

INQUIRY REPORT

NICTA's findings as a result of its Public Inquiry into the need for a Retail Service Determination regarding certain mobile telephony services

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1 INTRODUCTION

The *National Information and Communications Technology Act 2009* (the Act) provides for NICTA to conduct a public inquiry into whether or not particular retail services should be subject to a retail service determination. A retail service determination is a regulation that is made by the Minister, based on a recommendation from NICTA, which can specify the retail pricing, service standards or pricing principles in relation to the supply of a particular retail service.

From November 2011 to August 2012, NICTA conducted a public inquiry into the possible need for a retail service determination regarding certain mobile telephony services supplied by Digicel (PNG) Limited (“Digicel”).

This report sets out NICTA’s findings as a result of that inquiry for the purposes of section 235 of the Act. The basis of those findings and the conclusions drawn from them are discussed in a series of other documents that form part of the inquiry. A list of those documents is provided at Annex C. This report should be read in conjunction with those other reports.

2 SUMMARY OF THE INQUIRY PROCESS

In November 2011, NICTA initiated a public inquiry into the possible need for a retail service determination regarding certain mobile telephony services supplied by Digicel (PNG) Limited (“Digicel”). The terms of reference for the inquiry are provided at Annex A.

NICTA’s decision to initiate an inquiry followed the receipt of a complaint by bemobile (PNG) Limited (“bemobile”) regarding the pricing of Digicel’s off-net mobile calls and SMS. NICTA undertook a preliminary examination of the substance of bemobile’s complaint and concluded that there were matters that warranted being tested and considered further through a public inquiry process.

Annex B sets out the decision-making process that NICTA adopted in order to examine the matters under inquiry.

In November 2011, NICTA issued the first of two public discussion papers that set out NICTA staff’s preliminary examination of what they considered to be the key relevant issues. The purpose of that first discussion paper was to determine whether or not there were grounds that warranted NICTA considering a specific proposal for a retail service determination. That first discussion paper was focused on the key threshold questions of:

- what is the relevant market;
- is that market susceptible to ex ante regulation;
- if so does anyone have a substantial degree of power in that market (hereafter “SMP”); and
- if so, is there any harm to consumers or to effective competition being or able to be caused by that SMP.

NICTA extended the period of consultation in response to a request for additional time to be made available to prepare submissions (resulting in the consulting period running for a total of 10 weeks).

Submissions in response to this first discussion paper were received from:

- bemobile, which was accompanied by a separate submission prepared by:
 - Ms Emma Lanigan;
- Digicel; and
- Telikom.

NICTA also provided an opportunity for interested parties to review and submit comments on those submissions.

Such cross-submissions were received from:

- bemobile; and
- Digicel.

NICTA staff’s consideration and responses to the key issues raised in those submissions were set out in a Response to Comments Report, published in May 2012.

After considering the submissions NICTA concluded that some of the issues raised in the first discussion paper were not directly relevant to the matter under inquiry but that the substance of bemobile’s original complaint warranted further detailed examination. To that end, NICTA issued a data request to bemobile, Digicel and

Telikom and undertook further research into some of the issues raised by the submissions. The findings and proposed conclusions from that analysis were set out in a second discussion paper that was issued in May 2012.

The period of consultation on the second discussion paper was four weeks. An additional two weeks was provided for cross submissions.

Submissions in response to the second discussion paper were received from:

- bemobile; and
- Digicel, which was accompanied by a submission prepared by:
 - Professor Martin Cave and Dr Chris Doyle.

A late submission was also received from Telikom. As Telikom had not sought or been granted an extension of time, Telikom's comments were not considered further.

NICTA staff again provided an opportunity for interested parties to review and submit comments on the submissions in the form of cross-submissions. Such cross-submissions were received from:

- bemobile, which was accompanied by a submission prepared by:
 - Professor Dr Justus Haucap and Ms Emma Lanigan;
- Digicel; and
- Telikom.

NICTA staff's consideration of the submissions and cross-submissions and the evidence that they contained or referred to resulted in NICTA revisiting some of its analysis, revising some of its conclusions and modifying its proposal for a retail service determination. These matters are summarised in a separate Response to Comments Report, which was published on 5 September 2012.

A list of the inquiry documents issued by NICTA is provided at Annex C. All documents were published on, and remain available from, NICTA's Public Register on its website.

3 SUMMARY OF NICTA'S KEY FINDINGS

The public inquiry into the possible need for a retail service determination regarding certain mobile telephony services supplied by Digicel lead NICTA to make the following key findings:

- (a) The relevant market is the retail mobile services market, which comprises mobile access and mobile call origination, includes SMS and MMS services, but excludes fixed telephony access and is assumed to exclude both mobile data and fixed call origination;
- (b) The relevant retail service in the retail mobile services market is a mobile originated retail national voice call service that is supplied on a pre-paid basis;
- (c) The retail mobile services market satisfies the three criteria that have been widely adopted by the European Union and many other countries to indicate that a market is susceptible to (though not necessarily in need of) ex ante regulation to address the risks of harm associated with the existence of substantial degree of market power;
- (d) Digicel has a substantial degree of power in the retail services market and the evidence in support of this finding is clear and compelling;
- (e) The retail services market is not effectively competitive because there exists an operator with a substantial degree of power;
- (f) In the absence of ex ante regulatory intervention, the substantial degree of power in the retail services market that is enjoyed by Digicel would be likely to endure over at least the forthcoming two years and likely for much longer than that;
- (g) Digicel has an incentive and the ability to use on-net/off-net price discrimination in a manner that is anti-competitive because it increases barriers to entry and/or expansion and customer lock-in and, in turn, risks leading to the foreclosure of the market to competition;
- (h) The scale of Digicel's on-net/off-net price discrimination is exceptionally high by international standards;
- (i) An extremely high proportion of mobile-originated national voice traffic in PNG remains on-net;
- (j) Ex ante regulatory intervention is necessary to address the potential anti-competitive effects of Digicel's strategic manipulation of the relationship between its on-net and off-net prices and a retail service determination establishing some form of non-discrimination rule is the only practicable regulatory option in the circumstances;
- (k) The welfare implications of on-net/off-net price discrimination in the retail mobile services market in PNG are ambiguous and the evidence that such discrimination is essential for mobile operators to continue to increase mobile penetration is not compelling. However, the possibility that a degree of price discrimination can help foster continued market expansion cannot be completely discounted. Accordingly it is reasonable, prudent and appropriate in the circumstances to tolerate a certain level of possibly pro-competitive on-

net/off-net price discrimination by Digicel while at the same time preventing Digicel from practising on-net/off-net price discrimination at levels that can have anti-competitive effects;

- (l) An appropriate and reasonable level at which to cap the scale of Digicel's on-net/off-net discrimination is 40% (per call minute), calculated by dividing the difference in the relevant prices by the on-net price for the relevant minute of a call made at the same time.

4 OUTCOME OF THE INQUIRY AND APPLICABILITY OF RETAIL REGULATION CRITERIA SPECIFIED IN THE ACT

Following the public inquiry NICTA considered whether the retail regulation criteria specified in section 158 of the Act would be met by the Minister making a retail service determination reflecting NICTA's key findings and conclusions. NICTA was satisfied that all of the criteria would be met.

Accordingly NICTA recommended that the Minister subject mobile originated retail national voice call services that are supplied by Digicel on a pre-paid basis to a retail service determination that established a pricing principle that prevents discrimination of more than 40% between on-net and off-net prices, except to the extent that any further differences in on-net and off-net prices are objectively justifiable (by NICTA) based on differences in the costs of supplying the service. NICTA recommended that that retail service determination apply for a period of five years, with a review of its effectiveness and continuing need undertaken after it has been in operation for two years.

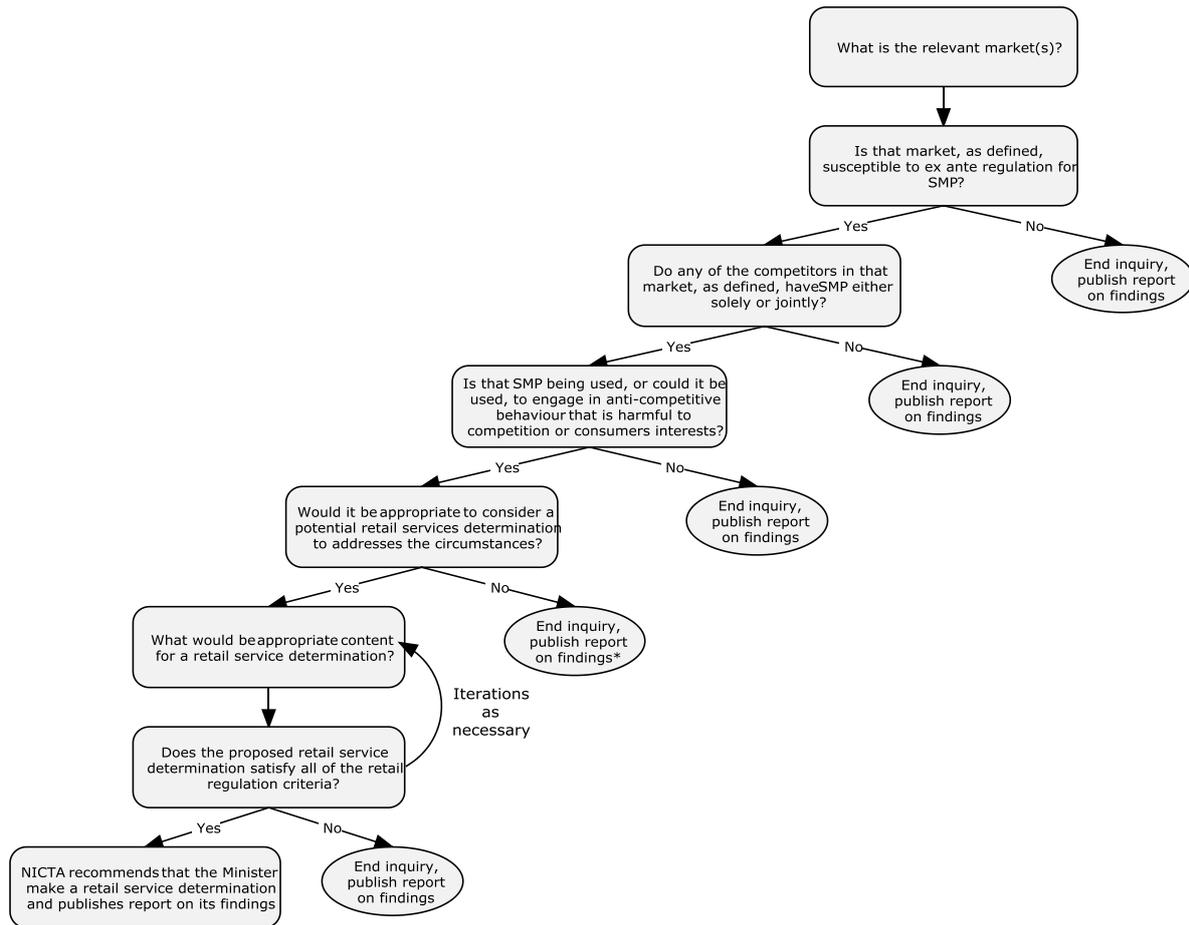
ANNEX A: INQUIRY TERMS OF REFERENCE

Having regard to allegations made by bemobile Limited (“bemobile”) and its own preliminary investigations, and pursuant to Section 157 of the Act, NICTA has decided that a public inquiry be undertaken in accordance with Section 230 of the Act to determine whether or not NICTA should recommend to the Minister that a particular retail service supplied by one or more specified Operator Licensees should be subject to a Retail Service Determination. The services in question are call and SMS services provided by Operator Licensees supplying mobile services, generally, with particular reference to the off-net call and off-net SMS services provided by Digicel (PNG) Limited (“Digicel”).

The specific terms of the public inquiry are:

- (i) NICTA shall inquire and determine whether any Operator Licensee, and Digicel in particular, has established retail mobile service prices for on-net and off-net calls and SMS that, because of their levels and/or relationships, are an abuse of a dominant position in the market for domestic mobile calls and SMS or are otherwise anti-competitive and contrary to the objectives of the Act; and
- (ii) NICTA shall determine whether a Retail Service Determination is appropriate in the circumstances considered and having regard to the evidence that the public inquiry reveals, and, if so, NICTA shall recommend the content of such a Determination in accordance with Section 161 of the Act for the Minister’s approval.

ANNEX B: NICTA'S DECISION-MAKING PROCESS



* NB. If a problem was identified but it was not considered appropriate to address that problem through a retail service determination (which is the focus on the present inquiry) then subsequent consideration of other potential remedies to the problem might involve a separate inquiry.

ANNEX C: LIST OF INQUIRY DOCUMENTS

1. FIRST DISCUSSION PAPER: Issued on 17th November 2011
2. RESPONSE TO COMMENTS REPORT: NICTA staff's response to the comments received during the public consultation on the need for a retail services determination regarding certain mobile telephony services; Issued by NICTA on 4th May 2012
3. SECOND DISCUSSION PAPER: Issued on 4th May 2012
4. RESPONSE TO COMMENTS REPORT: Issued on 5th September 2012
5. INQUIRY REPORT [i.e. the present report]: Issued on 5th September 2012
6. RECOMMENDATION REPORT: A report to the Minister recommending the introduction of a retail service determination: Issued on 5th September 2012