



CONSULTATION RESPONSE REPORT

**NICTA staff's response to the comments
received during the public consultation
on the draft rule specifying the
acceptable form for reference
interconnection offers**

22nd February 2012

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1 INTRODUCTION

Under the *National Information and Communications Act 2009* (the Act), an operator licensee that supplies a declared service may submit to NICTA for its approval a reference interconnection offer (RIO) setting out the terms and conditions under which the licensee will supply access seekers with a declared service in fulfilment of its statutory non-discrimination obligations.

The Act envisages in section 141(1)(c) that NICTA may make a rule specifying the acceptable form of RIOs. In November 2011, NICTA staff published a draft of such a rule and invited interested parties to comment on it. That consultation period was originally scheduled to end on 15th December 2011 but was subsequently extended to 31st January 2012 to provide respondents with more time to prepare their submissions.

Written comments were received from three parties:

- Digicel PNG;
- Telekom PNG; and
- Telstra International PNG.

The comments made by those parties are summarised in this report together with NICTA staff's consideration and response.

Telstra provided a number of comments on specific provisions of the model RIO that was attached to the draft rule as a guide. Those comments were very useful and appreciated and improved the model RIO. However, as explained below NICTA staff have reconsidered the need to include a model RIO as an attachment to the rule and no longer intend to do so. NICTA staff will be making amendments to the model RIO to address, where appropriate, the comments received about specific provisions. However, the revised version of the model RIO will simply be made available in NICTA's Public Register rather than being attached to the finalised rule. Any licensee that wishes to use the model RIO will be able to access it from the Public Register. NICTA may, in the future, consider formally specifying a model RIO by way of an amendment to the finalised rule or as a separate guideline issued under section 218 of the Act should it be considered necessary.

Among the issues raised in the submissions there were two that warrant detailed responses. Those issues are:

- the role and function of a RIO; and
- what NICTA may address in specifying the form of a RIO.

NICTA staff's comments on those two issues are provided below.

1.1 THE ROLE AND FUNCTION OF A RIO

Digicel submitted that a RIO, as per its definition in section 141 of the Act, 'is simply an undertaking given by an access provider to NICTA (not to an access seeker) that the access provider will discharge certain statutory obligations in accordance with the terms of the RIO.' Digicel also commented that it was not correct for NICTA staff to state that a RIO provides 'the default terms and conditions' on which an access provider will supply a declared service because a RIO is defined as an undertaking by an access provider to NICTA (not to an access seeker) and because an interconnection agreement between the access provider and the access seeker would still need to be negotiated to give effect to any terms and conditions in a RIO. Digicel was of the view that 'Any assumption [by NICTA staff] that the RIO is or must be a complete "interconnect agreement" between the two parties is incorrect.'

A RIO is indeed an undertaking given by an access provider to NICTA however, it is also an offer to potential access seekers who wish to accept the terms and incorporate them into an interconnection agreement. It is an undertaking/offer that must set out the prices and price-related terms and/or non-price terms and conditions under which an access provider will supply an access seeker with a declared service in a way that fulfils the statutory non-discrimination obligations on the access provider. The non-discrimination obligations, in general terms, require an access provider to supply an active declared service and/or interconnect its facilities with the facilities of the access seeker in a manner that enables the access seeker to supply retail services. The 'technical and operational quality' of the active declared service and the associated ordering and provisioning and fault rectification arrangements that are supplied by the access provider must be equivalent to that which the access provider supplies to itself (s.136(3)). Similarly, the 'technical and operational quality' and timing of the interconnection services and the associated fault rectification arrangements supplied by the access provider must be equivalent to that which the access provider supplies to itself (s.136(5)).

The terms and conditions included in a RIO 'must provide sufficient information for an access seeker to determine the basis on which the access provider will supply the relevant declared service' (s.141(3)). Those terms and conditions must also be consistent with the general pricing principles and any relevant service-specific pricing principles (s.142(5)(b)). They must also be 'reasonable' (s.142(5)(b)), which is a judgement made by the NICTA based on the considerations listed in section 126 of the Act and any other matters that NICTA considers to be relevant.

Given these statutory requirements for RIO terms and conditions, the range of factors that can influence the 'technical and operational quality' and the timing (of delivery) of wholesale services, other relevant matters that NICTA may wish to take into account when assessing the reasonableness of RIO terms and conditions, and the experiences with the use of RIOs in other countries, NICTA staff believes that RIOs should be comprehensive documents. NICTA staff also believe that the best way to organise such documents is in the form of a standard interconnection agreement (it is, after all, supposed to be a reference offer). It also provides greater certainty to both access providers and access seekers. Such an approach is not unique to Papua New Guinea; RIOs are prepared in the form of a standard interconnection agreement in many countries around the world, including the Bahamas, India, Jordan, Oman, Singapore, Vanuatu, and all the countries in the European Union.

NICTA staff accept that it was not completely accurate to say that a RIO 'provides the default terms and conditions' for the supply of a declared service in the event that an access provider and access seeker cannot reach a commercial agreement on the applicable terms and conditions. That description accurately reflected the arrangement that NICTA staff proposed would apply as a consequence of the draft rule requiring that RIOs be set out in the form of a specimen interconnection agreement and include both price-related and non-price related terms and conditions. However, as noted further below, NICTA staff now intend to remove the clause in the draft rule that requires RIOs to include both price-related and non-price related terms. Consequently, it is possible that a RIO may address only price-related terms or only non-price related terms. In such a circumstance, if that RIO was accepted by an access seeker, it would still be necessary for the two parties to negotiate terms and conditions relating to the matters not addressed in the RIO.

NICTA staff recognise that it will be necessary to establish an interconnection agreement to enter into a RIO. Indeed, this was explicitly noted in clause 6 of the model RIO that was

appended to the draft rule. However, NICTA staff expect RIOs to contain sufficient detail about the terms of supply of declared services that, if an access seeker is willing to agree to those terms, the establishment of that portion of the interconnection agreement that covers those terms of supply should be very straightforward. A RIO must (to the extent that it addresses price and/or non-price matters) contain sufficient information about that matter to enable an access seeker to determine the basis on which the access provider will supply the relevant declared service (s.141(3)). Accordingly, there ideally should be few terms and conditions relating to the aspect covered by the RIO that are *not* communicated to potential access seekers through the RIO. Indeed, any non-price terms that are not included in a RIO (that addresses non-price matters) should not be fundamental to the basis on which the relevant services will be supplied. Telstra supported this approach, commenting that ‘If a RIO is developed and approved by NICTA then it should be sufficiently detailed to allow the parties to enter into an interconnection arrangement without the need for further negotiation.’

1.2 WHAT NICTA MAY ADDRESS IN SPECIFYING THE FORM OF A RIO

Digicel submitted that NICTA was attempting to specify matters that related to the content of RIOs when NICTA is authorised (under clause 141(1)(c) of the Act) only to specify the ‘form’ of RIOs. Digicel commented that ‘While the term “form” is not defined in the Act, the normal dictionary definition of the term suggests that the term is intended to describe the shape or configuration of the RIO rather than its content.’

In the view of NICTA staff, such an interpretation of the word ‘form’ is unduly narrow. The *Australian Oxford English Dictionary* relevantly defines (the noun) ‘form’ as follows:

1. a shape; an arrangement of parts
3. the mode in which a thing exists or manifests itself
- 5(a) a printed document with blank spaces for information to be inserted
- 5(b) a regularly drawn document
7. a customary method; what is usually done
8. a set order of words; a formula
12. general state or disposition
16. arrangement and style in literary or musical composition

The *Merriam-Webster* dictionary lists the following relevant definitions of ‘form’:

- 1(a) the shape and structure of something as distinguished from its material
2. the essential nature of a thing as distinguished from its matter
- 3(a) established method of expression or proceeding; procedure according to rule or rote; a standard or expectation based on past experience
- 3(b) a prescribed and set order of words
4. a printed or typed document with blank spaces for insertion of required or requested information
- 10(a) orderly method of arrangement (as in the presentation of ideas)

Dictionary.com lists the following relevant definitions of ‘form’:

1. external appearance of a clearly defined area, as distinguished from colour or material; configuration
6. a particular condition, character or mode in which something appears
7. the manner or style of arranging and coordinating parts for pleasing or effective result, as in literary or musical composition
11. due or proper shape; orderly arrangement of parts; good order
14. a set, prescribed, or customary order or method of doing things
15. a set order of words, as for use in religious ritual or in a legal document
16. a document with blank spaces to be filled in with particulars before it is executed
17. a typical document to be used as a guide in framing others for like cases
18. a conventional method of procedure or behaviour

These definitions contain many common elements. When considered in the context of clause 141(1)(c) of the Act—which states that a RIO ‘must be clearly written, organised in a logical and consistent manner, and in any form specified by NICTA’—it is clear that specifying the ‘form’ of a RIO can involve specifying the arrangement of its constituent parts into an prescribed structure or set order, and specifying the manner, style and/or expression of those parts. In addition, NICTA may also specify a set order of words for all or part of a RIO or specify a document that is to be used as a guide in the development of a RIO.

Digicel responded that ‘it is improper of NICTA to try and impose specific terms on any access provider under the guise of [the draft] rule’ and expressed its view that requiring access providers to address specific issues of content in a RIO is beyond the specification of ‘form’ and thus beyond NICTA’s legal powers. NICTA staff disagree with this characterisation of the draft rule. In section 6 of the draft rule, NICTA staff set out a number of matters that it proposed must be addressed by an access provider in a RIO. For example, call handover, supply conditions, and fault rectification. NICTA staff proposed only that those matters be addressed in a RIO; it did not specify how those matters must be addressed. That is, it did not try to impose specific terms on access providers. However, in specifying the form of RIOs NICTA must mention the matters that must be addressed in a RIO. Even using only Digicel’s simple definition of what constitutes ‘form’—that is, a description of the shape or configuration of a RIO—NICTA must make mention of the various parts or elements of the RIO in order to specify their configuration.

NICTA has the power (under clause 141(1)(c) of the Act) to specify that particular matters be addressed by the access provider in the content it proposes in a RIO. NICTA also has the power to specify the precise form of words that must be used if particular matters are to be addressed by an access provider in the content of a RIO. As indicated in the consultation paper, NICTA staff do not intend to be overly prescriptive and intend only to require that particular matters be addressed in any RIO submitted to NICTA and that they be configured in a particular way. That is what the draft rule is intended to do.

2 NICTA STAFF’S CONSIDERATION OF, AND RESPONSE TO, THE MAJOR COMMENTS RECEIVED

No.	Sub-mission	Reference or subject	Comment	NICTA staff’s response	NICTA staff’s intended action
1	Digicel	NICTA’s priorities	There are other more important issues that NICTA should be addressing instead of making a rule on the acceptable form of RIOs. Those priorities including review of numbering capacity, spectrum migration, digital dividend, completion of licence migrations, enforcement of network coverage obligations, and access to international capacity.	<p>NICTA staff recognise that there are many important regulatory issues that need to be addressed as NICTA establishes its regulatory instruments and undertakes its ground work. Many of the matters identified by Digicel are among NICTA’s priorities for 2012. However, there are also many other issues that NICTA needs to address as part of its implementation of a new Act and regulatory regime.</p> <p>NICTA staff wanted to make a rule specifying the form of RIOs before any access providers submitted a RIO for NICTA’s approval and before NICTA commences a series of inquiries into the potential declaration of various wholesale services (as envisaged under ss.131(7) of the Act). NICTA staff consider this particular rule-making (specifying the form of RIOs) to be essentially administrative in nature and thus relatively straightforward.</p>	No specific action required.
2	Telstra	The rule making exercise	The publication of the rule and the sample RIO are ‘an important step in the fulfilment of NICTA’s role of providing guidance to the industry	Noted.	No specific action required.

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			about the form and terms appropriate for a [RIO]'. 		
3	Digicel	The rule making exercise	NICTA should refrain from making rules on the acceptable form of a RIO until an access provider has submitted a RIO for NICTA's consideration. That experience would give NICTA a better perspective of the way RIOs are intended to be used by access providers and to propose rules on the form of a RIO that would be helpful to market participants and not discourage access providers from lodging a RIO. The issue of guidelines on the process NICTA will adopt in considering a RIO application would be an appropriate alternative to a rule.	NICTA staff disagree. NICTA staff wish to specify certain matters relating to the form of RIOs to guide the development of any RIOs that are to be submitted for NICTA's consideration. NICTA may in the future consider issuing guidelines under section 218 of the Act on access and interconnection issues relating to declared services.	No specific action required.
4	Digicel	The rule making exercise	NICTA should withdraw the proposed rule or defer its consideration for the time being. 'The present consultation cannot proceed based on the proposed rule [because of the issues that have been raised by Digicel]. If NICTA wishes to continue the consultation, the draft rule needs to be revised substantially.'	The public consultation period was extended by a month and ended on 31 January 2012. Pursuant to the rule making process set out in s.219 of the Act, NICTA will finalise the proposed rule taking into account the comments received during the consultation period.	No specific action necessary.
5	Digicel	The nature of RIOs	A RIO, as defined in section 141 of the Act, is simply an undertaking given by an access provider to NICTA (not to an access seeker) that the access provider will discharge certain statutory obligations in accordance with the	See section 1.1. above. NICTA staff intend to specify that RIOs must be submitted in the form of a standard contract to ensure that they are submitted in that form. Digicel's comment misses the fundamental purpose of a RIO, which is to expedite the process of	No specific action necessary.

No.	Sub- mission	Reference or subject	Comment	NICTA staff's response	NICTA staff's intended action
			terms of the RIO. Any assumption that the RIO is or must be a complete "interconnect agreement" between the two parties is incorrect.	putting in place effective interconnection arrangements between operator licensees regarding the supply for declared services.	
6	Digicel	The nature of RIOs	It is not correct for NICTA to state that a RIO provides "the default terms and conditions" on which the access provider will supply a declared service.	See section 1.1 above.	NICTA staff will refrain from describing RIOs as providing the default terms of supply of a declared service.
7	Digicel	The nature of RIOs	A RIO not only gives access seekers certainty, it also gives access providers certainty because it gives access providers a potential means to reduce regulatory uncertainty in respect of the terms and conditions of supplying declared services.	NICTA staff recognise that a RIO can be used by an access provider to provide itself with greater regulatory certainty regarding the terms of supply of a declared service.	No specific action necessary.
8	Digicel	The nature of RIOs	NICTA's vision of a "comprehensive" RIO is unrealistic and will limit the potential role that a RIO can play in helping address regulatory uncertainty.	NICTA staff disagree. See section 1.1 above. It is standard regulatory practice internationally that RIOs are comprehensive documents and presented in the form of a standard contract or specimen interconnection agreement. This helps to maximise the role that RIOs play in reducing uncertainty, proving transparency, promoting competition, and facilitating arrangements for interconnection as expeditiously as possible.	No specific action necessary.
9	Telikom	The nature of RIOs	'Whilst Telikom recognises the benefits of a RIO, we do stress that the decision to provide a RIO must remain the discretion of the Access Providers	The draft Rule does not seek to (and cannot) alter the fact that an access provider's submission of a RIO to NICTA is voluntary. NICTA staff clearly noted this on page 6 of	No specific action necessary.

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			and Access Seekers to promote commercial agreement.'	the consultation paper saying 'An access provider is not obliged to prepare a RIO, but may choose to do so of its own initiative'.	
10	Digicel	Process for NICTA to accept or reject a RIO	Any draft RIO that is submitted by an access provider for consideration by NICTA 'should include a document that explains the purpose and operation of a RIO including any supporting data and analysis that is relevant (particularly in relation to price) to justify the terms that have been proposed'. This would add discipline to the RIO process and ensure that the required RIO consultation is as effective as possible.	<p>NICTA staff do not wish to see explanatory text or general discussion of the methodology for determining particular wholesale prices included in the RIO itself. The RIO is intended to be a standard contract and so (if the access provider intends addressing price-related terms in a RIO) only the proposed prices and price-related terms should be specified by the access provider, not the rationale for, or justification of, those prices or terms.</p> <p>However, as NICTA must consider whether any prices and price-related terms in a draft RIO are consistent with both the general and service-specific principle principles, access providers that submit a RIO to NICTA will be invited to also submit (as a separate document) an explanation of how any prices or price-related terms that they have proposed are consistent with those principles. That separate document will be made available during the public consultation on the draft RIO.</p> <p>The submission of this separate document does not need to be made mandatory as it is in the access provider's own interest to explain and demonstrate its consistency with the pricing principles.</p>	No specific action necessary.

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11	Telstra	Consequences of acceptance of a RIO	<p>The Act is not clear about whether NICTA's acceptance of a RIO means that a term of the RIO cannot later be determined to be void (under section 134(3) of the Act) because it is inconsistent with the general pricing principles. Nor is the Act clear about what the status of a RIO is in relation to any model terms that NICTA may make under section 133 of the Act. 'Telstra submits that it would assist the industry if the Draft Rule included rules clarifying the status of an accepted RIO in relation to both the general pricing principles and any model terms, including guidance about the relative hierarchy of these documents and relevance in the event of a dispute.'</p>	<p>This is a very good observation. NICTA staff also note that there could be a scenario where service-specific pricing principles are changed in such a way that renders a previously approved RIO inconsistent with the (revised) pricing principles. The Act does not explicitly address how such a scenario would be resolved if the access provider did not submit a proposed variation to its RIO for NICTA's consideration.</p> <p>NICTA staff agree that the matters raised should be clarified. NICTA staff do not believe it would be appropriate to address them through the current rule-making, which is focused only on the form of RIOs. Instead, NICTA staff will consider whether these matters can be clarified through a separate guideline issued under s.218 of the Act.</p>	<p>NICTA staff will consider these matters further and, if possible, develop a guideline under section 218 of the Act to clarify them.</p>
12	Digicel	Clause 5(1)	<p>The RIO is only relevant to declared services. The RIO cannot (under the Act) apply to services that are not declared. The inclusion of other services in a RIO should not create a basis for NICTA to determine the supply terms of any non-declared services.</p>	<p>A RIO is relevant to whatever services an access provider wishes it to apply to. The definition of a RIO in s.141 of the Act defines a RIO as setting out proposed terms and conditions for the supply of one or more declared services. However, it is possible than an access provider may wish to include in its offer the optional supply of services that supplement or enhance a declared service, but which are themselves not part of the definition of a particular declared service (as that service is defined either in Schedule 1 to the Act or by NICTA in any declaration recommendation under s.129 of the Act).</p>	<p>NICTA staff will review the language used in clause 5(1) for clarity to ensure there is no misunderstanding of its intent or effect. However, no substantive change to the underlying principle will be made.</p>
13	Telikom	Clause 5(1)	<p>'The RIO Rule should be restricted and apply only to declared wholesale access services that are subject of a RIO and it should not apply to other wholesale access services (declared</p>		

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			<p>or not) that are not subjected or covered under a RIO. In that way, businesses that are Access Providers and Access Seekers are left to deciding for themselves what is best for them through commercial agreement.'</p>	<p>For example, an access provider may wish to include the optional supply of co-location to supplement its supply of a particular declared service. Similarly it is possible that an access provider may wish to establish a RIO in relation to the supply of a wholesale service that it not a declared service. NICTA staff would regard any such initiatives by an access provider as positives and want to prevent such initiatives being used by access seekers as an opportunity for regulatory gaming (for example, by attempting to have a RIO set aside during an access dispute arbitration under Div.6 of Part VI of the Act on the grounds that it goes beyond the definition of what constitutes a RIO in s.141).</p> <p>Clause 1 does not expand NICTA's powers nor enable NICTA to determine the supply terms of any services that are not declared services. As is clear under Part VI of the Act, NICTA's powers in relation to the terms and conditions of supply and the arbitration of access disputes relate only to declared services.</p>	
14	Telikom	Clause 5(1)	<p>'The RIO Rule should not apply generally to all wholesale declared service Providers until the parties themselves seek regulatory intervention through request for negotiations in the presence of NICTA or arbitration, etc.'</p>	<p>NICTA disagrees. The Rule specifies the form of a RIO that may be submitted to NICTA. Although an approved RIO may be relevant to, and thus suitable to take into consideration during, a particular dispute being arbitrated by NICTA, the specification of the acceptable form of a RIO is essentially a separate exercise.</p>	<p>No specific action necessary.</p>

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15	Digicel	Clause 5(2) re principle of "one operator, one RIO"	<p>The "one operator, one RIO" rule is not a rule on the "form" of a RIO. Rather it is an artificial restriction not contemplated by Division 5 of Part VI of the Act, which contemplate the RIO being an undertaking in respect of the access provider's supply of "one or more declared services" that are interconnection services, not "all declared services". NICTA had not sufficiently explained the policy objective for this rule. There may be a legitimate reason to have different RIOs for different services. An access provider may legitimately specify only price terms for one declared service, and non-price terms for a different declared service. It is inappropriate to assume or require that a single RIO would be suitable for any future declared service.</p>	<p>Clause 5(2) of the draft Rule specifies that the form of RIOs is to be a single document that relates to all declared services that an access provider wants to have covered by a RIO. As the consultation paper made clear, under this principle, access providers may propose different terms and conditions for different declared services, and may choose to have certain declared services covered by a RIO while other declared services are not. The principle only requires that any and all RIOs that an access provider submits to NICTA are housed in, and organised as, a single document. The reasons for this are clear – to avoid uncertainty and potential confusion if there are multiple RIO documents in place, with different dates and currency, and which may overlap in their coverage.</p> <p>The terms and conditions of a RIO will still continue to apply only to the particular services that the access provider specifies. It is not intended to automatically expand the terms and conditions of a RIO to all declared services. Similarly, an interconnection agreement based on a RIO need not include the provision of all of the declared services covered in the RIO.</p> <p>An access provider may wish to establish a RIO that covers some declared services but not others; that is allowed and acceptable.</p>	<p>NICTA staff will review the language used in clause 5(2) for clarity. No substantive change to the principle will be made.</p>
16	Telstra	Clause 5(2) re	'Telstra supports this approach, noting	Noted. NICTA staff also note the substantial	No specific action

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		principle of "one operator, one RIO"	that variations specific to particular declared services can be accommodated within the Parts of the Interconnection Agreement dealing with those services. This assists Access Seekers by reducing the inherent complexity of telecommunications service descriptions and terms, avoiding unnecessary repetition of many common terms across a suite of declared services.'	experience over some decades of Telstra in the field of interconnection in Australia and elsewhere as both an access provider and an access seeker	necessary.
17	Digicel	Clause 5(3) re. scope of RIOs	It is not a requirement of the Act that a RIO cover both price and non-price terms. Any requirement in the draft rule to that effect is beyond NICTA's power. Also, it is not a rule on the "form" of a RIO. It is also contrary to section 141(3) of the Act and will limit the potential role that a RIO can play in addressing regulatory uncertainty.	As discussed in section 1.2 above, NICTA has the power under clause 141(1)(c) of the Act to specify that specific issues be addressed in the content of any RIO submitted to it. However, after considering the feedback received, NICTA staff have decided to remove this proposed requirement from the finalised rule and thus enable access providers to determine for themselves whether to include in a RIO both price and non-price terms and conditions, or just one or the other.	NICTA staff will not include the requirement reflected in clause 5(3) in the finalised rule. The rules (in clause 6 of the draft rule) specifying the structure of a RIO will be amended to reflect that the inclusion in the RIO of both price and non-price terms is optional.
18	Telstra	Clause 5(3) re. scope of RIOs	'This appears to differ from the approach under the Act in which section 141(1)(a) and section 141(3) would permit a Access Provider to determine whether it wishes to offer proposed price terms or proposed non-price terms, or both, in its RIO. Given the fundamental nature of the requirement in 5(3) of the Draft Rule and the possible risk to the regulatory structure in Papua New Guinea if this requirement was found subsequently	NICTA staff would, however, still prefer that RIOs includes both price and non-price terms so that it forms the basis on which agreement may be readily achieved between access providers and access seekers.	

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			to be inconsistent with the Act, Telstra suggests that NICTA should clarify the basis upon which it can stipulate in the Draft Rule that both price and non-price terms must be included in the RIO.'		
19	Telikom	Clause 5(3) re. scope of RIOs (and clauses 5(4) and 6(e))	'Clause 5(3) of the proposed RIO Rule is inconsistent with section 141(3) of the Act insofar as the former seeks to insist on the inclusion in a RIO of both price and non-price terms and conditions when the Act provides the Access Provider with the discretion to include in a RIO price or non-price terms and conditions...We suggest that section 5(3) be amended to reflect that discretion.'		
20	Digicel	Clauses 5(4)–(5) re. non-discriminatory pricing	The phrase “non-discrimination obligations” has a technical meaning under section 136 of the Act. It concerns ensuring equivalent between the access provider and access seeker in relation to certain technical and operational quality and timing aspects of an active declared service. There is no prohibition against discrimination generally and it would be inappropriate for NICTA to infer such a prohibition from this phrase.	NICTA staff understand that Digicel's comment relates principally to clauses 5(4)–(5) of the draft rule, which stated that 'The prices and charges made available by an access provider under a RIO should be available to all access seekers on a non-discriminatory basis...'. Clause 5(4) is not an application of, or extension of, the statutory 'non-discrimination obligations', which are defined in s.136 of the Act. Rather, clause 6 reflects an important principle that NICTA staff wish to see reflected in the supply of declared services to promote the competition objective (defined in s.124 of the Act) and to	NICTA staff will not include the principle reflected in clauses 5(4)–(5) in the finalised rule. NICTA staff will instead consider the introduction of such a principle in relation to particular declared services on a case by case basis through the determination of service-specific pricing principles. Any such proposals will be the subject of a separate consultation exercise.
21	Telstra	Clauses 5(4)–(5) re. non-discriminatory	'From a policy perspective Telstra understands the basis for this rule. That noted, Telstra considers that it		

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		pricing	<p>would assist the industry to understand how this rule should be interpreted together with 5(4) of the Draft Rule...[which] is typically described as a 'most-favoured-nation' obligation'. Telstra suggests that NICTA provide guidance on how rules 5(4) and 5(5) will operate in practice.</p> <p>One of the difficulties with an MFN obligation is that it creates a disincentive for an access provider to offer to any individual access seeker a discount beyond the existing RIO price terms, or an additional feature or other benefit beyond the existing RIO non-price terms. NICTA will need to carefully consider whether there is merit in permitting such individual benefits for a period of time before they are passed on to all other Access Seekers, or in certain circumstances, provided that there is no anti-competitive consequence.</p>	<p>maintain a level playing field.</p> <p>Telstra's comments about how the proposed principle is expected to operate in practice, including in particular scenarios that may arise in the future, suggests to NICTA staff that further consideration is necessary before imposing such an obligation on access providers and that it would be prudent to consider the need for, relevance and application of such a principle on a case-by-case basis instead of imposing it generally on all declared services.</p> <p>Based on all the feedback received, NICTA staff have reconsidered the inclusion of this principle in the rule on the acceptable form of RIOs and now believe that such a principle might be better considered and addressed on a case-by-case basis through service-specific principles determined under s.135 of the Act.</p>	
22	Digicel	Clause 5(6) re. the structure of RIOs	<p>The draft rule 'purports to prescribe very specific technical content (such as call handover and routing principles which may be irrelevant to a declared service)'. NICTA has no power to predetermine the terms of a RIO, it may only prescribe "form". While some content, such as ordering and provision may have more general application, there is no compelling reason for NICTA to require that a RIO</p>	<p>NICTA staff disagree. See section 1.2 above. In any case, the draft rule does not prescribe any specific technical content. It does however seek to ensure that particular matters are addressed and that those matters are organised in a particular manner. The specific terms and conditions that an access provider proposes in the specified sections are determined by the access provider.</p>	<p>NICTA staff will amend the draft rule to address circumstances where a particular prescribed section may not be applicable to the supply of a particular declared service and explain the extent to which alternative formats may be used.</p>

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			contains such content. Nor is there any obligation under the Act for an access provider to provide any undertaking in relation to such matters. The requirement to address specific content is beyond specifying the "form" of a RIO.	It is possible that one or more of the specified sections will not be applicable to every type of declared service. It is also possible than an access provider may wish to propose a variation to the prescribed order or configuration to those sections. Accordingly, NICTA staff will amend the proposed rule to clarify the circumstances in which it is acceptable to propose a variation to the prescribed format.	
23	Telstra	Clause 5(6) re. the structure of RIOs	The prescription of the format requirements may unduly limit the appropriate exercise of discretion by NICTA. 'This rule could be qualified to indicate the extent to which NICTA will tolerate reasonable departures from these format requirements – for example, where rationalisation of the document is appropriate or a departure is required to align with existing (or preferred) contracting structures.'		
24	Digicel	Clause 7 re. the attachment of a model RIO to the draft rule	It is inappropriate to append a model RIO to the draft rule. Doing so is inconsistent with the rule making process under s.141 of the Act, creates an excessive amount of material for licensees to review during the consultation period, risks creating a de facto standard for NICTA's consideration of future RIOs, and unnecessarily promotes uniformity and standardisation in RIOs. It privileges a very specific version of a multitude of possible legitimate contracts that an access provider may wish to use. The draft pro forma contract should not be	As discussed in section 1.2 above, in specifying the form of a RIO under s.141 of the Act, NICTA has the power to specify a document that is to be used as a guide in the development of a RIO. NICTA staff prepared and appended the model RIO to demonstrate the required form of RIOs that was being proposed in the draft rule. The suggestion that by doing so NICTA staff are privileging that form of RIO and the terms included in it above all others is incorrect. As clause 7 of the draft rule made clear, the model RIO reflects the kind of layout with sample content that NICTA staff	NICTA staff do not intend to append a model RIO to the finalised rule. However, an updated version of the model RIO will be made available on NICTA's Public Register for the purposes of guidance.

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			<p>seen as having any precedential value and neither its terms nor structure should be binding on any party.</p>	<p>believe meets the requirements of the rule.</p> <p>Nevertheless, NICTA staff has reconsidered the need to specify a document for guidance purposes and does not intend to include a model RIO as an attachment to the finalised rule. An updated version of the model RIO will be made available on NICTA's Public Register and thus will remain accessible to any access provider that wishes to use it as a guide or as the basis for its development of a RIO.</p> <p>NICTA may in the future consider formalising the model RIO as a guidance document by way of an amendment to the finalised rule or as a separate guideline issued under s.218 of the Act.</p>	
25	Digicel	The model RIO in Annex A to the draft rule	<p>The appendix to the draft rule suggests that NICTA equates a pro form interconnection agreement with a RIO. This is not correct. A RIO could take the form of a standard interconnection agreement, but need not do so. A RIO is simply an undertaking to NICTA that the access provider will supply one or more declared services on the terms contained in the RIO. For convenience a standard contract could form a part of the RIO but there is not necessity to do so.</p>	<p>See section 1.1. NICTA intends to specify that RIOs must be submitted in the form of a standard contract to ensure that they are submitted in that form. These reasons have been enumerated above.</p>	<p>No specific action necessary.</p>
26	Telikom	The model RIO in Annex A to	<p>Telikom notes that the model RIO is provided solely for the purpose of guidance and therefore does not wish</p>		

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		the draft rule	to comment on its contents. In the event that Telikom considered submitting a RIO in the future, it would prefer to submit one that reflected its existing access agreements with which it is already familiar and which have proven to be effective to date.		
27	Telstra	The model RIO in Annex A to the draft rule	NICTA's inclusion of 'A Sample RIO provides guidance to industry as to the appropriate content and matters to be included in the wholesale supply of declared telecommunications services and provides minimum standards and commitments by operators to ensure fair access to bottleneck infrastructure.'	Noted.	No specific action necessary.
28	Digicel	The model RIO in Annex A to the draft rule	'Digicel is concerned that the pro forma contract...may not be suitable for the specific circumstances that exist in PNG.'	Clause 7 of the draft Rule makes it clear that the model RIO is for the purpose of providing guidance to access providers considering developing a RIO. As guidance material, the specific terms and conditions contained in the model RIO are not mandatory on anyone.	No specific action necessary.
29	Telstra	The model RIO in Annex A to the draft rule	'The [model] RIO is structured in a manner consistent with international practice where the agreement broadly has the following distinct sections: substantive contractual terms; detailed service descriptions; specific operational terms; and contact information.' However, the order of precedence between the different components should be clearly set out	NICTA staff agree that the model RIO (and indeed, any draft RIO submitted to NICTA in the future) should clearly identify which sections of the RIO take precedence over others in case there is a conflict between the terms of difference sections.	NICTA staff will revise and where appropriate amend the model RIO to address the comments received from Telstra on specific provisions of the model RIO. However, NICTA staff no longer intend to append a model RIO to the finalised rule. Instead, the revised

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			to avoid potential conflict between the various sections.		version of the model RIO will simply be added to NICTA's Public Register where it may be accessed by licensees in the future should they wish to.
30	Telstra	The model RIO in Annex A to the draft rule	Despite the useful detail that has been included in the Sample RIO, there are areas which could be better addressed through further detail.' NICTA should indicate, either in the model RIO or an accompanying guidance note, any sections of the model RIO in which NICTA has intentionally omitted detail but expects access providers to specify that detail in any RIO that submit to NICTA based on the model RIO. 'Statements of this kind would be a useful indication to licensees of NICTA's expectations as to which provisions would need to be fleshed out with the appropriate detail in a RIO lodged for NICTA's consideration even though, understandably, those provisions are not drafted in detail in the Sample RIO'.	NICTA staff agree that the inclusion of such clarifications would improve the model RIO.	
31	Telstra	The model RIO in Annex A to the draft rule	The relationship between the operation of clauses 6.1(a) and 6.1(b) of the model RIO, regarding the process for entering into interconnection agreements under a RIO, should be further clarified. Clause 6.1(a) provides that the access provider must enter into an Interconnection Agreement on the RIO terms with a licensed operator where requested. Clause 6.1(b) appears to contemplate	NICTA staff agree that this aspect of the model RIO should be clarified.	

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			<p>a “process” or period of separate negotiation between the parties. ‘If a RIO is developed and approved by NICTA then it should be sufficiently detailed to allow the parties to enter into an interconnection arrangement without the need for further negotiation.’</p>		
32	Telstra	The model RIO in Annex A to the draft rule	<p>Wholesale agreements need to reflect the general long-term nature of the arrangement whilst providing flexibility to allocate terms of possibly different lengths to individual services. This distinction should be clearly reflected in the model RIO. ‘For example, the upfront term of an interconnection agreement entered into under the Sample RIO could be specified in clause 11 [of the model RIO], with the individual terms set out in each Part describing the different services to be supplied under the RIO.’</p>	<p>NICTA staff agree that such an amendment would improve the model RIO.</p>	
33	Telstra	The model RIO in Annex A to the draft rule	<p>‘The Sample RIO contemplates that interconnection agreements will generally only be varied where there is a change to the underlying RIO, thus requiring regulatory oversight by NICTA. However, Telstra suggests that the terms of the Sample RIO ought not to preclude amendment of an interconnection agreement where the amendment is mutually sought by the parties. It may also be appropriate</p>	<p>NICTA staff agree that the inclusion of such provisions would improve the model RIO.</p>	

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			for some parts of the interconnection agreement to be subject to specific variation rights: for example, operational documents / specifications or contact information may need to be updated on a regular basis.'		
34	Telstra	The model RIO in Annex A to the draft rule	'Clause 18.2 states that an interconnection agreement "shall be deemed to be automatically amended in respect of any changes to the rates and charges in the Price Schedule". The Sample RIO does not clearly set out how changes to the Price Schedule may be made. It may be NICTA's intention that any changes to regulated prices in respect of declared services will automatically flow through to the interconnection agreement: however, this is not entirely clear and NICTA may wish to provide appropriate clarification.'	NICTA staff agree that this matter should be clarified but are not certain that the model RIO is the most appropriate means of doing so. For example, it might be more appropriate to clarify such a matter through the publication of guidelines under section 218 of the Act. NICTA staff will further consider the best way to clarify this matter.	NICTA staff will consider this matter as part of any development of relevant guidelines under section 218 of the Act.
35	Telstra	The model RIO in Annex A to the draft rule	'Contractual arrangements need to provide appropriate delineation between rights that may be exercised in relation to suspension and termination, including how they apply (and interact) as between individual services and the agreement as a whole. For example, certain events in the RIO which give rise to suspension, such as a failure to pay invoices in respect of a service, do not directly give rise to a termination right in	NICTA staff agree that addressing these issues would improve the model RIO.	NICTA staff will revise and where appropriate amend the model RIO to address this aspect. However, NICTA staff no longer intend to append a model RIO to the finalised rule. Instead, the revised version of the model RIO will simply be added to NICTA's Public Register where it may be accessed by licensees in the

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			<p>circumstances where the underlying circumstances that led to the suspension continue to persist. Whilst an Access Provider may terminate the provision of a service if the Access Seeker has failed to rectify non-performance in accordance with clause 13.2(d), the Sample RIO should give mutual rights to terminate where an event giving rise to suspension persists for a prolonged period (for example, 90 days).</p> <p>Clauses 12 (Suspension) and 13 (Termination) also only give rise to rights with respect to "Services", not the agreement as a whole. The nature of a contractual breach will determine whether it is appropriate for the Access Provider to exercise rights in whole or in part with respect to the agreement. However, the Access Provider should have suspension and/or termination rights with respect to the entirety of the agreement for certain events (for example, termination where the Access Seeker ceases to hold an operator licence). Additionally, it is noted that the titles of Clauses 12 and 13 both refer to the ability to suspend and terminate the interconnection agreement.</p> <p>Termination for convenience rights should be included and approached symmetrically. A strict reading of</p>		<p>future should they wish to.</p>

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			<p>clause 13.1(c) might be that an Access Seeker could formally request a termination of a Service at any time by written request, creating significant uncertainty for Access Providers. A mutual convenience termination right with an appropriate notice period (i.e. 6 months) should be included in the Sample RIO...Mutual termination for breach rights might also be included. As currently drafted the Access Provider only has this right (under clause 13.2(d)) and may exercise the right if it has given 6 months notice of termination to the Access Seeker. Telstra submits that a shorter notice period would be more appropriate, potentially in the range of 60-90 days...'</p>		
36	Telstra	The model RIO in Annex A to the draft rule	<p>'Telstra queries whether it is appropriate to include a specific contractual term requiring the Access Provider to comply with a regulatory obligation such as non-discrimination as exists in clause 7 of the Sample RIO. The drafting of clause 7 potentially narrows the scope of the contractual non-discrimination commitment (limited only to "quality of service" and not including price) against an Access Seeker's obligations under the regulatory framework. A more flexible approach would be to include a general obligation on both</p>	<p>NICTA staff had originally sought to link the model RIO, through clause 7, to the statutory non-discrimination obligations of s.136 of the Act. However, Telstra's comment raises an interesting issue: Is it necessary for the model RIO to effectively restate the statutory non-discrimination obligation as a RIO term in order for the RIO to set out how the access provider will discharge that obligation? As it is a statutory obligation, it is unnecessary to effectively restate that particular obligation and instead, as Telstra suggests, include a more general obligation of compliance with applicable laws and obligations (which is lacking from the current</p>	

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			<p>parties to comply with all applicable laws and regulatory obligations. This approach would avoid misalignment of contractual and legal commitments, but also ensure that there is a contractual requirement to comply more generally with other important legal and regulatory obligations including occupational health and safety, environmental and consumer protection measures.</p>	<p>draft of the model RIO). NICTA staff agree that further consideration of this matter could lead to improvements to the model RIO and will consider addressing it as part of its revision of the model RIO.</p>	
37	Telstra	The model RIO in Annex A to the draft rule	<p>'Risk allocation is a fundamental function of contractual arrangements. Whilst it would not be appropriate for the Sample RIO to limit the ability of parties to agree appropriate arrangements, given their unique circumstances the Sample RIO should acknowledge that in principle parties will require provisions which adequately manage and share risk under an interconnection agreement – for example, through liability caps and indemnities. These terms will need to vary depending on the nature of the service provided, for example, the Access Provider may reasonably expect the Access Seeker to assume a greater degree of risk where the provision of the relevant services involves granting the Access Seeker access to the Access Provider's sites, buildings or facilities.'</p>	<p>NICTA staff recognise that this is an important issue and accept that the extent to which it has been provided for in the model RIO could be improved with some further consideration. NICTA staff will consider addressing it as part of its revision of the model RIO.</p>	

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38	Telstra	The model RIO in Annex A to the draft rule	The Parts containing service descriptions and specific terms require further detail and are currently very brief. As these are developed it is important that the service descriptions adequately match the corresponding descriptions of services which are declared under sections 130 and 131 of the Act.	<p>Those parts of the model RIO are brief but in preparing the model RIO NICTA staff did not believe that the particular matters addressed in those parts needed extensive detail nor that there necessarily would be a considerable list of service-specific terms and conditions. Of course, it is only a model RIO and access providers, should they choose to use the model RIO as a basis for their own RIOs, may take a different view and believe it necessary to expand these parts of the RIO. For the purposes of a model RIO though, NICTA staff think the level of detail in these parts are sufficient. In any case, NICTA staff no longer intend to append a model RIO to the finalised rule.</p> <p>NICTA staff agree that service definitions need to match the definition of the applicable declared service.</p>	
39	Telstra	The model RIO in Annex A to the draft rule	'The Sample RIO provides no guidance on the appropriate performance standards with which an Access Provider must comply in relation to the two key obligations of provisioning and fault rectification. When exercising its discretion to approve a RIO that an Access Seeker has proposed, NICTA should consider whether the timeframes proposed in the RIO discharge an Access Provider's non-discrimination obligations as required by section 136 of the Act and any minimum retail	<p>NICTA staff were intentionally silent on the performance standards in the model RIO as it was thought that that particular aspect might be service-specific in that different performance standards (even different measures) might apply to the supply of different declared services.</p> <p>Given the importance of 'technical and operational quality' within the statutory non-discrimination obligations, and as such factors may to some extent be service-specific, Telstra's comment leads NICTA staff to conclude that it would be appropriate</p>	NICTA staff will consider issues relating to technical and operational quality in the supply of declared services, including what that may specifically mean in the context of particular declared services, as part of future inquiries under s.127 of the Act or

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			performance standards which may be required by NICTA.'	<p>and prudent for NICTA staff to consider issues relating to technical and operational quality and/or performance standards either as part of any inquiry under s.127 of the Act or immediately following any decision under s.129 of the Act to recommend the declaration of a service. Doing so could help NICTA staff prepare for the consideration of any subsequent RIO and the monitoring of the non-discrimination obligations. It could also be an aspect that would benefit from the issue of guidelines under s.218 of the Act or from the issue of model non-price terms under s.133 of the Act.</p> <p>NICTA staff will consider these matters furthers during future inquiries under s.127 of the Act.</p>	
40	Telstra	The model RIO in Annex A to the draft rule	Telstra also made 33 comments on specific provisions in the model RIO, many of which are editorial in nature.	NICTA staff appreciate Telstra's specific comments and recognise that the model RIO could be improved by considering the issues that they raise.	NICTA staff will revise and where appropriate amend the model RIO to address these specific comments and editorial suggestions.