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TRR'S DRAFT DETERMINATION CONCERNING THE INDEMNITY CONDITION ADOPTED BY DIGICEL IN INTERCONNECTION NEGOTIATIONS WITH WANTOK

I. INTRODUCTION

1. This Draft Determination is provided to Digicel (Vanuatu) Ltd. ("Digicel") and Wantok Networks Ltd. ("Wantok") for the purpose of TRR receiving submissions, comments or information from them, within 7 days, relating to the matters discussed below.
2. Nothing in this Draft Determination involves a final, binding, reviewable or other decision by TRR. TRR will give further consideration to these matters after the comment period and then promptly make any final decision that is warranted.
3. According to correspondence provided by Digicel, it appears that Wantok initially began seeking interconnection from Digicel in June 2015. More recently, on 24 January 2017, Wantok again requested interconnection from Digicel.
4. In response, Digicel informed Wantok that Digicel had concerns that Wantok was not licensed or authorized to provide any "voice services," and accordingly was not entitled to interconnection from Digicel (or any other licensee). Digicel also informed Wantok that due to this claim or concern, Digicel would impose certain pre-conditions on having further interconnection negotiations or discussions with Wantok. For example, Digicel's letter to Wantok of 31 January 2017 stated:

"Digicel has serious concerns about whether or not Wantok may lawfully provide voice services or interconnect with the networks of other licensees. Those concerns remain and the existence of the purported licence amendment has done nothing to alleviate them. Nevertheless, and subject to the following conditions, Digicel, as a demonstration of its good faith in the matter, is willing to proceed to engage further with Wantok in respect of interconnection discussions. Those conditions are:

1. Any interconnection discussions are conducted on a "without prejudice" basis with respect to Digicel's views on whether or not Wantok is lawfully entitled to provide voice services in Vanuatu or to interconnect with the networks of other licensees in order to provide voice services;

2. *Wantok agrees, in the event that either the Telecommunications Regulator or a Court determines that Wantok is not:*

a. lawfully entitled to provide voice services in Vanuatu; or

b. lawfully entitled to interconnect with the networks of other licensees;

to indemnify Digicel against any and all costs that it has or may incur in connection with, or as a result of, the interconnection discussions.”

3. Digicel reserves the right to suspend or discontinue interconnection discussions if, in its reasonable opinion, the continuation of those interconnection discussions is likely to prejudice Digicel’s position with respect to Wantok’s lawful entitlement to provide voice services in Vanuatu or to interconnect with other licensees in order to provide voice services.”

5. TRR will refer here to the italicized condition in Paragraph 2 of the above-quoted Digicel letter as “The Indemnity Condition.”

6. On 21 February 2017, Digicel wrote to TRR, explaining the Indemnity Condition and Digicel’s reasons for imposing it.

7. On 28 February 2017, Wantok wrote to Digicel (copying TRR), rejecting Digicel’s proposed indemnity and stating: “Wantok has no doubts as to their rights to deploy voice services, and view Digicel’s demand for an indemnity to be high-handed, unnecessary and possibly as just a means to seek delay fair competition. As we do not see eye to eye on this issue, and in order to avoid any further delays to interconnection, our next step will be to write to TRR to formally request that they resolve this difference at their earliest convenience”.

8. By letter dated 3 March 2017, Wantok referred to the above letter to Digicel, and formally requested assistance from TRR “in order to resolve the current impasse we are facing in pursuing domestic interconnect negotiations with Digicel”.

9. By its letter of 30 March 2017, Digicel stated that it was willing to have any dispute over this indemnity determined by TRR, using a proper and fair process.

10. This Draft Determination concerns this dispute, and in particular whether Digicel may refuse to negotiate for the supply of interconnection to Wantok, or refuse to supply or agree to supply interconnection to Wantok, unless Wantok agrees to The Indemnity Condition.

II. LEGAL FRAMEWORK

11. Interconnection refers to the physical and technical linking of the networks of competing providers of telecommunications services, such that they can be used to supply services to end-user customers.
12. Generally, speaking, interconnection allows customers of a given telecommunications supplier to call, or be called by, customers of a competing telecommunications supplier.
13. For example, under the Interconnection Agreement between TVL and Digicel, a call from a Digicel customer that originates on Digicel's network is transferred, at a physical location (or "Point") of Interconnection, to TVL's network, and TVL carries and terminates that call on its network to its customer, thereby providing an interconnection (call termination) service to Digicel. Without this, Digicel's customer could not reach a large number of customers, namely persons that are TVL customers and thus not connected directly to Digicel's network. This interconnection works both ways, so that Digicel provides interconnection services to TVL, by receiving and completing calls from TVL customers to Digicel customers.
14. Without such interconnection, a new market entrant will find it more difficult to compete. For example, when Digicel entered the Vanuatu market in about 2008, all the customers were TVL, and it was essential that Digicel have interconnection with TVL on reasonable terms that would enable it to compete with TVL. Similarly, a new entrant or smaller provider of services today would need interconnection with both Digicel and TVL, as together they are connected to all or substantially all customers.
15. The importance to competition, and consumer welfare, of interconnection is reflected in the Telecommunications and Radiocommunications Regulation Act, No 30 of 2009 ("the TRR Act"), and the Licenses issued to telecommunications providers prior to and after the TRR Act. Some of these provisions relating to interconnection are referred to below.
16. Part 6 of the TRR Act, entitled "Interconnection," contains requirements for interconnection to be available generally to competing service providers, promptly and on reasonable and non-discriminatory terms.
17. For example Section 26, entitled "Interconnection by all service providers" provides a right for a new market entrant or existing telecommunications supplier to negotiate to obtain interconnection on reasonable terms. Sections 26(1) and (2) state:
 - (1) "Every service provider who provides or intends to provide telecommunications services to the public, (hereinafter referred to as an "access seeker") has the right to require, by notice in writing, any other

service provider that operates a telecommunications network in Vanuatu (hereinafter referred to as an “**access provider**”) to negotiate in good faith, an interconnection agreement for the provision of interconnection by the access provider.”

- (2) Upon receipt of a notice under subsection (1), an access provider must enter into, and participate in, good faith negotiations with the access seeker to enter into such an interconnection agreement.”

18. Section 31 of the TRR Act states:

- (1) “If two or more service providers fail to reach agreement on any terms and conditions for interconnection within a period of 30 days from the date of receipt of a written notice provided under section 27,¹ the dispute may be referred by one or more service providers to the Regulator for determination;”
- (2) “If a dispute is referred to the Regulator in accordance with subsection (1), the Regulator may order the service providers to provide interconnection on such terms and conditions as the Regulator determines, or as may be prescribed by Regulations.”

19. Section 29 states:

- “(1) Interconnection agreements (including an interconnection agreement based on a RIO) must: (a) be consistent with this Act and comply with any applicable Regulations; and (b) meet all reasonable requests for interconnection at any technically feasible point; and (c) in all other respects, incorporate reasonable terms and conditions for interconnection, including technical standards and specifications.
- (2) “Every access provider must; (a) apply similar conditions to all access seekers seeking the same or similar interconnection services; and (b) provide interconnection to access seekers under substantially the same conditions and of substantially the same equality as it provides for its own telecommunications services, or those of its affiliates. . . .”

20. Section 27 of the TRR Act allows TRR to determine the terms of a Reference Interconnection Offer (“RIO”) applicable to one or more nominated service providers, and states that when an access seeker requests interconnection on the terms of a RIO, a nominated service provider is required to supply interconnection on the terms of the RIO. Section 27(8) states:

¹ The reference to Section 27 apparently is a typographical error, and should be to Paragraph 26.

“A service provider who provides or intends to provide telecommunications services to the public may, instead of following the process in subsections 26(1) and 26(2), notify a nominated service provider requiring them to enter into an interconnection agreement with that other service provider in the form of the nominated service provider’s RIO. The nominated service provider shall, within 10 working days after receipt of that notice, enter into this interconnection agreement, and, once entered into, the nominated service provider shall comply with its obligations under the interconnection agreement.

21. Since December 2013, a RIO applicable to Digicel, as a nominated service provider, has been in place, pursuant to Section 27 of the Act. It does not require an access seeker to agree to, and does not contain, any specific terms for indemnification.
22. These provisions of the TRR Act relating to interconnection, which contemplate interconnection being readily and generally available, are consistent with regulatory and industry precedent. For example, it is well-established in the telecommunications industry that interconnection generally should be readily available on fair, reasonable and non-discriminatory terms to competing service providers.
23. There are various reasons for this. One is that such interconnection generally will promote workable competition, efficiency, the development of the sector, and consumer welfare. Such interconnection also prevents one or more large or established network owners from denying entry to a new provider, or restricting competition, by refusing to provide interconnection on reasonable and non-discriminatory terms. A refusal to provide interconnection at all, or on reasonable and non-discriminatory terms, (especially by larger or more well-established suppliers) also can involve unlawful anti-competitive conduct and/or breach license conditions of established service providers.²
24. This is consistent with Part 5 of the TRR Act, which regulates anti-competitive conduct, including by a “dominant” telecommunications supplier. For example, the network of a dominant carrier, such as Digicel, is or may be a “bottleneck” facility to which Section 23(2) applies, such that a failure to supply network interconnection within a reasonable time and on commercially reasonable terms and conditions is deemed to be an abuse of dominance.
25. Digicel’s Licence, and the Licences of Wantok and other service providers, also contain requirements for general availability of interconnection between licensees. This includes Clauses 6.1 and 6.2, which require the Licensee to have a

² See, e.g., <https://thewire.in/75057/trai-rules-reliance-jios-favour-interconnect-point-issue/>; <https://www.accc.gov.au/media-release/18-million-penalty-imposed-on-telstra>

RIO with terms approved or as made by TRR, and to promptly provide interconnection to another Licensed Operator, upon request, under the RIO. A standard Licence Clause 6.3, entitled "Right To Interconnect", also provides: The Licensee has the right to require any other Licensed Operator that has an access network in Vanuatu . . . to negotiate in good faith, for the purposes of enabling provision of telecommunications services to end users in Vanuatu, an agreement for interconnection with the telecommunications network of that Licensed Operator, in respect of the telecommunications services to be provided by that Licensed Operator to the Licensee."

26. Overall, the legal framework of the TRR Act, and Licences, reflect a public policy of encouraging vigorous and fair competition, and the growth and development of the ICT sector, in part by interconnection being readily and promptly available between Licensees on terms that are reasonable and non-discriminatory.

III. CONSIDERATION OF DIGICEL'S INDEMNITY CONDITION

27. The issue presented in this Draft Determination is whether Digicel may refuse to negotiate for the supply of interconnection to Wantok, or refuse to supply or agree to supply interconnection to Wantok, unless Wantok agrees to The Indemnity Condition.
28. As referred to in Part I, Wantok and Digicel are in dispute about this issue, which they have agreed to have TRR determine (subject to their rights of internal or judicial review pursuant to Part 10 of the TRR Act).
29. Digicel reasons for imposing The Indemnity Condition are summarized in its letters to Wantok and TRR, including the letters of 31 January 2017 and 21 February 2017.
30. Digicel contends that Wantok is not, or should not be, licensed to provide voice services (and obtain interconnection for that purpose), either at all, or without certain restrictive conditions being included in its Licence. Based on this, Digicel says The Indemnity Condition is a reasonable protection for Digicel if it turns out that its claims are correct, so that Wantok is not entitled to or does not seek to obtain interconnection from Digicel.
31. In its decision dated 16 December 2016, TRR amended Wantok's Licence to state that it was authorized to generally provide telecommunications services, (including voice services) without restriction as to the technology used or type of services. TRR's decision of 16 December 2016 states:

"Pursuant to the exercise of the powers conferred under Paragraph 7(2)(c) of the Telecommunications and Radiocommunications Regulation Act No. 30 of 2009 and as a result of the consent to amend made on 16 December 2016, I,

the Regulator, hereby amend the Licence issued to Wantok Network Limited on 22nd September 2009, as amended on 31st March 2014, as follows:

- By the deletion of existing Clause 1.1 of the licence; and
- By the insertion of the following new Clause 1.1:

1.1 Licence to provide telecommunications services

This licence authorises the Licensee to:

Provide telecommunications services to end users in Vanuatu;

Provide international telecommunications services to end users in Vanuatu, and to persons outside Vanuatu; and

Provide any other telecommunications services that are supplementary to those telecommunication services.

32. This amended Licence remains in effect, and unquestionably allows Wantok to provide voice services.

For the reasons summarized below, TRR does not believe it is appropriate for Digicel to require Wantok to indemnify Digicel if this amended Licence is for some reason revoked, revised or invalidated and this results in Wantok not being entitled to, or wishing to, obtain interconnection. Such a continued insistence by Digicel on The Indemnity Condition, as a basis for refusing to continue interconnection discussions, or agree to provide and provide interconnection to Wantok, also would or is likely to result in Digicel engaging in anti-competitive conduct under Part 5 of the TRR Act, or Clause 12 of its Licence, and/or be unlawful under Part 6 of the TRR Act.

33. The Indemnity Condition applies to conduct of TRR, and seeks to make Wantok liable if TRR had improperly issued the 16 December 2016 Licence amendment, such that it was subsequently invalidated by a Court, or if TRR decided to revoke or amend Wantok's Licence, such that Wantok was not entitled to provide voice services or obtain interconnection from Digicel.
34. The Indemnity Condition is unreasonable because it operates and depends on such TRR decisions. These matters are the responsibility of TRR, and no licensed service provider should be required to accept that responsibility or to provide indemnities of any kind relating to prior acts or omissions, or future conduct, of TRR, in the good faith exercise of its public obligations and powers.
35. Such an indemnity also misunderstands the nature of the regulatory regime under the TRR Act, and the Licences. The Act makes Digicel, and Wantok subject to regulation by TRR, (and this also is a condition of each of their Licences). Regulated parties such as Digicel also are afforded extensive procedural protections and avenues to challenge TRR decisions, including via judicial review, internal review and expert determination (as provided in Part 10 of the TRR Act), These are the steps a regulated party may utilize to seek to challenge or obtain revision of TRR Decisions.

36. Especially given the extensive procedural protections and remedies available under the TRR Act, it is particularly unreasonable and unworkable for one regulated party, such as Digicel, to require that a competitor and regulated party, such as Wantok, provide indemnity or compensation if a TRR Decision is revised or revoked by TRR, or invalidated on judicial review. The other party has not made the Decision, and is not responsible for or able to control whether it is revised or revoked by TRR (or invalidated or changed through judicial review).
37. An interested party thus is entitled to rely on and receive the benefits of a decision by TRR, unless or until the decision is cancelled or revised pursuant to the procedures and remedies provide for in the TRR Act.
38. Allowing such an indemnity to be required from a regulated party as a condition of another regulated party complying with a TRR decision also has a very significant potential to reduce or obstruct the rights or benefits arising from Decisions by TRR.
39. This is illustrated by the present situation. Under Wantok's Licence Amendment of 16 December 2016, it is entitled to generally provide "telecommunications services," including voice services, and has rights under the TRR Act to obtain interconnection for that purpose. In order for that decision to be given effect, Wantok cannot be required to provide or pay indemnity, if TRR's decision is changed or found to be invalid. That adds a potentially significant and open-ended liability that may discourage the Decision being given effect, or burden the exercise of the rights granted by the Decision. The Indemnity sought by Digicel also is in very broad, vague and unlimited terms, any may extend to legal or other costs of Digicel. The burden or obligation it imposes thus cannot be said to be minimal or immaterial.
40. The scope for the regulatory regime to be compromised, if regulated parties were able to require such indemnities, also is quite significant. There are many different kinds of TRR decisions in which, as a condition of complying with a TRR Decision, a regulated party could require indemnity from a competitor or other interested party seeking to rely on and give effect to the TRR decision.
41. For example, if TRR were to reduce the prices of FCC, (a supplier of submarine cable telecommunications services to Digicel), by imposing price cap regulation on FCC under Section 36 of the TRR Act, FCC should not be allowed to require Digicel, as a condition of obtaining the reduced prices due to TRR's Decision, to provide an indemnity against a successful challenge to, or revision of that Decision. Instead, if FCC wished to challenge or seek revision of the Decision, it should be limited to the remedies available to do so under the TRR Act or its licensing instrument. The same conclusion applies to Digicel in the present case. It should be limited to the remedies available under the Act or its licence to challenge the validity of Wantok's right to interconnect.

42. The Indemnity Condition also is unreasonable for a number of other reasons.
43. First, even if TRR had not amended Wantok's Licence in December 2016, on that date, Wantok was, under its then existing License, authorized to provide voice services, so long as this was done using the defined "IP Protocol" technology referred to in the Licence.³ The voice services Wantok is providing today, and for which it seeks interconnection from Digicel, are such IP Protocol services. Accordingly, even if TRR had not amended Wantok's Licence in December 2016, it still would be authorized to provide these voice services, and obtain interconnection for that purpose.
44. Second the Indemnity Condition is based at least in part on Digicel's arguments that, although Wantok currently is authorized by its License to provide voice services (and obtain interconnection for that purpose), this decision is invalid, or must be revised by TRR. As explained in Digicel's prior correspondence to TRR, including its letter of 21 February 2017, Digicel contends that Wantok, or any other competitor, should only be licensed to provide voice services or be licensed generally to provide all "telecommunications services," if the competitor also is required to comply with a license condition the same or similar to the condition, in Digicel's 2008 License, that it build a mobile network providing "nationwide" service coverage to at least 85% of Vanuatu's population. TRR was well aware of, and had regard to, these contentions and views of Digicel when TRR decided in December 2016 not to adopt this approach, and to instead grant Wantok a general licence to provide "telecommunications services", including any voice services, regardless of the technology used to provide such voice services. TRR's prior consideration, and rejection, of Digicel's approach included the following matters:
- a. The national coverage obligations in Digicel's 2008 Licence reflected its specific circumstances and the Government's Policy at that time in establishing a competing network to that of TVL, which involved Digicel for several years being the only mobile service competitor to TVL, in exchange for other obligations, including Digicel constructing an alternative mobile network with specified population coverage;

³ Clause 1.1 of Wantok's 2009 Licence states: "*This licence authorises the Licensee to: (a) provide internet-related telecommunications services to end users in Vanuatu (excluding mobile telecommunications services prior to 31 March 2011); (b) provide internet-related international telecommunications services to end users in Vanuatu, and to persons outside Vanuatu; and (c) provide any other telecommunications services that are supplementary to those telecommunications services. It also provides: "Internet-related means services that use the Internet Protocol (IP as specified in RFC-791 (IPv4 or RFC-2469 (IPv6))."*

- b. These circumstances and obligations were specific to Digicel's market entry in 2008, and were not intended or required to apply to any or all later market entrants, including Wantok;
- c. Instead, the appropriate policy has been and remains that is not necessary or desirable for each new entrant or competing supplier to construct its own nationwide network in order to be authorized to provide competition in voice and other telecommunications services (or obtain interconnection from TVL and Digicel for that purpose);
- d. Prior to December 2016, service providers other than Wantok (such as SPIM and ICL) were granted Licenses or Licence amendments authorizing them to provide voice and other telecommunications services, without an obligation to construct a nationwide network or provide national coverage. Such Licenses have been available to Digicel and the public on TRR's website, and have never been challenged as being invalid. There does not appear to be any or sufficient reason for Wantok, but not such other service providers, to be required to construct a national network or provide national coverage, in order to be licensed to provide voice or other telecommunications services.

45. TRR also has so far decided not to undertake an internal review of decision, on 16 December 2016, to amend Wantok's Licence. So far, sufficient reasons and supporting materials to warrant such an internal review have not been provided.

Conclusion

46. TRR has decided to resolve the dispute referred to it by requiring Digicel to cease imposing The Indemnity Condition as a condition or requirement for further interconnection negotiations with Wantok, or as required term of agreeing to provide, or providing, interconnection to Wantok.

47. This Decision is implemented by the accompanying Order in the above terms.