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National Information and Communications Technology Act, 2009 (National ICT Act, 2009)

NOTICE OF MAKING GUIDELINES UNDER THE NATIONAL ICT ACT, 2009

I, Charles S. Punaha, Chief Executive Officer of the National Information and Communications Technology Authority (also known as NICTA), by virtue of the powers conferred by Sections 9; 10 and 218 of the *National ICT Act, 2009* and all other powers me enabling, hereby give notice of the following Guideline that has been made by NICTA pursuant to the *National ICT Act, 2009*.

Introduction

These guidelines have been made by the National Information and Communications Technology Authority (NICTA) under Section 218 of the *National Information and Communications Technology Act 2009* (the "Act") to provide guidance to ICT licensees regarding their submission of written comments and documents to:

- any public consultation conducted by NICTA under Section 229 of the Act; and
- any public inquiry conducted by NICTA under Section 230 of the Act.

Pursuant to Section 218 of the Act, these guidelines apply to any of NICTA's public inquiries and public consultations. NICTA will apply the same arrangements and procedures, including in relation to consideration of claims for confidentiality, to the submissions by parties that are not ICT licensees (although alternative means of submission may be made available to accommodate individual members of the public).

1. Means of submission

1.1 Written comments and documents must be submitted via email to the appropriate email address, which will be:

- (a) consultation.submission@nicta.gov.pg for public consultations under Section 229 of the Act; and
- (b) inquiry.submission@nicta.gov.pg for public inquiries under Section 230 of the Act.

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1.2 Submissions should be in an electronic format that is text-searchable and allows a 'copy and paste' function.

1.3 NICTA prefers to receive submissions in:

(a) Adobe Portable Document Format (PDF) if the submission is expressed entirely in words and text;
or

(b) Microsoft Office File format (i.e. Microsoft Word, Microsoft Excel, or Microsoft Power Point).

1.4 NICTA staff may make alternative arrangements for the submission of written comments by members of the public (for example, to accommodate circumstances where they do not have access to computer or email facilities).

2. Observation and extension of submission deadlines

2.1 Submissions must be received by the specified deadline to ensure that those comments are taken into account by NICTA. NICTA may, at its discretion, decide not to consider a late submission or decide to give consideration to a late submission (for example, in circumstances where the timeframe precludes a full and timely analysis of the submission).

2.2 A respondent may request an extension of the specified deadline for submissions. Any such request must be submitted via email to the appropriate email address. A requested extension will apply only if NICTA grants the request and communicate the extended deadline to the requestor. If NICTA grants an extension of time, the extended deadline will be general and apply to all respondents and their submissions.

3. Acknowledging of receipt of submissions

3.1 NICTA staff will acknowledge receipt of all submissions via email. Any respondent that has not had its submission acknowledged by NICTA staff within 48 hours of their submission should contact the nominated NICTA staff member by telephone or email to draw the matter to the attention of NICTA staff. A submission for which receipt has not been acknowledged by NICTA staff may be taken not to have been formally received by NICTA.

4. Publication of submissions on NICTA's public register

4.1 Submissions will generally be treated as public documents and published on NICTA's public register in accordance with subsection 229(3) and clause 43(1)(k) of the Act unless the respondent has asserted a claim for confidentiality in relation to part(s) of or all of the submission and that the claim is accepted, in whole or in part, by NICTA pursuant to Guideline 5.

4.2 Submissions made on or before original deadline will not be published until such time as the final deadline has lapsed.

5. Treatment of claims of confidentiality

5.1 Claims for confidentiality over any written information submitted to NICTA as part of a public consultation or a public inquiry is governed by Section 44 and Section 237 of the Act. Under Section 44 of the Act, NICTA ultimately determines whether or not it will accept a claim for confidentiality and exclude from publication the information that is subject to that claim.

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- 5.2 A claim for confidentiality must be in writing and received at the same time, and in the same manner, as the submission to which the claim relates. The specific information that the claimant/respondent considers to be confidential should be clearly identified in accordance with Guideline 5.1. A blanket claim for confidentiality over the entirety of a submission should not be made unless all such information is truly regarded by the claimant/respondent as being confidential.
- 5.3 The specific information subject to the claim for confidentiality must genuinely be of a confidential nature and not otherwise publicly available. Statements of opinion are generally not considered confidential.
- 5.4 A claim for confidentiality must be accompanied with reasons why confidentiality is being sought. Where it is asserted that a specific direct harm or loss would be caused or arise to the commercial or other interests of the claimant/respondent, sufficient details must be provided as to the nature and extent of such harm or loss. If no justification is provided as to why the information should be designated as confidential information, then NICTA may conclude that it is not confidential and may publish the information on its public register.
- 5.5 A respondent may submit information that it considers confidential in one of two ways:
- (a) by way of a separate attachment to its submission that can be withheld from publication; or
 - (b) by submitting two versions of its submission, namely:
 - (i) a version in Microsoft Office File format for NICTA's reference; and
 - (ii) a public version in either Adobe PDF or Microsoft Office File format in which the confidential information is redacted. In any such redacted submission, the information or text for which confidentiality is being claimed should be replaced with black bars (for example: ) to enable readers to identify where information has been removed and how much information has been removed, and to retain the same formatting and page/paragraph numbering as the confidential version.
- 5.6 In response to a claim for confidentiality, NICTA staff will first determine whether the information, subject to the claim, is relevant to the matter under consultation or under inquiry. If it appears that it is not, NICTA staff may invite the claimant to withdraw that information and lodge a replacement submission.
- 5.7 If the information subject to the claim appears to be relevant, NICTA will determine whether the information is confidential. In making this determination, NICTA will adhere to the following principles:
- (a) Confidential information means all information of a party that is not available to the public (other than as a result of a disclosure directly or indirectly in breach of confidentiality obligations) and the disclosure of which is claimed by the party to be disadvantageous to its commercial and other interests. The information claimed to be confidential may be in any format, whether having been disclosed to NICTA orally, visually or in any tangible or electronic form or media and whether of a technical, business or other nature, including, without limitation, any information relating to business or marketing plans, operations, processes, intentions, financial projections, financial reports, technical plans, technical specifications, purchasing requirements or intentions, customers and business affairs, internal reports, marketing plans opportunities, product information, software, know-how, design, rights, trade secrets, or any information of a market sensitive nature, that has been identified as being proprietary and or confidential by the party in providing it to NICTA.

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- (b) Confidential information excludes information that is or becomes part of the public domain through no wrongful act or failure to act or breach of confidence on the part of any person to whom the information had been disclosed.
 - (c) Information that can only be gathered from the public domain at significant cost or effort is not considered to be information in the public domain.
- 5.8 If the information is confidential in accordance with the principles set out in the Guideline 5.7 above, NICTA will determine if “disclosure of the information is in the wider public interest” pursuant to Section 44(4) of the Act. In making this determination and in having due regard to the need to consider commercial interest of any person:
- (a) NICTA will recognise that there is a public interest in respecting the confidentiality of information provided to NICTA, albeit that there may be a competing public interest in holding open and transparent consultation or inquiry processes through the publication in full submissions that have been made to NICTA;
 - (b) NICTA will determine to what extent the wider public interest in holding open and transparent consultation or inquiry processes may be achieved without disclosing the confidential information, by:
 - (i) disclosing only aggregated information such that the confidential information cannot be inferred or estimated by another person using information available to that person; or
 - (ii) disclosing the confidential information only on a “need to know” basis in circumstances that retain the confidential character of the information, including by obtaining a written undertaking on confidentiality from the person to whom the information is disclosed; and
 - (c) NICTA will then determine whether the wider public interest in holding open and transparent consultation or inquiry process (whether or not aggregated, and whether or not on a “need to know” basis), outweighs the wider public interest in upholding the confidentiality of the information provided to NICTA.
- 5.9 Where NICTA determines that it is necessary to disclose confidential information on a “need to know” basis subject to confidentiality restrictions, NICTA will first:
- (a) establish a register of interested parties and invite members of the public (or, in NICTA’s discretion, those members of the public who have made a submission in relation to the matters under consultation or inquiry) to apply to be registered as an interested party to the consultation or inquiry, and publish the register; and
 - (b) require each interested party to provide a written undertaking to NICTA to comply with any directions that NICTA may give from time to time in connection with the confidentiality of information disclosed to a recipient, being the interested party, and as appropriate its employees, agents, external consultants and external advisors.

Such directions may entail, without limitation, limiting disclosure of information considered to be highly sensitive only to the interested party’s external advisers, and or requiring each recipient to provide specific confidentiality undertakings relevant to the confidential information in a form acceptable to NICTA.

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- 5.10 In determining whether the wider public interest favours keeping information confidential or its disclosure, NICTA will take account of the commercial sensitivity of the claimed confidential information and the private harm that would be suffered if the information is disclosed, and shall have particular regard to the comments of the party whose information it is in this matter.
- 5.11 Where NICTA determines that disclosure of confidential information would be in the wider public interest NICTA staff will inform the claimant/respondent of NICTA's decision(s) and ask the claimant if it therefore wishes to withdraw the information subject to the denied claim. If the claimant/respondent requests a withdrawal, the information subject to the denied claim will be returned to the licensee and any decision on the matter under consultation or inquiry will be made without any consideration being given to the returned material. (In such a case, if the claimant submitted a redacted version of its submission, then NICTA will consider only the redacted version).

6. Withdrawal of submissions

- 6.1 A respondent may withdraw a submission that it has made to a consultation or inquiry:
- (a) at the invitation of NICTA staff as per Guideline (5); or
 - (b) at any time prior to the specified deadline for receipt of submissions.
- 6.2 Unless NICTA staff have specifically invited a respondent to withdraw all or parts of its submission, a request for withdrawal of all or part of a submission must be made in writing and communicated to NICTA staff via email to the same email address to which the submission was sent.
- 6.3 If a licensee requests the withdrawal only of part of its submission, and that particular part of the submission cannot in the opinion of NICTA staff be separated and withdrawn independently from the rest of the submission (for example, because the submission is in a format that cannot be edited by NICTA staff), then the only option available to the respondent is the withdraw of submission in its entirety.
- 6.4 Requests for extensions of time will be dealt with pursuant to Guideline 2.2. If a respondent requests the withdrawal of all or part of its submission when it has not been invited to do so by NICTA staff, the respondent must submit any replacement submission by the original submission deadline (or the extended deadline if such applies at the time the request is made) in order for that replacement submission to be taken into consideration by NICTA.

These Determinations take effect from 22nd October, 2014.

Issued this 28th day of October, 2014.

C.S. PUNAHA,
Chief Executive Officer.