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21 December 2012

Charles Punaha
Chief Executive Officer
National Information & Communications Technology Authority
Section 34, Lot 19 7 20, Frangipani Street, Hohola
PO Box 8444
Boroko
National Capital District

Dear Mr. Punaha,

RE: DECISION OF THE ICT APPEALS PANEL

The ICT Appeals Panel has reached a decision on the appeals on the application for review of a determination by the National Information and Communication Technology Authority relating to retail services voice calls on pre-paid mobile services under section 254 of the *National Information and Communication technology Act 2009*.

A copy of the decision is attached for your information and perusal.

Yours faithfully,


.....
for

IGIMU MOMO

Chair, Panel of Experts Secretariat

IN THE APPEALS PANEL

**RE: APPLICATION FOR REVIEW OF A DETERMINATION BY THE
NATIONAL Information and COMMUNICATIONS TECHNOLOGY
AUTHORITY RELATING TO RETAIL SERVICES VOICE CALLS ON PRE-
PAID MOBILE SERVICES UNDER SECTION 254 OF THE NATIONAL
INFORMATION and COMMUNICATIONS TECHNOLOGY ACT 2009**

BY: DIGICEL (PNG) LIMITED

TELIKOM PNG LIMITED

BEMOBILE LIMITED

Applicants

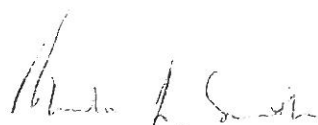
DR. RHONDA L SMITH

18 DECEMBER 2012

THE APPEALS PANEL:

1. The Appeals Panel confirms NICTA's decision that in relation to pre-paid mobile calls:
'Digicel shall not price discriminate on the basis of the mobile network (including its own) that will terminate the call...'.
2. However, the Appeals Panel rejects exemption 6 (1) (a) – that is, an allowance for a discriminatory price difference of up to 40% between on-net and off-net pre-paid mobile calls should NOT be allowed.
3. Exemption 6 (1) (b) is based on an incorrect understanding of price discrimination and is unnecessary.

4. Exemption 6 (1) (c) is not normally regarded as conduct that is price discrimination. Nevertheless, it makes the position explicit and does no harm so long as explanation is provided about duration and frequency of promotional offers..



Dr Rhonda Smith

Appeals Panel

18 December 2012

REASONS FOR DECISION

THE APPEALS PANEL: DR. RHONDA L SMITH

5. On 15 October, 2012, Digicel (PNG) Limited [hereafter Digicel] applied to the Appeals Panel as provided for in Section 254 of the *National Information and Communication Technology Act 2009* (“the Act”) for review of the decision by the National Information and Communications Technology Authority (NICTA)), dated 25 September, 2012 in relation to Retail Services of Mobile-originated Voice Calls Services.
6. Digicel’s application is provided for under Section 256 (d) of the Act which relates to retail services, and the scope of the appeal is set out in paragraph 2 of the application. In essence, the concerns of Digicel are that:
 - i. the criteria to be considered as the basis for a recommendation in relation to a Retail Services Determination were not in fact considered by NICTA;
 - ii. irrelevant factors were taken into account;
 - iii. NICTA’s decision was unfair because analysis was used that Digicel did not have an opportunity to comment on; and
 - iv. NICTA’s recommendations do not achieve the objectives of the Act.
7. Prior to this, on 25 September 2012, bemobile sought a review of the NICTA decision of 5 September 2012. The basis for bemobile’s request was that it ‘failed to address non compliance with the General Pricing Principles of mobile termination rates between Digicel and bemobile in a timely manner’ and contravened NICTA’s statutory obligations ‘ under the NICTA Act 2009’ NICTA decided to assess price discrimination in relation to on-net and off-net mobile

service by Digicel. It did not set out to consider mobile termination rates (MTR) per se. Whether or not this was an appropriate choice by NICTA is not for the Appeals Panel to determine.

8. An application for review of NICTA's Determination of 24 September, 2012 was received from Telikom on 16 October, 2012. The basis for this application was Telikom's concern that the decision was unfair and in particular whether its application would achieve a fair and efficient market.
9. On 28 October 2012 bemobile requested that the ICT Review Panel reject Digicel's application because a copy was not provided to bemobile. The legitimacy of the Digicel's appeal is subject to legal advice and may be better clarified through the Courts given some potential inconsistency within the NICTA Act. Irrespective of the outcome of the legal advice or whether a court subsequently rules that Digicel's conduct was unfair to other parties, there are still two applications before the Appeals Panel and they raise similar if contrary concerns to those of Digicel.
10. Given the uncertainty surrounding NICTA's decision and in the interest of fairness to all parties, as provided by the Act, the Appeals Panel decided to accept all applications for review without reference to the statutory limit on the time for application.

PRELIMINARY ISSUES

11. First, NICTA has questioned whether the Appeals Panel has the power to review a decision by NICTA after that decision has been adopted in a ministerial determination This is by reference to the wording of section 256 together with section 263 (NICTA cross submission, 13 December, 2012, paragraph 19). Clarification of this interpretation lies with the court.

12. Second, Telikom's submission raised issues under the Fairness of Transactions Act. This Appeal Panel has no jurisdiction in relation to that Act. NICTA in its cross submission of 13 December, 2012, provides a detailed discussion of this matter (see Part XI)..
13. Third, the Appeals Panel's role is to review decisions by NICTA based on the materials before it, not to start afresh (see s.234 of Act). NICTA did not set out to address non compliance with the general pricing principles of mobile termination rates. Consequently, the Appeals Panel cannot consider this issue.
14. Fourth, under section 261 of the Act, the Appeals Panel can vary NICTA's decision or remit it.

NICTA's Decision

15. This decision had its origins in a complaint from bemobile that Digicel's pricing for mobile calls terminating on bemobile's network involved price discrimination which was anti-competitive (2.2). This was not a dispute relating to mobile termination rates (MTR) as such but rather to the relativity of call charges to particular types of customers by Digicel. However, MTR do impact on the cost on on-net compared to off-net costs of supply. The Appeals Panel has no power to accede to bemobile's claim that NICTA should have considered MTR more generally. A subsequent investigation by NICTA led to its decision of 5 September, 2012 and/or of 24 September 2012.
16. On 24 September, 2012 NICTA recommended to the Minister that:
'In pricing the services to which this Determination relates, Digicel shall not price discriminate on the basis of the mobile network (including its own) that will

terminate the call except that Digicel may price discriminate between on-net and off-net calls:

- a. up to a limit of 40% for each separate minute, or part thereof, on a national call...;or*
- b. to the extent that any such differences in the price of an on-net call and the price of an off-net call are objectively justifiable based on differences in the costs of supplying the service; or*
- c. ...to the extent that any differences in the price of an on-net call and the price of an off-net call are the subject of a limited period promotional offer the terms of which have been approved by NICTA...¹*

17. I am satisfied that NICTA's decision is made within its powers under the NICTA Act 2009. In particular such a decision is provided for under:

- i. Section 124 and especially 124 (b) which relates to the competition objective;
- ii. Section 161 which relates to retail service determinations.

18. Under the Act NICTA has the power to regulate particular retail services (as distinct from aggregate services), that is, those services supplied by a particular licensee. This enables NICTA to focus on the supply of national voice telephony as it relates to pre-paid mobile services – pre-paid services are stated to account for 99% of mobile services in terms of the number of subscribers.² The issue to be addressed arises in the context of mobile-to-mobile services and so does not include mobile to fixed line service or vice versa.

19. As required by the Act, the expiry date for the decision is stated and it is 5 years.

¹ This would be a standard exemption under competition policy/law eg in relation to predatory pricing.

² NICTA, Recommendation Report, 5 September, 2012, p.6.

Telikom raised concerns about the length for which the decision applies in light of uncertainty about future directions within the industry. However, I find this uncertainty to be adequately addressed via the provision for review in two years.

20. Under the Act, NICTA is responsible for regulating various prices for telecommunication services. In addition, under Part VII Consumer Protection And Price Retailing, it may recommend to the Minister that 'a retail service supplied by an operator licensee should be subject to a retail service determination in respect of that operator licensee.' (Section 156 (b)).
21. The content of a Retail Service Determination, and hence what may be included in NICTA's recommendation to the Minister, is specified in Section 161 (a)-(g). In particular in the current circumstances, the Section enables regulation of prices for the supply of retail services (Section 161 (a) (i) and specification of pricing policies and/or principles which must be complied with by the operator licensee in pricing the retail service (Section 161 (a) (c)).
22. Given this, it is clear that NICTA has the statutory authority to make a recommendation in relation to whether and under what conditions an operator licensee such as Digicel can engage in price discrimination in charging for any or all of its services.
23. The next issue is whether NICTA has followed the appropriate procedure in making its decision in relation to its recommendation to the Minister. Section 157 of the Act provides that NICTA may hold a public inquiry in order to obtain information relevant to its decision. In this matter NICTA chose to hold a public inquiry. Subsequently, NICTA produced two public discussion papers and a report dated 5 September, 2012 detailing its findings as a result of the Public Inquiry. There is no basis for concluding, as alleged by Digicel, that NICTA lacked a proper basis for its decision. Nor is there any evidence to suggest that the various parties were given inadequate opportunity to provide information to NICTA.

16. Further, Section 159 of the Act states *inter alia* that:

- (a) NICTA shall recommend to the Minister that the retail service should be subjected, or continue to be subject, to a retail service determination in respect of that particular operator licensee; and
- (b) NICTA shall publish a report identifying-
 - (i) NICTA's analysis of the extent to which the retail regulation criteria would be met for that operator licensee; and
 - (ii) the particular terms of the retail service determination,

26. The Applicants dispute that the objective of the Act and these criteria were adequately addressed.

27. NICTA in its recommendation to the Minister sets out in Section 5 its findings in relation to each of the criteria in Section 158 of the Act. I find therefore that it is incorrect to allege that NICTA has not paid attention to these criteria. Further, contrary to bemobile's concern, NICTA did have regard to sections 2 and 3 of the Act.

28. Nevertheless, there are a number of issues that arise from the treatment of these criteria that need to be addressed by the Appeals Panel. They are addressed below.

Market Definition and Substantial Market Power

29. Section 158 (b) (i) refers to the need to establish that the 'operator licensee has a substantial degree of power in *the market* within which the retail service is supplied' (emphasis added).

30. NICTA identifies the relevant market as ‘the retail mobile services market’ (3.1, p. 6, 24 September Report). It then notes that ‘*A retail service determination must specify the particular retail service to which it applies.*’ (Sections 159 and 161). The service is identified as ‘the supply of mobile originated retail voice call services’. While it may be true that there are no close substitutes for mobile services, market definition is based on the presence/absence of close substitutes and this should have been discussed.
31. NICTA goes on to narrow its market to ‘Digicel’s supply of mobile originated national retail voice call services on a pre-paid basis.’ NICTA should be more precise in defining the relevant market as the service represents the product dimension of that market. However, as pre-paid calls are said to account for either 97% or 99% of mobile calls, the distinction is a fine one and would not alter the decision.
32. In addition, where price discrimination occurs, as observed by the DOJ/FTC Horizontal Merger Guidelines, particular attention may be paid in defining the market to the customers at risk of the discrimination. In this case, the customers at risk are those with pre-paid mobile service whose calls originate on the Digicel network but do not terminate on it. This would justify narrowing the market from mobile services as NICTA did. Nevertheless, it should have been explained.
33. Despite the failure of NICTA to explain its reasoning in arriving at the market definition adopted, the market is unlikely to be broader than ‘the retail mobile services market’ and even if it is narrower, this is unlikely to alter the finding in relation to Digicel’s market power.
34. Market definition is required as a basis for establishing that the operator licensee, in this case Digicel, possesses substantial market power. Although there are various ways of defining substantial market power, it is generally accepted that it exists where a firm is able to make decisions, such as pricing decisions, independently of the market, that is, without reference to its competitors.

35. In its decision NICTA states that Digicel possesses substantial market power and that market power is likely to persist into the future.³ In relation to Criterion 5.2 the basis for this finding is stated to be:

- *Digicel's high and prevailing market shares (Digicel's has 74% of all mobile subscribers in PNG, earns 88% of the total market revenues, and generates 91% for the total voice traffic in the market);*
- *Digicel's network reach and being first in with a high coverage of both territory and population;*
- *Digicel's price leadership and its ability to sustain on average higher prices than its competitors; and*
- *Digicel's use of strong network effects (specifically tariff mediated network externalities derived from the scale of its discrimination between on-net and off-net prices) to reinforce its market share and overall market position.*

36. The report to the Minister provides a summary of the reasons for finding that Digicel possesses substantial market power.⁴ This is discussed more fully in NICTA's report from its public inquiry. The Recommendation Report should be a 'stand-alone' document and so a more fulsome explanation of these reasons is appropriate in the Report itself, as distinct from being contained in the associated documentation.

37. Market share may confer temporary market power but competition issues arise in the context of ongoing or long run market power. A firm that has a very large market share (even 100%) will not possess substantial market power if it is at risk of entry because barriers to entry are low. Digicel's strong network effects create a

³ NICTA, Recommendation Reports, Section 5.2 (5 September, 2012 and 24 September, 2012).

⁴ NICTA, Recommendation Report, Section 5.2. (5 September, 2012 and 24 September, 2012).

significant barrier to entry and a fuller explanation of this in NICTA's decision would have been helpful.

38. Although there is discussion of network effects, an issue not discussed in the Recommendation Report is switching costs. In relation to pre-paid calls, it is relatively easy to switch carriers, and once the prepayment is fully used, costless. However, two factors suggest that despite this switching costs are significant. These are network effects and the switching costs resulting from price discrimination. NICTA has considered these.

39. It is clear that for the present purpose, that is, assessing the effects from price discrimination in relation to on-net/off-net pre-paid mobile calls, NICTA had adequate evidence as a basis for concluding that Digicel possesses substantial market power.

The Meaning of Price Discrimination

40. A useful basis for further consideration of the rationality of the NICTA decision is what the term 'price discrimination' means. NICTA did not discuss this and nor did it discuss the conditions required for price discrimination to occur.

41. Price discrimination occurs when customers in a market are charged different prices for the same product, for reasons that do not reflect differences in the cost of supply.⁵ Thus, price discrimination exists when in relation to the same product the ratio of the price to marginal cost of different buyers is not equal. No price discrimination exists if, for products of the same quality:

$$P_a/MC_a = P_b/MC_b$$

⁵ Pepall, Richards & Norman, *Industrial Organization and Contemporary Theory and Practice*, Wiley, 2009, pp 85-88; Jeffrey Church & Roger Ware, *Industrial Organization: A Strategic Approach*, Irwin McGraw-Hill, 2000, chapter 5 – available at http://works.bepress.com/jeffrey_church/23.

where:

P is the price of the product,

MC is the marginal cost of the product,

a, b are customers for the product.

42. Given this, one cannot infer from observing different prices paid by different customers that price discrimination is occurring unless one knows that:

- i. the same product (including the same quality of product) is supplied to these customers;
- ii. the costs of supply are the same – for example one customer may buy very large volumes which impose lower administrative costs on the supplier, while the other buyer purchases small volumes or requires additional service – such as delivery of the product or credit - and so the unit price for the former may be lower. This is not discriminatory so long as the price difference reflects the difference in the cost of supply.

43. Correspondingly, it is not possible to conclude whether discrimination is occurring simply because different customers are charged the *same* price. This is because if the supplier incurs different costs or supplies products that differ in quality, price discrimination will occur if these differences are not reflected in the prices they are charged.

44. In order to engage in price discrimination the following conditions are usually necessary:

- i. the supplier has *market power* and so is able to set its own price rather than responding to the market price – without market power the supplier could not profitably raise prices above the competitive level⁶;
- ii. *arbitrage* between the low-priced market and the high-priced market is not possible. If this were not the case, buyers facing the lower price could resell to those facing the higher price with the effect that prices would equalise;
- iii. different customers or groups of customers must have *different price elasticity of demand* and hence different willingness to pay so that those with the lower price elasticity are charged the higher price.⁷

45. Although not canvassed by NICTA, it is likely that these three conditions are satisfied in relation to the service supplied by Digicel in relation to mobile services:

- i. NICTA concluded that Digicel possessed substantial market power (see above).
- ii. Given the nature of the service supplied, arbitrage is not possible.
- iii. There are clearly two relevant buyer groups based on the nature of customer calls. If a Digicel customer wants to make a call to a non Digicel customer, they are unlikely to change supplier, even if this just means removing one SIM card and replacing it with another. This indicates that the price elasticity of demand between on-net and off-net calls is likely to be different.

⁶ If prices are being reduced below the market rate, market power is not necessary – for example, offering a discount to senior citizens or in particular circumstances (although such conduct may confer market power in future). This is not the case here.

⁷ Peppall, Richards & Norman, pp 86-88.

In my opinion the conditions necessary for price discrimination by Digicel are satisfied.

Implications for NICTA's Decision – Statutory Criteria

46. The next issue is the relevance of price discrimination for NICTA's decision.

First, it has implications, as NICTA recognised, for its findings in relation to the statutory criteria. Secondly, it has implications for its recommendations. Each is considered below.

a. Efficiency Implications

47. In the case of first degree price discrimination, each consumer is charged a price for the relevant product that reflects his/her willingness to pay. As a consequence there is no deadweight loss (no allocative inefficiency) associated with the pricing conduct. First degree price discrimination is not usually feasible because the supplier does not know the willingness to pay of consumers and is unable to ascertain it.⁸ The type of discrimination that Digicel has engaged in or is proposing to engage in, is not first degree price discrimination.

48. For other forms of price discrimination, including that by Digicel in relation to pre-paid mobile voice calls, a deadweight loss is created by price discrimination and so pricing is not allocatively efficient. However, even if there is no price discrimination and Digicel simply sets prices to maximise profits taking into account its substantial market power, a deadweight loss will be created. This gives rise to the question of balance between the allocative inefficiency from market power per se and the allocative inefficiency that results from price discrimination. If price discrimination creates/increases barriers to entry, as NICTA concludes, this helps protect or maintain Digicel's substantial market power and so it is reasonable to conclude that the net effect on efficiency (technical, allocative and dynamic) is negative.

⁸ Airline price systems overcome this problem to a degree by enabling consumers to self select fares from a basket of offerings.

49. The efficiency objective is discussed by NICTA in relation to Criterion 1 – it is also relevant for Criterion 4 but is not discussed in that context. NICTA’s assessment of efficiency effects relates to efficiency in investment which is more appropriately considered in relation to Criterion 3. Efficiency should have been addressed in the context of supplying the service and its elements – technical or production efficiency, allocative efficiency and dynamic efficiency⁹ should have been discussed.

b. Competition Objectives

50. Price discrimination may be an exercise of market power and it may be the means by which market power is acquired and/or maintained. Criterion 1 requires consideration of the implications of the conduct for the competition objective of the Act. NICTA’s assessment of this in Section 5.1 of its Recommendation Report is totally inadequate – even if there is fuller discussion elsewhere.

51. The speed with which Digicel has achieved such a large market share should at the very least have provided an incentive for NICTA to have examined this in detail, including the relevance of price discrimination for this outcome.

52. Competition effects of the conduct are relevant to assessing Criterion 5.4. Although this is recognised (see NICTA’s listed benefits), again there is no substantive discussion or justification for the views expressed.

c. Return on Assets

53. In relation to Criterion 3 NICTA states that it:

‘...is satisfied that the proposed retail service determination would meet this criterion. The proposed determination would not increase the cost burden on Digicel. If there are genuine differences in the costs associated with terminating

⁹ This may but does not necessarily relate to investment decisions.

*calls off-net and on-net, the proposed determination provides a means for such costs to be covered through price discrimination if Digicel so desires.*¹⁰

54. Unfortunately, this reflects a misconception in relation to the meaning of price discrimination. If there are differences in costs associated with servicing one group of customers (eg those that make calls on-net) compared to others (those that make calls off-net) then pricing that reflects that cost difference is not price discrimination (see above for the definition of price discrimination).

55. Thus whether or not price discrimination is prohibited should not reduce profitability in the way suggested in NICTA's discussion of this criterion.

d. Net Benefits Associated with the Conduct

56. In relation to Criterion 4, NICTA lists a number of benefits from allowing Digicel to price discriminate. The first of these refers to 'stimulat(ing) competition and foster(ing) increased mobile penetration while also preventing the anti-competitive effects of excessive levels of price discrimination. Quantification of costs and benefits is not required by the Act but an assessment and balancing is required. NICTA has considered the costs and benefits and it has determined the balance.

57. In its Recommendation Report, NICTA fails to satisfactorily articulate its arguments in relation to:

- i. the consequences for competition of Digicel's conduct absent NICTA's recommendations;
- ii. how the recommendations actually address the competition problem, in relation to which price discrimination is likely an effect rather than the cause;

¹⁰ NICTA, Recommendation Report, Section 5.3, p.11 (5 September, 2012 and 24 September, 2012).

- iii. the effect of price discrimination as a tying device and/or on switching costs (especially in the context of Digicel as a dominant carrier).

58. Given the market share of Digicel and the barriers to entry referred to above, there was likely to be very little competitive pressure within the mobile market prior to NICTA's recommended changes, and allowing price discrimination is likely to continue to prevent competition.¹¹ Given this, the second benefit cited by NICTA for its recommendations seems very unlikely.

59. The third benefit is described as follows:

network effects would be available, to the extent permitted by the 40% tolerance, at the market level instead of solely at the operator level, enabling the benefits to be better enjoyed by all mobile phone users;

60. I interpret this to mean that the lower costs incurred in servicing on-net users will be shared with customers via lower prices. However, as noted above if there really are cost differences between on-net and off-net customers this is not price discrimination and so no exemption from the prohibition on price discrimination is required. This, like innovation and increased investment referred to by NICTA as benefits from allowing limited price discrimination, would exist only so long as another competitor survived. Given the market share differential and to the extent that there are economies of scale and network effects, that may not be for very long. Indeed, NICTA expresses quite strongly its concerns about the impact of Digicel's strategic pricing behaviour on competition.

61. In relation to the detriments likely to follow from NICTA's decision, there is only limited explanation for the first and none for the second.

¹¹ Indeed in relation to Criterion 1 NICTA states that its decision is pro-competitive because it reduces excessive price discrimination.

62. NICTA expressed concern that if Digicel was prevented from price discriminating, the result would be increased prices for consumers. Given time, a more competitive environment than would exist with discrimination would likely have the opposite effect. Continued discrimination is likely to further reduce the already limited competition and higher prices/poorer service can be expected to flow from this. NICTA recognised this in its second Discussion Paper.
63. Despite shortcomings in its explanations and exploration of the various criteria, NICTA concludes that Digicel should not be allowed to price discriminate (subject to certain exceptions). In my opinion, had NICTA more fully addressed these issues the implications would have been for the exceptions rather than for the prohibition on price discrimination.

Exemptions from Prohibition on Price Discrimination

64. As noted above, there are three exemptions or partial exemptions from NICTA's decision that price discrimination by Digicel should be prohibited. As discussed above the second reason is invalid and is not discussed further – price differences based on cost differences are not price discrimination.
65. NICTA sets out to achieve a compromise on the extent to which it is prepared to allow Digicel to engage in price discrimination in relation to the relevant services in order to gain what it regards as the benefits from price discrimination while avoiding the worst of the detriments. Thus it determines that Digicel may price discriminate up to 40% between on-net and off-net prices.
66. NICTA states that a 40% tolerance is 'reasonable and sufficient to cover (a) any likely differences in the costs between the supply of on-net and off-net calls that may exist...' It is difficult to see how this is consistent with (b) which states that price differences that simply reflect differences in the cost of supply are allowed. 40% is not a small or insignificant degree of discrimination, although NICTA describes it as moderate. Based on NICTA's discussion of the effect on competition (paragraphs 57, 58 and especially 75 of its cross submission, 13

December, 2012), and recognising the very small percentage of such sales not supplied by Digicel, such a degree of price discrimination is not justifiable in the circumstances of the market and the dominance of Digicel – comparisons with overseas jurisdictions are not valid unless they too experience the degree of dominance achieved by Digicel.¹² While I agree that there is a risk that on-net prices could be increased, given that the differential is not justified by cost differences, such an increase could be viewed as an anti-competitive exercise of market power which could be addressed under the ICCA Act.

67. In relation to the exemption for promotional pricing, the *temporary* nature of a promotional discount generally means that such pricing is not treated as anti-competitive discriminatory pricing or as an exercise of market power. In that sense the exemption is valid but need not be stated. Critical, however, is the period for which NICTA is prepared to allow such pricing to occur and the decision is silent on this. In addition, this provides a means of circumventing the prohibition on price discrimination if promotional offers are extremely frequent. Thus, if the exception is to remain, it needs to be further qualified to reflect these issues.

Appeals Panel Conclusions

1. The Appeals Panel confirms NICTA's decision that in relation to pre-paid mobile calls:
2.
'Digicel shall not price discriminate on the basis of the mobile network (including its own) that will terminate the call...'.
3. However, the Appeals Panel rejects exemption 6 (1) (a) – that is, an allowance for a discriminatory price difference of up to 40% between on-net and off-net pre-

¹² The countries examined are listed in the attachment to NICTA's cross submission, The market share of the leading supplier in those countries tends to be between 25-45%, not 90+%. It is instructive that Digicel submits that the benchmarking exercise was flawed and one reason for this is lack of comparability (Digicel's letter to Appeals Panel, 13 December 2012, paragraphs 21 and 22)

paid mobile calls should NOT be allowed as NICTA's justification for this (paragraph 121 of its cross submission of 13 December, 2012, summarises its reasons) is inconsistent with its findings in relation to Digicel's market power and the consequences of that power for competition and consumer welfare and due to its failure to recognise that price discrimination is not merely the presence of a price differential..

4. Exemption 6 (1) (b) is based on an incorrect understanding of price discrimination and is unnecessary.
5. Exemption 6 (1) (c) is not normally regarded as conduct that is price discrimination. Nevertheless, it makes the position explicit and does no harm so long as explanation is provided about duration and frequency of promotional offers..

Recommendations by the Appeals Panel

6. In future, NICTA should clearly identify any decision that it makes and when an earlier decision is being amended and when it is being replaced. This would help to avoid confusion concerning the time available for applications for review. In its cross submission to the Appeals Panel, dated 13 December 2012, NICTA did provide the appropriate information (paragraph 16)
7. Any decisions from NICTA should be self contained documents. They should not rely on other documents for the information on which key elements of the decision is based. Key elements in the decision should be fully elaborated in the report. In this respect, much of the content of NICTA's cross submission to the Appeals Panel, dated 13 December, 2012, should have been included in its original decision, even though it was contained in associated documents.
8. NICTA stated that it had consulted with other parties, including the ICCC. Both NICTA and the ICCC have powers that would enable them to address the

competition consequences of anti-competitive discriminatory pricing. In future, it may be beneficial if consideration is given to how the relevant competition issue can best be addressed and which organisation has powers best suited to achieving this.

9. A recurring problem with documentation associated with applications for review of decisions by the telecommunications regulator, now NICTA, relates to the timeliness (or lack of it) with which this is exchanged between the parties. In future this could be overcome, or at least reduced, if parties provided documentation to the Appeals Panel Secretariat and the Secretariat was responsible for distributing documents to the relevant parties as appropriate.