termination services and compete for customers in Papua New Guinea and that customers are free to choose from whom they buy their mobile service (including call termination). Digicel submits that it is not relevant to this particular WDC whether or not one network currently has more customers than the other or that one network currently has greater geographic coverage than the other."</p> | <p>NICTA staff believes that this point has been made in error and that there may be confusion by Digicel of the service that "cannot feasibly be substituted". It is true that there are two mobile networks with material coverage in PNG and that customers may subscribe to the retail service of either or both (which as noted above in comment 8 includes call termination). However Digicel would be well aware from its own experience that customers are much more inclined to choose their retail service provider based on other factors than whether they will receive incoming calls, because they expect to receive incoming calls as a matter of course and have been encouraged in that view by the history of competitive services in PNG.</p> <p>The relevant service that must not be capable of being feasibly substituted is the wholesale service subject to the declaration review, not the retail services discussed by Digicel. Given the expectation of customers and therefore the competitive and commercial realities that flow from this, terminating access services (which are different from the retail service of receiving calls) cannot be feasibly substituted.</p> |
| | | p. 14 point 51: "However, Digicel submits that the situation with respect to the DFTAS is not so clear. At present there is only one fixed access network in Papua New Guinea (operated by Telikom)." | NICTA staff consider that this line of argument confuses the service that may be feasibly substituted. The Act, as stated above, refers to the wholesale service when talking of feasible substitution in |

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| | | Based on the technologies that are currently available, it is unknown to Digicel whether it would be feasible, as a matter of commercial reality, to substitute Telikom's fixed access network with another fixed access network." | s129(b)(ii). |
| 15 | The efficiency objective: of promotion of economically efficient use of and investment in ICT services – s 129(c) | <p>p. 14 point 53: "Having regard to the obligations of Section 128(c)(i) of the Act, it must be shown by NICTA that declaration of the Declared Wholesale Services would not materially compromise the incentives for efficient investment in any facility over which the Declared Wholesale Service may be supplied."</p> <p>Point 54: "As stated above, Digicel considers that any declaration that included the regulation of calls that originate outside of Papua New Guinea would be a disincentive to investment for network operators such as Digicel. Digicel relies heavily on revenues earned from the termination of calls that have originated outside of Papua New Guinea to support its ongoing investment in infrastructure and its ability to be able to offer affordable telecommunications services within Papua New Guinea."</p> | <p>It is important to note that s 128(c) does not require that the profitability of the access service provider to be maximised or to be maintained at any specific level. S 129(c)(ii) refers to technical feasibility having regard to the specific factors identified in s 124(2)(a). s 124(2)(b) refers to "the legitimate commercial interests of the access provider is supplying the ICT services, including the ability of the access provider to exploit economies of scale and scope". In the case of DMTAS, in particular, economies of scale and scope may well be enhanced by regulated termination resulting in increased traffic levels, provided the economies have not already been exhausted. S 124(2)(c) requires regard to be had to the incentives for investment in the facilities by which the ICT services may be supplied. In this respect NICTA staff note that Digicel has invested substantially in its mobile network during the period since 2010 when the deemed declaration of DMTAS has been in place and before that under earlier legislation. As far as NICTA is concerned, the domestic termination of calls originating overseas has been covered by the arrangement since 2010 and no additional disincentive to investment has been alluded to in Digicel's submission.</p> |
| 16 | Benefits to an access seeker in including calls originating overseas | p. 15 point 55: "...Digicel submits that a declaration which includes the termination of calls that have originated outside of PNG would not provide any long term benefits to an access seeker in Papua New Guinea. That is because any brief opportunities that might result from a difference between existing international settlement rates and the current domestic termination rates would quickly be eroded with the only real beneficiaries being network operators domiciled outside of Papua New Guinea who have little incentive to offer lower rates to consumers calling Papua New Guinea from their networks and would be more likely (as has been seen with other South Pacific markets in past) to simply "pocket the benefit" and increase their own margins on calls to Papua New Guinea customers that originate on these overseas networks." | <p>It is possible that PNG operators might compete to encourage overseas carriers to deliver calls to their international gateways. This is not the only scenario and also it is not necessarily made more likely by excluding the internationally-originated call termination component from the DMTAS and DFTAS service definitions as Digicel is proposing.</p> |

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| 17 | Technical feasibility – s 128(c)(ii) and s 124(2)(a) | <p>p. 57 points 57 and 58: "Having regard to Section 128(c)(ii) of the Act, NICTA must show that access or increased access to the Declared Wholesale Services (as a consequence of declaration) is technically feasible having regard to:</p> <ul style="list-style-type: none"> (a) the technology available or likely to become available; (b) the reasonableness of the costs involved; and (c) the effect of supplying the Declared Wholesale Services on the integrity, operation or performance of other ICT services or facilities." <p>At point 58: "Digicel notes that, as the DMTAS and DFTAS have previously been declared, it can be reasonably argued that a renewal of the declaration would meet this WDC."</p> | <p>NICTA staff note that Digicel considers that the period of declaration to date tends to support the view that technical feasibility has not been an issue, and that continuation under a new declaration will also be technically feasible.</p> |
| 18 | The definitions of "interconnection" and "any-to-any" | <p>pp. 16-7 point 65: "... it is clear from a reading of the definitions of "interconnection" and "any-to-any connectivity" that are contained within the Act that designated interconnection services are, necessarily, domestic services and only apply to the termination of calls that are made from the customers of one network in Papua New Guinea to another network in Papua New Guinea. This can be seen clearly when the two definitions are read into each other. That is: <i>"interconnection means the physical and/or logical linking of one network to another network to achieve the ability of a retail customer connected to one network to send communications to, and/or receive communications from, a retail customer connected to another network, where those communications are conveyed in whole or in part via the two networks"</i></p> <p>Digicel submits that this means that the principle of any-to-any connectivity refers specifically to the passing of communications between the retail customers of the two networks that are interconnected. It does not contemplate that two networks will be required to interconnect so that one network may act as a transit operator for incoming international calls that are handed to it by a wholesale network operator that is located outside of Papua New Guinea where the party handing over the call to the network on which the call terminates has no relationship whatsoever with the customer originating the call."</p> | <p>This is discussed at #10 above.</p> <p>To be clear the any-to-any connectivity principle as presented in the Act does not require direct interconnection and is quite open to the notion of intermediate networks being involved. The Act must be read with the normal meaning of the words used (or not used) in mind and only if such a reading is nonsense should less straightforward interpretations be sought.</p> <p>The Act does not preclude the intermediation of transit networks (to use Digicel's phrase) in the course of interconnection or in the realisation of the any-to-any connectivity principle.</p> <p>It is important to note, when considering the definitions of 'interconnection' and 'network services' in the Act, that network services are services between two points, only one of which need be in PNG.</p> |
| Bmobile | | | |

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| 18 | Executive summary | 1 st page, point 3: Bmobile agrees that the DMTAS and DFTAS markets are subject to SMP, and that this has the potential to harm the development of effective competition in the retail mobile services market. Bmobile agrees that these circumstances warrant renewal of the declaration of the two wholesale services. | Noted. |
| 19 | Criteria for declaration of DMTAS and DFTAS | 2 nd page: "We cannot comment on the degree of alignment of the declaration criteria assessed by NICTA, but accept that in broad terms, the relevant network operators do have SMP." | Noted |
| 20 | Costs to licensees of a declaration | 2 nd page: Bmobile comments that "if the declarations were to be renewed, that is will be necessary to assess the costs that apply to licensees within an agreed timeframe following the renewed declaration." This is in response to the comment in the Discussion Paper that "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". | NICTA staff are unsure what Bmobile has in mind with its comment. The point made in the Discussion Paper was no more than a procedural matter that the Regulation will need to be amended to refer to the designation of the services. This does not necessarily trigger a review of charges as suggested by the Bmobile comment. |
| 21 | Renegotiation of interconnection (terminating access) charges | 2 nd page, point 4: "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, and Bmobile expects to seek to commence commercial negotiations with the access provider if the determinations are renewed. We recommend that NICTA prepare a detailed arbitration process based on an approved RIO (Reference Interconnection Offer) if negotiations were to stall or be cancelled by one of the negotiating parties." | Whether a re-negotiation of access charges is required as a result of the further declaration of the terminating access services depends on the contingency arrangements that the parties have agreed on in the current interconnection agreement(s). It is not automatic that the charges are opened up for re-negotiation if the services are declared beyond 31 December 2014. In addition no service provider has submitted a RIO. NICTA cannot prepare for an arbitration unless asked to arbitrate by one or both parties in relation to issues in an actual dispute. The comment therefore is getting well ahead of the issues being considered in the current inquiry. |
| 22 | Summary of key preliminary findings | Agreed | Noted |
| 23 | Section 5 – Consideration of the declaration criteria | Parts A, B and C are all agreed. In relation to Part B Bmobile recommends that any assessment of interconnection costs be subject to expert third party review. | The Act is based on a "negotiate / arbitrate model" for the setting of wholesale charges. Initially it will be a matter for the interconnecting service providers to decide whether expert third party review is sought. In any case it is not considered to be a matter of immediate relevance to the current inquiry. |

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| | | In relation to Part C Bmobile states that claimed economies of scale apply in the case of facilities access services but to a lesser extent with interconnection. | In relation to the last comment by Bmobile on this point, NICTA staff agree but note that the Act makes economies of scale relevant irrespective of the type of wholesale service involved. |
| 24 | Annex B, Section 5 | 3 rd page: Bmobile notes: "Section 5 – Service Description – DMTAS. Consider adding a third form of traffic in addition to voice and SMS – that of mobile data." | Bmobile has not made a case for inclusion of mobile data in the service description. The any-to-any connectivity requirement is essentially a requirement built on voice and SMS (in the case of mobile). Data is essentially unidirectional, and lacks the characteristics traditionally associated with "any-to-any connectivity" as a concept. |
| Telikom | | | |
| 25 | Circumstances with the associated existing declarations of terminating access services | 2 nd and 3 rd pages (after cover page 1): Telikom notes that the Government "in its own wisdom" decided to declare the DMTAS and DFTAS, and that "such direct government intervention to some extent has distorted a free market that had the potential to provide healthy competition by simply allowing the forces of demand and supply to work and that could have led to competition flourishing." | <p>In the absence of the deemed declaration the competing service providers would have been free to agree terminating access terms, as they have done (but with regulatory guidance) or to fail to agree. If the latter had been the outcome then, absent the declaration, interconnection would have been frustrated. As a result the amenity of end-users and customers delivered via interconnection would have been eliminated.</p> <p>Telikom explicitly raises the question of why there was a deemed declaration of the DFTAS and DMTAS in the Act. In 2007-8 the Telikom as incumbent and Digicel failed to agree on interconnection until encouraged to do so by the ICC and the threat of intervention by the then Minister. It is reasonable to consider that this experience may have had a lot to do with the decision to deem the declaration of terminating access services in the Act in 2009.</p> <p>If the declaration had not been deemed in the Act declaration would likely have occurred via a more detailed process, leaving service providers with a level of avoidable uncertainty in the meantime, as had happened in 2007-8.</p> |
| 26 | Monopoly | 3 rd page: Bmobile says that "our chief concern is, were there sufficient market assessment conducted at that point in time before a declaration was made; taking into consideration <i>inter alia</i> the operating circumstances of the individual licensees, or was it declared because there were two mobile operators ... and a fixed | NICTA staff consider that the precise considerations that informed the legislative deeming in 2009 are largely irrelevant to the present exercise. Now the concern is that the declaration criteria in the Act are met. |

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| | | line operator ... by simply drawing a conclusion that an implied monopoly exists. "It is, therefore, our view that a proper assessment of the market has been overlooked and a declaration of the [DMTAS and DFTAS] were made based on market assumptions. | NICTA staff disagrees in relation to the present review. The assessment of the market is to be made in accordance with the criteria for declaration set out in the Act and that is what has been done. |
| 27 | Evidence based assessment | 3 rd page, Section B: "... Telikom is of the view that the discussion paper has not widely covered the relevant market of the [services]. Much of the discussions have been attempted to satisfy the declaration criteria which in our view also lacks evidence based assessment." | Given the nature of the terminating access monopoly in CPNP circumstances discussion of many finer details of the market (beyond the monopoly in relation to each network-defined market) is unnecessary. |
| 28 | Achievements | 3 rd and 4 th pages: Telikom asks, "over the declaration period, what has been the notable achievements realised in the domestic mobile terminating access services and the domestic fixed terminating access service". It goes on to say that "it would be fair and reasonable to inform the licensees of what has been the outcome as a direct result of the current declarations." | NICTA staff disagree that an assessment of the achievements (if that is the right term) of the current declarations is part of the current review or is required by the Act or would even be useful. The important aspect of the current deemed declaration is whether experience has suggested that any of the criteria might not apply. Experience has not suggested anything of that kind. |
| 29 | Planned achievements | 4 th page, point C.2: "Under the proposed renewal of the declaration of the [services] Telikom propose that NICTA should set out clearly what it intends to achieve as a result of the renewal of the Declaration." | What NICTA staff have set out in the discussion are the issues that, in NICTA's opinion, are relevant to the potential renewal of the declaration of the DMTAS and DFTAS, and some discussion of relevant background issues. The "proposed achievements" or outcomes expected of declaration are set out in the Act. If the criteria are met, the pro-competitive and (possibly) efficiency enhancing purposes in s 124 will be promoted. |
| ICCC | | | |
| 30 | DMTAS and DFTAS market definitions | Page 1, Introduction: ICCC concurs with the definition of the markets proposed by NICTA staff. | Noted. The ICCC has not made any explicit comment on the clarification of the market definitions in relation to the termination of internationally originated calls. The concurrence on the market definitions is appreciated. |
| 31 | Extent of competition in the market for termination services | Pages 1 - 2: "Given the current structure of the market where one player is dominant and has stronger presence than other players, the Commission is of the view that if the declaration is not renewed, both the wholesale and retail segments of the markets would suffer | Noted. The ICCC's views fully align with those expressed by NICTA staff. |

| | Topic | Comment | NICTA Staff Response |
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| | | in terms of high termination rates at the wholesale level and high call/SMS/MMS rates for subscribers at the retail level." ICCC also gives support to the concept that the services are not substitutable, which supports the earlier comment that the market definitions are appropriate. | |
| 32 | The declaration promotes efficiency in investment in the facilities by which ICT services may be supplied.\ | Pages 2 – 3: "Given the nature of the market where SIM cards are 'locked' to their respective networks and there is competition among network operators to increase their subscriber base at the retail level, the Commission is of the view that without declaration calls/SMS/MMS termination is likely to be expensive and consequently less calls/SMS/MMS will be terminating on each other's network which will result in network operators operating on losses at the wholesale market." | Noted. NICTA staff agree that if termination charges are not declared they will in all likelihood rise above cost and lead to market distortions, including reduction in off-net calling and maximising of on-net calling. |
| 33 | The declaration of these services will promote any to any connectivity | Page 3: "The Commission believes that the declaration of these services will promote any to any connectivity by subscribers of respective networks." | Noted and agreed. |
| 34 | Overall | Page 3: "Overall, the Commission believes that regulation is second best to having a competitive market. However, given the nature of the business activities involved there is no competition in the termination services and one is difficult to exist there, the Commission is of the view that declaration of termination services should continue for another five years." | Noted. |