

31 March 2015

Mr. Paulias Korn
Secretary
Department of Communication and Information Technology
P.O.Box 1122
Waigani
National Capital District

Dear Mr. Korn,

RE: SUBMISSION FOR AMENDMENTS TO NICT ACT 2009

We acknowledge Department of Communication and Information Technology (DCIT) and NICTA public notice in the daily newspapers in 2014 and the industry stakeholders' consultation workshop held on 02nd July 2014, with the purpose to amend particular parts of the Act that are found to be inhibitive in the implementation and achievement of the objectives of the NICT Act 2009.

It is the prerogative of concern government agencies responsible for formulation and implementation of ICT industry legislations and policies; it is also our responsibility as ICT service provider to provide inputs into such legislative changes.

To fulfill the purpose of this regulatory requirement, we are attaching our comments as a formal submission to DCIT and NICTA for consideration. Our intention as the GoPNG appointed wholesale domestic and international ICT services provider is to ensure any changes to legislations and policies that govern the conduct of the industry stakeholders must be done to enable a conducive environment for buyers and sellers of ICT services to interact to maximize their intended welfare.

Any queries can be addressed to Mr. Une O'Ome, General Manager Commercial Services on email: uome@pngdataco.com or Commercial Analyst, Mr. Arnold Patiken, on email: apatiken@pngdataco.com within our Commercial Services Division.

Thank you for your consideration.

Sincerely,


PAUL KOMBOI
Managing Director

Cc: NICTA Chief Executive Officer

Attachment: PNG DataCo Submission to DCI (& NICTA) Proposed Amendments to NICT Act 2009 & Draft Bill

yes, you'll be covered



1st Floor, Wokples Building, Section 531, Allotment 12, Savannah Heights, Waigani
P.O Box 1744, NCD, Papua New Guinea
Telephone: (675) 3133 900/ 3133 901 Fax: (675) 3233 242
Email: dataco@pngdataco.com





PNG DATACO LIMITED

SUBMISSION TO DCI (& NICTA) PROPOSED AMENDMENTS TO NICT ACT 2009 & DRAFT BILL

Deadline: 31st March 2015

CAUTION: *This submission is provided to DCI (& NICTA) for the purpose of the current public inquiry only and may not be used for any other purpose.*

Preface

1. Universal Access and Service Regime

1.1 Under the current *National Information and Communications Technology Act 2009* ("**NICT Act 2009**" of "**the Act**"), there are specific and separate roles and responsibilities assigned to and performed by different entities, all of which are established under the Act and each of whom perform those specific roles and responsibilities for the desirable purposes of achieving the objectives of the Universal Access and Service Fund and regime ("**UAS Fund and regime**") in PNG. These entities are:

- UAS Board¹;
- NICTA²;
- The Fund Manager³;
- The Secretariat⁴;
- The Trustee⁵; and
- Minister⁶.

1.2 Whilst each of these entities perform their respective distinct roles and responsibilities relating to the UAS Fund and regime, NICTA presently performs the majority of them seeing as all functions assigned to NICTA are performed by a UAS Secretariat, which is instituted by NICTA and consists of NICTA staff specifically assigned to the Secretariat. Further, the Secretariat also performs NICTA's roles and responsibilities as the Fund Manager of the UAS Fund.

1.3 On the other hand, the UAS Board, the Trustee and the Minister perform their distinct roles and responsibilities relating to the UAS Fund and regime independent of but in collaboration with NICTA. This structure and the participation by these various entities under the current *NICT Act 2009* ensures good governance in the administration of the UAS Fund and regime, which is warranted considering the UAS Fund involves millions of kina, a sizeable percentage of which will be contributed by Licensees such as DataCo in the form of UAS levies. It can be safely stated that it was not the intention of the Act to vest the entire administration of the UAS regime and disbursement of UAS Fund on a single entity such as NICTA.

1.4 The roles and responsibilities assigned to and currently performed by the UAS Board is fundamental in that the UAS Board is the entity that recommends and ranks the UAS projects for implementation by NICTA in PNG in its order of preference to the Minister, who makes the ultimate decision. Although it can be argued that it is the Minister who makes the decision on the type and number of UAS projects under the current Act, it is fair to state that the UAS Board is in a position to influence decision-making on UAS projects by its recommendation and ranking to the Minister.

¹ Sections 90 & 91, NICT Act 2009.

² Ibid at sections 88, 98(2), 99(2), 103, 104, 107-122.

³ Ibid at sections 105 & 119.

⁴ Ibid at section 99.

⁵ Ibid at sections 102, 103 & 117.

⁶ Ibid at section 106, 108, 121

- 1.5 The UAS Board mainly consists of senior public servants in the position of Heads of key Departments, who provide the interface between the government and the ICT sector. Their participation on the UAS Board allows these senior public servants to bring to Board deliberations their experiences in service delivery in rural PNG, which is fundamental in the collective role of the UAS Board in recommending and ranking viable UAS projects to the Minister for approval and ultimate implementation by NICTA. These senior public servants, aside from the independent director are familiar with different government policies that may be relevant to and are applicable to the Universal Access and Service delivery and will be able to contribute effectively on the Board level for that purpose. Being senior public servants, they are well placed on the UAS Board to ensure that government policies are implemented through their recommendation and ranking of UAS projects and also influence government policies relating to the UAS Fund and regime in PNG.
- 1.6 Under the proposed amendments to the *NICT Act 2009*, the UAS Board would be repealed and its functions would be transferred to NICTA. As stated in paragraph 1.2 above, NICTA already performs the majority of roles and responsibilities as the Secretariat and Fund Manager of the UAS Fund. By eliminating the UAS Board and transferring its role to NICTA, in addition to NICTA's current roles as the Secretariat and Fund Manager, coupled with its primary role as regulator of the ICT sector, NICTA will have a significant amount of control over the administration and implementation of the UAS Fund and regime in PNG. This creates a governance issue especially when the UAS fund and regime not only represents a significant amount of money but the UAS fund and regime is aimed to deliver much needed ICT projects in areas that are not commercially attractive for Licensees to deliver ICT services. Whilst DCI may be seeking to address a case of non-attendance or poor attendance by current Board members of the UAS Board in fulfilling their roles and responsibilities, it is DataCo's respective view that DCI should not be addressing this issue by removing the UAS Board altogether and lumping them on NICTA who is already assigned overwhelming responsibilities in relation to the UAS Fund and regime in addition to its role as the regulator of the ICT sector. It is not the structure of the UAS regime that needs addressing but the composition of the UAS Board. DataCo has responded in its submission as shown in the Attachment that the composition of the UAS Board should be amended to allow for proxies of especially Departmental Heads to attend UAS Board meetings when the Departmental Head is unavailable to attend. In this way, the contributions by the various Departmental Heads is ensured on the UAS Board.
- 1.7 Good governance requires that there is good participation in decision-making, transparency, responsiveness, accountability but to name a few. The current UAS regime ensures good governance in the selection, approval, monitoring and evaluation of UAS projects for recommendation to the Minister since NICTA carries out the preliminary process⁷ whilst the UAS Board makes its recommendation based on the NICTA report and ranks the projects for the Minister's consideration and approval⁸. There is a real concern for lack of governance if the proposed amendments were allowed to become part of the *NICT Act 2009*.
- 1.8 Under the proposed amendments, the governance, selection, approval, monitoring and evaluation of the UAS Fund and projects are vested wholly on NICTA, with the only other independent entity, the Trustee providing very little input. In addition, the competitive tender/selection process is designed by NICTA and it is again NICTA that recommends and ranks the projects and submits for Minister's approval under this proposed amendments. NICTA then

⁷ Ibid at section 108(2).

⁸ Ibid at section 108(2) & (3).

is to enter into agreement with successful contractor and is responsible for payment of contractors of the UAS fund to commissioning the independent audit of the UAS Fund⁹.

- 1.9 Whilst DataCo acknowledges that DCI may be proposing these amendments in an attempt to streamline the UAS process and its implementation in PNG, DataCo is mindful that the potential removal of the UAS Board leaves very little independence, collaboration and checks and balances in the administration of UAS Fund and UAS regime in PNG.
- 1.10 DataCo's concern is that when it comes to the UAS Project which involves millions of kina and the disbursement thereof, it may not be prudent for the Regulator of the ICT industry to also be the entity that solely administers and influences decisions relating to the implementation of UAS regime in PNG. DataCo acknowledges that the accountability processes, including reporting of activities and auditing of accounts are retained as part of the proposed amendments to the current Act however, for the sake of good governance, the demarcation of roles and responsibilities between the current different entities relating to the UAS fund and regime should not be amended.
- 1.11 However, and without prejudice to its stance as stated in this Preface, DataCo has provided in the **Attachment** its submission to each of the proposed amendments. Further to its response, DataCo has also proposed additional amendments to the *NICT Act 2009* for consideration by DCI and NICTA.

2. Interconnection and Wholesale Access

- 2.1 In terms of NICTA's responsibilities in granting Network licenses under section 132, DataCo cautions that NICTA should be mindful of the Government's continued reforms, especially reforms in its state-owned entities and agencies. Therefore, any decision by NICTA in granting licenses under section 132, ought to be made in light of those government policies. Such policies may include giving exclusivity rights to the State to provide wholesale facilities and services such as international communication cable links and landing of submarine cable facilities in PNG, particularly in the design, construction and operation of international communication cables links, where these facilities are not easily feasibly substituted or duplicated. Whilst the State may have exclusivity in designing, constructing and operating the international communication cable links, access to these facilities (once operational) would be regulated under the wholesale regime of the Act which is beneficial to both the State and the ICT sector. Moreover, the State's investment in providing international communication cable links and landing facilities in PNG would be protected whilst at the same time, the Act's objectives of efficiency and competition in the provision of interconnection and wholesale services will be achieved especially in a small ICT market such as PNG.
- 2.2 Allowing the State to have exclusivity in the provision of international communication links and landing facilities would ensure that the Government's interests in addressing and arresting Cybercrime, Cyber Security and even Censorship Control is given prominence. These concerns are matters of national interest and national security and can be best achieved with single points of monitoring, filtering or control through the State having exclusivity to these international links.

⁹ Section 99(2) NICT Act 2009

- 2.3 With the high upfront investment cost of building submarine cables and the potential natural monopolistic nature of the asset itself, together with the rising issues of national interest discussed above, DataCo believes that the State should reserve the exclusive right to build, own and operate international cable links and landing rights in PNG. The State can exercise that right through its nominated vehicle to ensure that the wholesale capacity is made available non-discriminately at reasonable prices and at the same time availing the single point of control when required by the law enforcement agencies or the government in general.
- 2.4 In terms of registration of commercial agreements between consenting Access Providers and Access Seekers, the proposed new section 138A defeats the entire purpose of having commercial agreements in the first place. The whole NICTA regime is premised on a negotiate-arbitrate model which promotes commercial agreements between consenting parties and only allows NICTA to intervene at the parties' request when the parties fail to reach agreement. The proposed amendment attempts to reintroduce into the *NICT Act 2009* the old regime that existed under the repealed *Telecommunication Act 1996* which gave the regulator a heavy-handed approach to regulation of ICT services, which is not desirable for the advancement of the provision of ICT services in PNG. Therefore, such a proposal should be discouraged and rejected.
- 2.5 Further, there appears to be a misconception that NICTA does not presently have the ability to scrutinize commercial agreements, which is not the case. NICTA does have scrutiny powers under the Act, details of which are captured in DataCo's submission in the *Attachment*. To allow this amendment to become part of the Act would be a heavy-handed regulation by NICTA and should be rejected.

DataCo's response to NICTA's proposed amendments

No.	Proposed Amendment	DataCo's Comments
1.	SUBSECTION 4(1) [INTERPRETATION] (definition of "eligible corporation") Omit "and", substitute "or"	DataCo takes no issue with this amendment.
2.	SUBSECTION 4(1) [INTERPRETATION] (definition of "UAS Board") Omit the definition	Disagree. DataCo objects to the proposed deletion of the UAS Board and the transfer of its functions to NICTA. DataCo advocates that the UAS Board should remain a separate and independent entity from NICTA in relation to the UAS Fund and regime. Maintaining the roles of the UAS Board under the Act and keeping separate the UAS Board from NICTA, who already has the role of the Secretariat and Fund Manager in addition to its main role of being the Regulator of the ICT sector, will ensure proper governance and administration of the UAS funds, which is a considerable amount of money. DataCo is concerned that by removing the independence of the UAS Board as suggested in this proposed amendment and enabling NICTA to take on those functions in addition to its current roles as the UAS Secretariat and UAS Fund Manager and Regulator of the ICT sector, places NICTA in an overwhelming position which may be detrimental for NICTA in terms of misapplication of UAS funds or rushing projects that require proper attention in PNG. In addition, NICTA's view and prejudices as the Regulator of the ICT sector is likely to taint its decision making when it takes on the role of UAS Board.

	DataCo would propose that instead of attempting to repeal the UAS Board and have its functions transferred to NICTA as suggested in the proposed amendment, DCI and NICTA should instead advocate for amendments to the composition of the UAS Board under section 92 of the current Act that allows Departmental Heads to have their <u>delegate or proxy, vested with voting rights, to attend at the meeting of the UAS Board.</u> Accordingly, the DataCo proposed amendment to section 92 would be such that every reference to a Departmental Head should include his nominated delegate or proxy. For instance, section 92(1)(b) should be amended to read: “the Departmental Head of the Department responsible for communication and information or his <u>delegate or proxy having full voting rights, ex officio...</u>” Consequential amendments should be made to all references to Departmental Heads under section 92. In addition, DataCo would suggest that section 92 be amended to include more than 1 independent Board member from the public, which will not only enable and encourage wider participation on the Board but would ensure that there are enough Board members to ensure a quorum to proceed with the functions and business of the UAS Board.
3.	SUBSECTION 4(1) [INTERPRETATION] (definition of “UAS Secretariat”) Insert “UAS Secretariat means the secretariat that attends on NICTA’s behalf to the administration of the Universal Access Scheme and the Universal Access Fund, established under Section Error! Reference source not found.”
4.	PARAGRAPH 32(2)(b) [FUNDING OF NICTA] Omit “10%”, substitute “20%”.

Disagree.

NICTA has not provided justification for a 10% increase in the maximum surplus percentage that NICTA is authorized to retain

		under the Act. Unless such justification is provided, DataCo takes issue with this proposed amendment. The current Act ensures that NICTA's forecasted annual expenditure is sufficiently budgeted for under the Act ¹⁰ . As for the costs attributed to NICTA performing its role as both the Secretariat and Fund Manager, the current Act also sufficiently mandates NICTA to recover those costs ¹¹ . Given these circumstances and unless a convincing reason is provided by NICTA to justify the increase from 10% to 20%, DataCo disagrees with the proposed amendment.
5.	SECTION 38 [ACCOUNTS AND AUDIT] After Subsection (2), insert: <i>(3) NICTA may employ qualified Auditors as it sees fit to conduct audits of its accounts and may submit such audit reports as part of its reporting obligation under Subsection (2).</i>	DataCo does not take issue with this proposed amendment and acknowledges that the proposed amendment enables NICTA to expedite the auditing of its accounts when it is appropriate for NICTA to do so.
6.	SUBSECTION 53(1) [LICENSE EXEMPTIONS] Omit "The Head of State, acting on advice, may make regulations", substitute "The Minister, acting on a recommendation from NICTA, may make a determination".	DataCo does not take issue with this proposed amendment.
7.	PARAGRAPH 88 (b) [SIMPLIFIED OUTLINE] Repeal the paragraph, substitute the following: <i>(b) NICTA shall develop, and cost UAS Projects to give effect to Government Policy;</i>	DataCo maintains its objection to the rationale behind the proposed amendment to repeal the UAS Board. However, in terms of sentence structure alone, and without prejudice to its objections, DataCo does not take issue with this proposed amendment.
8.	PARAGRAPH 88 (d) [SIMPLIFIED OUTLINE] Repeal the paragraph.	Disagree.

¹⁰ Sections 30-32, *NICT Act 2009*.

¹¹ Ibid at section 104(4).

		Instead of deleting paragraph (d) altogether, the only amendment should have been the substitution of the word “NICTA” with “UAS Board”
9.	PARAGRAPH 88 (g) [SIMPLIFIED OUTLINE] Omit “Each of the UAS Board,”.	DataCo maintains its objection to the rationale behind the proposed amendment to repeal the UAS Board. However, in terms of sentence structure alone, and without prejudice to its objections, DataCo does not take issue with this proposed amendment.
10.	SECTION 91 [UAS BOARD] HEADNOTE Omit headline “UAS BOARD.”, substitute “FUNCTIONS OF NICTA WITH RESPECT TO THE FUND.”	Same as above.
11.	SUBSECTION 91 (1) [UAS BOARD] Omit the subsection and renumber subsection (2) as subsection (1)	Same as above.
12.	RENUMBERED SUBSECTION 91 (2) [UAS BOARD] Omit “the UAS Board”, substitute “NICTA under this Part”.	Same as above.
13.	SECTION 91 [UAS BOARD] Insert the following subsections after renumbered subsection(1): (2) Pursuant to Part VI and Part VIII, NICTA may require an operator to provide co-location or other forms of access to and sharing of network facilities or spectrum to any contractor under this part on the basis of commercially negotiated rates or other terms and conditions. (3) A person who fails to comply with a lawful direction of NICTA under subsection (2) is guilty of an offence. Penalty – In the case of an individual, a fine not exceeding K100,000.00 for a first offence or, for a subsequent offence, the greater of K500,000.00 or three (3) times the value of the benefit	Disagree. This proposed amendment is repetitive and redundant in that access to facilities that are constructed as part of UAS projects under the Act is already provided for under section 131(1)(b). In addition, penalties for contravention or breach of the Act are also being provided for under section 274, which makes this proposed amendment highly unnecessary and it ought to be rejected. DataCo also wishes to point out that section 131(1)(b) already deems to be declared under the wholesale access regime facilities access services supplied under a Project Agreement from funding from the UAS Fund. If someone needs co-location on a UAS funded facility, the current Act obligates the owner of the UAS funded

	<i>that the individual has obtained directly or indirectly from the contravention.</i> <i>Penalty – In the case of a body corporate, a fine not exceeding K1,000,000.00 for the first offence, or, for a subsequent offence, the greater of K2,000,000.00 or three (3) times the value of the benefit that the body corporate has obtained directly or indirectly from the contravention.</i>	facility to provide access to the facilities, which is presently a declared service. DataCo would propose that NICTA ensure that when designing the competitive selection process under section 109(2)(b), it must have as part of the Request for proposals a clear undertaking by the applicant to carry out its obligation under the current section 131 (1)(b), i.e. to provide access to facilities for access services once the facilities are constructed and commissioned for use or attract contravention of the Act under section 274. NICTA must carry that intention through in its negotiations and execution of the Project Agreement with the successful contractor.
14.	SECTION 92 [COMPOSITION OF THE UAS BOARD] Repeal the section.	Disagree. DataCo adopts and advocates its contentions as stated in response to proposed amendment No.2 above [SUBSECTION 4(1) [INTERPRETATION] (definition of "UAS Board") Omit the definition].
15.	SECTION 93 [VACANCY] Repeal the section.	Disagree. Consistent with DataCo's objection to the repeal of UAS Board, DataCo advocates that this provision is necessary to cater for vacancies and appointment of independent directors of the UAS Board.
16.	SECTION 94 [PROCEDURES OF THE UAS BOARD] Repeal the section.	Disagree. Consistent with DataCo's objection to the repeal of UAS Board, DataCo advocates that this provision is necessary to cater for the procedures of the UAS Board.
17.	SECTION 95 [DISCLOSURE OF INTERESTS] Repeal the section.	Disagree. Consistent with DataCo's objection to the repeal of UAS Board, DataCo advocates that this provision is necessary to cater for the procedures of the UAS Board.

		In addition, DataCo is of the view that both the Trustees and NICTA's staff assigned to the UAS Secretariat should also disclose any conflict of interest that each of them may have in relation to any UAS projects and NICTA should take appropriate measures to ensure that there is impartiality and transparency in nominating projects and in selecting, approval, monitoring and evaluation of applicants interested in entering into a Project agreement with NICTA and delivering a UAS funded or subsidized project.
18.	SECTION 96 [VALIDITY OF CONDUCT] Repeal the section.	Disagree. Consistent with DataCo's objection to the repeal of UAS Board, DataCo advocates that this provision is necessary to cater for the conduct and business of the UAS Board.
19.	SECTION 97 (IMMUNITY) Repeal the section.	Disagree. Consistent with DataCo's objection to the repeal of UAS Board, DataCo advocates that this provision is necessary to protect UAS Board members in carrying out the roles and responsibilities of the UAS Board.
20.	SUBSECTION 98(1) [GOVERNMENT POLICY FOR UNIVERSAL ACCESS AND SERVICE FUND] Omit " <i>the UAS Board and</i> ".	DataCo maintains its objection to the rationale behind the proposed amendment to repeal the UAS Board. However, in terms of sentence structure alone, and without prejudice to its objections, DataCo does not take issue with this proposed amendment.
21.	SUBSECTION 98(2) [GOVERNMENT POLICY FOR UNIVERSAL ACCESS AND SERVICE FUND] Omit " <i>the UAS Board and</i> ".	Same as above comments.
22.	PARAGRAPH 99(2)(a) [UAS SECRETARIAT] Omit " <i>or the UAS Board</i> ".	Same as above comments.

23.	PARAGRAPH 99(2)(a) [UAS SECRETARIAT] Omit "their respective", substitute "its".	Same as above comments.
24.	PARAGRAPH 99(2)(c) [UAS SECRETARIAT] Omit "tender", substitute "selection"	DataCo agrees with the proposed amendment since the current section 109 provides for a "Competitive Selection Process" and not a competitive tender process.
25.	SUBSECTION 103 (4) [ADMINISTRATION OF THE TRUST ACCOUNT] Omit "The UAS Board", substitute "NICTA".	Same as above comments.
26.	SUBSECTION 103 (5) [ADMINISTRATION OF THE TRUST ACCOUNT] Omit "the UAS Board", substitute "NICTA".	Same as above comments.
27.	PARAGRAPH 104 (2)(c) [MANAGEMENT OF UNIVERSAL ACCESS AND SERVICE FUND MONIES] Omit, "collaborating with the UAS Board to determine", substitute "determining".	Same as above comments.
28.	SECTION 106 [AUDITOR] Insert the following new subsection (2): (2) <i>Where an audit under subsection (1) is not completed within 6 months after the end of a financial year NICTA may appoint an independent auditor for the Universal Access and Service Fund, who shall provide an annual audited financial statement that shall be included in NICTA's annual report to the Minister.</i> Renumber current subsection 2 as subsection 3.	As long as the audit of the UAS Fund is kept separate from the audit of NICTA, as PNG's ICT sector regulator, DataCo agrees with the proposed amendment. In addition, DataCo would propose an amendment to the preceding paragraph (1) in the following terms: (1) The Minister, in consultation with NICTA and the Departmental Head of the Department responsible for finance matters, shall approach the Auditor General of PNG for the Universal Access and Service Fund audit; who shall provide an annual audited financial statement that shall be included in NICTA's annual report to the Minister.

29.	PARAGRAPH 107 (2)(a) [AUDITOR] Omit “as advised to NICTA by the UAS Board,”.	DataCo maintains its objection to the rationale behind the proposed amendment to repeal the UAS Board. However, in terms of sentence structure alone, and without prejudice to its objections, DataCo does not take issue with this proposed amendment.
30.	NEW SECTION 107A [PRINCIPLES OF UNIVERSAL ACCESS AND SERVICE PROJECTS] Before section 108, insert: <i>107A PRINCIPLES OF UNIVERSAL ACCESS AND SERVICE PROJECTS</i> <i>Any project under the UAS Fund should abide by the following principles–</i> <i>(1) The UAS Fund shall seek to promote efficient, self-sustaining projects which may continue to expand access to information and communications on their own initiative, requiring the minimum amounts of UAS Fund resources possible.</i> <i>(2) The UAS Fund may be used to finance projects to the extent necessary to create adequate economic incentives for investors.</i> <i>(3) Notwithstanding the provisions of subsection (1) and (2) complementary strategies to meet UAS objectives and targets may be implemented by NICTA.</i> <i>(4) Such mechanisms under subsection (3) may include additional roll-out targets, microcredit programmes, public-private-partnerships, build- transfer-operators (BTOs), cooperatives, or multi-purpose community centres.</i> <i>(5) For the avoidance of doubt, projects financed by the UAS Fund–</i>	DataCo does not take issue with this proposed amendment.

	(a) include but are not limited to physical infrastructure and communications network projects; and (b) include ICT training and education for adults and children.	
31.	SUBSECTION 108 (1) [UAS PROJECTS] Omit, "the UAS Board shall engage NICTA to", substitute "the UAS Secretariat shall".	DataCo maintains its objection to the rationale behind the proposed amendment to repeal the UAS Board. However, in terms of sentence structure alone, and without prejudice to its objections, DataCo does not take issue with this proposed amendment.
32.	PARAGRAPH 108 (1)(d) [UAS PROJECTS] Omit, "the UAS Board", substitute "the UAS Secretariat".	Same as above comment.
33.	PARAGRAPH 108 (1)(f) [UAS PROJECTS] Omit "for consideration by the UAS Board,"	Same as above comment.
34.	SECTION 108 [UAS PROJECTS] Insert new Paragraph (g): (g) The UAS Secretariat shall submit a draft report to NICTA, which shall then submit the final report prepared under (f) to the Minister to inform him of their findings.	Same as above comment. In addition, the proposed new sub-paragraph (g) is a repetition to the provisions of subsections (2) and (3) of section 108. The creation of a new paragraph (g) as proposed is highly unnecessary and ought to be rejected.
35.	SUBSECTION 108(4) [UAS PROJECTS] Omit "and the UAS Board shall have regard to", substitute "shall take into account".	DataCo maintains its objection to the rationale behind the proposed amendment to repeal the UAS Board. However, in terms of sentence structure alone, and without prejudice to its objections, DataCo does not take issue with this proposed amendment.
36.	PARAGRAPH 108(4)(f) [UAS PROJECTS] Omit "the UAS Board", substitute "NICTA".	Same as above comment.
37.	PARAGRAPH 108(5)(c) [UAS PROJECTS] Omit "the UAS Board and".	Same as above comment.

38.	SUBSECTION 108(6) [UAS PROJECTS] Omit “rejected”, substitute “approved”. Insert at the end of the Subsection “<i>other than any UAS Projects specifically rejected by the Minister</i>”.	Same as above. The subsequent insertion appears imprecise. NICTA has not clarified whether that insertion suggests that the Minister would be given a list of projects, of which he would either reject some listed projects and decide not to make any decision on other projects on that list, in which case, his non-response would be deemed an approval of the projects that he had ignored to make a decision on.
	SUBSECTION 108 (2)&(3)[UAS PROJECTS]	It ought to be pointed out here as well that there are no proposed amendments to references to the “UAS Board” in subsections 108(2) and (3). Whilst DataCo maintains its objection to the rationale behind the proposed amendment to repeal the UAS Board, DataCo would propose that equivalent amendments be made to section 108(2) and (3) to ensure consistency and coherence in the sentence structure of the Act.
39.	RENUMBERED SUBSECTION 108(9) [UAS PROJECTS] Repeal the subsection and insert: <i>(9) Rejection by the Minister of a particular UAS Project for implementation does not preclude NICTA from re-evaluating and re-submitting the UAS Project at a later date to the Minister in accordance with Subsection (3).</i>	DataCo maintains its objection to the rationale behind the proposed amendment to repeal the UAS Board. However, in terms of sentence structure alone, and without prejudice to its objections, DataCo does not take issue with this proposed amendment.
40.	SUBSECTION 109(1) [COMPETITIVE SELECTION PROCESS] Omit “successful bidder, substitute “qualified contractor”.	DataCo does not take issue with this proposed amendment.
41.	SUBSECTION 109(1) [COMPETITIVE SELECTION PROCESS] Omit “by the Minister”.	DataCo does not take issue with this proposed amendment.

42.	SUBSECTION 109(1) [COMPETITIVE SELECTION PROCESS] Omit “(5)(b)”.	DataCo does not take issue with this proposed amendment.
43.	NEW SECTION 109A [ALTERNATIVE MECHANISMS TO DISTRIBUTE FUNDS] Insert: <i>109A. Alternative Mechanisms to Distribute Funds</i> <i>(1) Notwithstanding the provisions of section 109 above, NICTA may also, following public consultation as provided for in sub-section 3 below, determine to distribute the funds on the basis of a restricted bidding procedure, a sole source procurement procedure or an emergency procurement procedure.</i> <i>(2) NICTA shall determine which method of procurement is appropriate in the circumstances and manage the procurement process in accordance with the requirements and procedures set out in this Act and the regulations.</i> <i>(3) Where NICTA intends to use a method of procurement other than open competitive bidding, it shall notify the public of its intention to do so and the reasons for choosing of the proposed procurement method to be used.</i>	Disagree. The UAS Fund consists of millions of kina, the disbursement of which should be through no other process other than the competitive selection process under section 109 of the Act especially now that the proposed amendment aim to repeal the independent UAS Board and vests the entire administration of the UAS Fund and regime on NICTA as a single entity. For the purposes of good governance, this proposed amendment ought to be rejected outright as the scrutiny of the process under section 109 of the Act is warranted.
44.	SUBSECTION 110(1) [PUBLIC NOTICE] Omit “bidders”, substitute “qualified contractors”.	DataCo does not take issue with this proposed amendment.
45.	SUBSECTION 111(1) [REQUEST FOR PROPOSALS] Omit “the competitive selection”, “substitute “a competitive selection”.	Disagree. As advocated in DataCo’s response to amendment no.44 above [NEW SECTION 109A [ALTERNATIVE MECHANISMS TO DISTRIBUTE FUNDS]], there must be a single competitive selection process when it comes to selecting qualified contractors to construct UAS projects

		especially now that NICTA is proposing to repeal the independent UAS Board and take on all its functions. In addition, all references to “bidders” in Subsections 111 (2) and (3) should be substituted with “qualified contractors” to maintain the consistency and coherence of the Act.
46.	SUBSECTION 116(6) [MONITORING OF PROJECTS] Omit “<i>successful bidder</i>”, substitute “<i>qualified contractor</i>”.	DataCo does not take issue with this proposed amendment.
47.	SUBSECTION 119(1) [REPORTING BY FUND MANAGER] Omit “<i>the UAS Board and</i>”.	DataCo maintains its objection to the rationale behind the proposed amendment to repeal the UAS Board. However, in terms of sentence structure alone, and without prejudice to its objections, DataCo does not take issue with this proposed amendment.
48.	PARAGRAPH 119(2)(a) [REPORTING BY FUND MANAGER] Omit “<i>and the UAS Board</i>”.	Same as above comment.
49.	SUBSECTION 119(3) [REPORTING BY FUND MANAGER] Omit “<i>UAS Board or</i>”.	Same as above comment.
50.	SECTION 120 [REPORTING BY THE UAS BOARD] Omit “<i>The UAS Board</i>” wherever it occurs, including in the headnote, substitute “<i>NICTA</i>”.	Same as above comment.
51.	SECTION 121 [REPORTING BY THE MINISTER] Omit “<i>the UAS Board</i>”, substitute “<i>NICTA under this Part</i>”.	Same as above comment.
52.	SUBSECTION 122 (2) [WEBSITE] Omit and substitute:	DataCo suggests that subsection (4)(d) be amended by inserting (,) after the word Projects, followed by the phrase “ <i>including updates</i> ”

	(4) NICTA shall include in the Universal Access and Service Fund website information regarding the activities undertaken under this Part in relation to the Funding fulfilling the objective set out in Section, except for any confidential information but including (without limitation) – (a) NICTA's annual reports; (b) information about UAS Project proposals; (c) information about current UAS Project requests for proposals; (d) information about current and past UAS Projects which have been awarded funds from the Universal Access and Service Fund; (e) the Act and any other legislation, regulations, guidelines or procedures regarding the fulfillment of the objectives set out in Section; and (f) any other information that NICTA considers relevant and appropriate for inclusion on the website.	on current Projects". The new subsection (4)(d) should then read as follows: "(d) information about current and past UAS Projects, <u>including updates on current Projects</u> which have been awarded funds from the Universal Access and Service Fund;"
53.	SUBSECTION 130(1) [DECLARATION BY MINISTER] Omit "On receiving", substitute "After a period of 20 days from the receipt of".	Agree.
54.	SUBSECTION 130(4) [DECLARATION BY MINISTER] Omit "thirty (30)", substitute "forty (40)".	Agree.
55.	SECTION 138 [COMPLIANCE WITH OBLIGATIONS] After section 138, insert: 138A. REGISTRATION OF AGREEMENTS (1) An access provider that enters into an agreement with an access seeker for the supply of a declared service shall, within ten (10) days of the execution of that agreement, submit a copy of the signed agreement to NICTA for registration.	Disagree. If the intention behind this proposed amendment to register agreements is to give NICTA a greater ability to act in the public interest, then that is misconceived and contrary to the negotiate – arbitrate regulatory model upon which the NICT Act 2009 is premised. This proposed amendment represents heavy-handed regulation by NICTA and should be rejected.

	(2) After considering an agreement submitted under Subsection (1), NICTA shall decide whether or not to register it. (3) NICTA shall not register an agreement submitted under Subsection (1) unless NICTA is satisfied that the agreement: (a) is consistent with the non-discrimination obligations that are applicable to the access provider; (b) contains terms and conditions that are reasonable in accordance with Section 126; and (c) is consistent with the general pricing principles and any service-specific pricing principles. (4) If NICTA does not make a decision under Subsection (2) within ten (10) days of receiving a copy of the signed agreement, NICTA shall be deemed to have accepted the agreement for registration. (5) If NICTA registers an agreement, or is deemed to have registered an agreement under Subsection (4), NICTA shall: (a) given both the access provider and the access seeker a written notice stating that the agreement has been registered; and (b) record the registration of the agreement and the parties to the agreement, but not a copy of the agreement, in its public register. (6) If NICTA decides not to register an agreement, NICTA shall give both the access provider and the access seeker a written notice stating that the agreement has been refused registration and setting out: (a) the reasons for NICTA's decision not to register the agreement; and (b) the amendments that would need to be made to the agreement to enable it to be registered by NICTA.	The proposed amendment undermines commercially negotiated agreements and insists that they go through a regulatory process of registration before they can be implemented. The idea that NICTA currently lacks ability to scrutinize commercial agreements in the public interests is very misconceived because the current provisions of the Act require all commercial agreements to be submitted to NICTA and NICTA also has the discretion to commerce the arbitration process if it considers that the commercial agreement has in it terms or conditions that are materially inconsistent pricing principles or directly or indirectly harmful to customers. In the circumstances, DataCo submits that this proposed amendment should be rejected.
56.	PARAGRAPH 138(a) [COMPLIANCE WITH OBLIGATIONS] After "seeker", insert "and registered by NICTA under Section 138A".	Disagree. Comments are same as above.
57.	SUBSECTION 139(2) [ACCESS EXEMPTIONS]	DataCo does not take issue with this proposed amendment.

	Omit “access seeker”, substitute “access provider”.	
58.	SUBSECTION 141(1) [REFERENCE INTERCONNECTION OFFER] After “undertaking”, insert “in the form of a standard contract”.	DataCo does not take issue with this proposed amendment.
59.	PARAGRAPH 141(1)(a) [REFERENCE INTERCONNECTION OFFER] (a) Omit “or” (first occurring), substitute “and”. (b) Omit “or both”.	DataCo does not take issue with this proposed amendment.
60.	SECTION 141 [REFERENCE INTERCONNECTION OFFER] After Subsection 141(1), insert: (1A) An access provider may on its own initiative give NICTA a RIO, or a proposed variation to an existing RIO, at any time provided that the RIO or the proposed variation is compliant with section 138A (1B) NICTA may at any time direct an access provider to submit: (a) a RIO; or (b) a variation to an existing RIO that has been accepted by NICTA and that remains in operation. (1C) NICTA may only direct an access provider in accordance with subsection (1B) in circumstances where, if the existing RIO were to be submitted for registration under section 138A it would not be accepted because of non-compliance with subsection 138A(3) of that section. (1D) If NICTA has directed an access provider under paragraph (1B)(b), NICTA may also direct that access provider to supply, or to continue to supply, services that are covered by the existing RIO as if an acceptable amendment has been made to that RIO. (1E) An access provider given a direction under Subsection (1B) must submit the requested RIO (or the requested variation to an existing RIO) within 60 days of NICTA’s direction.	Disagree for the same reasons advanced by DataCo in objection to the introduction of the proposed amendment introducing section 138A [138A. REGISTRATION OF AGREEMENTS]
61.	SUBSECTION 141(3) [REFERENCE INTERCONNECTION OFFER]	DataCo does not take issue with this proposed amendment.

	Omit "may cover either standard prices (with price-related terms), or standard non-price terms and conditions, or both, for a declared service, but in so far as it covers any or all of these matters, it".	
62.	SUBSECTION 141(4) [REFERENCE INTERCONNECTION OFFER] After "operation", insert "and the access provider was not directed to prepare that RIO under Subsection 1B"	Disagree for the same reasons advanced by DataCo in objection to the introduction of the proposed amendment introducing section 138A [138A. REGISTRATION OF AGREEMENTS]
63.	SUBSECTION 142(1) [REFERENCE INTERCONNECTION OFFER] Repeal the subsection, substitute: (1) A RIO, or a proposed variation to an existing RIO, must comply with Section 138A	Disagree for the same reasons advanced by DataCo in objection to the introduction of the proposed amendment introducing section 138A [138A. REGISTRATION OF AGREEMENTS]
64.	SUBSECTION 160(1) [RETAIL SERVICE DETERMINATION BY MINISTER] Omit "On receiving", substitute "After a period of 20 days from the receipt of"	Disagree for same reasons advance by DataCo in response to proposed amendment to subsection 130(1) above. [SUBSECTION 130(1) [DECLARATION BY MINISTER]
65.	SUBSECTION 204(1) [OFFENCES RELATING TO UNLICENSED CABLING WORK] Omit "other than a network licensee or a cabling licensee".	DataCo does not take issue with this proposed amendment.
66.	SECTION 235 [REPORT ON AN INQUIRY] Insert: (3) NICTA is not required to publish a separate report under Subsection (1) following: (a) a public inquiry under Section 127 if NICTA publishes the report mentioned in paragraph 129(1)(b); or	DataCo does not take issue with this proposed amendment.

	<i>(b) a public inquiry under Section 157 if NICTA publishes the report mentioned in paragraph 159(1)(b).</i>	
67.	PARAGRAPH 258(1)(e) [APPLICATION FOR REVIEW] Insert "up to a maximum of ten (10) additional days" after "period"	DataCo does not take issue with this proposed amendment as it attempts to give precision to that provision.
68.	SUBSECTION 304(2) [LICENSE MIGRATION PROCESS] After "an ICT licence", insert "during the transition period".	DataCo does not take issue with this proposed amendment.
	ADDITIONAL PROPOSED AMENDMENTS TO THE ACT: DataCo proposes the following amendments in addition to the amendments proposed by DCI and NICTA.	
69.	SUBSECTION 112(1) [ELIGIBILITY TO COMPETE] Repeal the word "bidders" and replace it with "qualified contractors"	
70.	SUBSECTION 113 [DECLARATION OF INELIGIBILITY] Repeal all references to the word "bidder" and replace it with "qualified contractor".	
71.	SUBSECTION 114 [BID BOND] Repeal all references to the word "bidder" or "bidders" and replace it with "qualified contractor", as the case may be.	
72.	SECTION 115 [PROJECT AGREEMENTS] Repeal reference to the word "bidder" and replace it with "qualified contractor".	
73.	SECTION 132 [EXEMPT SERVICES] Delete the "." at the end of subsection (2) and insert "provided that such facilities cannot be feasibly substituted or should not be duplicated where such duplication may have the likely potential of threatening or undermining investments by existing Network Licensees in the provision of wholesale services under section 132(1)." Insert new subsection (3):	

	<i>"In making a decision under subsection (2), NICTA shall have regard to and must give effect to Government Policy, including Government Policy specific to the reform of State-owned entities and agencies".</i> Insert new subsection (4): <i>"(4) Government Policy shall determine whether a facility referred to in subsection (1) can be feasibly substituted or should be duplicated, taking into account, the Government's investments and interests in enabling its entities and agencies in providing facilities under section 132(1)."</i>
74.	NEW SECTION 132A [EXCLUSIVITY TO INTERNATIONAL COMMUNICATION CABLES] <i>(1) To achieve 'dynamic efficiency' and effect Government SOE reform policy, the State, through its entities or agencies, shall retain the exclusive rights to build and operate international communication cables up to and including 31st December 2025; and</i> <i>(2) The State-owned entity or agency shall disclose all relevant information on the design, construction, and operation of the international telecommunication transmission facilities.</i> <i>(3) The design, construction and operation of international communication cables cannot be feasibly substituted or shall not be duplicated for the purposes of section 132.</i>

END

