



CONSULTATION RESPONSE REPORT

**NICTA staff's response to the
comments received during the public
consultation on draft guidelines
regarding the submission of written
comments to public consultations and
public inquiries**

Issued by NICTA staff, Port Moresby on 20 April 2012

CONTENTS

1 EXECUTIVE SUMMARY	1
2 CONSIDERATION OF THE MAJOR COMMENTS RECEIVED AND THE RESPONSE OF NICTA STAFF.....	2

1 EXECUTIVE SUMMARY

On 8 March 2012, NICTA published a draft Guidelines on Submissions to Public Inquiries and Public Consultations to enable interested stakeholders and other parties to make comments before finalisation of the Guidelines.

Written comments were received from only one party, Digicel(PNG) Limited (“Digicel”), and these focussed mainly on confidentiality issues. The Guidelines covered procedural and other aspects of submission management and not just confidentiality issues..

The comments made by Digicel are summarised in this report together with NICTA staff’s consideration and response.

2 CONSIDERATION OF THE MAJOR COMMENTS RECEIVED AND THE RESPONSE OF NICTA STAFF

No.	Reference or subject	Comment	NICTA staff's response	Intended Action
1.	Detailed resolution of confidentiality claims (Digicel, paragraphs 3 – 6)	<p>Digicel is concerned that the Guidelines as drafted do not provide enough detail on the way claims for confidentiality will be assessed and how the balance with wider public interest values will be determined.</p> <p>Digicel is concerned that the Guidelines indicate a risk that "NICTA will override legitimate confidentiality concerns on public interest grounds".</p> <p>Digicel considers that the Guidelines are not in accordance with international best practice.</p>	<p>It is important to properly understand how the process works and the values that are at stake. It is assumed that the confidentiality concerns and interests are always legitimate and of value to the party asserting them. If this were not the case there would be nothing to determine. NICTA must weigh up and decide between claims of confidentiality that are presumably legitimate (but may nevertheless be strong or weak) and the wider public interest in disclosure. Either might prevail depending on the circumstances.</p> <p>It is important to recognise that the claimant is expected to argue in detail for the confidentiality that it asserts and to indicate the adverse consequences that might or will arise from disclosure. The claimant may make comment on the public interest issues involved and provide argument as to why disclosure is unnecessary or the value of disclosure is low.</p> <p>Contrary to Digicel's claim, the Guidelines were drafted after considering best practice in other jurisdictions. NICTA is very concerned that they should reflect international best practice.</p>	No specific action required.
2.	Bias in favour of disclosure (Digicel, paragraph 3)	The Guidelines reflect a bias towards disclosure. The suggestion is that such a bias is inappropriate. Digicel also notes	Sub-section 3(b)(iii) of the National ICT Act on Regulatory Principles places clear emphasis on the need for regulatory measures to be "administered in a transparent manner and, to the extent appropriate,	No specific action required.

No.	Reference or subject	Comment	NICTA staff's response	Intended Action
	7(c))	that there is a public interest value in maintaining commercial confidentiality.	<p>should be the subject of prior public consultation (in accordance with Section Error! Reference source not found. of this Act), published explanations and public clarifying guidelines". At the outset then, there is a bias towards disclosure to reflect the principles and advance the objectives of the Act. Not disclosing relevant information is an exception to this principle. It is then a matter for the claimant of confidentiality to make out its claim and to provide sufficient details to enable a proper judgment to be made.</p> <p>NICTA staff agree that there is a public interest in upholding commercial confidentiality as well, once a case has been made out.</p>	
3.	Reconciliation of different public interests. (Digicel, paragraph 7 (b))	There is nothing in the Guidelines about how the public interest in transparency can be reconciled with the public interest in protecting the confidentiality of commercially sensitive information	<p>"Reconciliation" is not the correct word for the process that NICTA must undertake. It must assess the extent of the value associated with disclosure, bearing in mind the importance placed upon transparency in the Act itself (see earlier response), against the specific issues associated with the claim that has been made out by the claimant. Clearly the process will need to be very case-specific having regard to many factors, including whether the information can be published in a form that limits any adverse commercial or other consequences for the claimant, and whether the claimant has published the same or similar information itself. NICTA will carefully consider the details that a claimant sets out in favour of continued non-disclosure, but will exercise its own judgment, as it must, as to whether the claim is over-stated.</p> <p>It may be possible to add to the guidance in the instrument after a period of operation, where specific types of arguments and claims can be better</p>	No specific action required.

No.	Reference or subject	Comment	NICTA staff's response	Intended Action
			addressed in the Guideline.	
4.	Protection of confidential information (Digicel, paragraph 7 (c))	The Guideline completely omits to specify how NICTA will protect information that is confidential	The primary point is in Clause 5.8 of the draft Guideline – the information will not be disclosed. NICTA does not intend at this time to adopt any additional procedures to its standard operating practices for the protection of confidential information based on the Act, and on Section 44 in particular. Sub-section 44(6) places positive duties on NICTA Members, staff and agents in dealing with any information received in the course of their duties, and sub-section 44(7) makes failure to comply a criminal offence.	No specific action necessary.
5.	Confidentiality should be preserved in most cases (Digicel, paragraph 8)	Digicel submits that in most cases it should be possible for NICTA to hold an open and transparent inquiry and still uphold confidentiality. For example Digicel suggests that only aggregate information might be used..	In some cases it may be possible to do both – to preserve the confidentiality claimed (after the claim is tested) and also to run a transparent inquiry. But it is not possible to say in advance that this will always be so. Nor is it possible to say in advance that in all cases aggregate information will be adequate and will convey the issues to other stakeholders (not the claimant of confidentiality) in a manner enabling those other stakeholders to participate sensibly in the public consultation. Further, there may be situations, especially in markets with few competitors, where the publication of aggregate information has the effect of disclosing specific information to competitors in any case. NICTA prefers to avoid overall conclusions ahead of specific cases.	No specific action necessary.
6.	Confidentiality undertakings (Digicel, paragraph 9)	Recipients of confidential information should be required to give confidentiality undertakings and the information should be confined	Digicel's comments may have relevance in commercial transactions between parties to the transaction. In the present situation the focus is on the potential disclosure of such information by NICTA. NICTA's operations are entirely governed by the Act and there	No specific action necessary.

No.	Reference or subject	Comment	NICTA staff's response	Intended Action
		to those who need to know. (Digicel, paragraph 9)	is no room for a suggestion of this kind. It is not for NICTA or licensees to add to or change the requirements of the Act. (Sub-section 44(6) has already been mentioned in this regard.)	
7.	Publication of submissions (Digicel, Annex 1, ref 4)	Submissions made on or before the original deadline should not be published until after the deadline has passed – to ensure that no unfair advantage results in favour of parties prior to making their submissions.	NICTA staff agree with the proposal – but not for the reasons advanced by Digicel. The issue of advantage in making submissions seems to be relatively unimportant, especially if NICTA permits respondents to comment on the submissions of other respondents. Comment-on-comments may be appropriate where parties offer in their submissions substantial new material that is appropriate for wider canvassing. The reason why the proposal is considered to be appropriate is because it is consistent with the approach already adopted in the Guidelines on withdrawal of submissions at Clause 6.1 and because it simplifies the administration of submissions.	The proposed words set out by Digicel in Annex A, clause 4.2 will be incorporated into the Guidelines.
8.	Redaction (Digicel, Annex 1, ref 5.5(b))	Digicel notes that how much information has been removed could itself be confidential and suggests that it is sufficient to indicate only where information has been removed.	If it is claimed that the amount of information at issue is itself confidential, then it will be a matter for the claimant to provide evidence and argument in support. There will almost always be a case (however strong) for alerting readers of a redacted text to the nature and extent of the redaction. A redaction could be, and often is, no more than a figure cited in a sentence, with the remainder of the sentence disclosed. NICTA staff disagree with Digicel that it will always be sufficient to just indicate where the information is removed.	No specific action necessary.
9.	Treatment of confidentiality claims (Digicel, Annex 1, ref 5.6)	In relation to Clause 5.6 of the draft Guidelines Digicel says that NICTA should first establish the confidential status of the information before determining	It is assumed that the information is prima facie of a kind that can be confidential, unless there is evidence of matters such as prior publication. Digicel's comment does not go to the substance of Clause 5.6 which is about a different matter – namely whether the	No specific action necessary.

No.	Reference or subject	Comment	NICTA staff's response	Intended Action
		whether there is a wider public interest in disclosing the information.	information is relevant or not to the matter in hand. If it is not particularly relevant and can be withdrawn then that is an option that NICTA is obliged to consider. Failing that, the irrelevance might also weaken the public interest in disclosure, leading to a decision to redact it.	
10.	Treatment of confidentiality claims (Digicel, Annex 1, ref 5.6)	Digicel proposes that all information not in the public domain should be regarded as prima facie confidential.	NICTA staff disagree and consider that such an approach would present major disadvantages for regulating in a transparent manner, and for ensuring that regulatory initiatives are open to full and meaningful discussion by stakeholders and other interested parties. The Guideline is based on the notion that it is for parties who wish to make submissions containing information that they do not wish to have publicly disclosed to identify the specific information they claim to be confidential and to provide specific reasons why it should not be disclosed.	No specific action necessary.
11.	Public interest in protecting confidential information v public interest in transparency (Digicel, Annex 1, ref 5.6A)	There is a public interest in protecting confidential information that is recognised in PNG law. NICTA must therefore reconcile two public interests involved and "the legitimate private interests of the submitting party and not necessarily assume that the public interest lies in favour of disclosure."	There is no assumption in the Guideline that the public interest will always (or necessarily) favour disclosure. The process that has been adopted however is that there is a public interest in disclosure that is the starting point on receipt of a submission, and that it is a matter for those wishing to have some level of non-disclosure to raise the claim of confidentiality and the case for non-disclosure. This matter has already been referred to in an earlier response.	No specific action necessary.
12.	Reconciling public interests (Digicel, Annex	It should generally be possible to hold an open and transparent public consultation or inquiry process while preserving	This point has already been discussed above. It might be possible to do what Digicel suggest in a given case, but there is no basis for say that it would generally be	No specific action necessary.

No.	Reference or subject	Comment	NICTA staff's response	Intended Action
	1, ref 5.6B)	confidentiality of information.	possible.	
13.	Weighing two competing public interests (Digicel, Annex 1, ref 5.6C)	Digicel suggests that it is very rarely necessary to weigh up and choose between two public interests in situations like those now being considered.	NICTA may be able to find a way to avoid the choice in the circumstances of a specific case, but there is no reason to say that this will be normal or usual.	No specific action necessary.
14.	Process for disclosing information on a confidential basis (Digicel, Annex 1, ref 5.6D)	Digicel refers to Australian and NZ processes for handling highly confidential information.	The processes referred to have very explicit uses and might be adopted by NICTA in appropriate circumstances. However they are not typical processes that should be incorporated into NICTA's standard approach to considering submissions for non-disclosure of information contained in submissions to public inquiries and public submissions. NICTA does not consider it appropriate to incorporate these procedures into the present Guideline. In addition NICTA considers that s.44 of the Act provides the framework on which it should proceed.	No specific action necessary.
15.	Private harm from disclosure (Digicel, Annex 1, ref 5.7)	NICTA must take account of private harm from disclosure and this should be expressly addressed in the Guidelines	For the avoidance of doubt about the relevance of considerations of private harm, if raised in a claim, a reference to private harm will be included in Clause 5.7.	Amend as indicated in the response.
16.	Testing information (Digicel, Annex 1, ref 5.8)	Digicel submits that it is rarely necessary to test information by disclosing it completely without restrictions.	The comment appears to misunderstand the point being made. The point is that claims made in submissions in public consultations and inquiries may need to be tested in the form they were asserted by being disclosed. There is no basis for saying that this is rarely necessary. A major reason for public consultation and inquiry processes is to enable interested parties to comment on all of the issues and the supporting evidence for views on those issues as far as possible. The extent will be defined by specific	No specific action necessary.

NICTA RESPONSE REPORT ON DRAFT REFERENCE INTERCONNECTION OFFER RULE

No.	Reference or subject	Comment	NICTA staff's response	Intended Action
			claims relating to confidentiality.	
17.	Withdrawal of submissions (Digicel, Annex 1, ref 6.2)	Any request for withdrawal prior to the final deadline for receipt of submissions must be respected. The onus should be on NICTA to ensure this.	The draft Guideline makes it clear that all requests for withdrawal in accordance with clause 6.1 (before the deadline for receipt of submissions) will be agreed. The process depends on both the party withdrawing a submission and NICTA. The matter is considered to be adequately covered in the current draft. The process specified for requesting withdrawal needs to be observed for orderly and better administration. It has been included in the light of actual experience in PNG.	No specific action necessary.
18.	Extension of time (Digicel, Annex 1, ref 6.4)	Any requests for more time to make a replacement submission should be dealt with in the normal way under clause 2.2, and any suggestion of punishment would be misplaced.	NICTA staff have considered this statement carefully and agree that it would be better to refer to clause 2.2 in the manner suggested in Digicel's proposed amendment at Annex A.	Amend as indicated in the response.
19.	Protection of confidential information (Digicel, Annex 1, ref 7)	The scope of the guidelines should be extended to specify what rules NICTA will put in place to protect the confidentiality of information.	This proposal has already been discussed and responded to in item 4 above. .	No specific action necessary.