



INDEPENDENT STATE OF PAPUA NEW GUINEA

*National Information and Communication Technology Act 2009, Part XIII*

*Independent Consumer and Competition Commission Act 2002, Part V*

Date: ..... **14 April 2020** .....

File No.: ..... **01** ..... of ..... **2020** .....

**DECISION OF ICT APPEALS PANEL**

PURSUANT TO SECTION 256(c) OF  
THE *NICT ACT 2009*:

APPLICATION FOR REVIEW OF  
NATIONAL INFORMATION AND  
COMMUNICATION TECHNOLOGY  
AUTHORITY (NICTA) DECISION OR  
DETERMINATION OF; SERVICE-  
SPECIFIC PRICING PRINCIPLES  
(SUBMARINE CABLE SERVICES)  
DETERMINATION 2019.

BY PNG DATACO LIMITED, APPLICANT

I; **Mark Pupaka**, chairman of the Panel of Experts, appointed pursuant to Part V of the *Independent Consumer and Competition Commissioner Act 2002* and consistent with Part XIII of the *National Information and Communication Technology Act 2009*, hereby notify that;

1. the application for review of the decision of the National Information and Communication Technology Authority (NICTA) by PNG DataCo Limited (DataCo) dated 13 January 2020 referred to as "NICTA'S Determination on Service-Specific Pricing Principles (Submarine Cable Services) Determination 2019" has been duly completed.
2. the ICT Appeals Panel constituted on 14 February 2020 comprised of; **Christopher Hanlon** as the International Arbitrator, and **Alphonse Malipu**, as the resident member.
3. the ICT Appeals Panel decision relating to the matter is dated **11 April 2020**, and now available for publishing and for public use.

Dated this ..... **14** ..... day of ... **April** ..... of ..... **2020** .....

**MARK PUPAKA**  
CHAIR (PANEL OF EXPERTS)

**Decision of the ICT Appeals Panel in respect of an application for review by PNG DataCo Ltd of the *Service Specific Pricing Principles (Submarine Cable Services) Determination 2019* made by the National Information and Communications Technology Authority and published in the National Gazette on 19 December 2019.**

**INTRODUCTION**

This is the Record of Decision of the ICT Appeals Panel in respect of an application for review by PNG DataCo Ltd ("DataCo") of the *Service Specific Pricing Principles (Submarine Cable Services) Determination 2019* ("the Determination") made by the National Information and Communications Technology Authority (NICTA) under section 135 the *National Information and Communications Technology Authority Act 2009* ("the NICTA Act") and published in the National Gazette on 19 December 2019.

The application for review is made by DataCo under section 258 of the NICTA Act.

DataCo's application for review was received by the ICT Appeals Panel Secretariat on 13 January 2020 and resulted in the establishment of a Panel to undertake a review of the Determination in accordance with the requirements of the NICTA Act.

This Record of Decision is set out as follows:

- Introduction
- The ICT Appeals Panel including its membership and functions in respect of this application for review
- The Legislative Framework
- The declaration of certain wholesale services
- The application for review including details of the original applicant
- The Review Process
- The Notice and Directions made by the Panel
- The Panel's consideration of the review application
- The submissions received from other parties
- The outcome of the Panel's consideration of the application for review

**THE ICT APPEALS PANEL INCLUDING ITS MEMBERSHIP AND FUNCTIONS IN RESPECT OF THIS APPLICATION FOR REVIEW**

As a result of the application for review lodged by DataCo, the Chairman of the ICT Panel of Experts, Mr Mark Pupaka, appointed Mr Alphonse Malipu, a resident member of the ICT Panel of Experts and

Mr Christopher Hanlon, an international member of the ICT Panel of Experts to undertake the review.

The appointment by Mr Pupaka was made pursuant to section 256(c) of the NICTA Act and given effect to by way of an instrument of appointment signed by Mr Pupaka on 14 January 2020.

Section 260(1) of the NICTA Act relevantly provides that “a review by the ICT Appeals Panel shall be by way of rehearing...”

This is limited to being conducted solely on the basis of documentary information and views that were before NICTA when it made its determination. This limitation is subject to section 260(2) which provides that the Panel may grant leave to a party to the review to introduce additional material or evidence that was not available to NICTA but only where the material or evidence updates the information before NICTA.

The Panel is approaching its task of proceeding by way of rehearing in the following manner. Our view is that a review by way of rehearing permits the Panel to make the decision which it reasonably believes that the original decision-maker ought to have made. This goes beyond merely considering whether the original decision-maker, NICTA, had a reasonable basis for making the decision published in the 17 December 2019 determination and, if it did, affirming that decision. Proceeding by way of rehearing means that even if we determine that NICTA had a reasonable basis for making its decision it is open to the Panel, if we consider that a better decision could have and should have been made, to make a new decision and substitute it for the original decision.

This is so unless the Panel decides that the review application is not valid or is otherwise without merit (effectively dismissing the application) or the Panel decides to set aside the decision and remit it to NICTA together with any directions we think appropriate.

Accordingly, the two step process the Panel undertook in evaluating the submissions it received was, first, to ensure that submissions deal with the material and evidence that was before NICTA (the “original material”) and, second, to ensure that any additional material or evidence included in submissions dealt with the same matters and does no more than update the original material.

Section 259(4) provides that the Panel has sixty days to conduct its review and may, where it so specifies, extend that period by up to 30 days. The Panel specifies that it requires the additional time provided for in section 259(4). Having regard to the interpretation rules in relation to reckoning of time, the date by which the Panel is required to make its decision is 14 April 2020.

## **THE LEGISLATIVE FRAMEWORK**

The declaration by the Minister for Communications and Information Technology of certain wholesale services as declared services; the Determination by NICTA; the application for review by DataCo; the Notice and Directions made by the ICT Appeals Panel; and the Panel’s review decision are all made under the NICTA Act.

The NICTA Act is the principal piece of legislation for the regulation of the provision of ICT services in Papua New Guinea. Among other things, it sets out the objective of the legislation and the applicable regulatory principles, processes for declaring certain wholesale services and for making pricing principles determinations and for reviewing certain decisions.

Relevantly for this decision, the Panel has set out a synopsis of the objective and regulatory principles and has set out in full the parts of the NICTA Act dealing with declarations and determinations and the review process.

#### **THE OBJECTIVE OF THE NICTA ACT**

The objective of the NICTA Act, see section 2, is to ensure that the information and communications technology (ICT) industry contributes to the greatest extent possible to the long-term economic and social development of Papua New Guinea including by:

- providing a regulatory framework (consistent with the regulatory principles set out in the NICTA Act) that promotes, first, the long-term interests of Papua New Guinea and its people and, second, the efficiency and competitiveness of the domestic information and communications technology (ICT) industry; and
- ensuring that socially important ICT services 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
- promoting the development of an efficient and competitive domestic ICT industry that is responsive to the needs of the nation and its people; and
- promoting and maintaining fair and efficient market conduct and competitiveness between persons engaged in commercial activities connected with the ICT industry, including by assisting the Independent Competition and Consumer Commission to achieve this; and
- promoting the development of the technical capabilities and skills of the domestic ICT industry; and
- providing appropriate community safeguards in relation to ICT activities and to regulate adequately participants in sections of the domestic ICT industry; and
- encouraging, facilitating and promoting industry self-regulation in the ICT industry; and
- encouraging, facilitating and promoting sustainable investment in, and the establishment, development and expansion of, the domestic ICT industry, including via the exercise of facilities rights.

#### **THE REGULATORY PRINCIPLES OF THE NICTA ACT**

To achieve the objective of the NICTA Act set out above the NICTA Act, section 3, also sets out regulatory principles to govern the manner in which the ICT industry in Papua New Guinea is to be regulated. These regulatory principles provide that the domestic ICT industry should be regulated in a manner that recognises the effectiveness of market forces in promoting consumer welfare, where markets are competitive, and, where markets are not competitive, by using appropriate anticipatory regulatory measures to promote and maintain effective and sustainable competition.

The Act also provides that regulatory measures should be:

- proportionate and not unduly burdensome; and

- based on sound economic principles and technology neutral; and
- administered in a transparent manner and appropriate public consultation, with published explanations and guidelines; and
- implemented within reasonable timeframes that recognise the need for ICT licensees to respond to dynamically changing market forces and the potential consumer detriment from protracted delay; and
- non-discriminatory; and
- the subject of consultation with relevant regulatory authorities in Papua New Guinea, where appropriate, to facilitate the development of a consistent regulatory policy in the public interest.

Part VI of the NICTA Act deals with interconnection and wholesale access including the manner in which the Minister declares certain services and the process to be undertaken by NICTA to make a determination.

NICTA may recommend to the Minister that certain wholesale services should be declared services. NICTA's recommendation must be based on the application of declaration criteria. The Minister may accept or reject NICTA's recommendation.

Access providers who supply declared services are required to comply with non-discrimination obligations in relation to those services unless an access exemption operates in the provider's favour.

The terms and conditions on which access providers are required to comply with the non-discrimination obligations are subject to agreement. Neither the access provider nor a related company is permitted to prevent or hinder the fulfilment of a non-discrimination obligation.

Access seekers are subject to any-to-any connectivity obligations and are required to obtain certain designated interconnection services from access providers.

Where agreement between access providers and access seekers cannot be reached, and the access provider has given a Reference Interconnection Offer (RIO), which is dealt with in section 141 of the NICTA Act, the terms and conditions of access are as set out in the RIO. If agreement cannot be reached and no RIO is in operation, the terms and conditions are to be determined by NICTA acting as an arbitrator.

NICTA may conduct an arbitration of a dispute about access to declared services. Any determination made by NICTA when conducting an arbitration must not be inconsistent with the non-discrimination obligations or a RIO.

Section 124 sets out the objectives of this Part and Part VII of the NICTA Act.

The objective of Part VI and Part VII of the NICTA Act are to promote effective competition in domestic markets for ICT services (the "competition objective"), subject to promoting the economically efficient use of, and the economically efficient investment in, ICT facilities (the "efficiency objective").

In determining the extent to which a particular thing is likely to promote the efficiency objective, the following matters must be considered:

- whether it is technically feasible for the relevant ICT services to be supplied, having regard to the technology available or likely to become available; and the reasonableness of the costs involved; and the effect of supplying the ICT services on the integrity, operation or performance of other ICT services or facilities; and
- the legitimate commercial interests of the access provider in supplying the ICT services; and
- the incentives for investment in ICT facilities by which the ICT services may be supplied.

The relevant sections of Part VI are reproduced here:

**Section 126 REASONABLENESS — TERMS AND CONDITIONS.**

For the purposes of this Part, in determining whether particular terms and conditions are "reasonable", regard shall be had (without limitation) to the following matters –

- (a) the extent to which the terms and conditions are likely to further the achievement of the objective of this Part as set out in Section 124; and
- (b) the legitimate business interests of the operator licensees concerned, and the access provider's investment in facilities used to supply the declared service concerned; and
- (c) the interests of any persons who have rights to use the declared service concerned; and
- (d) the extent to which the terms and conditions are consistent with the general pricing principles and any relevant service-specific pricing principles; and
- (e) the operational and technical requirements necessary for the safe and reliable operation of an ICT service or a facility.

...

**Section 130 DECLARATION BY MINISTER.**

(1) On receiving a declaration recommendation from NICTA, the Minister shall either –

- (a) if the declaration recommendation is to declare a wholesale service, either –
  - (i) accept the declaration recommendation and declare the wholesale service; or
  - (ii) reject the declaration recommendation and not declare the wholesale service; or
- (b) if the declaration recommendation is to renew, vary or revoke an existing declaration, either –
  - (i) accept the declaration recommendation and renew, vary or revoke the existing declaration as the case may be; or
  - (ii) reject the declaration recommendation and not renew, vary or revoke the existing declaration.



(2) In making the decision under Subsection (1), the Minister -

(a) shall have regard to the declaration criteria and the declaration recommendation, including any report under Section 129; and

(b) may have regard to such other matters as the Minister considers are relevant, provided that the Minister identifies those other matters in the Minister's published decision.

(3) If the Minister accepts the declaration recommendation to -

(a) declare a wholesale service or renew an existing declaration, the declaration must be published in the National Gazette on the particular terms set out in NICTA's report; or

(b) amend an existing declaration, the amended declaration must be published in the National Gazette on the terms set out in NICTA's report; or

(c) revoke an existing declaration, the revocation must be published in the National Gazette; and

(d) the Minister shall notify NICTA of his decision.

(4) If the Minister has not made a decision under Subsection (1) within thirty (30) days after receiving the declaration recommendation, NICTA shall confirm with the Minister the timing of his decision.

(5) If the Minister does not, within sixty (60) days after receiving the declaration recommendation make a decision to accept or reject the declaration recommendation, then the Minister is deemed, at the end of that sixty (60) day period, to have decided to accept that recommendation and Subsection (3) applies.

(6) A decision by the Minister to accept a declaration recommendation under Subsections (3) or (5) has effect from -

(a) the date of its publication in the National Gazette; or

(b) such later date as is specified in the terms of the declaration.

(7) If the Minister rejects NICTA's recommendation, the Minister shall publish reasons for the rejection.

...

#### **Section 134 GENERAL PRICING PRINCIPLES.**

(1) The "general pricing principles" are that the price of access to a declared service should promote the achievement of the objective of this Part as set out in Section 124 and, in particular, that the price of access to -

(a) that declared service should -

(i) be set so as to generate expected revenue from that declared service that is sufficient to meet the efficient costs of providing access to that declared service; and

(ii) include a reasonable return on investment, over the economic life of the assets employed, commensurate with the regulatory and commercial risks involved, this principle is known as the "cost recovery principle"; and

(b) a declared service that is a resale service should be set by –

(i) RMAC, where this results in pricing that is consistent with the cost recovery principle; or

(ii) cost-based pricing, if RMAC would result in pricing that is insufficient to meet the cost recovery principle; and

(c) a declared service that is not a resale service should be subject to cost-based pricing; and

(d) a declared service, where the access provider is required to extend or enhance to the capability of a facility in order to supply the declared service, should –

(i) be set so as to generate expected revenue in respect of that extension or enhancement that is sufficient to meet the reasonably anticipated costs of that extension or enhancement in the circumstances; and

(ii) include a reasonable return on investment, commensurate with the regulatory and commercial risks involved; and to avoid doubt, this may require the access seeker to bear up to 100% of the actual cost of any such extension or enhancement.

(2) For the purposes of Subsection (1), the following words have the following meanings – "cost-based pricing" means pricing based on the cost recovery principle in which NICTA has regard to the following factors –

(a) the application of the cost recovery principle; and

(b) the need for the pricing to make a fair and reasonable contribution to the access provider's common costs; and

(c) the need for the recovery of the reasonable costs, incurred in the provision of access and interconnection by the access provider, that would not have been otherwise incurred but for the requirement to provide such access or interconnection; and

(d) the availability and capacity of the facilities operated by the access provider and the timeframe reasonably required to provide access to additional capacity; and

(e) any other factors that NICTA considers relevant, to the extent that such factors are consistent with the cost-recovery principle and Subsections (a) to (d) of this definition.

"efficient costs" include the direct and indirectly attributable capital, operating and maintenance costs actually incurred by the access provider in providing the declared service to itself and access seekers (including a reasonable contribution to any common costs),



unless NICTA determines that such costs are inefficient having regard to the efficiency objective and any evidence before it.

"RMAC" means a "retail minus avoidable cost" pricing methodology in which NICTA has regard to the following factors –

(a) where the access provider offers the benchmark retail service at more than one price point, the starting retail price should be calculated as the weighted average of the retail price points for that benchmark retail service, where the weights are based on the number of units sold by the access provider; and

(b) the avoided costs deducted from that starting retail price should reflect the costs that the access provider would reasonably avoid by not retailing that benchmark retail service; and

(c) any other factors that NICTA considers relevant, to the extent that such factors are consistent with the cost-recovery principle, the efficiency objective, and Subsections (a) and (b) of this definition.

(3) Any provision of the following instruments has no effect to the extent it is inconsistent with the general pricing principles –

(a) any service-specific pricing principles; and

(b) any model terms; and

(c) any access exemption; and

(d) any RIO.

#### **Section 135 SERVICE-SPECIFIC PRICING PRINCIPLES.**

(1) NICTA shall, in writing, determine principles relating to the price of access to a particular declared service and publish that determination on its website for that declared service, to be known as "service-specific pricing principles".

(2) The service-specific pricing principles may contain price related terms and conditions (whether relating to a price or the method of ascertaining a price) and non-price terms and conditions relating to access to the declared service.

(3) NICTA shall make service-specific pricing principles for a declared service within six (6) months after the Minister declares a wholesale service to be a declared service. NICTA may amend any existing service-specific pricing principles at any time.

(4) Before making, amending or revoking any service-specific pricing principles, NICTA shall -

(a) publish a draft of the relevant determination, amended determination or revocation decision and provide the public with at least four (4) weeks to make submissions to NICTA; and

(b) consider any submissions that are received within this time limit.

(5) Unless sooner revoked, any service-specific pricing principles cease to be in force on the date of expiry of the declared service to which they relate.

(6) NICTA shall have regard to any service-specific pricing principles for a declared service if it is required to arbitrate an access dispute under this Part in relation to that declared service. However, this Section and any determination under this Section does not limit NICTA's powers with respect to accepting a RIO.

(7) NICTA shall ensure that any service specific pricing principles are "reasonable" within the meaning of Section 126.

**Section 136 NON-DISCRIMINATION OBLIGATIONS.**

(1) This Section sets out the "non-discrimination obligations".

(2) For the purposes of this Section, if an operator licensee supplies declared services, whether to itself or to other persons –

(a) the operator licensee is an "access provider"; and

(b) the declared services are "active declared services".

(3) An access provider shall, if requested to do so by an access seeker –

(a) supply an active declared service to the access seeker in order that the access seeker can provide retail services; and

(b) take all reasonable steps to ensure that the technical and operational quality of the active declared service supplied to the access seeker is equivalent to that which the access provider provides to itself; and

(c) take all reasonable steps to ensure that the access seeker receives, in relation to the active declared service supplied to the access seeker –

(i) fault detection, handling and rectification; and

(ii) ordering and provisioning, of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself.

(4) Subsection (3)(a) does not impose an obligation to the extent (if any) to which the imposition of the obligation would have any of the following effects –

(a) preventing an operator licensee who already has a contractual right of access to the declared service from obtaining a sufficient amount of the declared service to be able to meet the operator licensee's reasonably anticipated requirements, measured at the time when the request was made; or

(b) preventing the access provider from obtaining a sufficient amount of the declared service to be able to meet the access provider's reasonably anticipated requirements, measured at the time when the request was made.

(5) If an access provider owns or controls any facilities then the access provider shall, if requested to do so by an access seeker –

(a) permit interconnection of those facilities with the facilities of the access seeker for the purpose of enabling the access seeker to be supplied with active declared services in order that the access seeker can provide retail services; and

(b) take all reasonable steps to ensure that –

(i) the technical and operational quality and timing of that interconnection is equivalent to that which the access provider provides to itself; and

(ii) the interconnection complies with any applicable industry code or industry standard; and

(iii) that access seeker receives, in relation to that interconnection, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself.

(6) If an access seeker uses active declared services supplied by an access provider in accordance with Subsection (3), the access provider shall (in connection with matters associated with, or incidental to, the supply of those active declared services), if requested to do so by the access seeker, give the access seeker such billing information (at such times or intervals, containing such particulars, and in such a manner and form as is specified in the regulations) as is reasonably required to enable the access seeker to supply retail services.

(7) If an access provider supplies an active declared service by means of conditional access customer equipment, the access provider shall, if requested to do so by an access seeker who has made a request referred to in Subsection (3), supply to the access seeker any service that is necessary to enable the access seeker to supply retail services by means of the active declared service using that conditional access customer equipment.

(8) This Section does not impose an obligation on an access provider if there are reasonable grounds to believe that –

(a) the access seeker would fail, to a material extent, to comply with the terms and conditions on which the access provider complies, or on which the access provider is reasonably likely to comply, with that obligation; or

(b) the access seeker would fail, in connection with that obligation, to prevent dangerous conduct.

(9) Examples of grounds for the belief in Subsection (8)(a) include –

(a) evidence that the access seeker is not creditworthy; or

(b) repeated failures by the access seeker to comply with the terms and conditions on which the same or similar access has been provided (whether or not by the access provider).

## THE REVIEW PROCESS

Part XIII of the NICTA Act sets out the process to make a review application to the ICT Appeals Panel and the procedure to be adopted in conducting such a review.

Part XIII is set out here:

**PART XIII. — APPEALS.**

***Division 1. — Simplified Outline.***

**Section 254 SIMPLIFIED OUTLINE.**

The following is a simplified outline of this Part -

(a) Certain decisions of NICTA may be reviewed by the ICT Appeals Panel. The ICT Appeals Panel is constituted from members of the Panel of Experts established under the ICC Act.

(b) The ICT Appeals Panel shall be comprised of single member who will be an International Arbitrator or a resident member, depending on the matter the subject of the application for review. The International Arbitrator must be a person with international experience in the operation and administration of an economic regulatory regime and a non-resident of Papua New Guinea.

(c) The International Arbitrator may determine that certain applications warrant that the ICT Appeals Panel should be constituted by two members, the International Arbitrator and a resident member.

(d) The review provides a rehearing of the decision of NICTA with a streamlined process which precludes introduction of new evidence and requires decisions to be handed down within a prescribed time period.

(e) No actions may be taken in Court from a decision of NICTA until the ICT Appeals Panel process is first exhausted. Judicial review is only available after a person has first exhausted all other remedies provided under this Act.

***Division 2. — ICT Appeals Panel.***

**Section 255 ICT APPEALS PANEL.**

(1) Where an application for review is made under Section 258 the ICT Appeals Panel shall be constituted -

(a) in respect of a decision specified in Subsection 256(c) and (d) by -

(i) the International Arbitrator (as presiding member) and resident member, sitting

together; or

(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

(b) in respect of any other decision, by the resident member alone.

(2) In determining whether the dispute does not warrant two (2) members of the ICT Appeals Panel, the International Arbitrator shall have regard to –

(a) the desirability of increasing knowledge and expertise of Papua New Guinea citizens in the operation and administration of an economic regulatory regime by including the resident member; and

(b) whether the incremental cost of involving the resident member is appropriate if the dispute is minor or of minimal complexity.

(3) The ICT Appeals Panel shall immediately notify the applicant of the person(s) who constitute the ICT Appeals Panel. The date of that notification will be the date the ICT Appeals Panel is constituted.

(4) If a resident member is required to sit on the ICT Appeals Panel, the resident member shall be the person selected by the chairman of the Panel of Experts as the resident member from the current Panel of Experts.

#### **Section 256 REVIEW BY THE ICT APPEALS PANEL.**

An application may be made to the ICT Appeals Panel for review of the following decisions of NICTA

–

(a) in respect of an individual licence –

(i) to make or vary rules setting out terms and conditions under Section 55; or

(ii) to refuse an application under Section 56; or

(iii) to refuse to renew under Section 57; or (iv) to vary terms and conditions under Section 58; or

(v) to suspend or revoke under Section 60; or

(b) in respect of a class licence –

- (i) to make or vary rules setting out terms and conditions under Section 63; or
- (ii) to refuse to register under Section 65; or
- (iii) to deregister under Section 66; or

(c) in respect of wholesale services –

- (i) to make or not to make a recommendation under Section 129; or
- (ii) to make, amend or revoke a determination under Section 133; or
- (iii) to make, amend or revoke a determination under Section 135; or
- (iv) to grant (including on any conditions) or to decline to grant an access exemption under Section 139; or
- (v) to accept or reject a Reference Interconnect Offer under Section 142, including if such acceptance is deemed; or
- (vi) a final determination under Section 147 (including in a dispute notified under Sections 87 or 186); or

(d) in respect of a retail service determination, to make or not to make a recommendation under Section 159; or

(e) in respect of a radiocommunications licence –

- (i) to refuse an application under Section 171; or
- (ii) to vary, suspend or cancel under Section 171; or

(f) in respect of a cabling licence –

- (i) to refuse an application under Section 201; or



(ii) to vary the terms and conditions under Section 202; or

(iii) to cancel under Section 207; or

(g) to issue a desist notice under Section 280; or

(h) any other decisions of NICTA made pursuant to regulations that are prescribed in the regulations to be subject to review by the ICT Appeals Panel.

**Section 257 STANDING.**

(1) A person whose interests are affected by a decision of NICTA of a kind specified in Section 256, may bring an application for review of the decision to the ICT Appeals Panel.

(2) The Minister may intervene, personally or by counsel or other representative, in a review under this Part for the purpose of introducing evidence, or making submissions, on any question relevant to the public interest.

(3) If the ICT Appeals Panel is satisfied that a person applying under Subsection (1) has a sufficient interest, the ICT Appeals Panel shall review the decision.

**Section 258 APPLICATION FOR REVIEW.**

(1) An application for review of a decision of NICTA shall –

(a) be in writing; and

(b) be accompanied by –

(i) where the applicant is an individual, a bank cheque in the amount of K500; and

(ii) where the applicant is a body corporate, a bank cheque in the amount of K5,000;

(c) set out the decision or part of the decision to which the application relates; and

(d) set out in detail the grounds on which the applicant seeks review and the decision sought on the review; and

(e) be lodged with the ICT Appeals Panel within twenty (20) days after written notice of the decision is given to the applicant, or in the case of any deemed decision within ten (10) days after the decision is deemed to have been made, or such longer period as the Appeals Panel

as constituted under Section 255 may allow; and

(f) be provided to any other person directly affected by the application.

(2) The Chairman of the Panel of Experts shall –

(a) organize for the ICT Appeals Panel to be constituted under section 255; and

(b) for the application fee to be offset against the costs of the ICT Appeals Panel.

**Section 259 PROCEDURE.**

(1) The ICT Appeals Panel shall –

(a) give a copy of the application to NICTA and to any other person directly affected by the application; and

(b) invite them to join as a party to the review and make submissions on the matter the subject of the review in a manner within the period specified by the ICT Appeals Panel; and

(c) subject to Section 260, invite all parties (including the applicant) to make initial submissions on the matter the subject of the review within the period specified by the ICT Appeals Panel, accompanied by any documentary information, additional material or evidence, as permitted by Section 260, that they consider should be taken into account by the ICT Appeals Panel in the review; and

(d) ensure that all parties have an equivalent time to make initial submissions; and (e) ensure that each party has an opportunity to review and respond to any initial submissions made by any other party.

(2) The ICT Appeals Panel may stay the operation of the decision or recommendation of NICTA to which the application relates.

(3) If a decision of NICTA is stayed under Subsection (2) –

(a) the ICT Appeals Panel shall cause notice of the stay of the decision –

(i) to be given to NICTA; and

(ii) to be published in the National Gazette.

(b) NICTA shall publish the notice of the stay of the decision on its public register.

(4) A review shall be decided within sixty (60) days of the ICT Appeals Panel being constituted under Section 255 or such longer period, not exceeding thirty (30) days, as the ICT Appeals Panel specifies.

(5) If the ICT Appeals Panel fails to decide a review within the total period permitted by Subsection (4) the applicant may apply to the National Court for an order that the ICT Appeals Panel decide the review.

(6) Where two (2) members of the ICT Appeals Panel have been appointed, the members shall attempt to reach a consensus decision failing which the decision of the International Arbitrator shall be the decision of the ICT Appeals Panel on the application for review.

#### **Section 260 NATURE OF THE REVIEW.**

(1) A review by the ICT Appeals Panel shall be by way of rehearing and, subject to Subsection (2), must be conducted solely on the basis of the documentary information and views that were before NICTA when it made its determination.

(2) The ICT Appeals Panel may grant leave to a party to introduce additional material or evidence that was not available to NICTA but only by way of material or evidence that updates the information before NICTA with new facts up until the date of the ICT Appeals Panel hearing.

(3) The ICT Appeals Panel shall not be bound by the rules of evidence and may adopt such procedures it sees fit.

#### **Section 261 DECISION OF THE ICT APPEALS PANEL.**

(1) After considering the application, the ICT Appeals Panel may either –

(a) affirm or vary the original decision or any part thereof; or

(b) set aside the original decision and return the matter to NICTA with such directions as the ICT Appeals Panel considers appropriate.

(2) Where the ICT Appeals Panel returns the matter to NICTA under Subsection (1)(b), NICTA shall make a fresh decision in accordance with the ICT Appeals Panel's directions, including any directions in relation to the retrospective effect of the fresh decision to be made.

(3) In making its decision, the ICT Appeals Panel is to have regard to the desirability for consistency with previous decisions of the ICT Appeals Panel.

(4) The ICT Appeals Panel may make interim or final orders, including any other order it thinks fit to make. An order of the ICT Appeals Panel must be complied with by any person to whom it is directed in accordance with its terms.

(5) Subject to Section 263, any decision by the ICT Appeals Panel is final and binding on the parties to the appeal and is not subject to further appeal.

(6) The ICT Appeals Panel shall give the parties written notice of its decision and the reasons for the decision.

(7) The costs of the ICT Appeals Panel in a review of a decision of NICTA referred to in Section 256 shall be borne by the parties to the review, as determined by the ICT Appeals Panel.

#### **Section 262 PUBLICATION.**

(1) Subject to Subsection (2), NICTA shall publish any decision of the ICT Appeals Panel under Section 259 and the reasons for the decision and shall endeavour to do so by removing any information required by Subsection (2) not to be disclosed.

(2) NICTA shall not publish any information or any part of any information disclosed to it if the publication would –

(a) disclose a matter it determines to be of a confidential character; or

(b) involve the unreasonable disclosure of personal information about any individual.

#### **Section 263 APPLICATION TO THE NATIONAL COURT.**

(1) A person whose interests are affected by a decision or other action of NICTA, the ICT Appeals Panel or the Minister under this Act or a mandatory instrument may apply to the National Court only on a question of law.

(2) If a person applies to the National Court under Subsection (1) in respect of a decision of the ICT Appeals Panel, the Court shall not, unless it is satisfied that there are special or exceptional circumstances, make any orders staying or otherwise affecting the operation or implementation of the decision pending the finalisation of the application.

(3) A person shall not apply to the National Court under Subsection (1) unless that person has first exhausted all other remedies provided under this Act.

#### **THE DECLARATION OF CERTAIN WHOLESALE SERVICES**

As noted above, the Minister for Communications and Information Technology (“the Minister”) may declare specified wholesale services to be declared services.

On 18 February 2019, the Minister relevantly declared each of the following services under section 130 of the NICTA Act:

- The international submarine cable transmission capacity service;
- The international submarine cable transmission gateway access service; and
- The international submarine cable transmission duct access service.

Other services were also declared at the same time by the Minister.

The declaration of services was published in the National Gazette.

The effect of the declaration by the Minister was that pursuant to section 135 of the NICTA Act, NICTA had 6 months from the date of declaration of the services to publish service specific pricing principles.

In its Discussion Paper, issued on 3 July 2019, NICTA noted at paragraph 1.1.2 that it was required to determine the service specific pricing principles by 18 August 2019.

In this case NICTA did not publish its determination regarding those pricing principles until 17 December 2019. The date of determination was significantly after the 6 month deadline provided for in the NICTA Act. This is a matter to which we will return later in this decision.

#### **THE APPLICATION FOR REVIEW INCLUDING DETAILS OF THE ORIGINAL APPLICANT**

The application for review in this matter was lodged by DataCo. DataCo is a PNG public company located at Level 1, Workples Building, Savannah Heights, Waigani, NCD.

DataCo is a subsidiary of Kumul Telikom Holdings Ltd. Kumul Telikom Holdings Ltd is a state-owned enterprise held in trust by Kumul Consolidated Holdings.

DataCo describes itself as having been tasked with building the national transmission network (NTN) to provide wholesale non-discriminatory telecommunication services using existing PNG National Government-owned assets.

In its application for review DataCo has stated that it is involved in the construction of the Coral Sea Cable system (CS2 Cable) and the PNG National Submarine Cable Network (Kumul Cable). Both the CS2 Cable and the Kumul Cable are services of the kind designated to be declared services in the Minister’s declaration of 18 February 2019 and are covered by NICTA’s Determination.

The Panel is satisfied that DataCo is a person that has a relevant interest for the purposes of section 257 of the NICTA Act. The fact that the Determination includes indicative pricing of one of the

services, the CS2 Cable, in which DataCo is involved satisfies the Panel that a relevant interest of DataCo's is affected by the Determination.

The Panel's view that DataCo has an interest that has been affected by the Determination is not necessarily to be taken to mean that such an interest has been adversely or unfairly or unreasonably affected. On the basis that a relevant interest of DataCo's has been affected, the Panel is satisfied that DataCo is entitled to seek a review under section 258.

In its application for review dated 13 January 2020 identified what it considered to be five issues of concern.

These five issues, as described by DataCo in the heading for each issue as set out in its application for review, are:

1. **"Final determination does not meet 'reasonable' test under Section 126 of the NICTA Act"**
2. **"Final determination did not accord to the content of the Public Consultation Paper released by NICTA"**
3. **"Final determination was made outside period required under Section 135(3) of the NICTA Act"**
4. **"Final determination does not accord to General Pricing Principles under Section 134 of the NICTA Act"**
5. **"Effect of final determination on budget and annual operating plan for DataCo in accordance with the Kumul Consolidated Holdings (Authorisation) Act 2002"**

DataCo sought the following decisions and outcomes from the Panel:

- That the Determination be stayed; and
- The Determination be set aside and remitted to NICTA with whatever directions the Panel considered appropriate OR the Determination be varied by "revoking" the decision to set maximum prices on the services covered by the Determination.

The Panel's consideration of these matters is set out below.

#### **THE NOTICE AND DIRECTIONS MADE BY THE PANEL**

Having been convened by the Chairman of the Panel of Experts to consider DataCo's application for review, the Panel issued a Notice and Directions dated 28 January 2020 advising interested parties that an application for review had been received and a Panel appointed. The Notice and Directions stayed the operation of the Determination while the application for review was being dealt with and informed interested parties of the date (21 February 2020) by which any submissions must be made.

#### **THE PANEL'S CONSIDERATION OF THE REVIEW APPLICATION**

As noted above, DataCo's application for review sets out five issues. They will be dealt with here in the same order as set in DataCo's application.



*“Final determination does not meet ‘reasonable’ test under Section 126 of the NICTA Act”*

The first issue raised by DataCo is that they say that the Determination does not meet the ‘reasonable’ test under section 126 of the NICTA Act. Section 126 is set out in full above. DataCo refers to section 126(b) which provides that regard shall be had (without limitation) to the legitimate business interests of the operator licensees concerned and the access provider’s investment in facilities used to supply the declared services.

This ground is dealt with by DataCo in two paragraphs in its application for review and DataCo says that NICTA did not (the Panel’s emphasis) have any regard to the legitimate interests of DataCo as the licensed operator in the wholesale business or in DataCo’s investment in the NTN, in particular the submarine cables and other related project facilities being constructed to supply the declared services. DataCo says that in its view the decision by NICTA did not satisfy the reasonable test in section 126.

Section 126 comprises five paragraphs ((a) to (e)) that set out a wide range of matters that to be taken into account when assessing the reasonableness of the terms and conditions of a determination by NICTA.

The Panel notes that DataCo has focussed on only one of these matters, paragraph (b).

The Panel’s view is that the matters set out in paragraphs (a) to (e) ought to be given equal weight when assessing reasonableness. DataCo has not said what weight each of the paragraphs of section 126 should be given or if paragraph on which it solely relies ought to be given greater weight than the matters covered by the other paragraphs of section 126. If it is DataCo’s view that paragraph (b) should be given greater weight than the other parts of section 126 it does not explain why it holds that view. DataCo has not provided any material or evidence in support of its contention, made in absolute terms, that NICTA “did not have any regard” for the legitimate business interests of DataCo.

DataCo is saying that NICTA acted unreasonably and failed to comply with a requirement to understand the impact of its actions on a significant actor in the PNG ICT industry. Given the gravity of this claim the Panel approaches it with due deliberation and caution.

The mere fact that a decision made by a regulatory agency is contrary to the wishes of a particular person or entity or even adversely affects that person or entity’s interests is not of itself sufficient to establish that the decision lacked reasonableness or to establish that the regulatory agency “did not have any regard” for those interests. DataCo has not adequately address the issue of reasonableness as set out in section 126. Its broad assertion of failure by NICTA is not supported by analysis or evidence. Given the gravity of this allegation it is incumbent on DataCo to establish a reasonable basis for making such a claim. DataCo has not done this and consequently this ground of its application for review is not made out. This ground does not provide any basis for the Panel to act under section 261.

*“Final determination did not accord to the content of the Public Consultation Paper released by NICTA”*

The second ground raised by DataCo in its application for review is that the final determination made by NICTA does not accord with the Public Consultation Paper put out by NICTA prior to making the Determination.

This ground is not explained by DataCo and no examples of a departure from the Consultation Paper are given nor is it explained why, if there were such departures, those departures from the

Consultation Paper would be unacceptable. The lack of detail by DataCo in relation to this ground means that the Panel has little information before it to assist in determining the merits of DataCo's contention.

To the extent that this ground is based on the Determination identifying specific price points where the Consultation Paper gave price ranges it cannot be accepted. In the case of the APNG2 and PPC-1 projects the price points set by NICTA and included in the Determination are within the price range included in the Consultation Paper, although in the case of the PPC-1 Cable the price falls below the price range in the Consultation Paper in the third and fourth years of operation. In the case of the Coral Sea Cable the Consultation Paper did not specify a price or price range. This does not preclude NICTA from determining a price for wholesale services provided through this facility. With respect to the Kumul Cable no price or price range was proposed in the Consultation Paper or specified in the Determination.

The only argument that would appear to be available to DataCo is in respect of the Coral Sea Cable for a departure from what was presented in the Consultation Paper.

DataCo has not specifically argued that NICTA has no power to set a price point that it did not refer to in the Consultation Paper. Nor does it claim that NICTA is not entitled to have its view shaped by the responses and submissions it receives from interested parties. The Consultation Paper is not a promise to make a final determination or a decision that will not vary in any respect from what is canvassed in the Consultation Paper. If this was so, then the act of consulting with interested parties would be rendered nugatory. If views could not be sought and those views be used, to a greater or lesser extent, to shape the final decision then determinations would be reduced to decrees and the views of the parties would be meaningless. That is clearly not the process contemplated by the NICTA Act. DataCo has not established any basis for believing that setting a price in respect of the Coral Sea Cable was unlawful or beyond power or so unreasonable that it should be set aside.

DataCo has contended that it was denied natural justice because the Determination differed, in its view, from the Consultation Paper. This cannot be accepted. DataCo was given an opportunity to put its view and to comment on the position advanced by NICTA. The Response to Submissions report published by NICTA on 19 December 2019 makes clear that NICTA engaged with the arguments and positions put by DataCo (and others). A failure to accept a view or accede to a request or adopt the position put forward by another party is not evidence of a lack of procedural fairness. DataCo was entitled to an opportunity to be heard on the proposed pricing of the declared services and there is evidence (in the Response to Submissions document) that its position was understood and considered by NICTA. That is what is required by the principles of natural justice, acceptance of the position put by a party with a relevant interest in the outcome of a decision-making process is not a principle of natural justice. The foregoing statement, is qualified to the extent that a decision not to accept the position put by a party with a relevant interest must be reasonable.

As with the first ground above, it is a matter for DataCo to establish a basis for its contention that there was an impermissible or unfair change in pricing between what appeared in the Consultation Paper and what appeared in the Determination. DataCo has not done this. This ground is not made out and does not provide any basis for the Panel to act under section 261.

*"Final determination was made outside period required under Section 135(3) of the NICTA Act"*

As noted above, the declaration by the Minister was published on 18 February 2019. Section 135(3) then provides that NICTA has six months to make a determination. In this matter that required that the Determination be made by 18 August 2019. The Determination made by NICTA in relation to the matters that are the subject of this application for review was made on 17 December 2019 when it

was published in the National Gazette. This is considerably after the end of the six month period prescribed in the NICTA Act.

The Panel's view is that making the Determination after the expiry of the six month period prescribed in the NICTA Act does not invalidate the Determination. That does not mean that the prescribed period is of no relevance. Our view is that a failure to make a decision by the prescribed time would enable a person with a relevant interest to seek a judicial remedy to require NICTA to make a determination. This is an important safeguard for a person with a relevant interest because it is clear that the making of a determination by NICTA can have a significant impact on the market for the relevant declared services.

The Panel notes that while section 135 sets a prescribed period within which NICTA is to make its determination that section of the NICTA Act does not deal with the effect of a failure to do so by the prescribed time. This is in contrast to section 130(4) and (5) which provide for steps to be taken after 30 days – in the case of section 130(4) – and for the declaration recommendation to be taken to have been accepted by the Minister after a period of 60 days – in the case of section 130(5). No such provisions apply in relation to the six month time period.

Meeting the prescribed deadline is also important because once the Minister has declared certain services providers and customers (both wholesale and retail) will be seeking commercial certainty as to pricing. Providers and acquirers of services may be understandably reluctant to make investment or acquisition decisions in the period between the Minister's declaration of certain services and NICTA's determination of pricing matters. The NICTA Act in providing for a period of six months in which a determination should be made limits the period during which providers and customers are faced with any such commercial uncertainty.

The Panel is satisfied that the decision, although made after the end of the six month period, is not invalid for that reason.

The Panel thinks it noteworthy that DataCo raised the issue of timeliness even though its own submission to NICTA in response to NICTA's consultation paper was made on 4 September 2019, after the date by which the Determination should have been made. DataCo did not raise any objection in its submission to the fact that the six month period had already ended. It did not raise any questions at the time about the validity of the process and it continued to engage in the process after the expiry date. It cannot now be allowed to dispute the validity of a process it engaged in and where it took advantage of the consultation period that extended beyond the expiry of the six month period.

The Panel also considers it noteworthy that DataCo's original application for review was made on 13 January 2020. As noted above, section 258(1)(e) provides that an application for review must be lodged within 20 days or such longer period as the Panel may allow. In this case the period of 20 days ended on 6 January 2020, a day that is not a public holiday or a Sunday. DataCo did not seek an extension of time, nor did it acknowledge in its application that the 20 day period had already passed. This is a second example of DataCo not abiding by a prescribed time limit while objecting to another party's failure to do so.

Notwithstanding the late lodgement of the application for review, the Panel is prepared to accept the application and deal with it. The Panel's reasons for exercising its discretion in this manner are that the delay in submitting the application is relatively short; there is no evidence of prejudice to any other party resulting from that delay in lodgement; and it is in the public interest to ensure that

the proper scrutiny of a decision affecting an essential national service is not prevented from proceeding on narrow technical grounds relating to the calculation of a relevant time period.

DataCo has not satisfied the Panel that the Determination is not valid. This ground of review is not made and does not provide any basis for action by the Panel under section 261.

*“Final determination does not accord to General Pricing Principles under Section 134 of the NICTA Act”*

The fourth ground upon which DataCo seeks a review of the Determination is that it does not accord to the General Pricing Principles. As with the other grounds put forward by DataCo, this issue is dealt with only briefly by DataCo. No specific examples of a departure from the General Pricing Principles are given as to where the Determination does not accord with the General Pricing Principles.

DataCo says that in its submission to NICTA it “opposed, among other things, the idea of indicative pricing”. DataCo also says that it “instead suggested to NICTA a total service long run incremental cost as the pricing principle to be used.”

While it is clear that in its submission to NICTA dated 4 September 2019 that DataCo opposed indicative pricing, the position DataCo adopted in relation to appropriate costing methodology is far less clear. In its comments at paragraph 2.1.2 of the table included in its submission to NICTA DataCo said it “is NOT (their emphasis) in agreement with the costing methodology on cost based pricing principles as specified in the NICTA Act 2009.” There follows a regrettably confusing section of DataCo’s submission where it appears that it is saying that while it supports TSLRIC+ and FAC, these proposed costing methodologies must not be used to distort the pricing of the declared services. It finishes paragraph 2.1.2 by saying, “Therefore DataCo opposes all forms of pricing principles and methodologies as recommended by NICTA as the forces of demand and supply are to interplay to determine the equilibrium price which is the best approach going forward.”

In its comments at paragraph 2.1.3 DataCo notes NICTA’s position that it would in all cases seek to apply a TSLRIC+ (or FAC) costing methodology but fails to squarely deal with the indication by NICTA that it proposes to use TSLRIC+ or FAC to determine efficient costs in this matter.

DataCo’s contention that it “suggested to NICTA a total service long run incremental cost as the pricing principle to be used” seems to at least overstate what DataCo actually put to NICTA in its submission.

The clearest statement made by DataCo in its submission in respect of costing methodology is that it opposes all forms of pricing methodology recommended by NICTA. DataCo proposes instead the demand and supply determine the efficient costs.

On balance the Panel is satisfied that DataCo did not support NICTA’s use of TSLRIC+ or FAC. We are satisfied that DataCo wanted price determination to be left to market forces.

At paragraphs 7 and 8 of its Response to Comments Report NICTA expressly rejects the idea of relying on market forces in circumstances where the market is not competitive. Given NICTA’s role in relation to the national ICT market in Papua New Guinea NICTA is well placed to make such a determination.



DataCo has not established that NICTA's Determination is contrary to the General Pricing Principles set out in section 134. This ground is not made out and provides no basis for the Panel to act under section 261.

*"Effect of final determination on budget and annual operating plan for DataCo in accordance with the Kumul Consolidated Holdings (Authorisation) Act 2002"*

The essence of DataCo's concerns in respect of this matter are that, first, it had a very short time to implement the requirements of the Determination and, second, it had obligations under the *Kumul Consolidated Holdings (Authorisation) Act 2002* that governed how it is required to seek approval for its budget and annual operating plan.

These are matters of importance to DataCo and the Determination could clearly have an impact on the manner in which DataCo prepares its budget and operating costs models. However, they are not matters that were raised by DataCo in its submission of 4 September 2019 to NICTA.

DataCo provide a significant amount of commentary on the cost of services and on aspects of its budget in its submission, see paragraph 2.1.9 and the following paragraphs. However, it did not put to NICTA that for either commercial reasons or because of a statutory duty that it needed a specific amount of time to prepare to implement any changes to its pricing structure or budget or operating costs model that might arise as a result of NICTA setting a price, or a price range, for any of the declared services.

It is clear that DataCo knew or ought to have known that a pricing decision was likely to require changes to the manner in which DataCo managed its financial position and might require it to alter or renegotiate the terms upon which it supplied services. However, DataCo did not raise any of these matters in its submission.

As a result of the operation of section 260(1) the Panel is limited to considering matters that were before NICTA when it made its decision. Given that the issue of the effect of the timing of the Determination or the impact of the *Kumul Consolidated Holdings (Authorisation) Act* were not before NICTA, they cannot now be considered by the Panel. It is also the case that section 260(2) is not of assistance to DataCo because the information relating to time for implementation of any decision by NICTA and the *Kumul Consolidated Holdings (Authorisation) Act* matters are entirely new matters and not issues where the information submitted to the Panel updates earlier information.

This ground is not made out and does not provide any basis for the Panel to act under section 261.

In addition to the material submitted to the Panel on 13 January 2020, on 3 February 2020 sent to the Panel a copy of a letter it sent to NICTA on 31 January 2020. In its letter to the Panel DataCo described this material as a submission. Even if DataCo had not characterised it as a submission, the Panel would have been minded to treat it as such. DataCo initiated an application for review and presented material to the Panel intended to support its position. The material sent to the Panel on 3 February was also intended to support DataCo's position and as such is a submission to the Panel. That material was dealt with by the Panel and the Secretariat in accordance with section 259 of the NICTA Act and a copy was provided to interested parties.

This submission deals in its entirety with the impact of the Determination on DataCo's costs and pricing structure. As with ground 5 of DataCo's application of review dated 13 January the material submitted to the Panel was not before NICTA when it made its original decision, nor does it provide additional or updated material or information in relation to matters that were before NICTA. On that basis, it is not relevant to the issues that are the subject of the review.

However, notwithstanding that this material is not relevant to the issues subject to review it is still material and information that was submitted by the applicant for review and was intended by the applicant to be dealt with by the Panel as part of the review. Section 259 applies in respect of this material.

DataCo has since raised concerns that the additional material it provided to the Panel should not have been disclosed to any other party. DataCo has informed the Panel that it is seeking legal advice in relation to this matter. The Panel will continue to deal with the application for review but is of the view that it should not further engage in respect of the issue of the provision of this material to other parties while DataCo is considering its legal options.

#### **THE SUBMISSIONS RECEIVED FROM OTHER PARTIES**

Submissions in this matter were also received from Digicel (PNG) Limited, the Independent Competition and Consumer Commission (ICCC) and NICTA.

The matters raised in the submissions are dealt with here.

##### **Digicel (PNG) Limited**

Digicel wrote to the Panel on four occasions – 3 February 2020, 14 February 2020, 17 February 202 and 12 March 202. Digicel raised a number of procedural issues in its letters to the Panel.

These matters seemed to the Panel to fall into two broad categories – matters that were at the heart of the Panel’s review process, such as determining whether the application properly set out grounds for review in accordance with the requirements of the NICTA Act – and matters of a procedural or interlocutory nature that seemed to the Panel to be more in line with a party engaged in formal litigation before a superior court rather than a review process where the Panel is not bound by the rules of evidence and can determine its own procedures.

Digicel has put the view that it does not believe that there was any good reason to stay NICTA’s Determination. The Panel does not accept this view and has set out above why it was stayed.

Digicel also raised concerns about the lateness of DataCo’s application for review. The Panel acknowledges this issue and has addressed that matter earlier in this record of decision.

Digicel has also put the view that there was no proper basis for DataCo seeking a review of the Determination. As is made clear in this decision, the Panel does not believe that the grounds put by DataCo established a basis for the Panel to act under section 261. We emphasise the point that the purpose of the Panel’s consideration of the application was to determine if DataCo was able to establish a basis for the decision to be varied or revoked. That was not something, in the Panel’s view, that could be made peremptorily which is the approach it appears Digicel was advocating.

We thank Digicel for its submissions.

##### **Independent Consumer and Competition Commission (ICCC)**



By letter dated 19 February 2020 the ICCC wrote to the Panel in relation to DataCo's application for review. The ICCC generally refrained from making specific comments about DataCo's grounds for seeking a review. With respect to the first ground, the ICCC noted that it could not determine the validity of this ground. For the other four grounds, the ICCC noted that DataCo's application related to "NICTA's process of determining such matters" and so refrained from commenting.

There were no substantive matters raised by the ICCC. We thank them for their submission.

#### **NICTA**

By letter dated 20 February 2020 NICTA made a submission to the Panel in respect of the matters raised by DataCo in its application for review.

Understandably, NICTA does not accept the various positions put by DataCo.

The Panel has carefully read and considered NICTA's submission but does not find it necessary to rely on it in order to reach a position in relation to DataCo's application.

The final decision made by the Panel is, as will be seen below, consistent with NICTA's position but has been reached independently of NICTA's view.

We note that, while we have reached the same conclusion as NICTA that the Determination is not invalid even though it was made considerably after the expiry of the six month period provided for in section 135, we have done so on a different basis.

We thank NICTA for its submission.

#### **THE OUTCOME OF THE PANEL'S CONSIDERATION OF THE APPLICATION FOR REVIEW**

As noted above, the Panel's view is that DataCo has not made out any of the grounds upon which it based its application for review.

The grounds put by DataCo were not adequately explained by it and were accompanied by insufficient analysis or evidence to establish a basis upon which the Panel could determine that it was appropriate to vary the decision or set it aside and remit the matter back to NICTA. DataCo did not meet its obligation under section 258 to set out in detail the grounds on which it sought review. This failure to establish the grounds for review occurred even though DataCo submitted a large volume of material to Panel in furtherance of its application.

The Panel's decision therefore is to affirm the original decision of NICTA as set out in the Determination published in the National Gazette on 17 December 2019.

The Panel orders that the stay of the Determination, set out in the Notice and Directions dated 28 January 2020, be lifted with effect from the third day after the day on which NICTA, pursuant to section 262 of the NICTA Act, publishes the Panel's decision.

The final matter to be determined by the Panel falls under section 261(7). Section 261(7) provides that the costs of the Panel in a review of a decision shall be borne by the parties to the review as determined by the Panel.

In this matter, DataCo was unable to establish any of its grounds of review to the reasonable satisfaction of the Panel. DataCo submitted a large volume of material intended (although it did not in fact achieve that purpose) to support its position.

The other parties who made submissions did so generally rather briefly and where they proposed a particular outcome it was broadly supported, if sometimes for different reasons, by the Panel.

In the exercise of its discretion in this matter, the Panel has determined that the costs of the Panel, as calculated by the Secretariat, shall be borne solely by DataCo.

DataCo is required to pay the Panel's costs of the review within 28 days of being advised in writing by the Secretariat of the amount to be paid.

The Panel has completed its consideration of this matter. The Panel thanks the parties for their submissions and records its gratitude to the Secretariat for its assistance.



Christopher Hanlon  
International Arbitrator



Alphonse Malipu  
National Arbitrator

11 April 2020