

31 March 2015

BY HAND & BY EMAIL

Mr. Paulias Korn  
Secretary  
Department of Communication and Information Technology  
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WAIGANI  
NCD



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Dear Secretary Korn

**Public Consultation: Proposed Amendments to the NICT Act 2009 & Draft Bill**

Further to Digicel's letter to you dated 15 December 2014 please find attached our Submission in response to the public consultation on the proposed amendments to the National Information and Communications Technology Act 2009.

Yours sincerely



**Andrew Kidu**  
Senior Counsel  
Legal & Regulatory

# SUBMISSION

## EXECUTIVE SUMMARY

- 1      **Section 32 – funding of NICTA:** The adoption of a 20% figure for retention of any funding surplus by NICTA is not necessary given a mechanism already exists in the Act to authorise such a level of retention. The proposed amendments reduce transparency and accountability, while creating an incentive for NICTA to set licensing fees that lead to an over-recovery of revenues relative to NICTA's forecast budget.
- 2      **Section 91 – UAS Regime:** The new regulatory powers proposed for NICTA are inconsistent with the declaration procedure set out in Part VI of the Act. If the intent of the drafting is to allow NICTA to regulate services without declaration, this is directly contrary to the policy objectives of the Act and should be reconsidered. Such an approach is also inconsistent with international best practice as articulated in the regulatory principles set out in section 3 of the Act.
- 3      **Section 107A – principles of UAS Projects:** The proposed extension to the scope of the UAS Fund is inconsistent with the original policy intent of the UAS Fund. The increased scope may ultimately cause an increase in the price of ICT services in PNG, contrary to the intent of the Act and the UAS Fund itself. The proposed drafting creates an internal inconsistency in the Act as the concept of a "UAS Project" is still defined narrowly, leading to potential interpretative difficulties.
- 4      **Section 109A – distribution of UAS funds:** The proposed changes reduce transparency and are not subject to sufficiently rigorous processes.
- 5      **Section 138A – access agreement registration:** The rationale for the new section 138A is unclear. If the intent is to enable NICTA to veto the terms of access agreements, then this approach is inconsistent with the fundamental philosophy underpinning the Act. Such an approach is also inconsistent with international best practice in giving primacy to commercial negotiations, as adopted in PNG to date. However, if the approach is to provide greater transparency to NICTA of access agreements, this could be achieved by a simple notification mechanism as currently exists in Australia.
- 6      **Section 141 – development of RIO:** The original policy intent behind section 141 was that a RIO was inherently a voluntary concept. An access provider could obtain greater regulatory certainty by submitting a RIO for approval, but the primary focus of the access regime was on encouraging commercial negotiations. If a RIO were now mandated in the manner proposed, this would displace commercial negotiations and lead to the regulatory determination of potentially all terms and conditions. Such an approach would also repeat the concerns that originally led to the enactment of the NICT Act in 2009.

## GENERAL

- 7 Digicel welcomes the opportunity to participate in the Department of Communication and Information Technology's ("**Department**") public consultation ("**Consultation**") on proposed changes ("**Proposed Changes**") to be made to the *National Information and Communications Technology Act 2009* ("**Act**").
- 8 Digicel notes that the documents that have been made available by the Department for the purposes of the Consultation include:
- a "marked up" version of the Act that includes the Proposed Changes ("**Revised Act**");
  - a document titled *Revised Draft Amendment Bill (clean)* ("**Draft Bill**"); and
  - a copy of a presentation that was made Mr Jim Holmes of Incyte Consulting and which is titled *Proposed Amendments to the National ICT Act 2009, Port Moresby, 2nd July 2014* ("**Incyte Presentation**").
- 9 The original due date for submissions was 9 January 2015. The Department subsequently extended the due date to 31 March 2015.
- 10 Digicel is unaware of any additional documents related to or supporting the Proposed Changes. Nor is Digicel aware of any changes to Government Policy that would give rise to the need for changes to be made to the Act.
- 11 Digicel understands from the documents that have been provided by the Department that the Proposed Changes are:
- "... intended to address issues that have arisen for the administration of the Act and not to call into question the fundamental pro-competitive scheme of the Act."*<sup>1</sup>
- 12 Digicel also understands from that documents that have been provided by the Department that the Proposed Changes are intended to fall into two broad categories, namely proposed amendments to the Universal Access and Service ("UAS") scheme and other Proposed Changes. This submission will be structured similarly.
- 13 The Proposed Changes are extensive and will have far reaching effects on the operation and impact of the Act. This will necessarily result in substantial flow on effects into the telecommunications industry and the people it serves.
- 14 Given the potential ramifications of the Proposed Changes, Digicel has sought independent expert views on the Proposed Changes. This has resulted in two reports being prepared and which accompany this submission. They are:

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<sup>1</sup> Incyte Presentation at Page 5

- *Analysis of proposed changes to the National Information and Communications Technology Act 2009, March 2015* prepared by Dr Martyn Taylor, Partner and Head of Telecommunications (Asia-Pacific) at the global law firm Norton Rose Fulbright (“**Taylor Report**”); and
- *Analysis of Proposed Changes to the National Information and Communication Technology Act 2009, Report to Digicel, March 2015* prepared by Castalia Strategic Advisors (“**Castalia Report**”).

15 While the reports contain the independent views of the experts Digicel broadly supports those views and commends them to the Department for its consideration. Where relevant and appropriate, Digicel has also referred to the views contained in the expert’s reports in this submission.

### **The Existing Act**

16 The Act as it currently exists (“**Existing Act**”) was developed through extensive study and analysis in 2008 and 2009 that culminated in the release of two experts’ reports and the preparation of the Existing Act.

17 During the time the Existing Act has been in place investment in ICT infrastructure and services in PNG have flourished.

18 Through its focus on investment, innovation and customer service, Digicel has become one of the largest foreign investors in the Independent State of Papua New Guinea (“Papua New Guinea” or “PNG”), having invested in excess of PGK 1 Billion since it launched its telecommunications services in July 2007.

19 Since then, Digicel has rolled out its mobile voice and data network to all provinces in Papua New Guinea and now covers in excess of 5.5 million (78%) of the population of Papua New Guinea. Many of these areas had no telecommunications networks or services at all before the arrival of Digicel. Digicel is the only operator in Papua New Guinea to have satisfied all of its network coverage and network rollout licence obligations, including to each of the main centres, mid-sized centres, administrative district centres and small population centres detailed in its licence.

20 Digicel currently has more than 2.4 million customers. PNG’s population is estimated to be over 7 million, noting that the 2011 census recorded the population at just over 7 million.

21 To ensure its consumers are provided with the best quality of service, Digicel also invested in excess of PGK 80 million in a world class backhaul transmission network across Papua New Guinea. It has also invested in a 3G network and recently invested in the launch of a 4G network in Papua New Guinea.

22 Digicel continues to make investment commitments to its business in Papua New Guinea. For example, it is in the process of finalising its rollout of almost 300 mobile towers and expand its 3G network to other main centres at a cost of more than USD50 million.

- 23 Digicel employs more than 900 persons directly and, of these people, over 95% are Papua New Guineans. Each of these individuals benefits from the extensive training and skills transfer processes of Digicel. Thousands more Papua New Guineans benefit indirectly from Digicel's activities, including its construction, security, distribution and retail activities.
- 24 Without doubt, the impact of Digicel's entry into Papua New Guinea has been positive in terms of its benefit to the PNG economy and the people of PNG.
- 25 Digicel is actively involved in the Papua New Guinea community. It runs a host of community-based initiatives and has set up a Digicel PNG Foundation in Papua New Guinea, committed to building community and community spirit through advancing education that is inclusive and healthcare that is accessible. The Digicel PNG Foundation was officially launched on 15 October 2008 as a non-profit charitable organization with the aim to empower people by working with communities to develop and build sustainable and meaningful projects and programs focusing on the areas of education and health in Papua New Guinea.
- 26 During its six years of operations the Digicel Foundation has funded 453 community projects across 89 districts, in the areas of basic education and health in rural areas, at a total cost of about PGK45 million. These projects have been rolled out in partnership with Government, NGO, churches and the private sector. To date the following milestones have been achieved:
- 26.1 Construction of 190 primary school classrooms (including solar lighting, desks, blackboards, water and sanitation facilities through water tanks, toilets, and showers) in rural areas giving more than 7600 students access to an improved and healthier learning environment;
  - 26.2 Construction of 222 elementary school classrooms in rural and remote communities providing more than 4,400 children with access to basic education and a much improved learning environment;
  - 26.3 38 Community Learning Centres operational nationwide providing more than 3,000 vulnerable children with a basic education through phonics and numeracy skills;
  - 26.4 Funding and operations of 19 new mobile clinic ambulances in 12 different provinces, in partnership with Churches and Provincial Health, providing free outreach and health services to more than 300,000 people to date in rural areas;
  - 26.5 Co-funded five Family Support Centres in partnership with UNICEF and the National Department of Health to treat traumatic domestic violence cases in confidence
  - 26.6 Construction of three new Women's Resource Centres in partnership with Churches, NGO's and Provincial Health providing shelter and counselling as well as skill based training for victims of violence;

- 26.7 Funding of capacity building programs in partnership with churches and local NGO's addressing the quality of learning in the Community Learning Centres in the settlements of Port Moresby by training and mentoring community based volunteer teachers, developing the skills of community leaders in these settlement communities and providing women in the settlements with basic life skills training; and
- 26.8 Providing basic services (shelter, food, care and education) to up to 600 vulnerable children and funding school fees for over 600 vulnerable primary school aged children through WeCARE Foundation, a local NGO focusing on supporting young vulnerable women and children living in the settlements of Port Moresby.
- 27 Digicel is the market leader in providing mobile telecommunications services in PNG. It has achieved this through its very significant investment in its network, distribution network and customer service, as well as the significant community outreach described above. Digicel relies on revenues earned from its commercial activities to be able to fund these investments and extend these benefits to the people of PNG.
- 28 In short, when measured against consumer outcomes, the operation of the Existing Act and the broader regulatory framework has been an overwhelming success. This is no doubt at least partly as a result of the balance the Existing Act struck between maintaining incentives for private investment and ensuring the interests of consumers are protected.
- 29 Accordingly, Digicel submits that great care must be taken to ensure that careful consideration is given prior to making any changes to the ICT regulatory framework and that any proposed changes are supported by objective analysis not only giving clear reasons for the changes but also detailed estimates of the outcomes that the changes are expected to bring.
- 30 As noted above, the Existing Act was developed through a detailed study and analysis. Unfortunately and in contrast, the Proposed Changes do not appear to have had the benefit of a similar amount of in-depth study as to the need for and potential consequences arising from the Proposed Changes.
- 31 Digicel submits that, as a result, the Proposed Changes lack clarity of purpose and are unlikely to undermine the objectives of the Existing Act, add unnecessary costs to the industry and consumers and undermine incentives for future investment.
- 32 While there may be some justification for amendments to improve administrative processes under the Existing Act, Digicel submits that there is no basis for the changes that have been proposed. If the Draft Bill proceeds in its current form, it is likely that there will be significant disruption in the industry, incentives for further private investment will be chilled and the people of Papua New Guinea will be worse off as a result.

## THE PROPOSED CHANGES (UAS)

### Introduction

- 33 The Draft Bill sets out what Digicel considers to be three key changes to the UAS arrangements under the Existing Act. We provide comments on each of those in turn.

### Provision of Co-location, Access to or Sharing of Network Facilities or Spectrum

- 34 It has been proposed that a new provision be added to section 91 of the Existing Act that would introduce new powers to NICTA to direct operators to provide access to their network facilities and radio spectrum to “contractors” on terms specified by NICTA and that should an operator fail to comply with such a direction then severe penalties will apply.
- 35 This is despite the fact that a comprehensive and detailed access regime already exists under Part VI of the Existing Act. It is also the case that Part VI of the Existing Act has already successfully been applied to the declaration of services associated with the access to international gateways and capacity on submarine cables. There has been no suggestion the declaration criteria and mechanisms set out in Part VI of the Existing Act would be unsuitable as a basis for considering the declaration of a service that may be sought to be provided by a contractor under Part V of the Existing Act.
- 36 Accordingly, it would seem that, while the proposed wording of the proposed provisions is somewhat vague, the intention is to provide a mechanism to circumvent or lower the thresholds for regulatory intervention set out in the existing declaration process in Part VI of the Existing Act.
- 37 The effect of this would be that “contractors”<sup>2</sup>, i.e. parties who “win” allocations of UAS funds from NICTA would be permitted by NICTA to gain access to network facilities and spectrum that had been deployed as a result of private investment. Since Part VI of the Existing Act already sets out a detailed process and strict thresholds that must be met before NICTA may recommend that access be regulated, it can reasonably be assumed that NICTA would use these powers when it believed the regulation of access could not lawfully be justified under Part VI of the Act.
- 38 The Incyte Presentation explains the rationale for the proposed amendment as being:

*“The purpose of the amendment is to enable reduction of overall input costs for the industry and to improve affordability.”*

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<sup>2</sup> Although the term is not formally defined, Digicel presumes that the reference to a “contractor” is a reference to a “qualified contractor” as that term is used in the Draft Bill.

39 However, while regulated access to another operator's network facilities and radio spectrum on preferential terms may reduce costs to the contractor, it does not logically follow that the "input costs for the industry" will reduce or that service will become more affordable.

40 As noted in the Taylor Report:

*"The amendments proposed to section 91 appear to be inconsistent with this mechanism for the imposition of regulation in Part VI of the NICTA Act by enabling NICTA to imposed regulation on private infrastructure without following a declaration procedure. As a result, **this creates significant risks that such regulation could adversely impact on future infrastructure investment in PNG, contrary to one of the key policy objectives behind the NICTA Act.**" (emphasis added)*

41 The Taylor Report further noted:

*"The appropriate tests for the application of regulation to private infrastructure in Part VI were subject to very extensive consultation in 2008 and 2009. A substantial part of the Experts' Report is devoted to consideration of these issues, particularly as a decision was taken to significantly reform the Historic ICT Regime. The regime that is today applied in PNG is based to a large extent on the telecommunications access regime that applied (and still applies) in Australia. The Australian regime is viewed as adopting a sensible balance between the interests of infrastructure owners and the interests of access seekers."*

42 Digicel agrees and submits that the imposition of a new access regime that lacks appropriate checks and balances is entirely inappropriate.

43 Additional concerns were raised in the Castalia Report which notes:

*"Countries with outlying communities and similar per capita GDP to PNG invariably treat provisions for third party access separately to UAS, as do Australia and New Zealand. This can be seen in Table 4.1 where different regulatory instruments or separate parts of the same instrument deal with the two issues separately. The reason for this is clear: **doing otherwise would enable third party access that is uncompetitive and inefficient.** The standard treatment—as is currently the case in PNG—allows for the appropriate instruments to be applied to two separate problems: the problem of efficiency and competition, and the problem of universal consumer access.*

***The proposed changes to include infrastructure sharing provisions with UAS provisions are clearly at odds with the regulatory regimes designed to promote open and competitive telecommunications markets.***

...

*The unusual nature of the current proposal is further underlined by the fact that it is difficult to imagine how infrastructure sharing could contribute to*



*universal consumer access, since by definition it does not result in additional coverage.” (emphasis added)*

- 44 Furthermore, any such direction by NICTA would not be subject to review by the ICT Appeals Panel pursuant to section 256 of the Existing Act as is the case with recommendations by NICTA to declare a service pursuant to Part VI. This means that if the proposed amendments are made, NICTA will have largely unfettered power to impose regulation and penalties on operators who have made private investments on the basis of the laws that applied at the time the investments were made.
- 45 Digicel suggests that this is contrary to the objectives of the Existing Act and is also likely to be contrary to the requirements of the Constitution.
- 46 Accordingly, Digicel submits that the proposed amendments to section 91 of the Existing Act are wrong in principle, unnecessary and should be withdrawn.

**Proposal to make NICTA solely responsible for the operation of the UAS regime**

- 47 The Draft Bill makes a range of proposed amendments that would have the effect of making NICTA solely responsible for the operation of the UAS regime.
- 48 The Incyte Presentation describes the reason for this as being:

*“... the allocation of UAS management to NICTA allows for more cost-effective regulation in terms of resourcing, integrated administration and fully consistent policies affecting the industry across all issues.”*

- 49 While this may be the case, Digicel is concerned that, by doing so, important checks and balances on the operation of the UAS regime will be lost and that decision making processes will become less transparent as NICTA seeks to “expedite” UAS regime processes.
- 50 This already appears to be occurring. For example, NICTA has, apparently of its own volition, called for project proposals for Universal Access Services. This request for proposals which was announced by NICTA on 13 March 2015 included the following statement:

*“One of the key objectives of the National ICT Policy is to ensure equitable access to Information and Communication Technology Services. The policy objective is founded on the premise that ICT is seen as necessary tool for economic growth and social development. **The Universal Access Board within NICTA is mandated to give effect to this policy by identify and developing projects and is now embarking on program that is aimed at bridging the telecommunications and ICT gap that limits the opportunities available to ordinary citizens.** With the support of the World Bank the Board has commenced the program last year with the voice telephony project that will eventually connect over 500,000 citizens in remote and rural PNG by the end of this quarter. The voice telephone project will be followed with Internet Services Project targeting to rural communities.*

*Within this context, the National Information and Communications Technology Authority (NICTA) is inviting project proposals from interested stakeholders including the general public and ICT operators and service providers to **proposing projects consistent with the overarching goals within the ICT sector**. Proposals that are accepted will be considered by the UAS Board for implementation in 2015.” (emphasis added)*

51 NICTA further stated:

*“All stakeholders including the general public and ICT operators and service providers **are invited to submit project proposals for consideration and evaluation by the UAS Secretariat**. The submitted proposals should seek to promote the long-term economic and social development of Papua New Guinea through projects that will among other things, encourage the development of ICT infrastructure and improve the availability of ICT services within the country including under-served communities and geographic areas.” (emphasis added)*

52 NICTA further required that proposals be submitted by 27 March 2015 and that late proposals would not be accepted, i.e. a period of only two weeks was allowed for interested parties to prepare and submit detailed proposals, for NICTA’s “consideration”.

53 There are a number of concerns that arise from NICTA’s request for proposals. They include:

53.1 The Universal Access Service Board (“**UAS Board**”) is created by the Existing Act and it does not sit “within NICTA” as has been claimed.

53.2 It is the UAS Board and not NICTA that is responsible for publicising the UAS Fund and its objective which is:

*“... to promote the long-term economic development of Papua New Guinea by funding approved UAS Projects that will encourage the development of ICT infrastructure and improve the availability of ICT services within Papua New Guinea, including in rural communities.”*

Importantly, the objective that is included in NICTA’s request for proposals is broader than that which is contained in the Act and is likely to result in inappropriate projects being proposed for funding.

53.3 It is not the role of NICTA or the UAS Secretariat to determine which proposals should be successful as is implied by NICTA’s statement above. While NICTA does have a role in compiling information, performing analysis and ranking any UAS Project proposals, it is the UAS Board’s role to determine which proposed UAS Projects should proceed.

53.4 A two week time period for the preparation of what would necessarily be detailed and complex proposals, including technical design and economic

impact is grossly inadequate and raises questions about the underlying process being followed by NICTA.

- 54 As noted above, the removal of the UAS Board would also remove important checks and balances and transparency from the UAS regime. The composition of the UAS Board under the Existing Act was designed to ensure broad oversight of the UAS regime and, as well as Government representatives, also included representation from the private sector. This oversight will be lost under the Proposed Amendments.

#### **Proposed new principles for UAS Projects**

- 55 The Draft Bill proposes amendments that would establish a new section 107A of the Act and provide a set of new principles that would apply to UAS Projects. However, the UAS objective, the definition of UAS Project and section 108 of the existing Act already provide detailed guidance on the matters that NICTA and the UAS Board must have regard to when assessing the ranking of UAS Projects.

- 56 It is also the case that the amendments that have been proposed are either superfluous or are somewhat in conflict with those other provisions of the Existing Act. Importantly, the objectives of the UAS Fund are expressly limited to UAS Projects. UAS Projects solely relate to the exercise of facilities rights and/or the supply of ICT services. The concept of providing *“ICT training and education for adults and children”* clearly does not fall within the definition of a UAS Project in the Existing Act and it would be wrong to seek to broaden the scope of UAS Projects by the inclusion of such a new “principle”.

- 57 Nor does Digicel consider that it is necessary to do so in order to provide Government or Donor funded support for ICT training and education or any other similar initiatives. Such initiatives can and should be managed and funded outside of the UAS regime. Indeed Digicel is very supportive of the promotion of education in PNG and, as noted above, has through the Digicel Foundation already funded:

- 57.1 Construction of 190 primary school classrooms (including solar lighting, desks, blackboards, water and sanitation facilities through water tanks, toilets, and showers) in rural areas giving more than 7600 students access to an improved and healthier learning environment;
- 57.2 Construction of 222 elementary school classrooms in rural and remote communities providing more than 4,400 children with access to basic education and a much improved learning environment; and
- 57.3 38 Community Learning Centres operational nationwide providing more than 3,000 vulnerable children with a basic education through phonics and numeracy skills.

- 58 Consequently, Digicel submits that the proposed amendments are unnecessary and inappropriate and are likely to impose an unfair burden on the ICT industry.

## **Proposed alternative mechanism to distribute UAS Funds**

59 Digicel strongly opposes the proposed inclusion of a new section 109A in the Act which would permit NICTA to “distribute the funds on the basis of a restricted bidding procedure, a sole source procurement procedure or an emergency procurement procedure”, whether or not it is subject to a “consultation” process. That is because the allocation of UAS Funds must be subject to the highest levels of rigour to ensure that the allocation processes are and are seen to be allocated fairly and through a transparent process. This is especially the case when at least some of that funding may come from levies that are imposed on private firms.

60 Digicel also notes that the “*public consultation as provided for in sub-section 3 below*” referred to in the proposed section 109A(1) is not consultation at all. That is because subsection 3 does not refer to consultation and only provides a notification requirement, i.e. that NICTA is only required to:

*“... notify the public of its intention to do so and the reasons for choosing of the proposed procurement method to be used.”*

61 The proposed section 109A(3) makes no mention at all of a consultation process.

## **OTHER PROPOSED CHANGES:**

### **Proposal to increase NICTA’s retained surplus from 10% to 20%**

62 The draft Bill proposes to increase the licence fee surplus that NICTA may retain in any individual year from 10% to 20%. Digicel has strong concerns about this proposed amendment and that it is likely to result in increased licence fees and inappropriate use of those fees.

63 Digicel submits that the proposed amendment is inconsistent with the principles of cost recovery and fee minimisation that are set out in section 35(2) of the Existing Act. Digicel also disagrees with the statement in the Incyte Presentation that:

*“All monies have to be accounted for so this additional flexibility will not add to the cost of regulation.”*

64 Digicel respectfully suggests that such a statement does not take into account the practical reality that access to funding in excess of that which is necessary is likely to end up being wasted. Digicel further submits that, as a matter of logic, if licence payments to NICTA are increased to provide for the proposed additional surplus, then the cost of regulation must certainly increase.

65 It is also the case that no objective basis has been provided for the change other than to afford “*administrative flexibility*”. Digicel does not understand what this is intended to mean but notes that there are other mechanisms available to NICTA in the event that it faces a funding shortfall.

66 Digicel agrees with the following observations in the Castalia Report:

*“The proposed changes reduce incentives for NICTA to operate efficiently and prioritise efforts to areas that are highest value to consumers. To the extent that levies exceed what NICTA spends in a given year, requiring NICTA to make a case for the use of funds would ensure greater transparency and scrutiny. This reflects that levies paid by the industry reduce the financial resources available to invest and deliver services.*

*NICTA has fairly wide discretion under Section 33 of the NICT Act for applying funding. Given this discretion, the increased ability to accumulate funds creates an even greater uncertainty for the industry, increasing potential risks of changes in regulations (as NICTA may have scope to fund projects beyond those directly in the interests of consumers). This risk makes investment in PNG’s ICT industry less attractive, which in turn could impede access to, and reduce the quality of, ICT services in PNG.*

*Additional proposed changes include providing NICTA oversight of the UAS Fund instead of the UAS board, and increasing the scope of projects able to be funded by the UAS Fund. This gives NICTA further discretion in the use of levy funding, overseeing the use of all surplus revenue. This creates a further potential avenue for NICTA to fund projects and therefore may reduce incentives for NICTA to effectively prioritise its projects and lead to greater uncertainty for the ICT industry.”*

#### **Proposed registration of access agreements**

- 67      Digicel disagrees strongly with the proposed inclusion of a new section 138A in the Act that would require an access provider to “register” an access agreement with NICTA and provide NICTA with the ability to essentially “rewrite” what has been commercially agreed.
- 68      Section 143(6) of the Existing Act already provides NICTA the ability to intervene in commercially agreed access agreements in exceptional circumstances where a commercially agreed access agreement is *materially inconsistent* with the general pricing principles or any service specific pricing principles or is *directly or indirectly harmful* to retail customers in Papua New Guinea.
- 69      However the proposed amendment would lower the threshold for regulatory intervention and essentially permit NICTA to be able to substitute its preferred outcome for that which has been reached through commercial negotiation. This is contrary to the objectives set out in section 3 of the Existing Act and the Regulatory Principles to which those objectives refer.
- 70      Such an intervention is out of step with international practise and is inconsistent with the negotiate/arbitrate model of access regulation that has been adopted in PNG. As is noted in the Taylor Report:

*“The rationale for the introduction of section 138A is unclear. If the rationale is to enable NICTA to take a more heavy-handed approach to*

*regulation in PNG, then DCI may wish to reconsider this rationale in light of the detailed analysis undertaken by the independent advisers in 2008 and 2009. The heavy-handed approach to telecommunications regulation in PNG that pre-dated the NICTA Act had many identified problems, as set out in the Experts' Report and Final Report. A key philosophy underpinning the NICTA Act was to deregulate PNG's telecommunications markets in order to stimulate investment and competition, consistent with the overall policy basis of the Phase 2 reforms. This philosophy is also consistent with international best practice in telecommunications regulation.*

*If the rationale for section 138A is to ensure NICTA has greater transparency of access agreements, then an approach similar to that adopted in Australia could be followed. This approach requires that a copy of every access agreement is given to the regulator on a confidential basis, but the regulator does not have the ability to veto any terms of the agreement."*

Digicel agrees with this assessment and notes that section 143(5) of the Existing Act already provides for operators to provide NICTA copies of commercial agreements in relation to declared services.

71 Digicel also submits that the proposed section 138A, as drafted, would impose a process that was deeply flawed. This is for three reasons:

71.1 Firstly, the two week timeframe within which NICTA is required to make its decision whether or not to register an access agreement is grossly inadequate for it to be able to undertake a properly founded analysis of the access agreement. This means that any decision made by NICTA will be likely to be flawed and the risk of regulatory error is greatly increased.

71.2 Secondly, the very short process that has been proposed will have the effect of denying natural justice and procedural fairness to the parties to the access agreement.

71.3 Finally, a decision under section 138A would not be subject to review by the ICT Appeals Panel. This is in contrast to other determinations that are made by NICTA in relation to the provision of access, including final determinations over the terms of access. Digicel submits that it would be wrong for NICTA to be given such an unfettered power.

#### **Proposed power for NICTA to direct the preparation of a RIO**

72 The Draft Bill proposes amendments to section 141 of the Act that would in effect permit NICTA to prepare a reference interconnection offer ("**RIO**") and then be able to itself determine the terms of that RIO.

73 This is a fundamental change to the operation of the access regime under the Existing Act and, if passed into law would result in heavily regulated access arrangements, essentially displacing the negotiate/arbitrate regime that has worked successfully to date.

74 Importantly, interconnection in PNG has been subject to commercially negotiated arrangements since prior to the Existing Act coming into force. Those arrangements have resulted in commercial agreements that are not due to expire until 2020. Accordingly, there has been no market or regulatory failure and there is no reason to change the Existing Act.

75 As has been noted in the Taylor Report:

*“Section 141 of the NICT Act enables an access provider to voluntarily provide a reference interconnection offer (RIO) to NICTA. The drafting of section 141 is based largely on the concept of an ‘access undertaking’ from the Australian Part XIC access regime. The access undertaking in Australia is inherently a voluntary instrument that is submitted by access providers as a means to obtain greater certainty and reduce the risk of ad hoc regulatory decisions.*

*The objective of section 141 was therefore to give an access provider the ability to obtain voluntary pre-approval from NICTA of the terms and conditions that it offered. Such an approach was intended to reduce the scope for access arbitrations as well as to provide a greater degree of certainty to access providers as to the regulatory acceptability regarding their terms of supply.*

***Importantly, the concept of voluntary production of a RIO was intended to facilitate commercial negotiations, rather than override or circumvent them. If an access provider was mandated to submit a RIO, its incentive to engage in commercial negotiations would be reduced and it would instead focus on engaging purely with the regulator.”***  
(emphasis added)

76 Digicel agrees. The most likely outcome of the changes that have been proposed would be that the access arrangements between operators would all become subject to NICTA regulation. While this may be attractive in terms of “regulatory neatness”, it would not be consistent with the objectives of the Existing Act or its Regulatory Principles. Nor would it be in the long terms interests of consumers.

77 It is also the case that the drafting of the proposed amendments is unclear, as is the intended interaction between those proposed amendments and the other elements of the access regime, including NICTA’s powers to make Interim and Final Determinations. There also does not appear to be any “circuit breaker” or particular consequence in the event that NICTA does not approve a RIO that has been submitted by an access provider. This means that the outcome of the RIO process is uncertain and likely to be the subject of dispute.

## CONCLUSION

78 In conclusion, Digicel does not consider that the Proposed Changes or the Draft Bill have been thought through sufficiently. The legislative amendments that have been

proposed are, in many cases, unworkable and conflict with the Objectives and Regulatory Principles upon which the Existing Act is founded.

- 79 The impact of unwarranted or inappropriate regulation is significant for both private investors and the consumers who benefit from that investment. As the Castalia Report concludes:

*“A key criterion that rating agencies use to assess risk is consistency in the regulatory framework over time. If the regulatory regime is not consistent, rating agencies and investors will view industries and firms as greater risk, which can lead to a fall in their share price. For example, in New Zealand, repeated changes to the underlying regulatory frameworks in the electricity and telecommunications sector have led to relatively poor risk ratings from credit rating agencies. Similarly, in Europe, it is suggested that intrusive government regulation of the telecommunications industry has distorted the market and discouraged competition and capital investment in high-speed, high-capacity next generation access networks. As a result, network owners cannot capture the returns needed to fund investments. Consequently, many investors have chosen to invest in other industries or jurisdictions, as telecommunications companies have seen negative returns for their shareholders for the last several years.*

*This concern is especially relevant for PNG, which has a developing market that is already considered to be relatively risky for investors. Some stakeholders have expressed concern about unstable regulatory policies in the telecommunications industry in PNG. One source suggests that telecommunications regulatory agencies in small island states often “hinder, amend, or reverse” pre-announced reforms on telecommunications.*

***Uncertainty can lead to fewer participants in the market, decreasing competition***

*Uncertainty can also cause participants to exit the market (as they hope to move to a more hospitable economic environment) or can cause participants to avoid entering a market, decreasing competition. This has been seen in India, one of the fastest growing telecommunications markets in the world, where several foreign mobile phone operators decided not to enter the market. The lack of interest was said to be due to unstable policies, high tax rates, and over-regulation which led to high litigation costs. As a result of this experience, the Government of India is now adopting a “softer regulator mechanism”, increasing transparency, and clarifying the roles of different arms of the Government. PNG should strive to avoid this problem by fostering a stable regulatory environment that promotes competition and investment.”*

- 80 Digicel submits that the Draft Bill should be withdrawn pending further analysis and consultation on what changes (if any) to the Existing Act are warranted.

End.