



RESPONSE TO COMMENTS REPORT

NICTA staff's response to the comments received in response to the Discussion Paper issued for the Public Inquiry into the potential declaration of certain wholesale mobile telecommunications services

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1 INTRODUCTION

On 2 August 2013, NICTA published a discussion paper as part of its public inquiry into a potential declaration of certain wholesale mobile telecommunications services. The services are associated with mobile access and call origination and for the sake of convenience throughout this document have been referred to by the initials, MACO.

Written submissions were received from:

- Bemobile Limited (“bemobile”)
- Digicel (PNG) Limited (“Digicel”)
- Independent Competition and Consumer Commission (“ICCC”)
- PNG Air Services Limited (“PASL”)
- Telikom PNG Limited (“Telikom”)

In this case NICTA considered that it would be valuable to give respondents an opportunity to comment on other submissions, and a period was specified in which cross-submissions (sometimes known as “comments on comments”) would be received and considered by NICTA. Cross-submissions were received from:

- Digicel (PNG) Limited (“Digicel-X”)
- Telikom PNG Limited (“Telikom-X”)

This report sets out the main comments of each of the organisations that made a submission together with the response of NICTA staff. The submissions are discussed sequentially in alphabetical order of the name of each organisation involved. There is consequently some duplication of discussion, although, where possible, this has been reduced by references to similar discussions on the same issues earlier in the report.

The cross submissions are considered after the primary submissions, also in alphabetical order of the name of the organisation concerned.

Following the inquiry, NICTA considered the issues and the comments and cross-comments received from all contributors to the inquiry and concluded that, consistent with the preliminary view expressed by NICTA staff in the discussion paper, that the declaration of neither a domestic inter-network mobile roaming service nor facilities access services associated with mobile network facilities (including telecommunications transmission towers) would meet the statutory declaration criteria. Consequently NICTA does not recommend that the Minister declare either service at this time. NICTA’s conclusions and consideration of the declaration criteria are summarised in the separate Decision and Inquiry Report.

2 SUMMARY OF NICTA STAFF'S CONSIDERATION OF AND RESPONSE TO THE MAJOR COMMENTS RECEIVED

There are a number of substantial issues that were raised by respondents that warrant detailed and considered responses. Those responses are set out below. An overview of the comments that were received, and NICTA staff's consideration and response to them, is provided in section 3.

2.1 THE RELEVANCE OF SMP

Digicel has made the point in its submission that there is no requirement under Section 128 or elsewhere in the Act to consider significant market power (SMP) when determining whether the criteria for a wholesale service declaration have been met. Digicel also makes the further point that the criteria in the Act need to be met for such a declaration and that NICTA must follow the process of the Act and deal with those criteria. Other submissions make the point that the criteria in the Act must be the focus of NICTA's attention.

NICTA agrees that the criteria in the Act for wholesale service declarations are the matters that need to be the prime focus of the inquiry. Indeed NICTA staff made the point in the consultation paper that the Act was silent on the matter of SMP.

However NICTA take the view that it is important to understand the circumstances that operate in the relevant wholesale market and in related retail markets. It is important to understand the structure of those markets and the relative size and strength of the participants. If there is effective competition in all or part of the market then it is important to know that, because it will likely impact directly on the competition test. As per section 232 of the Act, the discussion papers that accompany public inquiries must set out issues that, in NICTA's opinion, are relevant to the matters under consideration and such background material as NICTA thinks appropriate. NICTA believes that consideration of SMP and the effectiveness of competition in the relevant market are relevant considerations to explore in discussion papers associated with inquiries into the potential declaration of wholesale services. As required by the Act, any decisions that NICTA takes following an inquiry would be based on the Declaration Criteria specified in section 128 of the Act.

2.2 DECLARATION OF SERVICES

Digicel and the ICCC have made the point those wholesale service declarations, if they are made at all, apply to services and not to services provided by licensed operators with SMP. NICTA agrees with this interpretation and any wholesale service declaration will apply to the service in question, not to any one supplier of it. Insofar as the discussion paper said otherwise it was incorrect. It is however, likely that the terms and conditions that attend any declaration may result in access seekers being licensees who are not present in part of a market seeking access from licensees who have facilities or an operating network and who

have SMP, especially in areas in which access is sought. However it is easy to envisage that a new entrant may seek national roaming on the network of an existing SMP operator or on the network of a non-SMP operator, or both

2.3 THE WHOLESALE MACO MARKET DEFINITION

In the discussion paper NICTA staff put the view that the wholesale MACO market was a national market having regard to the licensing arrangements, the tendency of the licenses to apply similar terms and conditions nationally and so on. There is nothing in the various submissions that appears to compel an alternative view.

However Digicel makes the point that whether the criteria for wholesale services declaration under the Act may need to be assessed on a much more localised basis, because the circumstances in the market and the feasibility of commercial substitution may well vary significantly from location to location. In saying that rural and remote locations may be more appropriate for network service and facility shared access picks up a similar point.

These comments caused NICTA staff to reconsider the matter of market definition and the circumstances that might warrant a more detailed declaration on a location basis. This matter is not immediately important because NICTA has subsequently formed the view that the services should not be declared at this time. However, the matter is important in the longer term because it is possible that the case for declaration may become more compelling in the future and the nature of the declaration will need to be considered in detail.

NICTA does not believe that it is necessary to consider every facility and every location when considering making a declaration in relation to a specific facility or a specific location. The Act contemplates that wholesale service declarations shall be made in respect of service types, not specific facilities or locations. However the terms and conditions that might be included in a determination may have the effect of further narrowing services based on location or other factors. Alternatively NICTA could make a general declaration and rely on the line of thinking that appears in the Digicel submission – namely that the market (that is the licensed operators who participate in the market) has the capacity to determine where and when it is commercially feasible to substitute a facility and when and where it is not. Without attempting to resolve the matter, it is at least open to NICTA to make a general declaration and to rely on the commercial sense of the market to guide implementation. This applies in the case of access to facilities such as sites, towers and so forth. In the case of national roaming it may not be appropriate to rely on commercial sense entirely because, for example, licence rollout obligations may suggest other constraints that ought to be applied.

2.4 STANDARD OF PROOF WHEN APPLYING DECLARATION CRITERIA

Digicel stresses the point that the matters associated with the declaration are so important for investment and the policy framework in general that a very high evidentiary burden is on NICTA in determining whether the criteria for wholesale service declaration in the Act have

been met. Indeed on several occasions Digicel goes so far as to suggest that the standard of proof is at the criminal level, namely beyond reasonable doubt.

NICTA does not find this argument compelling in the least and would much prefer to adhere to the process specified in the Act. Section 129 (1) requires that “following a public inquiry under Section 127” NICTA must be “satisfied that all of the declaration criteria would be met by the declaration”. These words suggest to NICTA that normal evidentiary burdens apply. If the Parliament intended a criminal standard to apply this would have been abnormal in legislation of this type and it is reasonable to think that it might have been specifically and explicitly provided for. The absence of reference to a criminal standard is an important indicator of legislative intention.

2.5 DEMAND FOR WHOLESALE SERVICES UNDER CONSIDERATION

NICTA staff consider that it is an important matter that none of the respondents who made submissions referred to any demand for the wholesale services under active consideration. NICTA does not have any other specific information available to it that suggests that there is a material level of current demand for these services. However earlier correspondence with bemobile did suggest that that some demand existed. Nothing has been added since in submissions. That is not to say that sharing does not now occur, but commercial sharing of towers means that some level of demand has been satisfied in the normal course of commercial operations. In the absence of any advice that there is a genuine and current level of demand for a particular service to be declared, then NICTA will be inclined not to recommend the declaration of that service.

Demand could of course arise at any time for wholesale domestic roaming services if a new licensee were to enter the market. NICTA staff consider that a new inquiry could be established and expedited to consider the matter should such a need arise.

2.6 NETWORK COVERAGE OBLIGATIONS AND POTENTIAL NEW INVESTMENT IN MOBILE INFRASTRUCTURE

Digicel has argued that it cannot be said to have SMP in the relevant wholesale markets because of the failure of other licensees to fulfil their licence obligations for network coverage. NICTA staff disagree, but the disagreement is not particularly important because the purpose of the discussion of SMP was to understand the structure and operation of the market. Digicel presents the failure of other mobile licensees to fulfil their rollout obligations in moral terms, and it may well have such a dimension, but for present purposes NICTA staff are concerned about the bearing that it might have on the market and on the argument for declaration.

It is true that some mobile licensees have yet to fulfil their network rollout obligations. It is also true that they have recommitted to do so and that NICTA intends that they do so. In addition, as Digicel has noted, both bemobile and Telikom have made public statements about their respective intentions to invest in facilities and infrastructure. NICTA has no

separate knowledge of the amounts and detailed timing involved. However, compliance with network rollout obligations is consistent with new investment.

3 OVERVIEW OF PRIMARY 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-submissions. Many arguments and comments were repeated, and sometimes many times. 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	bemobile	Market definition Q1, p 1	Bemobile agrees with the market definitions employed.	Noted
2	bemobile	Roaming constraints, p 1	Bemobile notes that forecasts of roaming traffic will be important for other networks to plan capacity and avoid congestion. "Mobile roaming is only practical with like for like networks interconnecting where handsets can connect with another roaming network."	This would be one of many requirements in a roaming agreement.
3	bemobile	Satellite-based mobile services are marginal Q2, p 1	Bemobile agrees that such services are marginal in terms of substitutability.	Noted.
4	bemobile	Susceptibility to ex ante regulation Q3, p 2	"Yes, the current market does not support complete duplication of networks, especially in regional areas."	Noted.
5	bemobile	Digicel and SMP Q4, p2	Yes, based on a wider geographic coverage. For Bemobile for every 1 incoming Digicel-Bemobile call, we observe 3.5 outgoing calls Bemobile-Digicel."	Noted. NICTA staff do not consider greater geographic coverage or higher interconnection traffic share as determinative of SMP in the wholesale MACO market – however they are indicators that may explain market power in part.

Sub-mission		Reference or subject	Summary of comment	NICTA staff's response
6	bemobile	Is Digicel's SMP in the wholesale market harmful to the development of competition in the retail mobile market? Q5, p 2	Bemobile answers that the market share is significant and that Digicel is effectively a monopoly.	Market share is not synonymous with market power. On the information about originating traffic provided by Bemobile, Digicel is not a monopoly.
7	bemobile	Declaration criteria Q6, p 2	Bemobile talks about the importance of forecasts of traffic volume, pricing and compliance review processes.	The response has not dealt with the declaration criteria set out in the Act.
8	bemobile	Sharing of facilities funded by public monies, p 3	Bemobile writes: "Digicel's extension into remote areas is also being funded by either local MPs from their electoral allowances or by groups like PNG Sustainable Development (PNGSDG) with a charter to reinvest local royalties into improving infrastructure in their region. NICTA should insist that any infrastructure built from such public funds should be essentially Declared and available on equitable terms for other qualified users. This should be made retrospective."	The principle that facilities paid for in full or in part from public funds should be subject to shared access has much merit and has been adopted in some other jurisdictions – usually in relation to the U/A/US regime (as is the case under paragraph 131(1)(b) of the Act). However NICTA has no evidence that any public funding (in the full sense of that term, being funds that have been allocated by government specifically for this purpose) is involved in the facilities under consideration in this inquiry. The inquiry relates to shared access to services and facilities that have been constructed via private investment or based on private initiative.
1	Digicel	Digicel's contribution to the social and economic development of PNG and development of the sector, pp 1 – 9, paras 1 - 17	Digicel points out that since the commencement of its operations in PNG in 2007 it has contributed through its investments to the social and economic development of the country in significant measure. In addition its work through the Digicel Foundation has contributed to the welfare of a range of groups in PNG including sporting organisations and local schools and communities.	The points that Digicel makes are not disputed. It is important to note that important though these various contributions are, they are not determinative of the key issues that are being considered in the present public inquiry.
2	Digicel	Subsidies to competitors, p 9, para 18	Digicel contrasts its own investment, service deployment and overall contribution to that of its competitors, "who have consistently failed to meet their own network roll-out obligations and own stated investment timetables." Digicel comments that after granting concessions against obligations, NICTA is now considering imposing regulation on Digicel which "could only be intended to	Digicel is right to contrast its own meeting of roll-out obligations with those of others. However, Digicel is making a number of assumptions about the manner in which access obligations to the wholesale services now being considered might be regulated in detail. In particular the assumption that any wholesale service determination might amount to a regulated subsidy in favour of competitors pre-empting the discussion that needs to be had about

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			have the effect of requiring Digicel to provide a regulated 'subsidy' to its competitors".	the access conditions that might or should apply. If, as the General Pricing Principles require, an access provider is appropriately compensated for the costs that it incurs and for the risk-adjusted return that those costs should support, then the notion of an enforced subsidy cannot be sustained.
3	Digicel Risks associated with wholesale regulation. p 9 para 19	Digicel notes that regulatory intervention for wholesale services is serious and can impact on downstream competition, innovation and investment. Digicel observes that the risks are particularly serious where the market is still growing and developing as in PNG.		The general point that Digicel is making is understood, and NICTA recognises the need for caution before intervening in markets. NICTA staff point out, however, that the focus of the present inquiry is with the wholesale market which, apart from self-supply, does not appear to have developed or grown at all. If the wholesale market has stalled or has otherwise failed there may well be a very important role for regulation to provide additional stimulation in that respect.
4	Digicel Impact on investment. p 9, para 20	"if a regulator prematurely regulates wholesale access, it removes the incentive to invest in infrastructure both from the perspective of an access provider and an access seeker."		Under certain circumstances this comment may be correct, but it assumes that the terms of the intervention are not shaped to address the need for continuing investment incentives. The comment needs to be considered in the context that duplicated investments may well be inappropriate having regard to the potential level of demand. There is overall economic advantage in such situations if the sharing of facilities leads to improved utilisation and improved efficiency all round
5	Digicel Undermining Digicel's financial position, p 9, para 24	"There will be an adverse financial and commercial impact on Digicel. Digicel will no longer be free to make commercial rollout and investment decisions. 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 undermined."		There is no basis for assuming an adverse financial and commercial impact on Digicel. No evidence that this would be the case has been provided. Nor does it follow that a wholesale service declaration would affect Digicel's freedom to make commercial rollout and investment decisions. Again no evidence has been offered to support such a view.
6	Digicel Chilling of investment because of the threat of regulation, p 9, para 24	Digicel considers that the threat of regulation would send a bad signal which "would chill investment". This is the argument for there being an adverse impact on investment in ICT markets. The present inquiry has caused a reconsideration of its investment plans.		NICTA staff are operating on the only basis which is open – namely that current and potential investors in the PNG ICT sector make rational decisions based on the actual content of regulation rather than on the basis of worst possible outcomes to inquiries

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7	Digicel	SMP filters, p 12, para 30	according to Digicel. Digicel comments on the three-criterion test referred to in the Consultation Paper, and says: "...it is not relevant or necessary (and the Act does not require) that NICTA consider whether a participant in the relevant has SMP or not before it considers the WDC [wholesale declaration criteria]."	that are specifically required by legislation. In NICTA's opinion, the operation of the market(s) is a relevant issue to explore in a discussion paper associated with the potential declaration of a wholesale service. NICTA also believes that it is relevant whether there is a fully and effectively competitive market in operation, because the WDC include reference to the impact on competition. The decisions that are made following the exploration of issues through the inquiry and discussion paper process are a separate matter and will always be based on the statutory criteria specified in the Act.
8	Digicel	Standard of proof and meeting criteria, pp 14-5, paras 37-40	Digicel put an argument that there are a number of WDC [wholesale declaration criteria] that NICTA must be satisfied are met. Digicel suggests that this involves a high threshold with requisite standards of cogency, and then concludes that the "standard for practical purposes equates to proof beyond reasonable doubt – i.e. the criminal standard..."	The conclusion does not follow at all. The Act requires that NICTA must be satisfied that the criteria for a wholesale service declaration are met before recommending such a declaration – that is all, but it is a substantial requirement nevertheless.
9	Digicel	Apprehended failure to be impartial, p 17, para49	Digicel claims that NICTA proposes to only regulate access to Digicel's network and that this "gives rise to an apprehension of bias or that NICTA is applying regulation in a discriminatory manner." Digicel claims "this falls foul of the regulatory principles in section 3 of the Act and does not align with the requirements of the WDC."	Clearly if facilities access is to be appropriate it typically means that one or other licensee has the relevant facilities in any particular relevant market. If all licensees had appropriate facilities then there would be little point in requiring wholesale access, other than for call termination. This is not bias in any sense, nor should or can it lead to a reasonable apprehension of bias. Suffice it to say, the criteria for wholesale service determination as specified in the Act must be met.
10	Digicel	Why not inquire into fixed network services? p 19, para 54	"Digicel questions whether it is appropriate for NICTA to have decided to 'roll up' inquiries in relation to two services into one proceeding while apparently leaving the fixed network services that are provided by Telikom 'untouched'. It is not clear and has not been explained why inquiries into the potential declaration of mobile services would have any greater priority than inquiries	NICTA considers that it would have been apparent that it has limited resources and must sequence the work it undertakes. NICTA also considers that it might have been readily apparent that the two mobile related services raised issues that are related and therefore that there is benefit in considering them in a single inquiry. Issues relating to fixed services have been raised in a

No.		Sub- mission	Reference or subject	Summary of comment	NICTA staff's response
				into the declaration of fixed services."	separate consultation paper.
11		Digicel	Barriers to entry, p 20, para 58 (a)	Digicel argues that barriers to entry are "no higher than in any other similar market anywhere in the world" and that PNG's relatively low mobile service penetration means that opportunities exist for other entrants.	<p>The criterion is not whether barriers are higher than elsewhere but whether they are high and non-transitory. The circumstances of each market need to be considered by the relevant regulator. In addition Digicel's comment seems to be directed to the retail mobile market not to the wholesale market that is the subject of the inquiry.</p> <p>Not all of the market would typically be considered addressable; a factor not disclosed in Digicel's observations. In addition the history of mobile competition in PNG suggests substantial first-in advantages including strong advantages in economies of scale. These characteristics are unlikely to change in any time frame relevant to the current enquiry.</p>
12		Digicel	Effective competition or tendency towards effective competition, p 20, para 58(b)	<p>Digicel "disagrees that the market is either not effectively competitive now or is not at least tending towards effective competition" and suggests that Telikom and IPBC investments in infrastructure support that view.</p> <p>"Digicel also notes that the Minister has made a Retail Services Determination that was intended to address any competition concerns that may have existed in the mobile services market."</p>	<p>The assumptions and thinking associated with the investments referred to are not known to NICTA and are unlikely to be known to Digicel (it does not claim knowledge). One can surmise that the investors are seeking a return but the period and level of return are not known. The investments are not evidence that the market is effectively competitive now or in any timescale relevant to the current inquiry.</p> <p>The Minister's Retail Services Determination was not intended to "address any [by which Digicel is suggesting 'all'] competition concerns that may have existed in the mobile services market." The terms of the determination do not give any support to the words that Digicel uses. That determination sought to address specific concerns about on-net/off-net price discrimination in the retail market, and never purported to resolve other issues, such as the wholesale services determination that the Act requires NICTA to consider.</p>
13		Digicel	Competition law sufficient, p 20, para58(c)	"... even if competition issues did arise, Digicel believes that ex post competition law action is sufficient to address	The threat from dominance in the wholesale MACO market is such that competition may be severely impacted and the situation not retrieved by ex post action, which can be very protracted.

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14	Digicel	Promotion of competition in another market, p 21, para 63	<p>those issues."</p> <p>Digicel cites section 128(b)(i) of the Act which requires that access to each of the declared wholesale services must be necessary for the promotion of effective competition in at least one market other than the market for the Declared Wholesale Services. Digicel notes that NICTA has "acknowledged" in relation to that and other criteria for WSD that "... it is not similarly apparent that declaration is necessary to promote the development of retail competition."</p>	<p>Digicel has given no reasons for its view in the case of PNG.</p> <p>For the avoidance of doubt, the discussion paper was not an 'acknowledgement' in the sense that Digicel may be intending to cast it. The point of the discussion paper was to generate discussion and seek views on whether a declaration is necessary to promote effective competition in the retail market, and NICTA staff did that by, among other things, advising that they have not found any reasons that apparently support a conclusion of necessity. At the time of the issue of the discussion paper, NICTA had not formed a final view on the matter.</p>
15	Digicel	Efficiency objective is satisfied, p 22 para 76	Digicel submits: "The declaration of each of the Declared Wholesale Services will further the achievement of the "efficiency objective" of promoting the economically efficient use of, and the economically efficient investment in the facilities by [which] the ICT services may be supplied in PNG."	Noted.
16	Digicel	No material compromise of the incentives for efficient investment, p 23, para 77	"Having regard to the obligations of Section 128(c)(i) of the Act, the Declared Wholesale Services would not materially compromise the incentives for efficient investment in any facility over which the Declared Wholesale service may be supplied."	Noted.
17	Digicel	Technical feasibility of roaming, p 24, para 85	Digicel notes that much detail on the roaming service is required before technical feasibility can be assessed.	NICTA considers that there can be no serious doubt about technical feasibility of roaming given the considerable history internationally of satisfactory roaming arrangements that is available to all to consider. Clearly the detail that Digicel lists would need to be specified if roaming was to be declared.
18	Digicel	Avoiding inefficient replication of facilities, p 24, paras 88 – 91.	Digicel notes that in the circumstances of PNG and for continuity of service when outages might occur, replication of infrastructure is highly desirable.	Indeed, a value might well be placed on infrastructure replication for these reasons, but that has to be considered against the probability of efficiency loss. Section 128 contemplates that judgments will need to be made. Digicel has offered no view on

Sub-mission		Reference or subject	Summary of comment	NICTA staff's response
19	Digicel	Government policy and the objectives of the Act, p 25, paras 92 - 95	Digicel puts the view that the objectives of Government at the time the Act was passed was to introduce infrastructure-based competition in telecommunications in PNG, and that areas that are 'truly uneconomic to serve', outside the coverage areas of each operator's licence, would be covered by the Universal Access and Service Regime.	such judgments and how they might be best made. NICTA does not accept this view of Government policy or of the Act if it implies that infrastructure-based competition is to be preferred to the exclusion of service based competition. Of course at the time of the Act and also now PNG seeks new infrastructure investment in the sector. However the inclusion of a wholesale access regime in the Act makes it very clear that the policy is not and has never been one of purely infrastructure-based competition plus UAUUS arrangements.
20	Digicel	Paper by Mr Alex Sundakov of Castalia Strategic Advisors	Digicel provided a paper by Mr Sundakov that dealt particularly with issues associated with feasibility of substitution of facilities and inefficient replication of facilities.	NICTA has considered Mr Sundakov's paper and generally found it both informative and interesting. Some specific comments appear below.
21	Digicel	Type I and Type II errors, Sundakov, p 3	Type I errors are errors of commission and Type II errors are those of omission (not acting). When information is imperfect and a sector is dynamic, then it would be appropriate to apply legislative tests [in s.128] "in a way which would minimise the possibility of Type I error occurring, even if it would slightly increase the probability of Type II error."	NICTA considers this to be sage advice in a general sense. However it does not lead to the conclusion that the risk of a Type I error should be completely avoided by not making wholesale service declarations under any circumstances. If that were the case there would be no point to the inclusion of the current services in the Act for review, nor any point for the inclusion of a wholesale access regime.
22	Digicel	Absence of private deals, Sundakov, pp 3 - 4	It is important to ask why parties have not come to a private deal on sharing infrastructure. "If the incumbent owner does not agree to come to a private deal, it would be acquiescing to a competitive investment which could undermine its own profitability, and would therefore punish itself. It would be in a worse position than if it had agreed to come to a deal." "In dynamic sectors such as mobile telecommunications, whenever there is such private incentive to reach an agreement over access, but no agreement exists, the outcome should be interpreted as strong evidence that	The question raised is an important one, and needs to be answered in the specific context of PNG, rather than generally. A private deal may not have occurred because there was no explicit demand. This may be the case in PNG given the lack of demand indicated during the inquiry. In that case the wholesale declaration might be questioned. However, the bargaining power and financial capacities of the parties might be such that not entering into a deal might not encourage alternative infrastructure but result in the deferral of competition in an area. The point is that the alternative to a private deal proposed by Mr Sundakov is not the only alternative that an incumbent might or should consider. In the second sentence quoted, the focus must be on

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No.							
				the incumbent has genuine efficiency reasons to deny access."	whether there is a private incentive to reach an agreement over access at all.		
23	Digicel	Static cost comparison test v social benefit test, Sundakov, p 6		Social benefit and the impact on dynamic aspects of efficiency and competition need to be considered, and "should not be confused with the static cost test proposed by NICTA staff."	NICTA staff agree that the assessment of a wide range of factors is appropriate in determining the benefits and impacts of sharing, and, for the record, have not proposed a static cost test of the kind described by Mr Sundakov.		
24	Digicel	Natural monopoly test for infeasibility to replicate a facility, Sundakov p 7		The suggestion is that NICTA staff have adopted a particular view of the test to be applied in relation to the question whether it is commercially feasible to replicate a facility – namely that the facility is a natural monopoly.	This comment incorrectly describes NICTA staff views. NICTA staff have not talked either in terms of replicating the facility as it exists, which is also suggested in Mr Sundakov's comments. The Act does not require that the facility should be a natural monopoly.		
25	Digicel	National roaming lessons from international experience, Sundakov, pp 10 - 13		Mr Sundakov has referred to the arrangements for national roaming in a selection of other countries and drawn some conclusions.	NICTA staff find the examples and the lessons both interesting and informative. For the avoidance of doubt, In PNG network rollout obligations must be considered when national roaming is being considered.		
26	Digicel	Scope of MACO market, Sundakov, p 14		"The MACO market is defined as being national in scope. However, the existence of alternatives to Digicel's facilities varies considerably in different areas of the country."	Noted. Although licensing and other indicators suggest a national market, it is open to a declaration to limit access to locations where certain factors apply. This option has not been foreclosed.		
27	Digicel	Risks, Sundakov, p 15		Mr Sundakov notes "Risks are far less for the renter or tenant of shared infrastructure." The tenant can reduce his order or leave, but the host network still bears the risk of losing the capital invested. "The tenant's risk exposure is minimal at best in comparison." "This situation of unbalanced risks is compounded by the rate setting process that regulators often undertake to set maximum prices for shared infrastructure or shared services." The process will typically "assume perfect foresight where all investments turn out to be successful."	NICTA is not aware of any requirement that risks should be "balanced" or of the same kind. However the point is taken that the terms imposed on the access seeker need to properly consider the risk associated with the investment in the first place and to be <i>risk-adjusted</i> . This is provided for under the General Pricing Principles and, if the service was declared, could be addressed further in the Service Specific Pricing Principles. The terms proposed and, if necessary, arbitrated may well require minimum commitments to prevent free-rider problems from arising. Mr Sundakov does not address the issue of how shared access might reduce the continuing risks of the facility owner, by providing		

Sub-mission		Reference or subject	Summary of comment	NICTA staff's response
28	Digicel	Comments from Dr Henry Ergas	Digicel provided comments by Dr Ergas on whether domestic roaming and mobile network facilities access meet declaration criteria in the National ICT Act	a return on otherwise unused capacity. NICTA has considered Dr Ergas's comments and generally found them both informative and interesting. Some specific comments appear below.
29	Digicel	Promotion of competition criterion, Ergas, p 2, para 7	Dr Ergas notes that a strategy open to Digicel's rivals is to complete on coverage by building sites in areas of population that are outside Digicel's coverage areas. "If this approach provides a feasible alternative to providing service in the areas where Digicel has network infrastructure that cannot be viably duplicated and this strategy allows rival networks to offer a coverage proposition to retail customers that is as attractive as Digicel's coverage, then access to Digicel's network is not necessary for effective competition to eventuate and declaration is not justified."	NICTA staff note that the argument is highly conditional and it is likely that the conditions could not be satisfied. One test of this is that the strategy has not been adopted – and one could say for the reason that the conditions cannot be satisfied in practice. NICTA staff do not find a highly theoretical argument of this kind particularly compelling. Certainly the theoretical possibility of such a strategy is not an adequate reason to consider declaration to be not justified.
30	Digicel	Risk of under-recovery of costs if declared, Ergas, p 2, para 8	"In the event of declaration there is a risk that prices set by a regulator for the declared wholesale services will be below the efficient level. This would lead to under-recovery of costs by the access provider" and reduce incentives for future investment.	This argument is also conditional. If regulated access prices are set appropriately, taking full account of the risks that Digicel has incurred, then the argument suggests that future investment incentives will be maintained.
31	Digicel	Network expansion and service improvement incentives, Ergas, p 2, para 9	"A second negative investment impact derives from the fact that if the services at issue are declared the competitive benefit of becoming a more attractive network by investing in increased coverage or improved service levels is lost."	This outcome is certainly possible and may be more likely with full service sharing via roaming than with access to passive facilities such as sites and towers. The terms and duration of roaming may well be such that both the access and the impact on coverage/service investments may be limited as well.
1	ICCC	Domestic mobile roaming services, p 2	ICCC notes that domestic mobile roaming "would give Digicel competitors the same coverage as Digicel."	It is not automatic that a declaration will enable competitors to have the same coverage as Digicel. A declaration might well have access conditions that make access dependent on circumstances associated with location.

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No.							
2	ICCC	Effective retail competition, p 2	".. it appears that Digicel does not have effective retail competition and so is likely to be shown to have achieved SMP. ... we agree that market pricing is not subject to effective retail competition ..."	Noted.			
3	ICCC	Operation and performance of supplied declared services, p 4 [e] a.]	The ICCC notes that 'roaming traffic volumes to be carried by the declared network might cause congestion, reduced service levels and loss of revenues for all parties.'	Paragraphs 134(1)(d) and 136(4)(b) of the Act provide for any capacity or similar constraints to be addressed			
4	ICCC	Risks of damage to shared facilities, p 4 [e] b.]	The ICCC notes that "third party access to Digicel facilities might increase the risk of damage to the facilities."	This is possible, but experience with shared access in other countries suggests a range of effective risk mitigation strategies, the cost of which can be managed and shared. ICCC recognises that these issues are all managed in other countries, and could be similarly managed in PNG.			
5	ICCC	Earlier network upgrades, p 4 [e] c.]	The ICCC notes that the "use of facilities by third parties is likely to bring forward the timing of network upgrades, leading to earlier capital and operational costs for Digicel."	This is certainly possible, but regulated wholesale charges, if applicable in the absence of commercial agreement, will reflect all costs and a risk-adjusted rate of return. ICCC recognises that these issues are all managed in other countries, and could be similarly managed in PNG.			
1	PASL	Market definition Q1, p 2	PASL considers that a national market is appropriate in both cases.	Although the discussion paper talks in terms of national markets, the application of any declaration may be less than national, depending on the nature of the conditions and qualifications that are added.			
2	PASL	Satellite-based mobile services Q2, p 2	"We agree as there are very limited parties with such service in PNG. Any party wishing to be an MNO should consider using satellite based mobile services due to PNG's geographical terrain, land ownership issues, vandalism as opposed to terrestrial links."	Noted. This response does not however address the issue whether satellite-based mobile services can be ignored for the purposes of this inquiry. We note that no other respondent has suggested otherwise.			
3	PASL	Susceptibility of wholesale MACO market	PASL agrees, based on NICTA's explanation.	Noted.			

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4	PASL	to ex ante regulation Q3, p 2 Digicel and SMP Q4, p 2	PASL agrees that Digicel has SMP.	Noted.
5	PASL	Impact of SMP on retail mobile market competition Q5, p 3	PASL does not consider Digicel's position as potentially harmful to retail competition. "... ifDigicel can commit to an initial huge capital investment, we do not see any reason why other MNO's can't do the same. Whilst Digicel's SMP can be seen currently as harmful, in the longer term it would be good to get others to strive to exceed Digicel's feat instead of accepting defeat. This will be good competition as Digicel has now set the benchmark."	Noted.
6	PASL	Would the declaration criteria be met? Q6, p 3	PASL seems to support the declaration on the grounds of providing service to more of the population. PASL also notes that "the declaration would also formalise any arrangements currently existing between bemoile and Telikom."	However there are other criteria as explained in the discussion paper. On the second point it is not clear how or whether a declaration would impact existing arrangements (if they exist) or whether such arrangements require "formalisation".
1	Telikom	Market definition Q1, Attachment p 1	"TPNG notes that the national scope of the market in question is targeted. However, it should be appreciated as highlighted, that a narrower definition or a variation of this market dimension may be later considered as the overall mobile services market further develops and matures."	Noted. This point is similar to other responses that suggest that a national approach to implementation may not be appropriate and that local conditions and circumstances may need to be reflected in the conditions that apply to any declaration and its implementation.
2	Telikom	Satellite-based mobile services Q2, Attachment pp 1- 2	Telikom agrees that satellite-based mobile services may be regarded as insignificant for the purposes of the inquiry. Such services would not be substituted for terrestrial mobile services for many end-users.	Noted.

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No.				
3	Telikom	Susceptibility of wholesale MACO services to ex ante regulation Q3, Attachment p 2	Telikom concurs with the view in the discussion paper.	Noted. However Telkom also says that NICTA might consider ex post regulation. If the market is susceptible to ex ante regulation this means that ex post regulation is unlikely to be sufficient to address market power.
4	Telikom	Digicel and SMP Q4, Attachment p 3	Telikom agrees that Digicel has SMP in the wholesale MACO market.	Noted.
5	Telikom	Potential for Digicel SMP in the wholesale MACO market to harm downstream competition Q5, Attachment pp 3-4	Telikom agrees that Digicel's SMP has these potentially harmful effects on competition in the downstream retail mobile markets. "Digicel's high market share in comparison to both Telikom and Bemobile is a realistic indication of a potential harmful effect to the development of effective competition."	Noted. The quotation refers to the market share that Digicel has in the retail mobile market. Since the wholesale market has not effectively emerged, it is difficult to discuss market shares in that market.
6	Telikom	Are declaration criteria met? Q6, Attachment pp 4-5	Telikom notes that the declaration criteria under section 128 can be met by the operators. Telikom raises the issue of demand – "whether there is pressing demand for the desired service".	The meaning of this comment is unclear. The declaration criteria are not met by the operators but by an assessment of the market circumstances that exist. The second point in relation to demand is very important. Neither of the existing other mobile operators – Telikom and Bemobile – have indicated during the inquiry that they want either of the services under consideration.
Cross Submissions				
1	Digicel - X	General comments, p 1 para 4	Digicel notes that other submissions appear to support the case for declaration but that they have neither provided evidence or any analysis nor considered the wholesale declaration criteria in the Act.	Noted. NICTA staff generally agree with this observation.

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2	Digicel - X	SMP in the Telkom submission, p 3, para 6	Digicel notes that Telkom ascribes SMP in the wholesale MACO market to Digicel because Digicel has large mobile coverage and has completed its network rollout obligations. Digicel notes that other operators have failed to comply with their rollout obligations. Digicel then asserts that the failure of others is no reason to ascribe market power to Digicel.	NICTA staff have argued that Digicel has SMP and that this is based on market structure and Digicel's place in that structure. NICTA staff have not sort to base the conclusion in the discussion paper on coverage or market share alone, although these are factors to be considered. However, SMP is not illegal or wrongful in itself, and may result from a combination of positive actions by the firm concerned (such as well-judged investments) and failures on the part of others (such as failures to invest and to achieve market presence).
3	Digicel - X	Imminent investment by others, p 3, para 7	Digicel refers to media coverage of significant investment plans by bembolie.	NICTA staff have no indication that the investments referred to have been made or that they will be reflected in network coverage in the short-medium term. Until that happens NICTA staff consider that there is no impact on its assessment of Digicel as having SMP in the wholesale market. However, Digicel's comment is important to the current inquiry in other ways. Because investment plans are in a state of flux and the wholesale market situation could change materially in the short-medium term, there is good reason for NICTA to adopt a cautious approach and to monitor developments. A declaration will have longer term consequences and should not be adopted with a short term perspective. In this respect NICTA staff are inclined to act in accordance with the comments of Mr Sundakov, who has prepared a paper appended to Digicel's initial submission, that the quantum of harm from a false positive (making an unwarranted declaration) are likely to be greater than the harm from a false negative (delaying a declaration that might have been warranted sooner).
4	Digicel - X	Bembolie's comments on Digicel's funding sources for investments in remote areas, pp 5-6, paras 16 - 21	Digicel notes that some towers have been constructed by Digicel for PNGSDP and that these are now owned by PNGSDP and not available for Digicel's exclusive use. In a confidential part of its cross submission Digicel sets out other arrangements that have been entered into, noting	NICTA staff appreciate the fuller explanation provided in confidence by Digicel and note that that explanation means that the principle raised by Telkom (that publicly funded facilities should be subject to shared access) would seem to have no application here.

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5	Digicel - X	ICCC comments, p 7 paras 21(bis)-23	that these arrangements do not go to coverage of the Digicel network. Digicel is concerned that comments in the ICCC submission have not been substantiated.	As Digicel notes at para 23 the ICCC submission concludes that further analysis is needed before a declaration could be made.
1	Telikom - X	On Digicel's submission, p 1	"However, if another successful bidder acquired the mobile service licence other than Digicel then they would have done the same (that is, rolled out in accordance with their licence coverage obligations) so it is unfair to say that the benefits of competition discussed under this section outweighs the regulator's view to regulate the MACO market." "... NICTA should not take into consideration the benefits of competition as discussed by Digicel under this section because, all things considered, any new MNO is capable of doing the same to achieve the government policy."	Telikom's point is unclear. It also seems to be incorrect: GreenCom was award a mobile service licence and failed to rollout a network; bembolie and Telikom also have such licensees and have not done what Digicel has done. The second quotation from Telikom is the same point that Digicel has made. Others can do what Digicel has done and therefore there is no need for a declaration.
2	Telikom - X	Candidate wholesale services, p 3	"Telikom PNG questions Digicel's intention to force NICTA to consider regulating the fixed network services."	NICTA staff do not see Digicel's submission in the way suggested by Telikom. Rather, NICTA staff see Digicel as querying why priority has been given to wholesale mobile services for review ahead of wholesale fixed services.