



DIGICEL (PNG) LIMITED

Submission to the National Information and Communications

Technology Authority

Public Consultation on

Proposed Amendments to the National Information and

Communications Technology Act of 2009

16 May 2025

This submission is provided to NICTA for the purpose of the current consultation only and may not be used for any other purpose

Executive Summary

- i. Digicel (PNG) Limited (“**Digicel PNG**”) welcomes this opportunity to share its comments and views on the National Information and Communications Technology Authority (“**NICTA**”) Discussion Paper titled *Proposed Amendments to the National Information and Communications Technology Act of 2009* (“**NICT Act**”) dated 2 April 2025 (“**Discussion Paper**”).
- ii. Digicel PNG considers this public consultation on the Discussion Paper to be particularly timely in the context of the changes to ICT technology and services, society, the geopolitical landscape and Papua New Guinea’s own broader legislative framework. The pace of these changes has been rapid in recent times with the result that some parts of the NICT Act are outdated or out of step with what may be considered best practice today.
- iii. In addition to the benefits arising from Digicel PNG’s own PGK 3.5 Billion investment and participation in the market, Papua New Guinea has also seen many other ICT led developments that have had a very significant impact, including the introduction of “Over-The-Top” (“**OTT**”) Internet-based social media and content services, ongoing investments in submarine cables to improve international connectivity and, more recently, developments in the Low Earth Orbit (“**LEO**”) satellite space.
- iv. Digicel PNG therefore appreciates the work NICTA has done to not only propose a number of changes to the NICT Act but also to invite broader comments from interested parties on issues and concerns they may have so that they too may be considered as part of this review process.
- v. In making our submission we have focused on the following key areas:

- a. Operator Licensing

Changes to technology and the way services are delivered has resulted in uncertainty and apparent inconsistency in the application of the licensing regime, particularly in respect of overseas entities that provide services directly to retail customers in Papua New Guinea.

We believe the licensing arrangements in Parts III and IV of the NICT Act could be improved to provide for additional certainty and ensure there is a consistent and non-discriminatory approach which requires all entities that provide retail services to customers in Papua New Guinea to operate under a licence, contribute to the economy by way of payment of licence fees, levies and taxes, and be held accountable for the quality of services that they provide.

- b. Radio Spectrum Licensing

Digicel PNG submits it is imperative to ensure that licensees can gain access to radio spectrum easily and at a reasonable cost to ensure services are able to be rolled out

quickly and efficiently across Papua New Guinea, and to enable those services to be provided to consumers at a reasonable cost.

In our view this goal can be supported through the inclusion of additional principles in the NICT Act that ensure:

- spectrum policy and allocation decisions are made in a timely way to provide mobile operators with certainty;
- the price for access is set at a level that is determined by the amount required to cover NICTA's costs of managing spectrum resources, consistent with the requirements of section 35 of the NICT Act; and
- where allocated spectrum is not used within a reasonable time it is required to be made available to other licensees in accordance with the spectrum allocation rules.

c. Universal Access and Service

In Digicel PNG's view, the current review provides an ideal opportunity to simplify and streamline the existing UAS arrangements so that they are more effective at delivering UAS outcomes in a timely and efficient way.

Key to such an approach would be to reduce reliance on the UAS Fund to fund UAS Projects and instead would see individual licensees being able to propose and deliver their own approved UAS Initiatives up to a specified value each year in lieu of making cash contributions to the UAS Fund.

Licensees that were unable to, or chose not, to deploy such infrastructure or services would be required to make a cash contribution directly into the UAS Fund, consistent with NICTA's proposal for a "Pay or Play" approach described on page 9 of the Discussion Paper.

Digicel PNG also supports changes to the composition of the UAS Board, including by adding two non-voting members nominated by network licensees.

d. Access Regulation

Digicel PNG considers one of the current strengths of the NICT Act to be its approach towards access regulation that is set out in Part VI (Interconnection and Wholesale Access).

However, we consider it can be further strengthened by clarifying and improving the interaction between the Ministerial declaration process and the operation of the decision review mechanism under Part XIII of the NICT Act.

e. Retail Price Regulation

Digicel PNG continues to have concerns about the operation of Part VII of the NICT Act which provides that NICTA may recommend, and the Minister may impose, retail price and/or service quality regulation. This is especially the case in markets that are subject to retail competition and where no statutory (or *de facto*) monopoly exists.

Not only is the market being impacted by a rapidly growing new entrant mobile network but, as has been recognised internationally, the very definition of the mobile market is also in flux as the impact of OTT services has fundamentally changed the way people use mobile services to communicate.

In order to address this and drive effective competition and deliver better outcomes for consumers, Digicel PNG submits there should be a move away from retail market regulation. Instead we propose amendments to the NICT Act that would focus on ensuring wholesale market settings and regulation are supportive of retail market competition and that, consistent with the existing provisions of section 9(e) of the NICT Act, any instances of alleged anti-competitive behaviour would be addressed through other available mechanisms, including Part VI of the Independent Consumer and Competition Commission Act 2002 (“ICCC Act”).

f. NICTA Decision Review Mechanism

Digicel PNG strongly supports the continuing inclusion of an effective decision review mechanism and, in principle, has no issues with the approach that is currently adopted in Part XIII of the NICT Act.

However, Digicel PNG has found that, in practice, the operation of the existing appeals process under Part XIII of the NICT Act to be ineffective as a means to provide timely and objective reviews of decisions made by NICTA.

In order to address this, Digicel PNG suggests that, rather than relying on the ICCC Act as the mechanism for appointing the Panel of Experts, an alternative process be included in the NICT Act itself to meet the specific needs of the ICT industry.

We also propose amendments that would improve coordination between the operation of the ICT Appeals Panel process and the Ministerial approval processes under Parts VI and VII of the NICT Act.

g. Cybercrime and Data Protection

Digicel PNG recognises the important role the Government plays in protecting the citizens of Papua New Guinea against the impacts of cybercrime and the misuse of data. They are issues that not only arise in this country but also occur around the world with bad actors becoming ever more sophisticated and determined to exploit weaknesses in technology, systems and processes.

While the ICT industry and NICTA will no doubt continue to play an essential role in addressing issues relating to cybercrime and data protection, we consider this to be a law enforcement and national security issue that requires a “whole of Government”

response that is coordinated as much as possible with regional and international agencies.

As such, we suggest the Government work closely with its international neighbours to establish a cohesive and consistent approach to dealing with cybercrime and data protection issues.

- vi. In addition to commenting on these issues and the proposals contained in the Discussion Paper, we have also suggested some specific changes to the existing provisions of the NICT Act that reflect our submissions and which we believe will result in a legislative framework that is best placed to meet the ongoing development of the ICT sector.
- vii. We look forward to continuing to work constructively with NICTA as the consultation progresses and welcome the opportunity to comment on the submissions of other stakeholders.

A. Introduction

1. Digicel PNG welcomes this opportunity to share its comments and views on the Discussion Paper *Proposed Amendments to the National Information and Communications Technology Act of 2009* dated 2 April 2025.
2. The NICT Act has served the country reasonably well since it came into effect around 15 years ago.
3. This can be seen through the very substantial private investments that have been made in technology since the introduction of the NICT Act, and outcomes that have been achieved following its introduction.
4. Digicel PNG has invested in excess of PGK 3.5 Billion since it launched its telecommunications services in July 2007. That investment is ongoing and includes current work by Digicel PNG to further upgrade and develop its network.
5. Over the past four years, this has included modernising and upgrading sites from 2G/3G to "Long-Term Evolution" ("LTE") technology, a fourth-generation ("4G") wireless standard that provides increased network capacity and speed. Digicel PNG has invested well in excess of PGK200m in Papua New Guinea over this period alone, with LTE population coverage increasing from around 25% to more than 71% today.
6. Around 85% of Digicel PNG's sites have already been upgraded to LTE. In the last 18 months, Digicel PNG has also added 45 new rural sites bringing coverage to otherwise unserved areas. In total, over the last two years, Digicel PNG has deployed 115 new mobile towers and upgraded 96 to 4G LTE, covering over 80% of PNG's population.
7. Aside from Digicel PNG's commercial initiatives and broad investment, the Digicel PNG Foundation investment in Papua New Guinea since 2008 stands at over PGK160m (~US\$40m). That investment has allowed the Digicel PNG Foundation to construct over 650 classrooms and 33 libraries across the nation. In addition, the Digicel PNG Foundation has delivered 43 mobile health clinics which – so far – have treated 730,000 patients through outreach programmes and over 18,500 Papua New Guinean women and men have graduated from life and business skills centres supported by the Digicel PNG Foundation. The Digicel PNG Foundation has put up K2.5million in direct funding to communities nationwide for their chosen projects, ranging from waiting houses for expectant mothers, water and sanitation facilities and library books.
8. Telstra, which completed its acquisition of Digicel Pacific Limited in July 2022, is also committed to continuing Digicel PNG's ongoing investment in network, services and people. As a long-term investor in Digicel PNG, Telstra's planning horizon for the Digicel PNG network extends beyond current technology and includes investment in continuing upgrades over time. In particular, Telstra has committed to completing the 4G upgrade of the Digicel PNG network and then to progress to even more advanced services across Papua New Guinea as demand for them grows. This includes plans to introduce 5G services into Papua New Guinea, and expectation that consumers will be able to benefit from

services that make use of new technology once the necessary radio spectrum is made available.

9. In addition to the benefits arising from Digicel PNG's own investment and participation in the market, Papua New Guinea has also seen many other ICT led developments that have had a very significant impact including the introduction of "Over-The-Top" ("**OTT**") Internet based social media and content services, ongoing investments in submarine cables to improve international connectivity and, more recently, developments in the Low Earth Orbit ("**LEO**") satellite space.
10. These changes to ICT technology and services have been accompanied by further changes to society, the geopolitical landscape and Papua New Guinea's own broader legislative framework. The pace of these changes has been rapid in recent times with the result that some parts of the NICT Act are outdated or out of step with what may be considered best practice today.
11. Digicel PNG therefore considers this public consultation to be particularly timely and appreciates the work NICTA has done to not only propose a number of changes to the NICT Act but also to invite broader comments from interested parties on issues and concerns they may have so that they too may be considered as part of this review process.
12. Accordingly, this submission is set out in four parts. The first part provides an overview of the key issues that we propose to be traversed through the course of this public consultation. The second part then provides our comments and suggestions in relation to the revisions that have been proposed in the Discussion Paper. The third part contains some additional suggestions for changes that we consider would improve the operation of the NICT Act. Finally, we suggest some specific changes to the existing provisions of the NICT Act that reflect our submissions and which we believe will result in a legislative framework that is best placed to meet the ongoing development of the ICT sector.

B. Overview of Key Issues

Operator Licensing

13. Existing Operator Licensing arrangements in Papua New Guinea are governed by (among other things) Parts III and IV of the NICT Act, and the *Standard and Special Conditions of Individual Licences Rule, 2011* (“**2011 Licence Rule**”).
14. These instruments provide a complex, interlaced set of provisions that govern the issuing and operation of individual and class licences.
15. However, changes to technology and the way services are delivered has resulted in uncertainty and apparent inconsistency in the application of the licensing regime, particularly in respect of overseas entities that provide services directly to retail customers in Papua New Guinea.
16. While this was recognised by NICTA in its consultation on proposed changes to the 2011 Licence Rule, no changes have yet been made.
17. In Digicel PNG’s submission, the licensing arrangements in Parts III and IV of the NICT Act could be improved to provide for additional certainty and ensure there is a consistent and non-discriminatory approach which requires all entities that provide retail services to customers in Papua New Guinea to operate under a license.
18. As well as providing additional certainty, such an approach would help to ensure that all providers of services in Papua New Guinea contribute to the economy by way of payment of licence fees, levies and taxes, and are able to be held accountable in a consistent and non-discriminatory manner for the quality of services that they provide.

Radio Spectrum Licensing

19. Radio spectrum is a critical component of nearly all modern telecommunications networks and plays an especially important role in the establishment of, and continued investment in, networks in countries like Papua New Guinea, where the deployment of physical infrastructure can be particularly challenging and costly.
20. Further challenges arise due to affordability issues and the relatively low population density outside of urban areas.
21. It is therefore imperative to ensure that licensees are able to obtain licences to radio spectrum easily and at a reasonable cost to ensure services are able to be rolled out quickly and efficiently across Papua New Guinea, and to enable those services to be provided to consumers at a reasonable cost.
22. The good news is that, relative to many developed countries, there is no shortage of spectrum in Papua New Guinea so that it should be possible for all licensees’ reasonable requirements to be met efficiently.

23. It is also important to recognise that the value of radio spectrum is best realised through its use by end users rather than the price that Government charges for access to it.
24. The key issue then is to ensure the rules for allocation of spectrum are well understood and applied consistently so that:
- spectrum policy and allocation decisions are made in a timely way to provide mobile operators with certainty;
 - the price for access is set at a level that is determined by the amount required to cover NICTA’s costs of managing spectrum resources, consistent with the requirements of section 35 of the NICT Act; and
 - where allocated spectrum is not used within a reasonable time it is required to be made available to other licensees in accordance with the spectrum allocation rules.
25. In our submission it would be helpful for these principles to be included in section 164 of the NICT Act.

Universal Access and Service

26. Digicel PNG is supportive of an industry-wide approach to deliver ICT services that are consistent with the NICT Act’s existing Universal Access and Service (“UAS”) objective of promoting the long-term economic and social development of Papua New Guinea through the development of ICT infrastructure and improving the availability of ICT services within Papua New Guinea, including in rural communities¹.
27. Unfortunately, as has been identified in the Discussion Paper, the existing UAS regime that is provided for in Part V of the NICT Act has, for a variety of reasons, struggled to deliver against this objective.
28. In addition, management of the UAS Fund has proven to be administratively difficult with further complexity arising from the potential application of the *Non-Tax Revenue Act 2021* and the *Public Finance Management Act 1995*.
29. Adding to this complexity is the current Draft Universal Access and Service Policy 2023 that Digicel PNG understands is still under consultation and the overlap between proposed UAS Project initiatives and network coverage and service quality obligations that fall under the *Standard and Special Conditions of Individual Licences Rule, 2011*.
30. In Digicel PNG’s view, the current review provides an ideal opportunity to simplify and streamline the existing UAS arrangements so that they are more effective at delivering UAS outcomes in a timely and efficient way.

¹ See section 90 of the Act.

31. Key to such an approach would be to reduce reliance on the UAS Fund to fund UAS Projects, by instead allowing individual licensees being able to propose and deliver their own approved UAS Initiatives in lieu of making cash contributions to the UAS Fund.
32. Licensees that were unable to, or chose not, to deploy such infrastructure or services would be required to make a cash contribution directly into the UAS Fund, consistent with the NICTA's proposal for a "Pay or Play" approach described on page 9 of the Discussion Paper.
33. Such an approach would also be consistent with the Objective set out in section 2 of the NICT Act which, among other things, includes:
 - (b) ensuring that ICT services of social importance are supplied as efficiently and economically as practicable and supplied at performance standards that reasonably meet the social, industrial and commercial needs of Papua New Guinea and its people; and*
 - (c) promoting the development of an ICT industry in Papua New Guinea that is efficient, competitive and responsive to the needs of Papua New Guinea and its people; and*
 - ...
 - (g) encouraging, facilitating and promoting industry self-regulation in the ICT industry in Papua New Guinea; and*
 - (h) encouraging, facilitating and promoting sustainable investment in, and the establishment, development and expansion of, the ICT industry in Papua New Guinea, including via the exercise of facilities rights."*
34. Importantly, the approach described above would not negate the need for the UAS Fund nor remove the possibility that interested parties other than licensees might wish to propose UAS Projects that could be funded by the UAS Fund.
35. However, it would add significant flexibility and mean that the size of the UAS Fund and the associated administrative burden that it currently attracts could be reduced substantially.

Access Regulation

36. Digicel PNG considers one of the current strengths of the NICT Act to be its approach towards access regulation that is set out in Part VI (Interconnection and Wholesale Access).
37. In Digicel PNG's submission it provides a robust, evidence-based approach to the imposition of access regulation that, in principle, is supported by appropriate procedural checks and balances.

38. It is also noteworthy that Part VI of the NICT Act is generally “forward looking” in its approach so that the regulation (declaration) of any new wholesale service can be considered on its merits.
39. This is important as it allows NICTA to be able to confidently apply regulation of wholesale services where it is necessary in order to support the continuing development of retail market competition.
40. Having said that, Digicel PNG is concerned that the current provisions in Part XIII of the NICT Act that relate to the appeal of declaration recommendations by NICTA do not function as they were intended to and undermine the integrity of the declaration process itself. This is for two reasons.
41. First, the Appeals Panel selection and administration process is currently ineffective so that appeals are not heard and determined in a timely way (or at all). This is discussed further below.
42. Secondly, there is a conflict between the timing of the appeals process and the Ministerial approval process specified in section 130 of the NICT Act. This conflict arises due to the requirement that the Minister must either accept or reject a declaration recommendation from NICTA within 60 days of that recommendation being received which means that, in the event of an appeal, the Minister is invariably forced to make a decision without the benefit of the appeal being heard or determined.
43. This problem is further compounded due to the Minister’s decision not being subject to appeals process and only reviewable through Judicial Review proceedings in the National Court.
44. In Digicel PNG’s view, this conflict could be rectified simply by providing that the lodgement of an appeal acts as a stay on the Ministerial decision-making process. This approach would be fairer on Ministerial decision makers, ensuring that better quality decisions will ultimately be made and minimising the potential for complex and costly litigation through the National Court and the Supreme Court.

Retail Price Regulation

45. Digicel PNG has long held concerns about the operation of Part VII of the NICT Act which provides that NICTA may recommend, and the Minister may impose, retail price and/or service quality regulation. This is especially the case in markets that are subject to retail competition and where no statutory (or *de facto*) monopoly exists.
46. While it is understood that NICTA will already be aware of these concerns, the reason behind them is that retail price regulation in dynamic ICT markets that are subject to competition can have far reaching, unintended consequences. These consequences can include:
 - limiting price and service innovation;

- creating price floors (and raising effective retail prices);
 - softening incentives for competition; and
 - softening incentives for investment by both the party subject to the regulation and its competitors.
47. The risk of any or all of these consequences occurring increases greatly in circumstances where the market is already being subject to significant and ongoing change as is the case in Papua New Guinea at present.
48. Not only is the market being impacted by a rapidly growing new entrant mobile network but the very definition of the mobile market is also in flux as the impact of OTT services has fundamentally changed the way people use mobile services to communicate. This has been recognised internationally, including by the Telecommunications Authority of Trinidad and Tobago which, in its *Determination: Retail Domestic Mobile Telephony Market Definition, May 2024*², concluded:
- “... there is a single relevant economic market for retail domestic mobile telephony services, **including over-the-top services (OTTs) which are substitutes for mobile voice and messaging services.**”* (emphasis added)
49. There is a further very real problem with the operation of Part VII of the NICT Act. That is, any Retail Service Determination may only be imposed on one market participant. This can create further market distortions and result in higher retail prices across the market.
50. Such a situation will inevitably discourage further investment and soften incentives for all competitors to compete hard to earn their own share of the market.
51. In order to address this, Digicel PNG proposes that there be a move away from retail market regulation in the NICT Act in preference for a focus on ensuring wholesale market settings and regulation are supportive of retail market competition and that, consistent with the existing provisions of section 9(e) of the NICT Act, any instances of alleged anti-competitive behaviour are addressed through other available mechanisms, including *Part VI of the Independent Consumer and Competition Commission Act 2002 (“ICCC Act”)*.
52. We believe such an approach will drive effective competition and deliver better outcomes for consumers.

NICTA Decision Review Mechanism

53. Digicel PNG strongly supports the continuing inclusion of an effective decision review mechanism and, in principle has no issues with the approach that is currently adopted in Part XIII of the NICT Act.

² See <https://tatt.org.tt/wp-content/uploads/2024/05/Final-Determination-Retail-Domestic-Mobile-Telephony-Market-Definition.pdf>

54. In particular, Digicel PNG considers the establishment and use of an expert ICT Appeals Panel to undertake rehearings of certain NICTA decisions to be an important check against the possibility of regulatory overreach and errors. We believe this to be essential in the fast moving and complex ICT environment where decisions often involve interlaced technical and economic issues.
55. In such circumstances, Digicel PNG considers a specialist tribunal such as the ICT Appeals Panel to potentially be a superior mechanism to the Courts as a forum to reconsider decisions of the Regulator.
56. In order to be effective, the ICT Appeals Panel must be comprised of people with a range of relevant skills that is then able to be convened quickly and conduct its affairs in a timely manner.
57. However, and as is discussed above, Digicel PNG has in practice found the operation of the appeals process to be ineffective as a means to provide timely and objective reviews of decisions made by NICTA.
58. Firstly, the Appeals Panel selection and administration process is currently ineffective so that appeals are not heard and determined in a timely way (or at all).
59. This appears, at least in part, to arise due to the difficulties associated with establishing a Panel of Experts and for the ICT Appeals Panel to then be constituted. These difficulties may well stem from the approach that is adopted in the ICC Act which deals with the appointment of the Panel of Experts and the use of the Appointments Committee³ as the appointing body.
60. In order to address this, Digicel PNG suggests that, rather than rely on the ICC Act as the mechanism for appointing the Panel of Experts, the process is contained within the NICT Act itself.
61. Digicel PNG further suggests that an alternative to the Appointments Committee is used to establish the Panel of Experts. Such an alternative could, for example, be based on the section 182 of the Tongan *Communications Act 2015* which provides:

“182 Appeals panel

- (1) The Ministry shall, upon the recommendation of the Attorney-General and Lord Chief Justice, establish a register of experts who shall be available to act as members of an appeals panel constituted under section 183.*
- (2) The Ministry shall ensure the register of experts comprises at all times at least three persons who collectively have commercial, technical, economic and legal expertise in the field of communications.*

³ The Appointments Committee under the ICC Act comprises the Prime Minister (who is the Chairman), the Leader of the Opposition, the Minister or, if the Minister is the Prime Minister, the Attorney General and the Governor of the Central Bank.

- (3) *The Ministry may only appoint a person to the register of experts if the person:*
 - (a) *meets the eligibility criteria to be appointed as a Commissioner under the Communications Act;*
 - (b) *has at least 10 years international experience in the regulation of communications markets; and*
 - (c) *is not a member, officer, employee, agent, external adviser or consultant of the Regulator, Ministry or a licensee and has not been such a person for at least 12 months.*
- (4) *The Ministry shall remove a person from the register of experts if the person no longer meets the criteria for appointment under sub-section (3) or if requested by the person.*
- (5) *The Ministry shall act as the secretariat for the appeals panel and shall publish the membership of the register of experts.”*

- 62. The second main issue is that there is a conflict between the timing of the appeals process under Part XIII of the NICT Act and the Ministerial approval processes specified in sections 130 and 160 of the NICT Act.
- 63. This conflict arises due to the requirement that the Minister must either accept or reject a recommendation from NICTA within 60 days of that recommendation being received which means that, in the event of an appeal, the Minister is invariably forced to make a decision without the benefit of the appeal being heard or determined.
- 64. In Digicel PNG’s view, this conflict could be rectified simply by providing that the lodgement of an appeal acts as a stay on the Ministerial decision-making process. By doing so, better quality decisions will ultimately be made and the potential for complex and costly litigation through the National Court and the Supreme Court can be minimised.

Cybercrime and Data Protection

- 65. Digicel PNG recognises the important role the Government plays in protecting the citizens of Papua New Guinea against the impacts of cybercrime and the misuse of data. They are issues that not only arise in this country but also occur around the world with bad actors becoming ever more sophisticated and determined to exploit weaknesses in technology, systems and processes.
- 66. Dealing with cybercrime and misuse of data must also be considered in the context of the protection of the basic rights of individuals under the *Constitution*.
- 67. While we understand that the Papua New Guinea Government has already taken steps to address cybercrime through mechanisms such as the Cybercrime Code Act 2016 and involvement in the Budapest Convention there is still much that can and should be done to improve readiness and capabilities in this important area.
- 68. While the ICT industry and NICTA will no doubt continue to play an essential role, we see this is as a law enforcement and national security issue that requires a “whole of

Government” response that is coordinated as much as possible with regional and international agencies.

69. As such, we suggest the Government work closely with its international neighbours to establish a cohesive and consistent approach to dealing with cybercrime and data protection issues.

C. Responses to NICTA Proposals

70. The table below sets out Digicel PNG’s comments on the issues raised by NICTA and its proposals to address them that are described in Annexure to the Discussion Paper and should be read in conjunction with that Annexure.

Issues Raised by NICTA		Digicel PNG Comments
Section 29 - Application of <i>Public Finances (Management) Act 1995</i> .	Harmonization of NICT Act with current <i>Public Finance Management Act (“PFMA”)</i> provisions.	Digicel PNG agrees in principle that amendments that have been made to the PFMA should be reflected in the NICT Act.
Section 33 - Application of money received by NICTA.	Proposing provision/s to exempt NICTA from application of the <i>Non-Tax Revenue Administration Act, 2022 (“NTRA”)</i> .	<p>While Digicel PNG recognises that the Government’s approach to administration of its finances is a matter for Government to determine, we do share NICTA’s concern that, in practice, the application of the NTRA may conflict with the principles and provisions of the NICT Act. This is especially the case with respect to section 35(2) of the NICT Act which states:</p> <p><i>“The fees prescribed under Subsection (1) shall be prescribed with regard to the following general principles (without limitation)</i></p> <p><i>(a) the principle of fee certainty, so that annual volatility in fees is minimised or the manner of calculation of fees is known in advance; and</i></p> <p><i>(b) the principle of cost recovery, so that NICTA ensures that the aggregate fees it proposes to recover from all ICT licensees are sufficient to recover its forecast ongoing expenditure; and</i></p> <p><i>(c) the principle of fee minimisation, so that NICTA endeavours to minimise the fees payable by ICT licensees, subject to the principle of cost recovery; and</i></p>

		<p><i>(d) the principle of non-discrimination, so that similarly situated ICT licensees undertaking the same activities are subject to similar fee structures; and</i></p> <p><i>(e) the principle of transparency, so that ICT licensees are informed of the rationale behind the fee structure proposed by NICTA; and</i></p> <p><i>(f) the principle of value recovery, so that a higher proportion of fees are recovered from those ICT licences that provide the greatest value to ICT licensees.</i></p> <p><i>Agree that NICTA should be exempt from the NTRA.”</i> (emphasis added)</p> <p>In Digicel PNG’s submission it is vital that these principles are preserved and adhered to, regardless of how NICTA’s funding is administered.</p>
<p>Section 38 - Accounts and audit.</p>	<p>Proposing provision/s to allow NICTA to seek the assistance of an independent auditor to conduct annual audits when necessary.</p>	<p>Digicel PNG agrees that NICTA should be able to retain independent auditors provided that the Auditor General also retains the right to audit NICTA’s accounts from time to time.</p> <p>We suggest that any such provision is aligned with section 106 of the NICT Act as it applies to audit of the UAS Fund and which provides:</p> <p><i>“(1) The Minister, in consultation with NICTA and the Departmental Head of the Department responsible for treasury matters, shall 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></p> <p><i>(2) The Auditor General of Papua New Guinea may at his discretion</i></p>

		<i>audit the Universal Access and Service Fund from time to time.”</i>
Section 11 - Government Policy.	Proposing to introduce specific qualifiers to prevent abuse.	<p>Digicel PNG understands that section 11 of the NICT Act already provides limitations on the requirement for NICTA to follow Government Policy. That is, the Government Policy must be published and NICTA’s obligation to follow such Policy is subject to the NICT Act (and any other Act).</p> <p>In other words, NICTA is not permitted to follow Government Policy that has not been published or which would require NICTA to do something that is contrary to the law.</p> <p>As such, we would appreciate further information from NICTA on this issue so that we can better understand the concerns it is seeking to address here.</p>
Section 40 - Independence.	Proposing to introduce higher qualifications to protect the independence of NICTA from political influence.	<p>Digicel PNG respectfully disagrees with the proposed removal of Ministerial oversight of NICTA’s recommendations under sections 129, 130 and 160 of the NICT Act.</p> <p>In our submission, it is appropriate that decisions that have a fundamental impact on the operation of the sector are subject to an additional layer of oversight. This is especially the case when the ICT Appeals Panel process has been ineffective as a review mechanism up to this point.</p> <p>One important change that could be made is to stay the Ministerial decision making process (sections 130 and 160) while an ICT Appeals Panel review process is under way.</p> <p>This would prevent the current issue of the Minister approving (or being deemed to have approved) NICTA recommendations when the validity of the NICTA recommendation is uncertain.</p> <p>Digicel PNG agrees however that greater transparency of NICTA decision making is warranted and we would welcome</p>

		meetings with the CEO, heads of divisions and board members being documented and published.
Section 254(a)	Proposal to remove constitution of the ICT Appeals Panel from the ICCC and consequently from Department of Treasury.	Digicel PNG agrees that appointment of the Panel of Experts and constitution of the ICT Appeals Panel needs to be addressed. Please see our comments earlier in this submission.
Part XIII of the Act relates to the establishment of the Appeals process and Appeals Panel.	<p>Proposal to remove constitution of the ICT Appeals Panel from the ICCC and consequently from Department of Treasury.</p> <p>Proposal to review the wording under certain provisions that indicate a timing to appeal (example, 20 days</p>	<p>See above.</p> <p>Aside from the current ineffectiveness of the ICT Appeals Panel process, it is not clear what other changes to the existing legislation would be necessary or why the timeframes that are specified in section 259 of the Act are inappropriate.</p> <p>Digicel PNG would appreciate further clarification from NICTA in this regard.</p>
Section 271 - NICTA to prosecute offences.	Proposal to bring back prosecution functions of NICTA.	Digicel PNG agrees that it would be preferable for NICTA to be responsible for NICTA to have primary responsibility to prosecute offences under the NICT Act.
Section 89(2) - Universal Access and Service Fund	Proposal to harmonize this provision with the PFMA and allow for interest earned on investment of fund money, to remain with NICTA.	<p>Digicel PNG agrees that UAS Fund should be able to earn interest with that interest being returned to the UAS Fund to support the achievement of its objectives.</p> <p>Such an approach is in keeping with section 103(4) of the NICT Act which states:</p> <p><i>“The trustees shall ensure that any cash reserves of the Universal Access and Service Fund Trust Account are prudently invested in accordance with the general directions of the UAS Board, but subject to the provisions, as prescribed, of the Universal Access and Service Fund Trust.”</i></p> <p>However, it is important to draw a distinction between any interest “remaining with NICTA” as is proposed in</p>

		<p>the Discussion Paper and remaining with the UAS Fund.</p> <p>Importantly, NICTA’s role is Fund Manager on behalf of the Universal Access and Service Fund Trust (section 103 of the NICT Act).</p> <p>We also refer to our comments earlier in this submission regarding some more fundamental changes to the UAS regime that Digicel PNG considers are warranted.</p>
Section 92 - Composition of the UAS Board.	Proposal to increase private sector representation or allow for proxies to vote at meetings.	<p>Digicel PNG agrees that additional private sector representation on the UAS Board would be desirable.</p> <p>However, it is not clear that the introduction of proxies would drive better decision making.</p> <p>Instead, Digicel PNG suggests that further consideration be given to the composition of the UAS Board to ensure effective representation of stakeholder interests.</p>
Section 108(6) and (7) - UAS Projects.	Proposal to amend and allow for projects to be “deemed approved” by the Minister is a response has not been received in writing to reject or approve the projects.	<p>Digicel PNG respectfully disagrees that a deemed approval provision should be included or that the Minister’s active involvement and oversight should be affected in this way.</p> <p>In our submission Ministerial approval is an important check on the power of NICTA and the UAS Board to make decisions that have a material impact on the industry and its participants.</p> <p>It is also worth noting that section 108 of the NICT Act does not intend that the identification and approval of UAS Projects should be an annual process or that UAS Projects that have been rejected by the Minister cannot be resubmitted at a later date. Specifically, section 108(3) of the NICT Act states:</p> <p><i>“The UAS Board shall submit the UAS Project report (as prepared under Subsection (2)), to the Minister, at least once in every</i></p>

		<p><i>calendar year, for the Minister's consideration."</i> (emphasis added)</p> <p>Section 108(9) of the NICT Act further provides:</p> <p><i>"A failure on the part of the Minister to select a particular UAS Project for implementation does not preclude the UAS Board from re-evaluating and re-submitting the UAS Project at a later date to the Minister in accordance with Subsection (3)."</i></p>
Section 109 - Competitive selection process.	Proposals to free up the process to allow for 'pay or play' model to be introduced.	<p>Digicel PNG agrees that a "Pay or Play" approach would be useful as a mechanism to deliver UAS Projects (see our earlier comments in relation to this issue).</p> <p>However, where funds from the UAS Fund are to be used to support the delivery of a UAS Project the process to allocate those funds should be objective and transparent and subject to a competitive tender process.</p>
New Part on Emergency Services	Proposing new provision/s to regarding Emergency Services and the role of ICT operators and authorities in national emergencies.	<p>It is not clear to Digicel PNG why any change to the NICT Act is required to deal with NICTA's concerns in relation to the delivery of Emergency Services and support during national emergencies.</p> <p>We would therefore appreciate further clarification of NICTA's concerns in relation to this issue.</p> <p>We are also concerned that highly prescriptive Emergency Service and national emergency support provisions that are enshrined in the NICT Act would lack flexibility and may quickly become outdated as technologies and services evolve.</p> <p>Instead, Digicel PNG suggests that NICTA's objectives and concerns are something that can be dealt with by way of Rules and Licence conditions following</p>

		detailed consultation with interested parties.
New Part on Cybersecurity and Resilience	NICTA welcomes feedback from industry on whether or not NICTA can and should perform these functions.	<p>Consistent with Digicel PNG’s comments earlier in this submission, we see this is as a law enforcement and national security issue that requires a “whole of Government” response that is coordinated as much as possible with regional and international agencies.</p> <p>The Cybercrime Code Act 2016 is already in effect.</p> <p>While NICTA, as the ICT Regulator, will certainly be able to provide a useful and important role in the context of “Cybersecurity and Resilience”, it is not obvious that it would be better (or necessary) for it to do so via changes to the NICT Act.</p> <p>Instead, where NICTA’s involvement is necessary, we believe it would be better to have that involvement detailed in the context of relevant subject-specific legislation.</p> <p>Supplementing or replicating parts of other legislation in the NICT Act would risk interpretational issues and jurisdictional confusion.</p> <p>Importantly, pursuant to Part IV of the NICT Act, licensed service providers are already obliged to cooperate with relevant Government agencies and to take reasonable steps to prevent to its facilities from being used for the purpose of any offence against a law of Papua New Guinea.</p>

D. Other Issues

71. In addition to the comments and suggestions above, Digicel PNG makes the following comments regarding specific provisions that are currently contained in the NICT Act.

<p>Section 36 – Valuable State Resources</p>	<p>Consistent with our comments above, Digicel PNG considers this section to be unnecessary and to raises an expectation for the Government to be able to generate material revenues directly from the “sale” of spectrum, numbers and other resources that are essential to the delivery of ICT services.</p> <p>Instead of seeking to generate Government revenues in this way, Digicel PNG suggests that more focus is applied to such resources available for efficient use at the lowest price possible. The country can then reap the economic and social benefits that will arise from better access to lower priced services throughout Papua New Guinea.</p>
<p>Part III – Operator Licensing</p>	<p>Consistent with our comments above, Digicel PNG submits that it would be useful to update this Part of the NICT Act to take into account changes to technology and services so that OTT services and other services that are supplied directly to consumers from outside of Papua New Guinea are subject to the same licensing and taxation requirements as services provided by domestic operators.</p>
<p>Section 130 – Declaration by Minister</p>	<p>As noted above, the Ministerial approval provisions contained in section 130 of the NICT Act provides an important check on NICTA’s decisions that have a fundamental impact on the operation of the ICT industry.</p> <p>As such we submit that it is inappropriate for there to be a deemed approval of a NICTA recommendation in the event that the Minister does not make a decision within 60 days of receipt of that recommendation. We therefore propose that section 130(5) of the Act be repealed.</p> <p>Digicel PNG further proposes that the Minister’s review and decision making process should be stayed in the event that NICTA’s recommendation to declare a service is the subject of a review by the ICT Appeals Panel.</p>
<p>Section 131 – Deemed Declarations and Mandated Inquiries</p>	<p>Digicel PNG considers that that this section of the NICT Act is now outdated or inappropriate (in relation to UAS funded facilities) and should be repealed.</p> <p>Insofar as it relates to UAS funded facilities, we would further note that the provision acts as a disincentive to bid for UAS Projects as the commercial uncertainty resulting</p>

	<p>from the deeming provision is likely in many cases to outweigh the benefit of receiving funding from the UAS Fund.</p>
Section 132 – Exempt Services	<p>Similarly, this section of the NICT Act is now outdated and can now be repealed.</p>
Part VII - Consumer Protection and Retail Pricing	<p>Consistent with Digicel PNG’s submissions earlier in this submission Digicel PNG believes that it is preferable for regulatory interventions to be focussed on wholesale markets and services that will allow retail competition to flourish.</p>
Section 160 - Retail Service Determination by Minister	<p>Consistent with our view in relation to section 130 of the NICT Act, we propose that the deeming provision in section 160(4) should be removed.</p> <p>Digicel PNG further proposes that the Minister’s review and decision making process should be stayed in the event that NICTA’s recommendation to declare a service is the subject of a review by the ICT Appeals Panel.</p>
Section 188 - Potential Implementation of Pre-Selection	<p>This section is now outdated and can now be repealed.</p>
Section 189 - Potential Implementation of Number Portability	<p>Digicel PNG does not have any “in principle” objection to the implementation of number portability in Papua New Guinea.</p> <p>However, in keeping with the technology neutral principles that are espoused in the NICT Act, any consideration of its introduction should require the inclusion of both fixed and mobile number portability.</p> <p>Similarly, any cost-benefit analysis of the merits of introducing number portability should take into account the significant synergies and consumer benefits that could arise from introducing fixed number portability at the same time as mobile number portability.</p>

E. Suggested Changes to the NICT Act

72. Consistent with our submissions above, Digicel suggests the following changes to the NICT Act that we consider will improve the operation of the NICT Act and reflect the changes that have occurred since it first came into effect.

Section	Suggested Amendment
4(1)	<p>Delete the definition of “International Arbitrator”</p> <p>Delete the definition of “Panel of Experts” and insert a new definition as follows:</p> <p style="padding-left: 40px;">““Panel of Experts” means the Panel of Experts constituted under Section 254A;”</p> <p>Insert a new definition immediately before the definition of “UAS Project” as follows:</p> <p style="padding-left: 40px;">““UAS Initiative” means an undertaking, consistent with the objective of the Universal Access and Service Fund, involving the exercise of facilities rights and/or the supply of ICT services, submitted to NICTA under Section 107(4) and may include an undertaking that delivers facilities or ICT services under a UAS Project;”</p>
29	Update references to Public Finances (Management) Act 1995
32	<p>Insert a new subsection (5) as follows:</p> <p style="padding-left: 40px;">“The Non-Tax Revenue Administration Act 2022 does not apply to or in relation to this Act.”</p>
36	<p>Repeal the existing Subsection (2)(a) and insert a new Subsection (2)(a) as follows:</p> <p style="padding-left: 40px;">“(2) Subject to Subsection (3), NICTA may allocate valuable State resources, in accordance with any procedures for the relevant allocation process as set out in the rules, subject to any regulations, but shall pay the proceeds of the relevant allocation process as follows –</p>

	<p>(a) NICTA may retain an amount from those proceeds equal to the aggregate of –</p> <ul style="list-style-type: none"> (i) the reasonable costs that NICTA incurred in undertaking that relevant allocation process; plus (ii) an amount equal to the standard charges that would have been recovered by NICTA for the allocation of the valuable State resource if NICTA had followed its standard allocation process; and” <p>Insert a new Subsection (3) as follows:</p> <p>“(2) When determining the relevant allocation process under Subsection (2), NICTA shall, to the greatest extent practicable, adhere to the general principles in Section 35(2).</p>
38	<p>Repeal the existing Subsection (1)(c) and insert a new Subsection (1)(c) as follows:</p> <p>“(c) publish on its website copies of the reports and statements prepared under Subsections (1)(b) and (3)(a).”</p> <p>Insert new Subsection (3) as follows:</p> <p>“(a) The Minister, in consultation with NICTA and the Departmental Head of the Department responsible for treasury matters, shall appoint an independent auditor for NICTA’s reports and financial statements prepared under Subsection (1), who shall provide an annual audited financial statement that shall be included in the reports published under Subsection (1)(b).</p> <p>(b) The Auditor General of Papua New Guinea may at his discretion audit NICTA from time to time.”</p>
92	<p>Repeal the existing Subsection (1) and insert a new Subsection (1) as follows:</p> <p>“(1) The UAS Board shall have six (6) members and be comprised as follows</p>

	<ul style="list-style-type: none"> (a) the Chairman of NICTA, ex officio, who is Chairman of the UAS Board; and (b) the Departmental Head of the Department responsible for communications and information, ex officio, who is Deputy Chairman of the UAS Board; and (c) a member to be appointed on the recommendation of the Departmental Head of the Department responsible for national planning; and (d) a member to be appointed on the recommendation of the Departmental Head of the Department responsible for financial management; and (e) a member drawn from the private sector appointed by the Head of State, acting on advice from NICTA, who can contribute meaningfully towards the fulfilment of the objective of the Universal Access and Service Fund; and (f) two non-voting members to be appointed on the recommendation of network licensees PROVIDED THAT, in case of two or more network licensees being unable to agree on two persons, the Registrar of the National Court shall nominate and recommend two persons from a list of persons nominated by each of the network licensees severally or jointly.”
92	<p>Insert a new Subsection (3) as follows:</p> <p>“(3) The members referred to in Subsection (1)(f)</p> <ul style="list-style-type: none"> (a) shall be appointed pursuant to a written instrument of appointment; and (b) serve for the term stated in the written instrument of appointment, such term being no more than two years; and (c) are eligible for reappointment for a further term or terms; and (d) are not eligible to vote on any matter before the UAS Board.”
107(1)	<p>Repeal the existing Subsection (1) and insert a new Subsection (1) as follows:</p> <p>“(1) Subject to Subsection (2) and Subsection (4), NICTA may levy charges on operator licensees for the Universal</p>

	Access and Service Fund, to be known as the "Universal Access and Service Levy"."
107(4)	<p>Repeal the existing Subsection (4) and insert a new Subsection (4) as follows:</p> <p>“(4) Upon receiving notification by NICTA of the amount owed as its Universal Access and Service Levy, an operator licensee shall either:</p> <p>(a) submit payment of the Universal Access and Service Levy to the Universal Access and Service Fund Trust Account; or</p> <p>(b) as an alternative to payment of the Universal Access and Service Levy, enter into a binding agreement with NICTA to deliver one or more UAS Initiatives that, together, have an aggregate value that is not less than the Universal Access and Service Levy that would otherwise be payable under Subsection (a).”</p>
109(1)	<p>Repeal the existing Subsection (1) and insert a new Subsection (1) as follows:</p> <p>“(1) NICTA shall develop and carry out a competitive selection process, in order to select a successful bidder for each UAS Project determined by the Minister under Section 108(5)(b) that is not otherwise delivered as a UAS Initiative under Section 107(4).”</p>
130	<p>Repeal the existing Subsection (5) and insert a new Subsection (5) as follows:</p> <p>“Notwithstanding Subsections 259(2) and 259(3), in the case of an application for a review under Part XIII of NICTA’s declaration recommendation, the decision of the Minister shall be stayed until the final decision of the ICT Appeals Panel has been made and notified in accordance with Section 261.”</p>
131	Repeal this Section in its entirety.
132	Repeal this Section in its entirety.

158	Replace the words “substantial degree of power” with the words “monopoly or an effective monopoly” wherever those words appear in this Section.
160	<p>Repeal the existing Subsection (4) and insert a new Subsection (4) as follows:</p> <p>“Notwithstanding Subsections 259(2) and 259(3), in the case of an application for a review under Part XIII of NICTA’s declaration recommendation, the sixty (60) day period and the decision of the Minister shall be stayed until the final decision of the ICT Appeals Panel has been made and notified in accordance with Section 261.”</p>
164	<p>Repeal the existing Subsection (c) and insert a new Subsection (c) as follows:</p> <p>“(c) provide a timely, responsive and flexible approach to meeting the needs of users of the spectrum that:</p> <ul style="list-style-type: none"> (i) minimises delay in its allocation; and (ii) ensures unused licensed spectrum is able to be reallocated to other users of spectrum.”
164	<p>Repeal the existing Subsection (e) and insert a new Subsection (e) as follows:</p> <p>“(e) provide an efficient, equitable and transparent system of charging for the use of spectrum in accordance with the principles specified in Section 35(2); and”</p>
188	Repeal this Section in its entirety.
189	Insert the words “and fixed number portability” after the phrase “mobile number portability” wherever that phrase appears in this Section.
255	<p>Immediately before Section 255, insert a new Section 254A as follows:</p> <p>“254A Panel of Experts</p> <p>(1) The Department responsible for communication and information (in this Section, “the Department”) shall,</p>

	<p>acting on advice from the Attorney-General and Chief Justice:</p> <ul style="list-style-type: none"> (a) establish a panel of experts who shall be available to act as members of an appeals panel constituted under Section 255; and (b) appoint a member of the Panel of Experts as its chairman (in this Section, “the chairman of the Panel of Experts”). <p>(2) The Department shall ensure:</p> <ul style="list-style-type: none"> (a) the Panel of Experts comprises at all times at least four persons who collectively have commercial, technical, economic and legal expertise in the field of communications; and (b) that at least one of those persons: <ul style="list-style-type: none"> (i) shall have international experience in resolving disputes in the context of the operation and administration of an economic regulatory regime; (ii) is not a resident of Papua New Guinea, and (iii) shall be known as an “International Arbitrator”. <p>(3) The Department may only appoint a person to the Panel of Experts if the person:</p> <ul style="list-style-type: none"> (a) is a person of integrity, independence of mind and good reputation; (b) has at least 10 years experience in the regulation of communications markets; (c) has experience in resolving disputes; (c) is not a member, officer, employee, agent, external adviser or consultant of NICTA, the Department or a licensee and has not been such a person for at least 12 months; and (d) would otherwise be eligible for appointment as a Member in accordance with Section 15. <p>(4) A member of the Panel of Experts shall be appointed for a term of office of three years and on the conditions determined by the Department and specified in the instrument of appointment and is eligible for reappointment for a further term or terms.</p>
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	<p>(5) The Department shall remove a person from the Panel of Experts if the person no longer meets the criteria for appointment under Subsection (3) or if requested by the person.</p> <p>(6) The Department shall act as the secretariat for the Panel of Experts and the ICT Appeals Panel and shall publish the membership of the Panel of Experts.”</p>
255	<p>Repeal the existing Subsection (1) and insert a new Subsection (1) as follows:</p> <p>“(1) Where an application for review is made under Section 258 the ICT Appeals Panel shall within seven (7) days of the date the application has been received be constituted</p> <p>(a) in respect of a decision specified in Subsection 256(c) and (d) by –</p> <p>(i) an International Arbitrator (as presiding member) and resident member, sitting together; or</p> <p>(ii) if the International Arbitrator determines that the dispute does not warrant two (2) members of the ICT Appeals Panel, by the International Arbitrator alone; or</p> <p>(b) in respect of any other decision, by any member or members of the Panel of Experts who either individually or collectively possess the requisite skills to hear and determine the dispute.”</p> <p>Repeal the existing Subsection (4) and insert a new Subsection (4) as follows:</p> <p>“(4) The member(s) of ICT Appeals Panel constituted under Subsection (1) shall be selected by the chairman of the ICT Appeals Panel in accordance with the requirements of this Section.</p>
271	<p>Repeal this Section and insert a new Section 271 as follows:</p> <p>“With respect to offences created by this Act or any mandatory instrument, NICTA may:</p> <p>(a) in consultation with the Police and the Public Prosecutor; and</p>

	(b) with the consent of the Public Prosecutor, carry out the prosecutions.”
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F. Conclusion

73. Digicel PNG reaffirms its view that this public consultation is particularly timely in the context of the changes to ICT technology and services, society, the geopolitical landscape and Papua New Guinea's own broader legislative framework. The pace of these changes has been rapid in recent times with the result that some parts of the NICT Act are outdated or out of step with what may be considered best practice today.
74. We look forward to continuing to discuss these issues with NICTA as the consultation progresses and welcome the opportunity to comment on the submissions of other stakeholders.