



## **RESPONSE TO COMMENTS REPORT**

NICTA staff's response to the comments received  
in response to the Consultation Paper issued for  
the Public Consultation on Draft Market Analysis  
Guideline

*Issued on 12 January 2017*

## **1. INTRODUCTION**

On 25<sup>th</sup> July 2016, NICTA published a consultation paper as part of its public consultation process under section 229 of the National Information Communications Act 2009, ('the Act') into a Draft Market Analysis Guideline. If adopted, the Guideline will set out the process and criteria that NICTA will adopt when assessing the competitiveness of markets and also in determining whether in a relevant telecommunications market in Papua New Guinea one or more supplier of services has significant market power (SMP) in accordance with the meaning given to that term in the Act. In addition, if adopted, the Guideline will also provide licensed operators and other industry stakeholders with a high degree of certainty about the processes and criteria that NICTA will adopt in the course of conducting market analyses, and they will be better placed to more effectively engage with NICTA in market analysis tasks.

Written submissions were received from:

- Digicel (PNG) Limited ("Digicel")
- Telikom PNG Limited ("Telikom")
- Independent Consumer and Competition Commission ("ICCC")

Those submissions were made available on NICTA's public register. This report provides a summary of the key comments and issues that were raised through these submissions and the NICTA staff responses in each case.

## **2. CONCLUSION**

The submissions contain a range of observations, overwhelmingly useful and positive. NICTA staff agree with the comments in most cases. Some will lead to action to amend the Guidelines before they are adopted by NICTA. Some are of interest but will not require the Guideline to be so amended.

Once again, NICTA thanks those that made submissions for their time, effort and assistance in improving the Guideline

### 3. OVERVIEW OF PRIMARY COMMENTS RECEIVED AND NICTA STAFF'S CONSIDERATION OF AND RESPONSE TO THOSE COMMENTS

Given the length 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. However, even if not specifically addressed below, all comments received were considered and have been taken into account.

No	Sub-mission	Reference or subject	Summary of comment	NICTA staff's response
1	Digicel	Letter, page 1, para. 3	"While Digicel appreciates that the Draft Guidelines are intended to 'explain how NICTA will define ICT service markets and assess competition within those markets' and we are supportive of that intention, we believe that the Draft Guidelines should go further to explain NICTA's approach and processes to applying an analytical framework to assess whether any market intervention may be required in order to perform its duties under the Act".	The comment has been considered by NICTA staff, and it is considered that the Guideline might be taken further in future. At this stage NICTA's aims are more modest and extend only to the core area of market analysis to determine if markets are effectively competitive or characterised by competitor dominance. NICTA does not wish to go beyond that at this stage, although, some further guidance may be useful later. <i>No further action proposed on this comment</i>
2	Digicel	Letter, <i>Establishing and analytical framework</i> , page 1	Digicel notes that inappropriate regulatory behaviour can adversely affect not only competitors but also customers. Digicel also notes the risk that might result for investors, and important matter generally but especially in a developing economy such as PNG.	NICTA staff agree that care and balance is required for all regulatory decisions, including decisions not to intervene in a market as well as decisions to intervene and about the type of intervention. NICTA staff consider that insofar as the Guidelines add to certainly they are a benefit to the industry, overall. <i>No further action proposed on this comment</i>
3	Digicel	Letter, <i>What is the relevant market?</i> page 4	Digicel is concerned that the Guideline may not adequately reflect the dynamic nature of ICT markets, and the rapid changes in technology, services and consumer habits that are currently occurring. Digicel contends that because of this what	NICTA staff agree that the dynamics of ICT markets are undergoing substantial and rapid transformation, including for the reasons outlined in Digicel's submission. NICTA staff have reviewed the draft to ensure that these points are made strongly and the consequences for market

No	Sub- mission	Reference or subject	Summary of comment	NICTA staff's response
			might constitute a particular market and time horizons for analysis of those markets must necessarily also change.	definition and market review.  <i>Action: The Guideline has been reviewed and the references have been strengthened to the consequences of dynamic change for changing market definitions and frequency of reviews</i>
4	Digicel	Letter, <i>Does any relevant firm have SMP in the market?</i> page 4	Digicel is concerned that NICTA proposes to regulate on the basis of "thought experiments" because it does not have key quantitative data.	Noted. NICTA staff agree that regulation should be based on the evidence that is available, including circumstantial evidence. There is nothing novel or new about this approach. However, the draft has been further reviewed to ensure that any other suggestions or connotations are removed.  <i>Action: The Guideline has been reviewed to ensure that it reinforces this approach and all points.</i>
5	Digicel	Letter, <i>Is there a coherent theory of harm?</i> Page 5	<p>"Digicel welcomes NICTA's acknowledgement that the fact that a firm has SMP in a market does not mean that the process of competition, and consumers, are necessarily harmed ..."</p> <p>"However, without proper evidence theories of harm are just abstract theories. If any such actual behaviour is alleged or expected to occur, the case for it must be established and proven by reference to the actual facts of the case, based on credible and cogent evidence that the claimed harm has occurred or can reasonably be expected to occur within a</p>	<p>This is not a new acknowledgement. The circumstance in which SMP is present may suggest that intervention is not warranted at least for the time being, but that more focused monitoring might be appropriate. This may be the case with new services, for example, where the market is in an embryonic state and the manner of its development is uncertain. The requirements for SMP might be met in such cases, but the case for intervention of any kind might not be.</p> <p>NICTA staff agree that there needs to be "proper evidence" and a credible basis for intervention. However that term is ambiguous and has not been used in a Guideline for that very reason. The purpose of the Guideline is to provide guidance not to introduce terms that appear to be unexceptionable but are really ambiguous. Where an abuse of dominance or other anti-competitive behaviour is alleged it must be proven. Such</p>

No	Sub-mission	Reference or subject	Summary of comment	NICTA staff's response
			relevant period of time."	<p>cases will typically require the application of the competition law by the ICC. Where a market has failed and proposed intervention is of an ex ante regulatory nature by NICTA the nature of the market structure and the prospect of behaviour that it might encourage are the relevant facts. Past behaviour may be relevant and if so, evidence of that behaviour needs to be adduced and appropriately analysed.</p> <p><i>No further action proposed on this comment</i></p>
6	Digicel	Letter, <i>Are the facts consistent with the theory?</i> Page 5	Following on from the discussion of the theory of harm theme, Digicel notes that when NICTA puts "forward a specific theory of harm, NICTA then needs to demonstrate how the theory applies to the specific facts of the case."	<p>NICTA staff note and agree with this comment, but further comment that when considering the exercise of regulatory powers on an ex ante basis, regulators will be heavily reliant on the facts relevant to the structure of the relevant market and whether that structure is or is not conducive to certain market behaviour which could harm competition and the consumer interest. There are many structural considerations that may be relevant to this analysis. These considerations may not all point in the same direction. For that reason regulators usually have to make "on balance" judgments about the likelihood of harm arising from the relevant market structure. The difference between this comment and Digicel's comments might be the emphasis on a broader assessment of facts than Digicel contemplates in its comment.</p> <p><i>No further action proposed on this comment</i></p>
7	Digicel	Letter, <i>Would regulatory intervention deliver net benefits?</i> Pages 5 and 6	Digicel comments: "Once a coherent theory of harm has been established, NICTA must then undertake analysis to determine whether any proposed regulatory intervention can reasonably be expected to deliver material net benefits to PNG. Any such analysis should be based on empirical evidence with	<p>NICTA staff agree that regulatory intervention should only be contemplated if there is a reasonable expectation of net benefits. However to require detailed quantification of both costs and benefits is to set the bar far too high given the information, time and resource available. A literal interpretation of this comment would lead to a</p>

No	Sub- mission	Reference or subject	Summary of comment	NICTA staff's response
			the costs and benefits quantified.”	<p>situation where intervention may be desperately appropriate and required but not implemented. This cannot have been the intention of the Act. On the other hand regulators should strive to make the case for intervention, and for describing the net benefits of intervention to the extent possible and to ensure that, through consultations and similar processes of engagement with affected industry stakeholders, attempt to refine that analysis in the light of the total industry experience and comment. That is the practical approach that NICTA considers to be contemplated by the Act.</p> <p>NICTA staff regard the Digicel comment as aspirational, in its literal sense, and agree with it on that basis. The reference in paragraph 5.8 of the Guideline, which Digicel cites with approval, is as far as NICTA staff consider it appropriate to go.</p> <p><i>No further action proposed on this comment</i></p>
8	Digicel	<i>Consistency with analysis under the ICC Act, page 6</i>	<p>Digicel notes that PNG's competition law and settings are currently under a review initiated by the Department of Treasury (Government's "CCF" Review).</p> <p>"Digicel submits that it would be appropriate for any Guidelines to be prepared in a coordinated way so as to ensure that competition law is applied consistently across all industries" and that NICTA should work with the ICC and the Government's CCF Review Team.</p>	<p>NICTA cannot anticipate the outcomes. Therefore the Guidelines are based, as they should be, on current legislative and policy settings. The Guidelines and other instruments will need to be reviewed in the light of the CCF Review outcomes, when they are adopted by the Government.</p> <p>Insofar as there is an interface in the Guidelines with competition law, coordination with ICC is necessary. The ICC has separately commented on the Draft Guidelines in some detail and the issues are best considered in response to that submission. As noted above, coordination with the CCF Review Team is inappropriate since that would be to anticipate the review outcomes.</p>

No	Sub-mission	Reference or subject	Summary of comment	NICTA staff's response
				<i>This set of issues has been deferred until consideration of the ICC's comments later in this Response Report.</i>
9	Telikom	Page 1, 2 <sup>nd</sup> para	Telikom's submission represents its initial thoughts on the subject matter. "However, we have yet to get responses from senior management sufficient so we may make further comments."	No further comments were received from Telikom during October 2016 so it is assumed that "senior management" had no further responses for NICTA's consideration. NICTA thanks Telikom for the comments received.  <i>No further action proposed on this comment</i>
10	Telikom	Page 1, 3 <sup>rd</sup> para.	"The draft guidelines do not yet provide a clear indication of how NICTA will approach market analysis in the future. It would help clarify interpretation in the future if the new guidelines comment on how they are informed by and may differ from NICTA's previous analyses."	There is a limit to how detailed general guidelines can be without inappropriately commenting on individual market situations in advance of a detailed analysis of those markets. NICTA staff disagree that the clarification sought by Telikom would be a clarification at all, given the need to be careful not to pre-judge market situations. Past analyses are subject to "sunset conditions" and therefore comment would be at substantial risk of pre-judging the situation when they next arise for review.  <i>No further action proposed on this comment</i>
11	Telikom	Section 1.1, page 1	Telikom asks on what occasions is NICTA contemplating that the Guidelines might be inadequate and then suggests that the last sentences of the section be deleted.	The context makes it clear that circumstances may arise where the guidelines are inadequate but obviously, if these circumstances were known in advance they would be covered in the draft. The last sentences are very important in explaining what NICTA will do if such circumstances arise. They need to be retained.  <i>No further action proposed on this comment</i>
12	Telikom	Section 1.2, page 1	Telikom refers to Part XII of the Act regarding public inquiries and investigations and to the M&A provisions of the ICC Act.	The Guidelines relate only to market analyses, not to inquiries and investigations generally.  The ICC's submission refers to M&A issues and are

No	Sub-mission	Reference or subject	Summary of comment	NICTA staff's response
				<p>better covered later in this Response Report.</p> <p>It is noted that Telikom says that some of the criteria that the ICCC needs to consider when applying the ICCC Act to M&amp;As may not be relevant to NICTA's role as sector regulator</p> <p><i>M&amp;A issues is deferred until consideration of the ICCC's comments later in this Response Report</i></p>
13	Telikom	Section 2: What is a market analysis?	Telikom considers that the guidelines should be structured differently and that this section should be deferred to Section 6.	<p>Telikom has provided no compelling reasons for its proposed rearrangement. NICTA staff have considered the proposal and consider the current structure to be quite satisfactory. Although the table produced by Telikom is of interest it does not further the specific aims of the current Guideline and for that reason will not be incorporated. Telikom's approach would lose the important specific focus that the Guideline seeks to achieve.</p> <p><i>No further action proposed on this comment</i></p>
14	Telikom	Section 3: Why might a market analysis be necessary?	Telikom considers that there are two definitions of "effective competition" and that only one should be included.	<p>The term "effective competition" has a long history. It is a complex concept that is still developing. The section has been reviewed to make it clear that the concept is being discussed, without reducing important material that helps to explain various aspects of the concept.</p> <p><i>No further action on the proposal, but a review of the section has been undertaken to ensure there is no confusion about the nature of the discussion.</i></p>
15	Telikom	Section 6: Defining a relevant market	Telikom proposes that critical loss analysis be included in the section, especially given the difficulties of finding data to inform a MHT (SSNIP	NICTA staff consider that a critical loss analysis is in effect a version of the SSNIP test. In order to estimate the actual loss that might arise from a price increase, and to compare it to the calculation of the drop in sales for



No	Sub-mission	Reference or subject	Summary of comment	NICTA staff's response
			test) analysis.	<p>unprofitability, it is necessary to know the margin over cost for the service, and, importantly, the price elasticity of demand. Without price elasticity the forecast for actual demand cannot be known. Therefore critical loss analysis has its own difficulties (especially in relation to margins, which may be difficult to determine) and the comparison is with a forecast of loss that assumes price elasticity in any case.</p> <p><i>No further action proposed on this comment</i></p>
16.	Telikom	Section 4, review of market definitions	Telikom has concerns that reviews of market definitions may reduce certainty and should be for just cause.	<p>NICTA staff consider that the issue if the dynamic nature of the market and the impact on market definition was well stated by Digicel (see item 3 above). The just cause for review is always the changing dynamics of the industry at all levels – technology, demand, service innovation and creativity, etc. If market reviews were not undertaken on a regular basis the result would not be improved certainty, but improved certainty that the legacy definitions might be dangerously outdated and incorrect.</p> <p><i>No further action proposed on this comment</i></p>
17	ICCC	Page 1, re Clause 2 – Market Analysis	ICCC considers that SMP should stand in the Guideline for Substantial Market Power, not Significant Market Power, to align with the Act.	<p>NICTA staff agree. In fact the change that has been made is more detailed and uses the term in the Act, <i>substantial degree of power in a market</i>. The change must be made for the reasons that the ICCC states. In practice the two terms have the same meaning, and that has now been pointed out to ensure for the purposes of connecting with EU references and practice.</p> <p><i>Substantial Degree of Power in a Market will be substituted in the Guidelines for Significant Market Power</i></p>
18	ICCC	Page 1, re Clause 2 –	ICCC recommends that the factors in Section 69(5)	NICTA staff note that the factors in Section 69(5) of the

No	Sub-mission	Reference or subject	Summary of comment	NICTA staff's response
		factors for consideration	of the ICCC be considered and incorporated.	<p>ICCC Act relate to M&amp;As, but that some have relevance to ex ante regulation of ICT markets.</p> <p><i>Action: NICTA staff have reviewed Section 69(5) factors and incorporated those that are relevant and which are not adequately covered already in the Guideline</i></p>
19	ICCC	Page 2, re Clause 3 – why might a market analysis be necessary	<ul style="list-style-type: none"> <li>• ICCC requests that NICTA be mindful of the distinction between a competition market and an economic market when conducting a market analysis.</li> <li>• ICC recommends that NICTA discuss further the processes that the ICCC uses for M&amp;A clearances and authorisation</li> </ul>	<ul style="list-style-type: none"> <li>• NICTA is mindful of the distinction although the words used to describe the contrast are often different to those in the ICCC's letter. NICTA is only concerned with what the ICCC would call "competition markets" for competitive market analysis. The distinction has been made more clearly in the section</li> <li>• Further discussions were held between NICTA and ICCC on 20 October 2016. Undoubtedly further discussions will be held as and when desirable.</li> </ul> <p><i>Action: The clause has been reviewed to make the point about competition markets for competitive market analysis clearer</i></p>
20	ICCC	Page 2, re Clause 4- defining a market	<ul style="list-style-type: none"> <li>• ICCC recommends that dimensions of markets other than consumer, product and geographic be considered, or at least that the Guideline not be confined to these dimensions. In particular the ICCC suggests that a functional dimension, relative to the supply chain, be considered.</li> <li>• ICCC recommends that NICTA and ICCC discuss further the intersection of access regime</li> </ul>	<ul style="list-style-type: none"> <li>• NICTA staff agree with the general point and the clause will be reviewed to avoid confinement to pre-determined dimensions. Before detailed definition occurs, using the dimensions set out (and others if relevant), the market will already have been classified as wholesale or retail. ICCC comments about supply chains within vertical (wholesale) markets are very apposite because there may be multiple sub-levels in a wholesale or retail market, and they might impact on precise market definition.</li> <li>• Further discussions were held between NICTA and ICCC on 20 October 2016. Undoubtedly further</li> </ul>

No	Sub-mission	Reference or subject	Summary of comment	NICTA staff's response
			arrangements for market analysis with the provisions of the ICC Act.	discussions will be held as and when desirable. <i>Action: The clause has been reviewed to leave open the prospect of other relevant dimensions and use the supply chain example to illustrate that within 'retail' and 'wholesale' there might be separate markets or sub-markets that need to be defined for more rigorous market analysis.</i>
21	ICCC	Page 2 – re clause 5: Suitability for ex ante regulation	<ul style="list-style-type: none"> <li>ICCC recommends that the 3CT test should consider the factors set out in section 69(5) of the ICC Act</li> <li>ICCC recommends that NICTA and ICC discuss further the declaration of entities and products under the ICC Act and the Prices Regulation Act Ch 330.</li> </ul>	<ul style="list-style-type: none"> <li>The three-criteria test (3CT) is a very specific test which provides a filter for ensuring that a market is susceptible to ex ante regulation. It does not displace the full analysis of the market that follows if the answer is 'yes, it is susceptible'. The Section 69(5) factors are likely to be applicable to the full market analysis rather than to the 3CT, but they have been further reviewed to check.</li> <li>Further discussions were held between NICTA and ICC on 20 October 2016. Undoubtedly further discussions will be held as and when desirable. However, it is recognised as unlikely that the ICC would seek to declare ICT entities and services when there are specific provisions for regulation in place for the sector under the NICT Act. If such a situation arose for consideration ICC and NICTA would confer and act in a fully coordinated way.</li> </ul> <p><i>Action: The discussion on the 3CT factors has been reviewed in the light of Section 69(5) of the ICC Act</i></p>
22	ICCC	Pages 2 and 3 – re Clause 6, Market Analysis	ICCC notes that PNG competition law, the ICC Act, does not prohibit monopolies or market power, only the abuse of market power, and recommends that the provisions of the ICC Act, such as Section 58,	NICTA staff note the point. The general point that market power and monopoly are not unlawful as such, has now been emphasised in the Guidelines where not sufficiently covered. However incorporation of Section 58 is not

No	Sub-mission	Reference or subject	Summary of comment	NICTA staff's response
			that deal with abuse/taking advantage of market power should be incorporated.	favoured because the Guideline deals with ex ante regulation under the ICC Act, not ex post application of competition law in response to actual abuse.  <i>Action: The lawfulness of monopoly and SMP without more has now been made clear in the Guideline</i>
23	ICCC	Page 3 – Collective Market Power	ICCC considers that this part of the guideline would be captured under Section 50 of the Act which deals with agreements or arrangements that have the effect of substantially lessening competition. ICC has powers to clear or authorise such arrangements under appropriate circumstances.	The emphasis in the Guideline is on ex ante regulation rather than any response to actual agreements or arrangements that are found to be in place. For regulation the issue is whether the structure of the relevant market is such that one or more competitors will likely operate on a collective or cooperative basis in their relationships with each other. This is a very complex and controversial issue in the law in all jurisdictions. NICTA staff will review the section of the Guidelines to ensure that the emphasis is correct, and to make a reference to Section 50, but we are keen to ensure that the matter becomes no more complicated than it needs to be.  <i>Action: A reference to Section 50 of the ICC has been inserted in the Guideline but it has been made clear that the Guideline emphasis is on ex ante regulation</i>
24	ICCC	Page 3 – General Observations	<ul style="list-style-type: none"> <li>ICCC recommends that the Guideline only refer to Australian competition concepts because the ICC Act was modelled on the Australian Trade Practices Act, 1974.</li> </ul>	<ul style="list-style-type: none"> <li>NICTA staff understand the point being made. However the best practice approach, with considerable detail, for market analysis process for ex ante regulation is that developed in the EU, and this needs to remain. There is no Australian equivalent in terms of comprehensiveness. Other concepts such as “effective competitive” need to be explored, as previously noted in response to a comment from Telikom. Nevertheless the proposal from the ICC has</li> </ul>

No	Sub- mission	Reference or subject	Summary of comment	NICTA staff's response
			<ul style="list-style-type: none"> <li>• ICCA recommends that the definition of competition concepts in Section 45 of the ICCA Act should be reflected in the Guidelines, where appropriate</li> </ul>	<p>been reflected in the further review of the Guideline.</p> <ul style="list-style-type: none"> <li>• NICTA staff have now made these references in the appropriate parts of the Guideline.</li> </ul> <p><i>Action: The Guideline has been reviewed and now incorporates ICCA Act definitions of competition concepts where appropriate</i></p>