

## **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, Port Moresby on 4<sup>th</sup> May 2012*

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# 1 EXECUTIVE SUMMARY

In November 2011, NICTA published a discussion paper to commence a public inquiry into the potential need for a retail service determination in relation to certain mobile telecommunications services. Written submissions were received from three parties:

- bemobile (which was accompanied by a separate report prepared by Ms Emma Lanigan, an economist);
- Digicel; and
- Telikom.

NICTA staff 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 consideration of the comments to the first discussion paper led NICTA staff to obtain and analyse additional information from licensees and undertake further research and more detailed analysis. The results from those processes have been set out in a second discussion paper, which should be read in conjunction with this report.

There are two particular issues raised in the submissions that are not addressed in detail in the second discussion paper and which warrant detailed responses. Those issues are NICTA's decision to initiate a public inquiry and the inquiry process itself, and they are discussed below.

## 1.1 NICTA'S DECISION TO INITIATE A PUBLIC INQUIRY

Digicel disputed the validity of the public inquiry,<sup>1</sup> NICTA's 'jurisdiction to inquire into the [terms of reference],<sup>2</sup> and claimed that '...there are serious questions of law concerning the validity of NICTA's public inquiry'.

NICTA has the discretion<sup>3</sup> to decide whether or not it will hold a public inquiry. Section 230 of the *National Information and Communications Technology Act 2009* (the Act) provides that

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<sup>1</sup> Paragraph 10 of Digicel's submission. Digicel submitted similar comments to the NICTA CEO in a seven page letter dated 7<sup>th</sup> October 2011.

<sup>2</sup> Paragraph 10 of Digicel's submission

‘Where NICTA considers that it is appropriate and practicable to hold a public inquiry under this Part [XII] into any matter relating to the performance or exercise of any of NICTA’s functions and powers, NICTA may hold such an inquiry into that matter.’ Further, specifically in relation to retail service determinations, section 157(2) of the Act provides that NICTA may hold such an inquiry either on its own initiative or upon receipt of written request from any person. As was explained in the first discussion paper, NICTA received such a request from bemobile. Although NICTA did not believe that the evidence presented in that request, in itself, warranted the initiation of a public inquiry, bemobile’s request led NICTA staff to do some preliminary analysis of its own based on the limited information available to it. Based on that preliminary analysis, NICTA concluded that there were matters that warranted being examined more closely, and with better information, through a public inquiry process and thus decided—on its own initiative—to commence such an inquiry.

Threats of legal action against NICTA for initiating a public inquiry or the reservation of rights of appeal<sup>4</sup> of any outcome of the inquiry are unnecessary, unhelpful and not appreciated at the very beginning of an inquiry process. Section 256 of the Act explicitly provides for the appeal to the ICT Appeals Panel of any decision by NICTA to make, or not to make, a retail service determination (s.256(d)). The statutory right of appeal of the outcome of the present inquiry is clear and apparent to all. It does not need to be reiterated or threatened to be invoked at every stage of the inquiry.

Digicel complained that ‘...NICTA did not give Digicel a fair opportunity to comment on NICTA’s examination and analysis **before** commencing the public inquiry’<sup>5</sup> (emphasis added by Digicel) and that ‘Digicel has not had a fair opportunity to review the basis for NICTA’s decision to commence the public inquiry’.<sup>6</sup> NICTA is not obliged to consult with any party or to disclose any information before exercising its discretionary power to initiate a public inquiry. As a request for an inquiry had been received from bemobile under clause 157(2)(b) of the Act, NICTA fulfilled the requirements of the section 157 of the Act to notify Digicel of that request. NICTA actually went further than required and shared a copy of bemobile’s actual letter of request with Digicel and invited Digicel to set out its position on the substance

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<sup>3</sup> Except if directed to do so by the Minister or required to do so by a provision of the Act.

<sup>4</sup> Paragraphs 10, 61, 106–107 of Digicel’s submission.

<sup>5</sup> Paragraph 58 of Digicel’s submission

<sup>6</sup> Paragraph 56 of Digicel’s submission

of the complaint and provide relevant supporting evidence. Digicel responded principally by criticising the absence in bemobile's request of a market definition, market analysis and some identification of specific harm that was being caused by the alleged actions.

NICTA staff considered the views of bemobile and Digicel and undertook a preliminary analysis of the issues Digicel identified in its response (i.e. NICTA staff identified a relevant market, and considered whether Digicel might have substantial market power (SMP) in that market). Having made the tentative conclusion that there was a prima facie case that Digicel did have SMP in a relevant market, NICTA staff then considered what specific types of harm might arise from the actions alleged of Digicel and whether there was any prima facie evidence to suggest that such harm might be occurring. NICTA staff tentatively concluded that there was no prima facie case that the alleged actions of Digicel were causing any harm in the form of anti-competitive cross subsidy or predatory pricing. Due to insufficient information and evidence, NICTA staff were unable to form a view (at that time) on whether or not the alleged actions of Digicel were causing any harm in the form of excessive pricing or anti-competitive price discrimination.

NICTA determined that both the allegations and the remedy sought were serious matters that warranted further examination, which in turned required more and better quality information, analysis and comment. NICTA was of a view that a public inquiry process was the best means of examining and considering serious matters in detail and in a completely transparent and open manner (and providing all stakeholders with 'the opportunity to review and correct, contradict or comment', as Digicel requested for itself<sup>7</sup>). NICTA staff thus prepared the first discussion paper setting out the issues that NICTA staff thought were relevant to any consideration of the matters raised, together with its preliminary analysis of those issues and the tentative conclusions that it had drawn from that analysis. The discussion paper expressed tentative views on various issues in order to generate discussion. That discussion paper also addressed the principal issues raised by Digicel in its above mentioned response to bemobile's original request (i.e. the absence of a market definition, market analysis, and identification of any specific harm being caused by the alleged actions of Digicel).

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<sup>7</sup> Paragraph 35 of Digicel's submission.

Digicel complained that ‘None of the evidence or analysis relating to [NICTA staff’s] purported “preliminary examination” has been disclosed’<sup>8</sup> and criticised what it considered to be ‘the continuing failure of NICTA to provide [that] information’<sup>9</sup>. Bemobile were also critical of NICTA staff (in correspondence) for not sharing its preliminary analysis. As NICTA staff made clear in correspondence to, and discussions with, both bemobile and Digicel at the time of the release of the first discussion paper, the preliminary analysis of NICTA staff, and the limited information that it considered, was set out—in its entirety—in the first discussion paper. There was no additional information or material that NICTA withheld or which it could have shared. NICTA staff accept that its preliminary analysis was basic and constrained by the limited information available to it at the time. NICTA staff would have appreciated more quantitative data being submitted by bemobile and/or Digicel in response to NICTA staff’s repeated invitations to do so. However, NICTA has been completely transparent about the basis for the tentative conclusions set out in the first discussion paper and in its conduct of this public inquiry.

## 1.2 THE INQUIRY PROCESS

Digicel criticised the first discussion paper for not specifically considering the retail regulation criteria in section 158 of Act and for not describing in detail an actual proposal for a retail service determination.<sup>10</sup> Digicel claimed the former was ‘an error of law and a serious procedural failure’.<sup>11</sup> Digicel also wrongly inferred that the discussion paper’s consideration of possible abuses of SMP meant that NICTA’s thought ‘that [a retail service determination] can be justified solely on the basis of a finding by NICTA that there has been an “abuse” of market power’.<sup>12</sup> It ‘strongly encourage[d] NICTA to refrain from pursuing such a line of enquiry’ because it is an ‘irrelevant exercise’, will result in ‘misleading outcomes’, and ‘will have potentially damaging consequences’ on Digicel’s reputation and confidence to invest in Papua New Guinea.<sup>13</sup>

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<sup>8</sup> Paragraph 35 of Digicel’s submission

<sup>9</sup> Paragraph 58 of Digicel’s submission

<sup>10</sup> Paragraph 49(b) of Digicel’s submission

<sup>11</sup> Paragraph 36 of Digicel’s submission

<sup>12</sup> Paragraph 7 of Digicel’s submission

<sup>13</sup> Paragraph 7 of Digicel’s submission

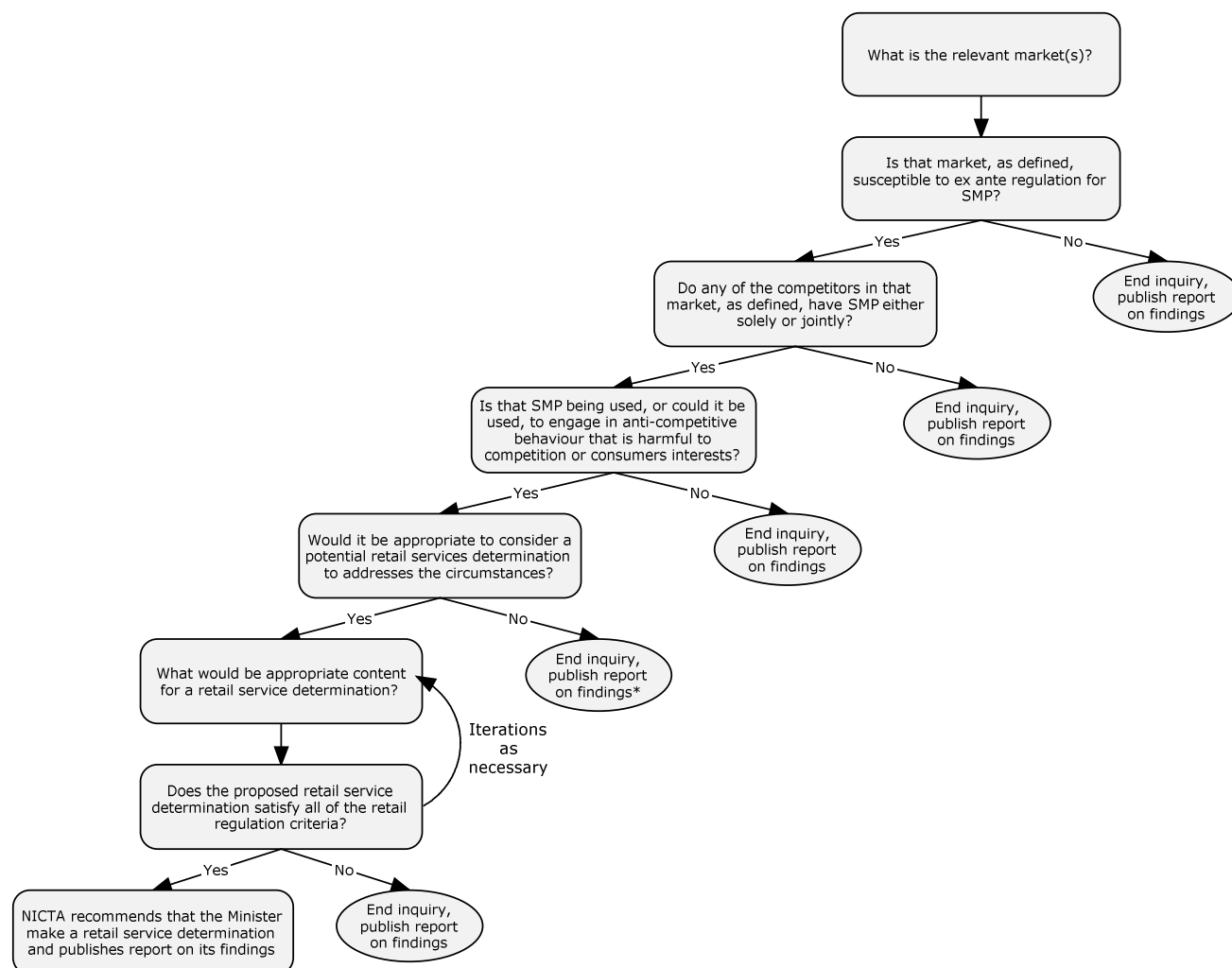
The first discussion paper made it clear that NICTA understood the significance of the retail regulation criteria and the need to consider a specific proposal for a retail service determination against those criteria. That discussion paper also made it clear that NICTA staff had not yet determined whether there were grounds that warranted the consideration of a specific proposal for a retail service determination and assessing that proposal against the statutory retail regulation criteria. The purpose of that first discussion paper was to generate discussion, information, comment and evidence that would enable NICTA to form a view one way or the other on that key threshold question.

Pages 22–23 of the discussion paper stated:

‘NICTA may only make such a recommendation to the Minister [in favour of a retail service determination] if NICTA believes that subjecting the retail service to a retail service determination would meet all four of the retail regulation criteria set out in section 158 of the Act... In the present case [i.e. at the time the first discussion paper was published], it is too early to consider the nature or content of any retail service determination in any detail. NICTA is currently concerned primarily with determining the relevant market, determining whether Digicel or any other licensee has SMP in that market, and determining whether any licensee with SMP is engaging in any anti-competitive retail pricing behaviour in the relevant market. NICTA’s response to positive findings (may or may not involve a retail service determination) will depend on what is discovered during the inquiry. If NICTA forms a view that a retail service determination may be appropriate, then that will be the subject of a specific consultation exercise as part of the present inquiry process.’

The decision-making process that NICTA is applying in this inquiry is set out in Figure 1 below.

**Figure 1: The decision-making process being applied in the current inquiry**



\* 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.

The diagram has intentionally been kept simple and high-level in an effort to ensure it is not misunderstood. Hence the decisions are shown as being simple “yes” or “no” answers even though the answers are likely to be more complex and perhaps less straightforward in practice. Also the diagram does not show iterative steps, such as the reconsideration of a specific proposal for a retail service determination against the retail regulation criteria if, for instance, an initial negative conclusion led to the identification of a possible variation or amendment to the proposed determination.



The first discussion paper was concerned with the key threshold questions of what is the market, whether it is susceptible to ex ante regulation, if so whether anyone has SMP in that market, and if so, whether there is any harm being caused by the abuse of that SMP. If those threshold questions were resolved in the affirmative (and with specificity), then NICTA staff would turn their attention to considering whether a retail service determination would be an appropriate form of regulation to *consider* in the circumstances and what form such a determination might take. NICTA staff's consideration during that phase would be guided by the six principles reflecting NICTA's general disposition to retail price regulation that were set out on page 23 of the first discussion paper. If NICTA staff concluded that it would be appropriate to consider the making of a retail service determination in the circumstances, then a specific proposal for a determination would be developed and it would be considered against the retail regulation criteria in the Act. As indicated in the first discussion paper, that consideration would be 'the subject of a specific consultation exercise as part of the present inquiry process'.<sup>14</sup>

This individual steps reflected in the process diagram in Figure 1 are discussed in greater detail in the second discussion paper.

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<sup>14</sup> Page 23 of NICTA's first discussion paper

## 2 OVERVIEW OF THE MAJOR COMMENTS RECEIVED AND NICTA STAFF'S CONSIDERATION OF AND RESPONSE TO THOSE COMMENTS

Given the length and detail of the submissions received, NICTA staff have not (in the table below) responded directly to every point or comment that was made by the respondents in their submissions and cross-submission. Even if not specifically addressed below, all comments received were considered in full and have been taken into account. Many of the matters that were raised in the submissions and cross submissions relate to matters associated with the definition of the relevant market, the analysis of SMP, tariff mediated network effects and Digicel's on-net/off-net price discrimination. NICTA staff's response on those matters is reflected in the second discussion paper, where NICTA staff's consideration (or re-consideration) of those matters has been set out in detail. To minimise repetition, the table below sets out NICTA staff's response to matters that were raised in the submissions and cross submissions that have not been addressed in detail in the second discussion paper.

No.	Sub- mission	Reference or subject	Summary of comment	NICTA staff's response
1	Digicel	Paragraph 2 The inquiry process	NICTA's inquiry is unjustified and should be discontinued. None of the evidence or analysis relating to NICTA's preliminary examination of the matter, which led it to initiate the inquiry, has been disclosed.	NICTA staff disagree. See section 1.1. above.
2	Digicel	Paragraph 34 Inquiry process	'By NICTA's own admission, bemobile failed to provide any evidence or analysis to support its complaint...'	See section 1.1 above. In principle, the fact that a party to a complaint provides insufficient evidence to support a decision on the matter under complaint can be a problem but is not necessarily determinative of whether or not the complaint has substance. NICTA staff note that bemobile provided a very detailed submission in response to the

No.	Sub- mission	Reference or subject	Summary of comment	NICTA staff's response
				first discussion paper.
3	Digicel	Paragraph 36 Inquiry process	The discussion paper does not consider the retail regulation criteria. This is an error of law and a serious procedural failure as NICTA must be satisfied that all of the criteria are met before recommending an RSD.	See section 1.2 above. It would only be an error of law if NICTA intended basing a decision on whether or not to recommend a retail service determination on the first discussion paper only. The discussion paper clearly stated that that would not be the case and could not be.  Having considered all of the comments received, and undertaking further research and analysis, NICTA staff concluded that consideration of a retail service determination is warranted and have set out a proposed specific determination, and their assessment of it against the retail regulation criteria in the second discussion paper.
4	Digicel	Paragraph 35 Inquiry process	'None of the evidence or analysis relating to [NICTA's staff's] purported "preliminary examination" has been disclosed and so the entire basis of the inquiry remains opaque to Digicel. This failure to disclose relevant information (to the extent that it exists) is a serious procedural error...'	See section 1.1 above.  The preliminary analysis of NICTA staff, and the limited information that it considered, was set out—in its entirety—in the first discussion paper. There is no additional information or material for NICTA staff to disclose. Digicel's natural justice has not been impinged.  The insinuation in Digicel's comments that NICTA staff did not undertake a preliminary examination nor consider relevant information when it specifically said it had done so is undue.
5	Digicel	Paragraph 96– 107 Inquiry process	'...the public inquiry into matters concerning whether Digicel's behaviour involves an abuse of a dominant position or is otherwise anti-competitive is beyond NICTA's jurisdiction'....  'the question of an abuse (or misuse) of dominance or market power is no part of the [retail regulation	NICTA staff disagree. See section 1.2 above regarding the steps involved in NICTA's approach to the inquiry.  NICTA staff also note that it is relevant to consider such issues as the identification of anti-competitive behaviour in a market would constitute evidence that would confirm the existence of SMP in that market.

No.	Sub- mission	Reference or subject	Summary of comment	NICTA staff's response
			criteria] <p>'None of these types of anti-competitive behaviour [mentioned in the discussion paper] are relevant to the [retail regulation criteria]'.  <p>'NICTA cannot lawfully hold an inquiry into these matters.'</p></p>	
6	Digicel	Paragraph 38 Inquiry process	NICTA's assessment of whether to recommend a RSD appears to go no further than a number of tentative conclusions about whether Digicel's conduct is an abuse of a dominant position or anti-competitive. There is nothing in the discussion paper that goes on to consider whether making an RSD would satisfy the RRC. The focus on whether Digicel's conduct is an abuse or anti-competitive appears to have distracted NICTA from the statutory require to consider all of the retail regulation criteria.	See section 1.2 above. The discussion paper was focused on key threshold questions to determine whether or not it would be appropriate to consider a retail service determination in the circumstances.
7	Digicel	Paragraph 29 Inquiry process	NICTA's analysis is inadequate because it does not apply a factual / counterfactual assessment of a retail service determination which is required under the Act. There are also other steps that NICTA should take to apply correctly the process in the Act for consideration of retail service determinations. An actual draft retail service determination should be described in detail to enable it merits to be properly analysed.	See section 1.2 above. <p>NICTA staff also note that as subsequent research and analysis led NICTA staff to conclude that the consideration of a retail service determination was warranted, they developed a specific draft determination and assessed it against the retail regulation criteria. Those matters are set out in the second discussion paper.</p>
8	Digicel	Paragraph 42 Inquiry process	Unless and until NICTA has undertaken coherent and comprehensive analysis and satisfied itself that all of the legislative and procedural requirements have been met (including the retail regulation criteria), it is not open to NICTA to reach a conclusion that the making of a retail service determination should be	See section 1.2 above. As explained by NICTA staff on page 22 of the discussion paper, the discussion paper was aimed at answering the key threshold questions and to determine whether it would be appropriate to consider a retail service determination in the circumstances. NICTA never intended to base a recommendation to the Minister

No.	Sub- mission	Reference or subject	Summary of comment	NICTA staff's response
			recommended to the Minister.	<p>on either the content of, or responses to, the first discussion paper and that was made clear to respondents in the discussion paper itself.</p> <p>It is possible that Digicel may have misunderstood the terms of reference for the inquiry to mean that NICTA will decide whether or not to make a recommendation to the Minister on the basis that something is an abuse of a dominant position instead of on the basis that a specific proposal for a retail service determination satisfies the retail regulation criteria. However, that is not what NICTA intended nor, as stated clearly in the first discussion paper, is it what NICTA is doing. It goes without saying that a retail service determination must be developed in accordance with Part VII of the Act. NICTA's terms of reference provide guidance to NICTA staff in the conduct of the inquiry; they do not, cannot and were not intended to replace the requirements of the Act.</p>
9	Digicel	Paragraph 59 Perceived bias against Digicel	<p>'Throughout the discussion paper, including the stated terms of reference, NICTA specifically refers only to Digicel's actions in relation to mobile calls and SMS, even though Digicel is just one of three providers of mobile calls and SMS in Papua New Guinea and that there is no evidence that has been presented to support an argument of any wrongdoing by Digicel.'</p> <p>The discussion paper also 'presumes "guilt"'. </p>	<p>There is no bias against Digicel. Digicel was the object of a complaint and NICTA staff are examining whether there are any grounds to that complaint.</p> <p>Further, if any of the three providers of retail mobile services have SMP, it would be Digicel as Digicel has the greater share of subscribers and thus presumably traffic and revenue. Focusing attention on the only possible candidates for SMP is not bias nor a presumption of guilt but a rational and efficient approach to market analysis that is commonly applied by other national regulatory authorities in similar exercises (i.e. market participants that are so small or very recent entrants are not considered to be likely to have SMP and analysis is thus focused on any remaining likely candidates). The discussion paper reflected NICTA staff's tentative conclusion regarding Digicel's SMP and invited</p>

No.	Sub- mission	Reference or subject	Summary of comment	NICTA staff's response
				<p>respondents to submit evidence and argument to either prove or disprove that tentative conclusions.</p> <p>The discussion paper indicates that the actions and behaviour that is being considered is 'alleged'. It would not be practical nor transparent to investigate or inquire into something without specifying either the alleged behaviour or the alleged practitioner.</p> <p>The use of the term 'guilt' in Digicel's comment implies that there is an underlying offence (i.e. there must be an offence of which to be guilty). However, NICTA staff note that it is neither an offence nor necessarily problematic for one or more market participants to have SMP. Hence, as shown in the inquiry process diagram in Figure 1 above, it is possible for the inquiry to find SMP but conclude that that SMP is not being used in a manner harmful to competition or consumers' interests and therefore that no regulatory intervention is necessary. The determination of whether or not there is SMP is a step in a process, not the end in itself.</p>
	Digicel (cross-submission)	p.3 Perceived prejudice	'Digicel is concerned that it has been unfairly prejudiced in its ability to make a complete submission [because] of the absence of an appropriate confidentiality regime to protect the confidential and commercial sensitive information that Digicel would otherwise provide'.	The confidentiality regime is set out in section 44 of the Act. Digicel has not been unfairly prejudiced in any way.
10	Digicel	Paragraphs 11–22  Retail regulation generally	There have been considerable benefits arising from the introduction of competition and the entry of Digicel, particularly in relation to direct investment, social and economic development, employment and human capital development, and lower prices and better QoS in the mobile sector. Retail price regulation would endanger these achievements and	NICTA staff recognise that there are considerable direct and indirect benefits that accrue from investment, and that the promotion of competition is a very effective way of stimulating such investment.

No.	Sub-mission	Reference or subject	Summary of comment	NICTA staff's response
			discourage further investment in PNG.	
11	Digicel	Paragraphs 23-31 Retail regulation generally	There are major risks associated with retail price regulation, including the risk of removing the incentive to compete, the possible deterrence of further investment, and that the regulation becomes self-justifying over time. This is particularly the case in markets that are subject to competition and where entry has been relatively recent.	<p>NICTA staff recognise that there are risks associated with the introduction of any form of regulation relating to pricing. NICTA staff also note that in mature markets, such as the European Union, the preference is to focus regulation at the wholesale level and avoid regulating at the retail level. NICTA staff also note that there is value in regulators refraining from regulatory intervention in markets when those markets are in a state of flux. However, it is unlikely that mobile telecoms in PNG could yet be considered to be a mature market and the concern raised in the present case is that competition is being seriously damaged.</p> <p>NICTA staff disagree though that retail price regulation is particularly risky or problematic in 'markets subject to competition', as distinct from 'markets that are subject to <i>effective</i> competition' (that is in which no competitor has SMP). NICTA staff agree in principle that regulatory intervention in retail pricing should be avoided in markets that are effectively competitive. However, that may not be the case in markets that are not effectively competitive and it may be necessary to consider such interventions for a time. The Act in the sections now being considered in the present inquiry clearly contemplates retail pricing regulation under certain conditions.</p>
12	Digicel	Paragraph 25 Retail regulation generally	The consequences of retail price regulation would be asymmetric and can create competitive distortions.	A retail service determination is a form of regulation intended to certain types of undesirable behaviour derived from SMP. All regulation in response to SMP is by definition asymmetrical. Also, all forms of regulation have a potentially distorting effect—that is typically the intention of regulation introduced in response to SMP. The role of

No.	Sub- mission	Reference or subject	Summary of comment	NICTA staff's response
				the regulator will always be to seek to minimise the distortion and to ensure that the regulation is no more intrusive than it needs to be to be effective.
13	Digicel	Paragraph 28 Retail regulation generally	'There will be an adverse financial and commercial impact on Digicel. Digicel will no longer be free to determine retail prices on a commercial basis. It follows from this that Digicel is not free to make optimal decisions that maximise the profitability of Digicel's business. Digicel's financial position will therefore be seriously undermined.'	If NICTA staff conclude that it would be appropriate to consider a specific retail service determination, NICTA will have to consider whether the licensee in question will be prevented from achieving a return on assets during the period of the regulation that is sufficient to sustain investment necessary to supply the retail service. Digicel's comments, to the extent that they are demonstrable, will be considered in that context.
14	Digicel	Paragraph 29 Retail regulation generally	Any retail regulation of mobile services in Papua New Guinea would be unprecedented in PNG and internationally and viewed unfavourably by investors.	<p>This assertion is incorrect.</p> <p>Bemobile's submission provided evidence that various forms of retail price regulation of mobile services have been applied in countries as diverse as Bolivia, Columbia, Kenya, Namibia, New Zealand, Paraguay, Qatar, Singapore, Slovenia, Thailand, and Turkey. NICTA staff have been in contact with a number of these regulatory authorities and have reviewed primary documents to confirm the information submitted by bemobile. Significantly, the forms of retail price regulation applied in these countries was intended to address the type of behaviour that is the subject of the present inquiry.</p> <p>In relation to the views of investors, it would be more accurate to say that retail price regulation may be viewed unfavourably by some investors as there is evidence that there are also some investors that would take an unfavourable view of the opposite situation—that is, the absence of regulatory intervention in retail pricing when SMP exists and is being used anti-competitively. In this respect NICTA staff note the comments by Trilogy International Partners to the New Zealand Commerce</p>



No.	Sub- mission	Reference or subject	Summary of comment	NICTA staff's response
				Commission dated 27 July 2009, <sup>15</sup> including the comment by the US Commerce Secretary to the Slovenian Prime Minister quoted therein, regarding the reasons for Vega's withdrawal from the Slovenian mobile sector in 2006.
15	Digicel	Paragraph 32, 43-48  Regulatory intervention	NICTA must meet a number of thresholds before it can recommend subjecting a retail service to an RSD, including the rules of natural justice. The standard of proof in respect of each matter in relation to which NICTA must satisfy itself, is proof beyond reasonable doubt. That burden rests on NICTA.	<p>NICTA staff disagree that NICTA must adopt a standard of proof that is beyond reasonable doubt. Section 159 of the Act requires that NICTA must be 'satisfied' that the retail regulation criteria would be met. That does not mean that NICTA must be satisfied beyond all reasonable doubt and there is nothing in the Act to suggest that NICTA must adopt such a standard. In the content of regulatory decision-making, to be satisfied means to be satisfied on the evidence that is available. (However, if a respondent prepares a very detailed response and does not comment compellingly on a matter, particularly when specifically invited to, or does not offer information that only it would have, then NICTA may take that into account in its eventual decision making.)</p> <p>NICTA staff note that in paragraph 46 Digicel stated that 'judicial support for [the adoption of] this high standard of proof is set out in more detail in Schedule 2'. However, Schedule 2 relates only to 'mobile diffusion and economic growth' and does not mention standards of proof.</p> <p>It is obvious that the burden of proof is with NICTA.</p>

<sup>15</sup> Available at [www.comcom.govt.nz/assets/Imported-from-old-site/industryregulation/Telecommunications/Investigations/MobiletoMobileTermination/ContentFiles/Documents/Trilogy-International-Partners-submission-27-July-2009.pdf](http://www.comcom.govt.nz/assets/Imported-from-old-site/industryregulation/Telecommunications/Investigations/MobiletoMobileTermination/ContentFiles/Documents/Trilogy-International-Partners-submission-27-July-2009.pdf)

No.	Sub- mission	Reference or subject	Summary of comment	NICTA staff's response
16	Digicel	Paragraph 49	'It is not Digicel's role to instruct NICTA as to how it should discharge its responsibilities...'	Noted and agreed. However Digicel and all interested parties are always encouraged to express their views on these matters.
17	Digicel	Paragraphs 63–82 Market definition	The correct definition of the relevant market is the 'market for the provision of mobile telecommunications retail services to end users in Papua New Guinea'. That is how other regulators in numerous other countries have defined the relevant market. The definition is common because the market definition methodology is essentially the same internationally, as are the features of mobile telecommunications. NICTA's proposed definition ignores the fact that consumers buy bundles of services and do not purchase 'off-net calls' as distinct services. As it is a service bundle that is purchased, it is necessary to recognise cluster markets. There is no consideration of how the services are linked to others due to demand- and supply-side substitutability. Digicel agrees that the geographic dimension of the market is national and that retail customers are likely to include both residential and business customers.	<p>The weaknesses and errors in NICTA's staff's proposed market definition have been well pointed out by both bemobile and Digicel. (It is likely that NICTA staff were focusing too narrowly on the specific retail service that was the subject of the original complaint by bemobile.) The submissions demonstrate that it is necessary for NICTA staff to redo completely its definition of the relevant market. NICTA staff requested specific data from all three mobile network operators to inform that exercise.</p> <p>NICTA staff also note that bemobile and Digicel have proposed market definitions that are substantially the same as each other.</p> <p>NICTA staff completely reviewed their proposed definition of the relevant market based on the information contained in the submissions and analyse of the separate data request to licensees. The outcome is set out in the second discussion paper.</p>
18	Bemobile	Paragraph 4.6 Market definition	NICTA has defined the market too narrowly and has not adequately considered supply-side substitution. Bemobile recommends 'that NICTA defines the relevant market to be: "The national retail market for the supply of domestic on-net and off-net mobile voice and SMS services."	
19	Digicel	Paragraph 78(c) Market definition	The evidence presented by NICTA in the market definition exercise does not substantiate the market definition conclusions. For example, following a price	NICTA staff note that Digicel did not supply any price elasticity data that would have enabled this aspect to be examined further and in much greater detail.

No.	Sub- mission	Reference or subject	Summary of comment	NICTA staff's response
			rise, if Digicel subscribers did increasingly asked the B parties to call them back to mitigate the effect of the price rise, it would undermine the profitability of the price increase.	NICTA staff completely reviewed their proposed definition of the relevant market based on the information contained in the submissions and analyse of the separate data request to licensees. The outcome is set out in the second discussion paper.
20	Digicel	Market definition	'NICTA's flawed market definition invalidates all of its subsequent analysis that is based on this definition'.	NICTA staff agree that a 'valid market definition' is crucial in a market analysis process. As indicated above, NICTA staff completely reviewed their proposed market definition.  For future inquiries though, NICTA staff would encourage any respondents that dispute or disagree with a particular definition of a market proposed by NICTA staff nevertheless to respond to the analysis and conclusions that flow from that definition. NICTA staff may not always conclude that it is necessary to revise a market definition, in which case the respondent might miss the opportunity presented to them to contribute to the other parts of the market analysis process.
21	Digicel	Paragraph 59(c) SMP	'NICTA's consideration of the factors relating to dominance appears biased against Digicel. NICTA only considers as relevant factors suggesting that Digicel is dominant, but does not acknowledge the relevance of factors indicating that Digicel is not dominant.'	In the discussion paper, NICTA staff identified the range of considerations that it thought needed to be assessed when determining if there is SMP in a market together with tentative indications of which of those considerations it thought were relevant in the present case and what it might suggest about the existence or not of SMP. NICTA staff did not focus only on factors that they tentatively thought might indicate that Digicel has SMP. NICTA staff note though that many of the considerations that it considered to be relevant to the present case suggested—in the tentative view of NICTA staff—that Digicel may have SMP. NICTA staff invited comment on the entire exercise and specifically requested respondents to explain if and how other considerations are relevant and what other conclusions could be drawn from all relevant

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				considerations.
22	Digicel	Paragraph 90(a) SMP	'The market share data relied upon by NICTA is incorrect as it is based on an incorrect definition of the relevant market...'	<p>NICTA staff note that Digicel's submission did not explain how the market share figure (estimated at 70% in the discussion paper) is incorrect (i.e. is that figure too high or too low?) NICTA staff also note that Digicel did not propose any alternative market share figure. Further, when NICTA staff requested data from Digicel (and other licensees) that would enable the determination of correct market shares, Digicel refused to supply the information, necessitating NICTA issuing Digicel with a formal direction to supply the requested data.</p> <p>NICTA staff obtained relevant and up to date data from the three mobile network operators and calculated new market shares. NICTA staff note that Digicel was correct that the market share which NICTA staff attributed to Digicel in the first discussion paper was incorrect as NICTA's staff subsequent data request and analysis showed that it <i>underestimated</i> Digicel's actual market share.</p>
23	Digicel	Paragraph 90(e) SMP	The market structure in PNG is typical of mobile industries worldwide and yet dominance is rare.	Bemobile has submitted evidence that shows that findings of dominance in retail markets are not uncommon internationally. NICTA staff recognises that the mature markets in the European Union prefer to address competition problems identified in retail markets through regulation at the wholesale level.
24	Digicel	Paragraph 91–93 SMP	NICTA's analysis does not take account of all facts that ought to be considered...' such as 'the mismanagement of bemobile and Telekom [sic] [which is] one factor in Digicel's success'.	<p>NICTA staff consider this to be an irrelevant consideration in the assessment of SMP. It is not a factor taken into account by other national regulatory authorities in market analyses.</p> <p>The purpose of the inquiry is not to support any individual competitors but to examine whether consumers' interests</p>

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				<p>or competition are being harmed or are at risk of harm, and if so, to take action accordingly.</p> <p>In paragraph 93 Digicel suggests that because 'management failures can be rectified quickly', if Digicel is found to have SMP it would 'not be? a durable situation'. NICTA staff note that all factors that are taken into consideration when determining whether or not there is SMP can and do change over time. It is for that reason that market reviews should be conducted regularly and any regulation that is applied because of a finding of SMP is also reviewed regularly.</p>
25	Digicel	Paragraph 94(c) (and repeated verbatim in paragraph 94(d)) SMP	Network coverage is not a relevant consideration. 'If coverage was a source of market power then Digicel could have higher prices in areas where bemobile does not have coverage. In fact, Digicel's retail prices are the same everywhere within Papua New Guinea.'	It is a matter for Digicel how (if at all) it chooses to differentiate its prices regionally. NICTA staff note that Digicel's prices are consistent nationally but also notes that there is no current impediment either from the Act or competition to Digicel differentiating its prices regionally in the future.
26	Digicel	Paragraphs 108-116 Anti-competitive outcomes	NICTA has not explained and needs to explain, a coherent theory of harm (that is, explain 'how high Digicel off-net prices might substantially lessen the intensity of competition'.	NICTA staff agree. However, as indicated in the inquiry process diagram in Figure 1, this was not an aspect that NICTA staff believed necessary to address in the first discussion paper, which was focused on the threshold questions. It is however, set out in detail in the second discussion paper.
27	Bemobile (Lanigan)	Page 13 Anti-competitive outcomes	'NICTA conduct [sic] some analysis of whether Digicel's pricing is excessive. In doing so it uses the mobile termination rate of 26t to proxy cost. It is not clear why NICTA considers this to be a good proxy for cost.'	<p>In the absence of any other information, NICTA staff considered that the existing mobile termination rates to be an adequate proxy for costs (for the purposes of its preliminary analysis) because those rates were originally set by the ICCC through an arbitration process in 2008. NICTA staff agree that a cost model would be a better source but none was (or is) available to NICTA staff.</p> <p>NICTA staff have no reason for assuming that the current</p>

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				<p>MTRs accurately reflect actual costs</p> <p>NICTA staff understand that the Samoan cost model (to which Ms Lanigan referred) is not particularly relevant to PNG, particularly given the very different topology in PNG, suggesting that the costs in PNG would be different to those reflected in the Samoan cost model.</p>
28	Digicel	Paragraphs 117(a)  Anti-competitive outcomes	Digicel agrees with NICTA's conclusion that reference to international call rates is irrelevant for assessing domestic off-net call prices. The cost drivers and demands for these two types of calls are different, so pricing of these services are not comparable.'	Noted. NICTA's staff's comment in the discussion paper reflected a tentative conclusion. As both bemobile and Digicel concur with NICTA's staff's tentative conclusion, NICTA staff have been encouraged in concluding that international call rates are indeed irrelevant for assessing off-net call prices.
29	Bemobile	Paragraph 3.1-3.7  Content of a retail service determination	Bemobile previously submitted that a price cap on off-net calls would be an appropriate action to be taken by NICTA to alleviate the competition problem. However, other national regulatory authorities have tried this and it has not proven effective in addressing the problem. International experience also shows that the regulation of wholesale mobile termination rates is not effective either when a single operator has a high market share. Accordingly, bemobile suggests that NICTA consider making a retail service determination that 'prevents any retail price discrimination for national calls or SMS generated by customers of the Dominant Service Provider'.	NICTA staff notes the summary of international experiences submitted by bemobile. NICTA staff also note that much of that material is drawn from a 2011 report prepared by Telecommunications Management Group and submitted to the New Zealand Commerce Commission as part of a similar inquiry. <sup>16</sup>

<sup>16</sup> The TMG report, titled *On-net/Off-net Price Differentiation: Review of International Precedent*, is available at [www.comcom.govt.nz/assets/Telecommunications/STD/MTAS/Submissions-on-draft-MTAS-STD/Telecommunications-Management-Group-Report-for-2degrees-submission-on-draft-MTAS-STD-On-net-Off-net-Differentiation-Review-of-International-Precedent-7-February-2011.PDF](http://www.comcom.govt.nz/assets/Telecommunications/STD/MTAS/Submissions-on-draft-MTAS-STD/Telecommunications-Management-Group-Report-for-2degrees-submission-on-draft-MTAS-STD-On-net-Off-net-Differentiation-Review-of-International-Precedent-7-February-2011.PDF)

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	Digicel (cross- submission)	Paragraph 57 Land access	'NICTA could...assist mobile network operators address landowner issues that to significant extent add to the cost of building sites in the many areas of PNG where land ownership is disputed...;	Note. NICTA staff will endeavour to examine this matter further in the near future.