



PUBLIC CONSULTATION PAPER:

PNG NATIONAL COMPETITION POLICY

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BACKGROUND

A. SUMMARY

1. The Government of Papua New Guinea has for many years recognised the importance of promoting competition in PNG markets and the need to protect consumers from unsafe goods and services and unfair trading practices. Since 2002 the Independent Consumer and Competition Commission (ICCC) has been responsible for administering and enforcing competition and consumer laws under the *Independent Consumer and Competition Commission Act 2002 (ICCC Act)* and several other PNG Acts.
2. During 2015 and 2016 the Department of Treasury led a comprehensive Consumer and Competition Framework Review (**Framework Review**), supported by the ADB's Pacific Private Sector Development Initiative (PSDI) and an international expert panel funded by PSDI.¹ In May 2017 the expert panel delivered its *Final Report and Recommendations* to Treasury. The review made over 200 recommendations, including that a national policy on competition and consumer protection should be formulated and introduced:

Recommendation 68: A National Competition Policy for PNG should be formulated and introduced, following public consultation on a draft version.
3. During 2017, Treasury requested PSDI's assistance in formulating and consulting on proposals for a National Competition Policy. This Public Consultation Paper is provided in response to Treasury's request, with the objective of setting out for consideration and comment by the public the issues proposed to be addressed by a competition policy and policy propositions currently under consideration by Treasury.
4. Papua New Guinea has in force competition law, consumer protection law and industry-specific pro-competitive regulation. PNG also has both a general competition and regulatory agency (the Independent Consumer and Competition Commission, or ICCC) and function-specific regulators (such as the NICTA and NISIT). At present there is no explicit policy articulating the Government's objectives in respect of competition and consumer protection.
5. Part 1 of this Consultation Paper sets out the draft text of the proposed *National Competition Policy*. Part 2 discusses the policy proposals, their background and rationale.

¹ The Review Team comprised: Mr Warwick Davis; Prof Brent Fisse; Dr Cynthia Hawes; Dr Vij Nagarajan; Dr Alma Pekmezovic; Dr Andrew Simpson (Chair); Dr Rhonda Smith; Mr Geoff Thorn.

6. This Consultation Paper is intended to stimulate discussion: it should not be taken as indicating any decision or preference on the part of the Government or any of its advisors. To the extent that any particular future course of action is proposed or discussed in this paper, that action remains under consideration. Individuals and organisations are encouraged to comment on the issues raised in this Consultation Paper, any other relevant issues, and the policy principles that should guide the future development of competitive markets in PNG.
7. Submissions in electronic format should be sent by email to:

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8. Submissions in hard copy format should be addressed to:

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9. All submissions received will be treated as public, and made available on the project's website:

www.CCFReview.info
10. Consideration will be given to requests to treat parts of a submission as confidential (by redacting them), where reasonable grounds are shown (e.g. commercial sensitivity of data).
11. All submissions must be received before **5:00pm on Friday, 15 June 2018**.

B. ROLE OF COMPETITION POLICY

12. Competition has been defined as: "...a process of rivalry between firms seeking to win customers' business over time by offering them a better deal."² The competitiveness of PNG markets and the competitiveness of PNG businesses regionally and internationally are matters of pivotal importance for the future economic development of PNG and the quality of life of its people.

² Competition Commission and the Office of Fair Trading, *Merger Assessment Guidelines: OFT1254* (2010) para 4.1.2.

13. Effective competition is likely to promote economic efficiency, sustainable and inclusive economic growth, and consumer welfare:³
- Economic efficiency is achieved where the economy's resources are used and allocated in the most effective way. Competition enhances efficiency by disciplining firms to produce at the lowest possible cost and pass cost savings on to consumers, and motivating firms to undertake research and development to improve the goods and services they supply.
 - Economic growth – the increase in the value of goods and services produced by an economy – is a key indicator of economic development. Economic development refers to an economy's well-being, including employment growth, literacy and mortality rates and other measures of quality of life. Competition fosters greater economic growth and development by improvements in economic efficiency and reduction of wastage in the production of goods and services. Competitive market forces help to allocate resources efficiently, improve productivity and generate a higher level of economic growth.
 - Consumer welfare is a central concern of competition policy. Consumers stand to benefit from competitive markets because competition is aimed at inducing firms to offer better choice (new or improved products), better quality and lower prices. Consumer policy is also aimed at improving consumer welfare. Consumers stand to benefit from consumer protection because firms are induced to act fairly towards consumers by enabling them to make informed choices and by not misleading or cheating them.
14. While PNG has had competition laws in force since 2002, and consumer protection laws in force since before 2002, PNG's competition policy has until now been implicit. The role of an *explicit* policy on competition should be, in the words of the Framework Report, to: "...help to set political and social expectations and to guide ongoing review and improvement of competition policy and law in all sectors of the economy." In particular, an explicit policy on competition assists the Government by communicating the goals sought to be achieved by the government to its officials, regulators (particularly the ICCC and NICTA) and courts, as well as to businesses and members of the public.

³ See, *ASEAN Regional Guidelines on Competition Policy* (2010), 2.2.

⁴ PNG Treasury *Consumer and Competition Framework Review: Final Report and Recommendations* (May 2017) (Final Report) p 75.

C. ROLE OF COMPETITION LAW

15. *Competition policy* sets out Government's commitments to promote market structures, conditions and conduct that will foster economic growth and total welfare by facilitating competition in markets. The term covers a range of measures, including reducing regulatory barriers to competition, pro-competitive procurement procedures, competition rules, consumer protection rules, and the administration and enforcement of such measures.
16. *Competition law* is an important part of a *competition policy*. Competition law is binding on individuals and entities that are engaged in business. It operates by prohibiting certain kinds of business behaviour that harm or inhibit the process of competition in markets. An effective competition law helps to deter (or penalize) domestic or foreign undertakings who might otherwise engage in anti-competitive conduct affecting markets in PNG, to the detriment of local consumers and businesses. The ICCA Act is PNG's competition law.
17. PNG is currently in the position of having a competition law but no explicit competition policy. Competition law is important to preserve competitive behaviour in markets that are *already* competitive – but in many PNG markets competition has not yet emerged. Competition policy for PNG should play the crucial role of *promoting the emergence of competition* where competition is not yet effective.
18. We recommend that competition policy in PNG should have the fundamental goals of:
 - Improving the existing competition and consumer protection laws and enhancing the impact of the ICCA in enforcing them; and
 - Fostering the development of competition in markets where competition is not yet effective.
19. PNG's competition law should be effective to *deter private sector and government-owned enterprises from engaging in anti-competitive conduct* that is damaging to the competitive process.
20. PNG's competition policy should focus on *removing or reducing impediments to competition*, which may be long-standing features of the economy. Such impediments include familiar "regulatory barriers" (such as statutory monopolies, restrictive licensing regimes, long-term concession arrangements and over-reaching regulation). Unpredictability, delay and inefficiency in public administration are also significant impediments: they impose costs on firms and hinder their ability to progress from the informal to the formal economy.

D. ROLE OF CONSUMER PROTECTION

21. Treasury has previously taken the position that competition and consumer protection measures should be considered as complementary and inter-related: for example, in the recent “Consumer and Competition Framework Review.” The Final Report from the Framework Review endorses the view that competition and consumer protection are complementary and inter-related areas of policy and law:

Effective consumer protection laws enable consumers and traders to participate in the marketplace with safety and confidence, and foster a trading environment in which private and public sector businesses compete in a fair and effective way.⁵

22. The Framework Review found that “PNG at present lacks comprehensive consumer protection legislation of the kind that exists in most other common law countries.”⁶ Accordingly, the Framework Review made numerous recommendations for the enhancement of consumer protection in PNG (which are addressed in more detail at **Section I** of this Issues Paper, below).

23. The importance of consumer protection to the development of competitive markets, and their complementarity, has been recognised in the expert literature:

[W]ell-conceived competition policy and consumer protection policy take complementary paths to the destination of promoting consumer welfare. I also submit that there are benefits from combining both functions in a single public institution. Our experience at the Federal Trade Commission suggests several synergies.⁷

24. Treasury proposes that the *National Competition Policy* should include the Government’s policy commitments in respect of consumer protection:

Policy proposal 1: The Government adopts this National Competition Policy to inform and guide all branches of Government, regulatory agencies, state-owned enterprises, private sector businesses and consumers in PNG and will update it as required.

⁵ Final Report (supra, n 2) p 37.

⁶ Final Report (supra, n 2) p 38.

⁷ TJ Muris “The Interface of Competition and Consumer Protection” paper presented to 29th Annual Conference, International Antitrust Law and Policy, New York City, 31 October 2002. See also, P Nebbia “Competition Law and Consumer Protection Against Unfair Commercial Practices: A more than complementary relationship?” in I Lianos and D Sokol (eds) *Global Competition Law and Economics* (Stanford Law Books, 2012).

PART ONE – NATIONAL COMPETITION POLICY (DRAFT)

A. Policy on competition in PNG

- (1) The Government adopts this *National Competition Policy* to inform and guide all branches of Government, regulatory agencies, state-owned enterprises, private sector businesses and consumers in PNG and will update it as required.

B. Competition Policy Objectives

- (2) The objectives of this *National Competition Policy* are to improve economic efficiency, promote sustainable and inclusive economic growth, increase consumer welfare, and enhance total welfare by promoting and maintaining fair and effective competition in all markets in PNG's economy.
- (3) Competition is important but is not an absolute goal, so public decision-making must also take due account of other economic and social policy objectives.

C. Competition Principles

- (4) The Government will be guided by the following Competition Principles in making policies, legislation and decisions that promote competition and the long-term interests of consumers:
 - (a) Competition policies, laws, institutions and practices should promote the long-term interests of consumers.
 - (b) Policies, legislation and regulation binding the public or private sectors should not restrict competition unless the restriction is justified on the ground of compelling public interest.
 - (c) Government should promote freedom of choice when funding, procuring or providing goods and services and enable informed choices by consumers and others who seek to acquire those goods and services.
 - (d) Arrangements for public procurement of goods and services should separate the interests of policy (including funding), regulation and service provision, and enable participation by a diversity of providers.
 - (e) Government should separate public monopolies from competitive service elements, and also separate contestable elements into smaller independent business activities, where it is feasible to do so.
 - (f) Government business activities that compete with private providers, whether for-profit or non-profit, must comply with competitive neutrality principles, to ensure they do not enjoy a net competitive advantage simply as a result of government ownership.
 - (g) A right to third-party access to significant bottleneck infrastructure may be legislated for in particular cases where doing so would promote competition in dependent markets and enhance the public interest.
 - (h) Where prices for natural monopoly infrastructure providers are set, administered or overseen, the responsible authority must be independent of the government and private sector.
- (5) The Competition Principles are to be applied consistently and are subject to a public

interest test, weighing any anti-competitive effects of proposed policy, legislation, decisions or practices against their public benefits.

D. Coordination of Initiatives

- (6) All Ministries are required to have regard to the possible effects on competition of all policies, legislation or decisions that are under consideration by them and, if in doubt, to refer such matters to Treasury.
- (7) Treasury may request the ICCC's expert advice regarding the possible effects on competition of any proposed policy, legislation or decision.
- (8) The ICCC may raise with Treasury and the relevant Ministry any concern the ICCC has regarding the competition implications of any proposed policy, legislation or decision.
- (9) If any policy, legislation or decision would have anti-competitive effects, then those effects should be explicitly identified and weighed by the relevant Ministry against the public benefits likely to result from the policy, legislation or decision, before the Ministry determines whether to proceed with it or not.

E. Reviewing and Rectifying Statutory Impediments to Competition

- (10) Statutory barriers to market entry or the expansion of business activity will be identified and progressively removed (except where justified) and avoided in new legislation or regulations.
- (11) The Government will amend the ICCC Act to expand the advisory role of the ICCC to allow the ICCC:
 - to provide advice to other Ministers and departments, in addition to Treasury, when its resources permit;
 - to provide advice to Treasury on the ICCC's own initiative; and
 - to make proposals to the Treasurer for desirable legislation.

F. Application to Government Business Activities

- (12) The competition and consumer protection provisions of the ICCC Act (or legislation updating it) will continue to apply fully to SOEs.
- (13) The ICCC and Kumul Consolidated Holdings are required to negotiate and agree Competitive Neutrality Principles setting out the obligations of all SOEs to:
 - Achieve a commercial rate of return on assets;
 - Be tax neutral – i.e. pay all relevant taxes and duties;
 - Be regulation neutral – i.e. comply with all relevant laws and regulations; and
 - Be debt neutral – i.e. borrow at commercial rates or include charges to account for implicit or explicit government guarantees.
- (14) The ICCC will have the function of receiving, investigating and reporting to Treasury on complaints of infringement of the Competitive Neutrality Principles by SOEs or Government.
- (15) On receiving a report from the ICCC regarding a complaint involving the Competitive Neutrality Principles, Treasury shall provide to Parliament: (a) the ICCC's report; and (b) Treasury's recommendations for appropriate action in response to the complaint.

- (16) The Government will ensure that its Community Service Obligation Policy is progressively applied to each of the regulated SOEs.
- (17) The Government will make provision for fully-funding the SOEs' community service obligations.
- (18) The Government will establish a National Working Group, to be chaired by the Treasurer (or his or her nominee) and with administrative support from the Department of Treasury, with the mandate to identify, in collaboration with the private sector, impediments to businesses entering, investing or expanding in markets in PNG and means of reducing or eliminating those impediments.
- (19) The responsibilities of the National Working Group shall include raising with Treasury and the ICCC any case in which the Group considers that a policy, statute or decision may conflict with the Government's competition policy objectives.
- (20) The Government will implement the recommendations of the National Land Development Programme and will support further work to improve land laws, titles, transfers, planning and zoning, in the interests of promoting entry to, and competition in, PNG markets.
- (21) The Government reaffirms its commitment to the elimination of corruption in public office in PNG.

G. Public Procurement

- (22) The Government will support reform of public procurement procedures and processes, including by enacting a Public Procurement Act, in the interests of ensuring competition in the supply of goods and services to Government and ensuring the Government obtains good value for public money spent.
- (23) The Government will undertake a review of its public procurement practices to ascertain whether any existing procurement rules unnecessarily exclude SMEs or unincorporated undertakings from participation or otherwise unduly limit opportunities for competitive supply.
- (24) The Government will investigate whether tenders can be structured or advertised in ways that remove or reduce barriers to participation by women's businesses and SMEs.
- (25) The procurement monitoring system will be enhanced to gather information on the participation, and success, of women's businesses and SMEs in public procurement processes.
- (26) The Government will amend the ICCC Act to include a prohibition against bid-rigging and the powers of the ICCC to investigate bid-rigging will be improved.

H. Institutional Arrangements

- (27) The Government will undertake a review of the NISIT Act and operations of NISIT, to ensure that NISIT is able to perform effectively the statutory responsibilities entrusted to it.
- (28) The ICCC and NICTA must administer and enforce their respective legislation in as consistent manner as possible and must ensure they communicate and coordinate their efforts efficiently.
- (29) The Government remains committed to the successful operation of the ICCC and will ensure that it receives funding that is sufficient to enable it to perform its statutory functions to the standard expected by the Government.
- (30) The ICCC shall be empowered to recover the costs of its regulatory activities from

regulated undertakings; and those costs shall be factored into the calculation of regulated undertakings' rates or tariffs.

- (31) The ICCC will remain an independent statutory body.
- (32) The ICCC must ensure that its approach to administration of the ICCC Act (or any equivalent law) is transparent to the public, including by publishing policies and guidelines that explain its approach to performing its functions and exercising its powers.
- (33) The ICCC and other statutory bodies and departments of the PNG Government must communicate regularly and coordinate their efforts to act effectively in performance of the functions delegated to them.

I. Consumer Protection

- (34) The Government will provide the ICCC with appropriate funding to ensure PNG's consumers and traders are aware of their rights and obligations and aware of sources of advice or assistance in relation to them.
- (35) The Government will support low-cost access to justice through District Courts and Village Courts by enacting necessary legislation and providing training for magistrates, to promote resolution of consumers' disputes at the local level.
- (36) The Government will revise legislation on product labelling, product information and conduct in trade to ensure that information is provided in at least one of the official languages of PNG, relevant laws are harmonized, and misleading or deceptive conduct is prohibited.
- (37) Particular forms of conduct which are harmful to consumers' rights and interests will be prohibited under PNG's laws.
- (38) The conditions and warranties implied into consumer contracts under existing law will be replaced by "consumer guarantees" and similar guarantees will apply also to services.
- (39) The Government will revise and consolidate laws on weights and measures and packaging to harmonize them and bring them up-to-date.
- (40) The Government will revise and consolidate laws on consumer protection to harmonize them, bring them up-to-date, and provide for effective means of enforcement and remedies.

J. Competition Legislation

- (41) The Government will modernize PNG's competition law, including by simplifying its language and structure as far as practicable and removing repetition wherever possible.
- (42) In modernising the competition law and supplementing existing consumer protection laws, the ICCC Act will be substantially amended (or repealed and replaced) and the revised law will be entitled the "Consumer and Competition Act".
- (43) The competitive conduct provisions of the ICCC Act will be revised to ensure the rules are clear, complete and consistent.
- (44) The mergers and acquisitions provisions of the ICCC Act will be revised to provide for mandatory pre-notification of mergers or acquisitions that exceed certain thresholds to be set out in Regulations.
- (45) The clearance, authorisation and exemption provisions of the ICCC Act will be revised to ensure they are clear, complete and consistent.

- (46) The ICCC will have the powers to commence civil or criminal investigations or proceedings on its own initiative and the ICCC will have the full range of investigative powers available to its counterpart agencies.
- (47) The sanctions and remedies provisions of the ICCC Act will be revised to ensure that courts have powers to order a broad range of remedies and to impose penalties at levels that are sufficient to ensure deterrence.
- (48) The review and appeal provisions of the ICCC Act will be revised to ensure they are workable and appropriate.

K. Regulated Industries

- (49) The Government will consider the costs and benefits of full and partial privatisation of the regulated SOEs, on a case-by-case basis.
- (50) The procedural provisions governing regulatory contracts and appeals will be streamlined and the period for an Appeals Panel decision extended to 90 days to enable fully considered decisions to be made.

L. Price Monitoring and Control

- (51) The Government will amend the *Prices Regulation Act* to require that economically-based thresholds be met as a condition for imposing price monitoring or price control, and to require the ICCC to report to the Minister on whether the relevant threshold has been met or not.
- (52) Decisions of the ICCC regarding price monitoring and price control will be subject to review by the Appeals Panel.

M. International Trade

- (53) The Government will take into consideration the implications for competition in markets in PNG of any bilateral or multilateral trade agreements into which it considers entering.

N. Timeframe and Resources

- (54) Treasury must develop a timetable for the implementation of this *National Competition Policy* and must submit the timetable to Parliament.
- (55) Treasury must report to Parliament not less than annually on the progress made in implementing this *National Competition Policy*, and the costs incurred in the past year and costs projected to be incurred in the coming year.

O. Progress Review

- (56) Progress in the implementation of this *National Competition Policy* and the impact it is having will be reviewed by an independent panel of experts, five years after this Policy comes into effect and again five years after the first review.

PART TWO – DISCUSSION OF NATIONAL COMPETITION POLICY

B. Competition Policy Objectives

25. The *National Competition Policy* must serve several objectives, which Treasury considers should be explicitly stated. In summary, the *National Competition Policy* aims to promote the development and maintenance of competition in markets for goods and services in PNG, in the interests of economic growth, economic efficiency and consumer welfare. The promotion of inclusive economic growth is an important objective in PNG. Competition policy must work together with other safeguards to avoid the further marginalization and impoverishment of the poor (in the context of market liberalization and increasing reliance on market forces).
26. Competition policy also aims at improving consumer welfare. Consumers benefit when competitive pressure forces businesses to find ways of offering better value to customers. Consumer protection measures also have pro-competitive effects, as traders that give their customers accurate information and trade on fair terms should not be disadvantaged relative to traders that do not.
27. The process of competition promotes economic efficiency, in the markets in which it is effective. Under the pressure of competition, markets are likely to be more “efficient” in several respects:
 - Allocative efficiency – the allocation of resources to their best uses;
 - Productive efficiency – the least costly production of goods and services; and
 - Dynamic efficiency – continual innovation in products and methods of production.
28. In a developing economy, such as Papua New Guinea, efficiencies are important and valuable, where they can be achieved. Even where markets might still be inefficient, however, effective competition policy and law can complement other policies and contribute to achieving them.
29. Competition policy should complement trade policy, industrial policy and regulatory reform. Competition policy targets business conduct that limits market access and reduces actual and potential competition. Trade and industrial policies encourage adjustment to trade and industrial structures in order to promote productivity-based growth. Regulatory reform eliminates domestic regulation that restricts entry and exit in the markets. Competition policy thereby seeks to increase investor confidence and to enable the benefits of trade to be realised. This encourages foreign investment.

30. Competition policy also needs to take account of other policy objectives (both economic and social) such as the integration of national markets and promotion of regional integration, the promotion or protection of small businesses, the promotion of technological advancement, the promotion of product and process innovation, the promotion of industrial diversification, environmental protection, fighting inflation, job creation, equal treatment of workers according to race and gender, and the promotion of welfare of particular consumer groups. Competition is an important way in which the welfare of the public can be improved but is not an end in itself.⁸ For example, national objectives such as wage and price stability, peace and reconciliation, and distributional goals are sometimes (although not always) in tension with competition policy. Any such policy tensions should be made explicit and resolved openly.
31. These objectives are reflected in the following provisions of the proposed *National Competition Policy*:

Policy proposal 2: The objectives of this *National Competition Policy* are to improve economic efficiency, promote sustainable and inclusive economic growth, increase consumer welfare, and enhance total welfare by means of fair and effective competition in all markets in PNG's economy.

Policy proposal 3: Competition is important but is not an absolute goal, so public decision-making must also take due account of other economic and social policy objectives.

C. COMPETITION PRINCIPLES

32. Treasury considers that explicit Competition Principles should guide the Government when making administrative and legislative decisions on competition-related issues.
33. The Competition Principles are intended to provide guidance and direction to the Government and SOEs, to help them act in conformity with the *National Competition Policy*. The underlying thrust of the Competition Principles set out below is that competition policy, laws and institutions should promote the long-term interests of consumers. The Competition Principles are high-level and are intended to be applied to differing circumstances in a consistent manner.
34. The application of the Competition Principles should be subject to a public interest test, namely that competition is not to be restricted by government policy or legislation unless:
- the benefits of the restriction to the community as a whole outweigh the costs; and
 - the objectives of the legislation or government policy can only be achieved by restricting competition, and any such restriction is kept to the minimum necessary.

⁸ See A Ezrachi, 'Sponge' (2017) 5(1) *Journal of Antitrust Enforcement* 49.

Policy proposal 4: The Government will be guided by the following Competition Principles in making policies, legislation and decisions that promote competition and the long-term interests of consumers:

- (a) Competition policies, laws, institutions and practices should promote the long-term interests of consumers.**
- (b) Policies, legislation and regulation binding the public or private sectors should not restrict competition unless the restriction is justified on the ground of compelling public interest.**
- (c) Government should promote freedom of choice when funding, procuring or providing goods and services and enable informed choices by consumers and others who seek to acquire those goods and services.**
- (d) Arrangements for public procurement of goods and services should separate the interests of policy (including funding), regulation and service provision, and enable participation by a diversity of providers.**
- (e) Government should separate public monopolies from competitive service elements, and also separate contestable elements into smaller independent business activities, where it is feasible to do so.**
- (f) Government business activities that compete with private providers, whether for-profit or non-profit, must comply with competitive neutrality principles, to ensure they do not enjoy a net competitive advantage simply as a result of government ownership.**
- (g) A right to third-party access to significant bottleneck infrastructure may be legislated for in particular cases where doing so would promote competition in dependent markets and enhance the public interest.**
- (h) Where prices for natural monopoly infrastructure providers are set, administered or overseen, the responsible authority must be independent of the government and private sector.**

Policy proposal 5: The Competition Principles are intended to be applied consistently and are subject to a public interest test, weighing any anti-competitive effects of proposed policy, legislation, decisions or practices against their public benefits.

D. COORDINATION OF INITIATIVES

35. Pro-competitive reforms pursuant to competition policy should be coordinated with other economic reforms underway in PNG, to ensure a consistently pro-competitive approach. As the *Final Report of the Framework Review* noted:

A number of the laws considered by Parliament each year, and many of the decisions made by Ministers under Acts of Parliament, have important implications for competition in PNG. The effects that a new law or decision may have on competition are not always obvious, so an expert assessment of potential implications is likely to assist decision-makers.⁹

36. At any given time the Government will be considering or implementing a range of different policies, each of which has significant economic implications. To guard against the possibility of a policy being adopted or implemented that could have unintended anti-competitive consequences, Treasury considers that all Ministries should be required to have regard to the possible effects on competition of policy, legislation or decisions that are under consideration and, if in doubt, to refer such matters to Treasury. To obtain expert advice on such matters,

⁹ Final Report (supra, n 2) p 179.

Treasury should be able to seek the opinion of the ICCC (though Treasury will form its own conclusions, having regard to all relevant views, including those of the ICCC).

Policy proposal 6: All Ministries are required to have regard to the possible effects on competition of all policies, legislation or decisions that are under consideration by them and, if in doubt, to refer such matters to Treasury.

Policy proposal 7: Treasury may request the ICCC's expert advice regarding the possible effects on competition of any proposed policy, legislation or decision.

37. In light of Ministries' workloads and the fact that they are oriented towards matters other than competition, the competition implications of a policy, statute or decision might "fall through the cracks" and be overlooked. The ICCC should, therefore, have the ability to raise with Treasury and the relevant Ministry a concern about the competition implications of any policy, statute or decision.

Policy proposal 8: The ICCC may raise with Treasury and the relevant Ministry any concern the ICCC has regarding the possible effects on competition of any proposed policy, legislation or decision.

38. While the promotion of competition is an important objective of the Government, it is always possible that the Government may consider it necessary or desirable to pursue a course of action that might not benefit competition. In other words, competition will not always be the most important objective. In such cases, however, it is appropriate that the effects on competition be explicitly identified and weighed against other aims or likely outcomes before a decision is made. The purpose is to help ensure that if the Government wishes to pursue a course of action that is anti-competitive, it do so with awareness of the cost in terms of the likely harm to competition.

Policy proposal 9: If any policy, legislation or decision would have anti-competitive effects, then those effects should be explicitly identified and weighed by the relevant Ministry against the public benefits likely to result from the policy, legislation or decision, before the Ministry determines whether to proceed with it or not.

E. REVIEWING AND RECTIFYING STATUTORY IMPEDIMENTS TO COMPETITION

39. The removal of statutory barriers to market entry and expansion of business activity is an important aspect of competition policy. Statutory restrictions, including those requiring a licence or permit to engage in a business or profession, can limit who participates in the market, what they can produce and the standard of the product or service they can provide. Sometimes the uncertainty of, or costs of complying with, statutory requirements will inhibit businesses' decisions to enter new markets or to expand.

40. Some of the warning signs have been identified by the OECD:¹⁰
- *Limiting the number of suppliers of a particular product or services:* This limitation can take place through various impediments such as the granting of exclusive rights for a supplier; the establishment of a lengthy (and/or costly) process to obtain a license, permit or authorisation required for operation; limits on the ability of some types of suppliers to provide a good or a service; start-up procedures (beyond the permit) which significantly raise the cost of entry.
 - *Limiting the ability of suppliers to compete:* This can be the case if regulation limits sellers' ability to set the prices for goods and services; limits the freedom of suppliers to advertise or market their products or services; significantly raise the costs of production for some suppliers relative to others (especially by treating incumbents differently from new entrants).
 - *Reducing the incentives of suppliers to compete:* This can be the case if regulation creates self-regulatory or coregulatory regimes; requires or encourages information on supplier outputs, prices, sales or costs to be published; exempts the activity of a particular industry or group of suppliers from the operation of general competition law.
 - *Limiting the choices and information available to customers:* This may be the case if the regulation limits the ability of consumers to decide from whom they purchase, reduces mobility of customers between suppliers of goods or services by increasing the explicit or implicit costs of changing suppliers or fundamentally changes information required by buyers to shop effectively.
41. Statutory barriers may be justified but often are not. Legislation should not restrict competition except to the extent required to foster competition or to meet other overriding policy objectives. Yet legislation may be enacted without adequate consideration of the likely impacts on competition. The need to avoid or remove unnecessary statutory barriers to entry or expansion is particularly important today, when many conventional modes of doing business are being disrupted or transformed by digital technologies.¹¹
42. The recent *Final Report of the Framework Review* noted some unnecessary or questionable statutory restrictions on competition in the context of industry regulation and price monitoring and control.¹² There has yet to be a comprehensive review of statutory barriers to entry or expansion in all PNG legislation.¹³ Steps should be taken, however, to identify and remove unnecessary statutory barriers to entry or expansion.

¹⁰ OECD, Economic Policy Reforms 2014, *Going For Growth Interim Report*, ch 2, at: <http://www.oecd.org/economy/going-for-growth-2014.htm>

¹¹ See eg FX Ollerros & M Zhegu (eds), *Research Handbook on Digital Transformations* (2016); World Economic Forum, World Economic Forum White Paper: Digital Transformation of Industries (2016) at: <http://reports.weforum.org/digital-transformation/wp-content/blogs.dir/94/mp/files/pages/files/digital-enterprise-narrative-final-january-2016.pdf>

¹² See Sections V, VI.

¹³ Useful guidance when assessing the justification or otherwise for statutory barriers to entry or expansion is available from a number of sources including the *OECD Competition Assessment Toolkit* www.oecd.org/daf/competition/assessment-toolkit.htm and the Australian Competition Policy Review *Final Report* Ch 10, at: <http://competitionpolicyreview.gov.au/final-report/>.

43. The progressive removal of existing impediments to competition, and the avoidance of new, unintended impediments requires continuing attention and expert input to decision making processes. The *Final Report of the Framework Review* recommended that these steps be taken:

Recommendation 190: *The advisory role of the ICCC should be specified under the ICCC Act as including:*

- (a) *advising any Minister (not solely the Minister for Treasury);*
- (b) *advising other agencies (not just the Minister);*
- (c) *advising on the ICCC's own initiative (not just on request); and*
- (d) *proposing new legislation to the Treasurer on its own initiative (not just responding to proposals).*

Recommendation 191: *The National Working Group on Improving Business and Investment Climate (or an equivalent body) should be resourced and supported by the government, with revised specific Terms of Reference, including an unequivocal mandate to identify impediments to competition and propose legal, administrative or other appropriate solutions to remove such impediments.*

44. These steps are relevant not only to competition but also to consumer protection. The proposed *National Competition Policy* includes the following:

Policy proposal 10: *Statutory barriers to market entry or the expansion of business activity should be identified and removed progressively (except where justified) and avoided in new legislation or regulations.*

Policy proposal 11: *The advisory role of the ICCC under the ICCC Act should be expanded to advising other Ministers and departments, advising on the ICCC's initiative, and proposing desirable legislation to the Treasurer.*

F. APPLICATION TO GOVERNMENT

45. Treasury recognises that the Government's commitment to promote competition in markets and to comply with pro-competitive safeguards in its own business activities and investments will be an important factor in the success of the *National Competition Policy*. If the Government was not visibly committed to competitive conduct in its own business activities, the business community would be much less likely to take seriously any pro-competitive policy that the Government may promulgate.
46. The Government of PNG has a profound influence in the economy and on the private sector of PNG. To the extent that the Government determines the framework of policies and laws in PNG it directly affects the environment in which business is transacted in PNG. Policy and laws can promote or inhibit competition economy-wide or in a particular market. The *National Competition Policy* reflects the Government's commitment to maintaining and developing competitive markets in all sectors of PNG's economy.

47. The Government directly supplies many goods and services to consumers and businesses in PNG (as distinct from supplying them through a SOE). For example, the Government is the largest provider of health services and education services. To the extent that the Government itself carries on a business, the Government should commit to comply with competition and consumer law. It is therefore appropriate that the ICCC Act already provides: “Except [as] otherwise provided, this Act binds the State” (ICCC Act s 3; see also s 48).

Measures additional to the business conduct rules of the ICCC Act can also assist to promote the development of competition in PNG. The proposals set out above (**Section D. Coordination of Initiatives**) describe measures intended to ensure that proposed policies, legislation and decisions identify likely impacts on competition in advance and take them into account. The paragraphs that follow elaborate on this general commitment and set out concrete measures for giving effect to it.

State Owned Enterprises

48. The Government is the owner of many of PNG’s largest corporations (through Kumul Trust, as owner of the shares of Kumul Consolidated Holdings Ltd (**KCH**), Kumul Minerals Holdings Ltd and Kumul Petroleum Holdings Ltd). At present, KCH’s portfolio comprises: Air Niugini Limited, Bemobile Limited, NCD Water & Sewerage Pty Ltd (trading as Eda Ranu), Motor Vehicle Insurance Limited, National Development Bank Limited, National Petroleum Company of PNG Limited, PNG Dataco Limited, PNG Ports Corporation Ltd, PNG Power Limited, Post PNG Limited, Telikom PNG Limited and Water PNG. Many of these entities enjoy a position of market power, in the markets they serve. All of them provide services their customers would deem essential.
49. SOEs are bound to comply with the competition and consumer protection provisions of the ICCC Act. SOEs may, however, receive various advantages from the Government which distort competition in their favour, relative to their private sector rivals:

SOEs and GSEs enjoy a variety of government-granted subsidies, privileges, and immunities. These privileges give government firms an artificial competitive advantage over private rivals. [An artificial] competitive advantage is not based on superior management skills, more efficient technology, enhanced innovation, better negotiating techniques, or indeed any other economic factor. Its competitive advantage is government created.¹⁴

50. Government-created competitive advantage distorts the economy by enabling less-efficient SOEs to undercut more-efficient rivals. This results in mis-allocation of resources, due to prices

¹⁴ Geddes R Richard (ed.) *Competing with the Government: Anticompetitive Behaviour and Public Enterprises* (Hoover Institution Press, 2004) p 28.

not reflecting true economic costs, and deters private-sector rivals from expanding or entering the market.¹⁵ Such advantages include:

- Government-protected monopoly – an exclusive right to supply a market can be created by legislation or by a failure to licence the entry of rivals (e.g. to the market for compulsory third-party motor vehicle insurance¹⁶).
- Credit guarantees – which enable SOEs to borrow funds at lower interest rates.
- Tax exemptions – an exemption or waiver of certain taxes operates as a subsidy to an SOE, artificially lowering the firm’s costs and giving it the ability to price below its more efficient but taxed rivals.
- Direct subsidies – some SOEs receive direct monetary subsidies to meet capital and operating costs, or access to land or office space at discounted rents.
- Other exemptions and privileges – some SOEs might be exempt from requirements that their rivals are bound to comply with, such as permit requirements, planning or environmental restrictions.

51. To combat such distortions, some countries have legislated against “state aid” to particular undertakings (e.g. TFEU art. 107) or have required government businesses to conform with “competitive neutrality” principles (e.g. the Commonwealth of Australia).

52. Rather than having a costly litigation-based mechanism such as the EU’s “state aid” prohibition, the *Final Report of the Framework Review* recommended that PNG promote competitive neutrality by means of principles which the Government should adhere to in its dealings with SOEs:

Recommendation 187: The ICCC and Kumul Consolidated Holdings should be required to negotiate and agree Competitive Neutrality Principles binding on all SOEs and the ICCC should have the function of investigating and reporting publicly on possible infringements.

53. In Australia, competitive neutrality principles apply to government businesses, but:

- not where the costs outweigh the benefits;
- not to policy or government decisions; and
- not to non-profit, non-business activities.

54. The principles are administered by the Australian Government Competitive Neutrality Complaints Office (AGCNCO) within the Productivity Commission (and by similar bodies at State level). The AGCNCO receives and investigates complaints relating to government action that may infringe the principles and provides independent advice to the Treasury. The

¹⁵ Id, p 29.

¹⁶ See Final Report (*supra*, n 2) pp 143-144.

government is not bound to act on the advice of the AGCNCO but its findings are published. To avoid multiplying PNG government agencies, it would appear efficient for the ICCC to perform a role equivalent to that of the AGCNCO. The ICCC would require some additional funding to undertake this new responsibility.

Policy proposal 12: The competition and consumer protection provisions of the ICCC Act (or legislation succeeding it) will continue to apply fully to SOEs.

Policy proposal 13: The ICCC and Kumul Consolidated Holdings should be required to negotiate and agree Competitive Neutrality Principles to require all SOEs to:

- **Achieve a commercial rate of return on assets;**
- **Be tax neutral – i.e. pay all relevant taxes and duties;**
- **Be regulation neutral – i.e. comply with all relevant laws and regulations; and**
- **Be debt neutral – i.e. borrow at commercial rates or include charges to account for implicit or explicit government guarantees.**

Policy proposal 14: The ICCC will have the function of receiving, investigating and reporting to Treasury on complaints of infringement of the Competitive Neutrality Principles by SOEs or Government.

SOE Community Service Obligations

55. Separately from the issue of possible preferential treatment of SOEs by the Government, several SOEs are required by the Government to provide services that are not profitable. This involves distortion of the markets affected and hampers SOEs' ability to achieve a commercial rate of return on their assets (as competitive neutrality requires).
56. The Department of Treasury has developed and Government has adopted a Community Service Obligation Policy (**CSO Policy**) that has been tested in "pilot" mode but has not yet been widely deployed. The *Final Report of the Framework Review* made the following recommendations in respect of CSOs:

Recommendation 144: The Government should give high priority to implementation of its 2012 CSO Policy for SOEs.

Recommendation 145: The Government should give high priority to funding CSOs, either directly or by other means that are appropriate and explicitly identified for the purpose.

Recommendation 154: The Government should accord high priority to implementing the CSO Policy in respect of ports services, including by making explicit any public policy obligations that PNG Ports must pursue and the funding arrangements for those obligations.

Recommendation 158: In the continuing implementation of the EIP, high priority should be given to transferring the technical regulatory function to DPE or the ICCC and implementing a suitable CSO policy for PPL.

Recommendation 164: *CSO obligations borne by MVIL should be explicitly identified to enable decisions on the future funding of such obligations.*

Recommendation 168: *If any direct subsidies are required to address concerns about continued postal service to remote communities these should be financed through a separate, transparent CSO contract.*

Recommendation 175: *The Government should implement its CSO Policy for SOEs as a high priority in the water and sewerage industry.*

57. The proposed *National Competition Policy* reaffirms the Government's commitment to the CSO Policy and its implementation in relation to the regulated SOEs.

Policy proposal 15: *The Government will ensure that its Community Service Obligation Policy is progressively applied to each of the regulated SOEs.*

Policy proposal 16: *The Government will make provision for fully-funding the SOEs' community service obligations.*

Public administration

58. The Government's operations in its non-business functions (e.g. policy and decision-making) can also strongly affect the competitive environment.
59. The manner in which the Government's policies and laws are administered by Ministries, Departments and a variety of statutory bodies has a significant impact on the day-to-day operations of private sector undertakings. Administrative uncertainty and delay may drive substantial costs into PNG businesses.¹⁷ These raise barriers to market entry, particularly to the entry of informal economy businesses into the formal economy.
60. Government administration must be oriented toward the maintenance and development of competition in PNG's markets. To this end, the *Final Report of the Framework Review* made the following recommendation:

Recommendation 184: *The Government should renew efforts to simplify and streamline administrative processes and eliminate administrative inefficiencies (including by re-establishing the National Working Group on Improving Business and Investment Climate, or an equivalent body).*

61. The Government commits, in the proposed *National Competition Policy*, to re-establishing a group similar to the National Working Group on Improving Business and Investment Climate (NWG). Formerly, the NWG was chaired by the Chief Secretary to Government and received secretarial support from the Department of Trade, Commerce & Industry.

Policy proposal 18: *The Government will establish a National Working Group, to be chaired by the Treasurer (or his or her nominee) and with administrative*

¹⁷ See INA, *The Business and Investment Environment in Papua New Guinea in 2012: Private Sector Perspective* (2013).

support from the Department of Treasury, with mandate to identify, in collaboration with the private sector, impediments to businesses entering, investing or expanding in markets in PNG and means of reducing or eliminating those impediments.

Policy proposal 19: The responsibilities of the National Working Group shall include raising with Treasury and the ICCC any case in which the Group considers that a policy, statute or decision may conflict with the Government's competition policy objectives.

62. PNG businesspeople have previously complained that inefficiencies in the Land Transfer Office were a common constraint on doing business.¹⁸

63. Land is an essential input to a large proportion of economic undertakings and access to land is essential to many businesses' ability to compete. Treasury therefore considers the work of the National Land Development Programme to be important to the development of competitive markets.

Policy proposal 20: The Government will implement the recommendations of the National Land Development Programme and will support further work to improve land laws, titles, transfers, planning and zoning, in the interests of promoting entry to, and competition in, PNG markets.

Anti-corruption efforts

64. The reduction or elimination of corruption would have pro-competitive effects in PNG. The *Final Report of the Framework Review* notes:

It is well known that the economic and social costs of corruption are substantial.¹⁹ Corruption damages the competitive process, since it excludes real competition on price or quality. It also undermines the development of markets and, more generally, of the business environment in which firms operate.²⁰

65. The *Final Report of the Framework Review* supported anti-corruption efforts as pro-competitive:

Recommendation 186: The elimination of corruption is pro-competitive and the Review endorses recommendations made in other contexts toward this end.

66. While the reduction or elimination of corruption will require broad and continuing efforts that cannot be encapsulated by a single policy proposition, the proposed *National Competition Policy* should recognize the existence of a connection between the efforts to reduce corruption by reducing administrative discretion, inefficiency and opacity, and the development of

¹⁸ ADB and INA, *The Challenges of Doing Business in Papua New Guinea: An Analytical Summary of the 2012 Business Environment Survey by the Institute of National Affairs Business* (2014) p 7.

¹⁹ See, e.g., IMF, *Corruption: Costs and Mitigating Strategies* (May 2016) p 5. Available at: <https://www.imf.org/external/pubs/ft/sdn/2016/sdn1605.pdf>

²⁰ Final Report (*supra*, n 2) p 174.

competitive markets. The *National Competition Policy* re-affirms the Government's commitment to existing anti-corruption efforts.

Policy proposal 21: The Government reaffirms its commitment to the elimination of corruption in public office in PNG.

G. PUBLIC PROCUREMENT

67. The Government is a substantial buyer of many goods and services and may have market power (monopsony power) in markets for many of those goods and services. It is in the public interest that the Government not exert its market power as a buyer and should encourage competition among potential suppliers to Government.
68. Public procurement is an important part of competition policy in our market economy, for these main reasons:
- public procurement involves the expenditure of large sums of public money and has major impacts on the economy;
 - well-designed public procurement enables and fosters effective competition in markets for the goods and services that are to be procured;²¹
 - effective competition for the goods or services sought through public procurement is likely to lower their cost, increase their quality and spur innovation;
 - poorly designed or badly administered public procurement is likely not only to waste public resources and generate corruption but also to prevent effective competition in the government sectors of many markets; and
 - bid-rigging is a notoriously harmful problem in public procurement and needs to be met with cartel prohibitions that are effectively enforced.²²
69. The current public procurement system in PNG has recognised weaknesses, including fragmentation and the lack of a national regulator. A *Public Procurement Act* and a National Procurement Commission have been proposed to help overcome those weaknesses.²³ A commitment to enact a *Public Procurement Act* and establish a National Procurement Commission are key elements of the *National Competition Policy*.

²¹ See OECD, Competition Committee, *Competition and Procurement* (2011), at: <http://www.oecd.org/regreform/sectors/competitionandprocurement-2011.htm>.

²² See further SE Weishaar, *Cartels, Competition and Public Procurement* (2013). Bid rigging is a particular form of coordination between firms which can adversely affect the outcome of a sale or purchasing process in which bids are submitted. For example, firms may agree their bids in advance, or decide which firm will be the lowest bidder. Alternatively, they may agree not to bid or to rotate their bids by number or value of contracts.

²³ See 'Public procurement to be streamlined', Loop PNG, 14 December 2016, at: <http://www.looppng.com/business/public-procurement-be-streamlined-48300>

70. The *Final Report of the Framework Review* made several recommendations that relate to public procurement:

Recommendation 134: Public procurement policies should be reviewed to ascertain whether any existing procurement rules unnecessarily exclude unincorporated undertakings from participation.

Recommendation 135: Public procurement policies should be reviewed to ascertain whether tenders can be structured or advertised in ways that increase the opportunities for women's businesses and SMEs generally to participate.

Recommendation 136: The procurement monitoring system should be amended to gather information on the participation, and success, of women and SMEs in public procurement processes.

71. PNG's anti-cartel laws need to be updated to include a specific prohibition against bid-rigging.²⁴ The powers of the ICCC to investigate bid-rigging and other cartel conduct also need to be revised. The ICCC should complete its current work to establish an Immunity Policy that offers a strong incentive to bid-riggers to come forward to the ICCC and disclose details of the cartel.²⁵

Policy proposal 22: The Government will support reform of public procurement procedures and processes, including by enacting a Public Procurement Act, in the interests of ensuring competition in the supply of goods and services to Government and ensuring the Government obtains good value for public money spent.

Policy proposal 23: The Government will undertake a review of its public procurement practices to ascertain whether any existing procurement rules unnecessarily exclude SMEs or unincorporated undertakings from participation or otherwise unduly limit opportunities for competitive supply.

Policy proposal 24: The Government will investigate whether tenders can be structured or advertised in ways that reduce or remove barriers to participation by women's businesses and SMEs.

Policy proposal 25: The procurement monitoring system will be enhanced to gather information on the participation, and success, of women's businesses and SMEs in public procurement processes.

Policy proposal 26: The Government will amend the ICCC Act to include a prohibition against bid-rigging and the powers of the ICCC to investigate bid-rigging will be improved.

H. INSTITUTIONAL ARRANGEMENTS

72. Since 2002 the ICCC has been responsible for administering and enforcing competition and consumer protection law under the ICCC Act and several other Acts of Parliament. The ICCC also has responsibility for price monitoring and control, and regulation of declared entities.

²⁴ Consumer and Competition Framework Review, *Final Report and Recommendations* (2017) 78.
²⁵ Id, 94-95.

Consumer representation

73. At present, PNG has no consumer representative body, such as the Consumer Councils that exist in a number of countries. The *Final Report of the Framework Review* did not recommend the establishment of such a body:

While “Consumer Councils” and similar bodies can play a useful role, the Review Team considers it would not be desirable to establish such an additional body in PNG at this time given the challenges of staffing, funding and coordination. A more readily achievable reform would be to establish a Consumer Liaison Unit within the ICCC, with specific responsibility for promoting awareness of consumers’ rights, traders’ obligations, and the role of the ICCC in consumer protection.²⁶

74. The proposed *National Competition Policy* does not mandate the creation within the ICCC of a Consumer Liaison Unit, though the ICCC would be free to do so if it considers that an expedient way of responding to policy objectives.

National Institute of Standards and Industrial Technology (NISIT)

75. NISIT plays an important part in consumer protection and ensuring fair conditions for competition, through its function of certifying and maintaining standard weights measures. A review of NISIT’s operations and legislation has been delayed and should be given a higher priority.

Policy proposal 27: The Government will undertake a review of the NISIT Act and operations of NISIT, to ensure that NISIT is able to perform effectively the statutory responsibilities entrusted to it.

National ICT Authority (NICTA)

76. NICTA serves as the specialist telecommunications and ICT regulator, administering the *National Information and Communications Technology Act 2009*. The *Final Report of the Framework Review* identified a need for close cooperation between NICTA and the ICCC:

The functions of NICTA include “to exercise all licensing and regulatory functions in relation to the ICT industry” under the NICT Act and “to assist the ICCC to investigate complaints regarding market conduct...” in PNG’s ICT industry. While NICTA has responsibility for licensing telecommunications operators and administering the legislation applicable specifically to the ICT industry, the ICCC retains responsibility for application of the ICCC Act in the ICT sector as in other sectors. NICTA receives a large number of consumer complaints, often about misleading conduct, which generally NICTA refers to the ICCC. NICTA’s licensing and interconnection functions entail significant competition implications. Consultation and coordination between NICTA and the ICCC is therefore essential.²⁷

77. Although the *Final Report of the Framework Review* observed some overlap in the responsibilities and expertise of NICTA and the ICCC, it did not recommend their consolidation

²⁶ Final Report (*supra*, n 2) p 40.

²⁷ Final Report (*supra*, n 2) p 40.

in a single agency. The proposed *National Competition Policy* affirms the need for communication and coordination between NICTA and the ICCC to achieve consistent pro-competitive regulation of telecommunications and ICT providers and effective protection of telecommunications and ICT consumers.

Policy proposal 28: The ICCC and NICTA must administer and enforce their respective legislation in as consistent manner as possible and must ensure they communicate and coordinate their efforts efficiently.

Independent Consumer and Competition Commission

78. The ICCC has a wide range of responsibilities and undertakes a correspondingly wide range of activities, funded mainly by Government appropriation and partly by cost-recovery from regulated industries. The ICCC's regulatory activities are a costly aspect of its work overall. Internationally, many regulators recover their costs of regulating (or a contribution to those) from the firms that they regulate. Regulatory contracts for some regulated entities in PNG include provision for cost recovery by the ICCC but the statutory basis for this has been disputed and the Framework Review was advised that the ICCC has been unable to obtain payment of its costs from regulated entities.
79. The *Final Report of the Framework Review* also recommended expanding the ICCC's responsibilities in some respects. First, it recommended modernising and filling gaps in existing consumer protection law (please refer to **Section I.** of this Consultation Paper). Improved consumer protection laws should lead to more complaints and greater enforcement activity, which will use more ICCC resources. Secondly, the *Final Report of the Framework Review* recommended a new role for the ICCC in investigating and reporting on possible infringements of Competitive Neutrality Rules (please refer to **Section F.** of this Consultation Paper). Thirdly, the *Final Report of the Framework Review* recommended expansion of the ICCC's current work in "advocacy" – both by renewing efforts to educate consumers and traders about their rights and responsibilities and by taking on a wider role as advocate and advisor to Government on the competitive implications of new legislation and decisions (*please refer to Section E.* of this Consultation Paper).
80. To give effect to such changes in the consumer and competition framework will require the ICCC either to be given additional resources or to re-deploy some existing resources currently committed to other activities (and therefore reduce or cease those activities). The ICCC is currently examining its own activity costs and working to align its activity expenditures to its strategic goals but it seems unlikely that this approach will yield spare resources sufficient to cover the costs of the new functions referred to above.

81. To the extent that implementing the proposed *National Competition Policy* would require the ICCC to perform additional functions (for example, as competition advocate and advisor within Government; as the competitive neutrality complaints body; and as enforcer of improved consumer protection rules) the funding appropriated to the ICCC should be increased to cover the costs of those functions.
82. The proposed *National Competition Policy* sets out the Government's commitment to ensuring the ICCC is properly funded to do its work; and that the ICCC should be industry-funded in respect of its regulatory work, with the statutory powers necessary to recover its costs.
83. Treasury does not consider that the proposed *National Competition Policy* should address the way that the ICCC is structured. The Policy affirms Government's commitment to the independence of the ICCC, its public transparency, and its coordination with other agencies, in accordance with international best practice.

Policy proposal 29: The Government remains committed to the successful operation of the ICCC and will ensure it receives funding that is sufficient to enable it to perform its statutory functions to the standard expected by the Government.

Policy proposal 30: The ICCC will be empowered to recover the costs of its regulatory activities from regulated undertakings; and those costs shall be factored into the calculation of regulated undertakings' rates or tariffs.

Policy proposal 31: The ICCC will remain an independent statutory body.

Policy proposal 32: The ICCC must ensure its approach to administration of the ICCC Act (or equivalent law) is transparent to the public, including by publishing policies and guidelines that explain its approach to performing its functions and exercising its powers.

Policy proposal 33: The ICCC and other statutory bodies and departments of the PNG Government must communicate regularly and coordinate their efforts to act effectively in performance of the functions delegated to them.

I. CONSUMER PROTECTION

84. Consumer rights are currently protected at law in PNG by the *ICCC Act*, *Goods Act 1951*, *Hire Purchase Act 1966*, *Trade Measurement Act 1996*, *Packaging Act 1974*, *Commercial Advertisement (Protection of the Public) Act 1976*, *Bread Act 1974*, *Fairness of Transactions Act 1993*, and *Telecommunications Act 1996*. The *Final Report of the Framework Review* reported that these laws have significant gaps in their coverage of consumers' rights, have not kept pace with contemporary approaches to consumer protection internationally and should be consolidated and promulgated in a single Act.

85. The *Final Report of the Framework Review* (assisted by a consumer focus group study, carried out by the INA on behalf of the Review Team) identified a range of weaknesses in existing consumer protection measures in PNG, in relation to:

- Consumers' awareness of their rights;
- Traders' awareness of their obligations;
- Constraints on consumers' (and traders') access at village level to means of resolving consumer disputes;
- The provision of product information (e.g. by product labelling) to consumers;
- The lack of effective law on misleading or deceptive conduct in trade;
- The lack of effective law on certain forms of conduct posing a high risk to consumers (e.g. pyramid schemes, bait advertising, coercion or harassment and uninvited direct sales);
- The lack of consumer guarantees (with reliance instead on implied warranties);
- Constraints on the ability of the ICCC to bring timely enforcement actions to protect consumers; and
- Issues arising for consumers in relation to financial services, online offers and residential housing.

86. The *Final Report of the Framework Review* made 67 recommendations for reforms to enhance consumer protection in PNG. The proposed *National Competition Policy* set out the Government's commitments to modernise consumer protection legislation in PNG and improve consumers' access to remedies in cases where traders infringe that legislation. Policy commitments do not address each particular recommendation for reform but provide direction as to the Government's preferred course of reform.

87. First, a number of recommendations of the *Final Report of the Framework Review* relate to improving consumers' and traders' awareness of their rights and responsibilities. Although the ICCC has in recent years been making efforts to educate the public, a series of focus-group discussions conducted in six PNG towns on behalf of the Review Team found relatively low awareness among consumers of existing consumer protection laws and of the role of the ICCC.

Policy proposal 34: The Government will provide the ICCC with appropriate funding to ensure PNG's consumers and traders are aware of their rights and obligations and aware of sources of advice or assistance in relation to them.

88. Secondly, several recommendations in the *Final Report of the Framework Review* relate to consumers' and traders' access to remedies at the local and village level. Results from the focus group study carried out by INA on behalf of the Review Team confirmed comments from the ICCC itself that consumers outside the NCD, or distant from an ICCC regional office (Lae,

Kokopo, Goroka) have little or no opportunity to obtain the ICCC's assistance if they have a dispute with a trader. The costs of travelling to, or communicating with, an ICCC office are often high relative to the value of the dispute. Consumers therefore rely on self-help remedies or the support of family members to resolve disputes.

89. The *Final Report of the Framework Review* recognised that Government's resources are finite and cannot realistically support a nation-wide network of ICCC offices, so resolution of disputes locally is important.²⁸ Recommendations are therefore made in the *Final Report of the Framework Review* for supporting District Courts and Village Courts to resolve consumer disputes at the District and Village levels.

Policy proposal 35: The Government will support low-cost access to justice through District Courts and Village Courts by enacting necessary legislation and providing training for magistrates, to promote resolution of consumers' disputes at the local level.

90. Thirdly, the *Final Report of the Framework Review* reported widespread concern among consumers regarding improperly labelled goods (packaged foods, in particular) and noted the lack of a general prohibition against misleading or deceptive conduct in trade. Consumer choice is fundamental to the competitive process. It is essential that consumers are able to rely on the accuracy and completeness of information provided to them by traders, in order that consumers can make properly informed choices between rival products and rival providers.

Policy proposal 36: The Government will revise legislation on product labelling, product information and conduct in trade to ensure that information is provided in at least one of the official languages of PNG, relevant laws are harmonized, and misleading or deceptive conduct is prohibited.

91. Fourthly, current consumer protection laws of PNG are silent on particular forms of conduct which are harmful to consumers' rights and interests, such as coercive or harassing conduct by traders, pyramid schemes, 'bait' advertising, and uninvited direct sales. Such conduct should be specifically prohibited and the ICCC should advise consumers and traders about avoiding such conduct.

Policy proposal 37: Particular forms of conduct which are harmful to consumers' rights and interests will be prohibited under PNG's laws.

92. Fifthly, the *Final Report of the Framework Review* reports that concern is widespread among consumers about poor quality imported goods being retailed in PNG. The current law provides for conditions and warranties to be implied into contracts for sale and purchase of goods but these are difficult for consumers to enforce. Guarantees (e.g. as to quality, title, fitness for

²⁸ Final Report (supra, n 2) p 61.

purpose and correspondence with sample or description) should be legislated for and should be enforceable by the ICCC on behalf of consumers.

Policy proposal 38: The conditions and warranties implied into consumer contracts under existing law will be replaced by “consumer guarantees” and similar guarantees will apply also to services.

93. Sixthly, the *Final Report of the Framework Review* found that laws on weights and measures are fragmented and out-of-date and a review of the administration of standards by NISIT has been delayed. Consumer confidence in weights and measures is important to the exercise of informed consumer choice and hence material to competition in consumer markets.

Policy proposal 39: The Government will revise and consolidate laws on weights and measures and packaging to harmonize them and bring them up-to-date.

94. Lastly, the *Final Report of the Framework Review* found that PNG’s laws on consumer protection are dated, dispersed across a number of enactments, and give the ICCC little scope for enforcement action.

Policy proposal 40: The Government will revise and consolidate laws on consumer protection to harmonize them, bring them up-to-date, and provide for effective means of enforcement and remedies.

J. COMPETITION LEGISLATION

95. Competition legislation in PNG falls into four main categories:
- (1) the ICCC Act, which contains competitive conduct rules and some consumer protection rules;
 - (2) industry-specific legislation that regulates particular industries in ways that affect competition in the area regulated;
 - (3) price monitoring and price control legislation; and
 - (4) other legislation that restricts the extent to which market participants may compete.
96. The ICCC Act, enacted in 2002, now requires a thorough overhaul. The *Final Report of the Framework Review* recommends that the ICCC Act should be modernised and simplified and sets out numerous specific recommendations for revising the Act. The specific recommendations relate to:
- Modernising the competitive conduct rules (agreements substantially lessening competition; exclusionary provisions (collective boycotts); price fixing; taking advantage of market power; resale price maintenance; territorial jurisdiction; authorization and clearance; other exemptions) to ensure the rules are clear, complete and consistent;

- Requiring mandatory review of mergers and acquisitions (subject to significance thresholds);
- Improving the ICCC’s investigative powers and procedures;
- Ensuring the range of remedies and sanctions available to the ICCC and courts is complete and consistent; and
- Improving the rules governing reviews and appeals.

97. The Consumer and Competition Framework Review considered and consulted widely on these issues. Treasury considers that the recommendations set out in the *Final Report of the Framework Review* for modernising and clarifying the ICCC Act should be given effect by new legislation.

Policy proposal 41: The Government will modernize PNG’s competition law, including by simplifying its language and structure as far as practicable and removing repetition wherever possible.

Policy proposal 42: In modernising the competition law and supplementing existing consumer protection laws, the ICCC Act will be substantially amended (or repealed and replaced) and the revised law will be entitled the “Consumer and Competition Act”.

Policy proposal 43: The competitive conduct provisions of the ICCC Act will be revised to ensure the rules are clear, complete and consistent.

Policy proposal 44: The mergers and acquisitions provisions of the ICCC Act will be revised to provide for mandatory pre-notification of mergers or acquisitions that exceed certain thresholds to be set out in Regulations.

Policy proposal 45: The clearance, authorisation and exemption provisions of the ICCC Act will be revised to ensure they are clear, complete and consistent.

Policy proposal 46: The ICCC will have the powers to commence civil or criminal investigations or proceedings on its own initiative and the ICCC will have the full range of investigative powers available to its counterpart agencies.

Policy proposal 47: The sanctions and remedies provisions of the ICCC Act will be revised to ensure that courts have powers to order a broad range of remedies and to impose penalties at levels that are sufficient to ensure deterrence.

Policy proposal 48: The review and appeal provisions of the ICCC Act will be revised to ensure they are workable and appropriate.

K. REGULATED INDUSTRIES

98. The financial performance and quality of service provided by PNG’s regulated SOEs continues to be a subject of public concern and media attention. The *Final Report of the Framework Review* found the statutory framework for regulation of declared entities to be generally

satisfactory but made some recommendations for improvements to it (e.g. regarding appeals, the status of expired regulatory contracts and threshold for declaration).

99. The *Final Report of the Framework Review* reviewed the efficiency of current PNG industry-specific legislation in the following areas:
- ports services;
 - electricity services;
 - third-party motor vehicle insurance;
 - postal services; and
 - telecommunications.
100. The *Final Report of the Framework Review* observed that the efficacy of the regulatory contracts framework and the performance of regulated SOEs appeared to be affected to a significant degree by the imposition on SOEs of unfunded community service obligations (CSOs) and recommended the application to the regulated SOEs of the Government's CSO Policy (see, **Section F. Application to Government Activities**, above).
101. The *Final Report of the Framework Review* also recommended that the opportunities for full or partial privatisation of the regulated SOEs, and for the introduction of competition in the delivery of certain SOE services (e.g. compulsory third-party motor vehicle insurance) should be examined.

Policy proposal 49: The Government will consider the costs and benefits of full and partial privatisation of the regulated SOEs, on a case-by-case basis.

Policy proposal 50: The procedural provisions governing regulatory contracts and appeals should be streamlined and the period for an Appeals Panel decision extended to 90 days to enable fully considered decisions to be made.

L. PRICE MONITORING AND CONTROL

102. *Price monitoring* currently is limited to staple foods. Price monitoring may affect monitored firms' pricing decisions, as through adverse publicity in the event of price rises that cannot be justified by cost increases. Price monitoring is unnecessary in competitive markets but may be needed if the exercise of market power contributes to poor performance or as a transitional measure to determine whether reforms are working or to demonstrate the benefits of competition.
103. *Price control* directly addresses a problem of excessive pricing by a firm or firms with market power, where competitive pressure does not exist or is insufficient to restrain pricing behaviour. Price control is a 'last resort' remedy that is justified where market power exists and other

remedies (including price monitoring) would not constrain prices to levels consistent with effective competition. If there are strong natural or government-created barriers to entry, there might be insufficient competitive pressure to prevent high prices. In these circumstances, there may be a case to impose price control if the means of control do not cost more than the benefits. In recent years, price control has been removed from many products. Some formerly price controlled products are now subject only to price monitoring (e.g. staple foods).

104. The *Final Report of the Framework Review* considered current price monitoring and price control legislation in PNG, particularly:
- price monitoring of staple foods;
 - price control of water and sewerage services;
 - price control of refined fuels; and
 - price control of PMV and taxi services.
105. The *Final Report of the Framework Review* recommended amendment of the *Prices Regulation Act* to define an economically based threshold for the declaration of a good or service as subject to price monitoring or price control. It also proposed making ICCC decisions in respect of price monitoring and price control subject to review by the Appeals Panel.

Policy proposal 51: The Government will amend the *Prices Regulation Act* to require that economically-based thresholds be met as a condition for imposing price monitoring or price control, and to require the ICCC to report to the Minister on whether the relevant threshold has been met or not.

Policy proposal 52: Decisions of the ICCC regarding price monitoring and price control should be subject to review by the Appeals Panel.

M. INTERNATIONAL TRADE

106. The relationship between national policies on competition and nations' arrangements in respect of international trade has multiple facets. Broadly, contemporary free trade agreements are pro-competitive, to the extent that they seek to dismantle trade barriers and tariffs. Greater competition from imports can enhance competition domestically.
107. Trade liberalization, however, makes effective competition enforcement necessary. Without monitoring and sanctions for anti-competitive behaviour, there is a risk that foreign undertakings might achieve and exploit market power in domestic markets. There is also a risk that domestic suppliers might resort to cartel conduct to respond to new import competition.
108. Domestic suppliers, faced with new import competition (following the removal of trade barriers) may also lobby the Government to introduce protectionist measures, which would undermine the effect of trade liberalisation. Treasury considers that an expanded advisory role

for the ICCC would help to ensure the Government is informed about the competition implications of such proposals.

109. Finally, developing countries are often affected by the conduct of international cartels. As such conduct may affect markets in PNG, it will be important for the ICCC to have effective channels of communication with its counterpart agencies in other countries, particularly PNG's major trading partners.

Policy proposal 53: The Government will take into consideration the implications for competition in markets in PNG of any bilateral or multilateral trade agreements into which it considers entering.

N. TIMEFRAME AND RESOURCES

110. The Government expects that Treasury will ensure key pro-competitive reforms are implemented in a realistic timeframe. In order that the implementation of pro-competitive reform is transparent to the Government and the public of PNG, Treasury will develop a reform timetable and report on its progress in implementing reforms.

Policy proposal 54: Treasury must develop a timetable for the implementation of this National Competition Policy and must submit the timetable to Parliament.

Policy proposal 55: Treasury must report to Parliament no less than annually on the progress made in implementing this National Competition Policy, and the costs incurred in the past year and costs projected to be incurred in the coming year.

O. PROGRESS REVIEW

111. As for any complex reform process, it is highly desirable that an independent review of the progress made should be scheduled at specified intervals.
112. Such a progress review should reveal how well the *National Competition Policy* is being given effect, whether the *National Competition Policy* is having the desired impact, and whether policy settings need to be fine-tuned or changed.

Policy proposal 56: Progress in the implementation of this National Consumer and Competition Policy and the impact it is having will be reviewed by an independent panel of experts, five years after this Policy comes into effect and again five years after the first review.

CONCLUSION

113. Individuals and organisations are encouraged to comment on the issues raised in this Consultation Paper, any other relevant issues, and the policy principles that should guide the future development of competitive markets in PNG.
114. This Consultation Paper is intended to stimulate discussion: it should not be taken as indicating any decision or preference on the part of the Government or any of its advisors. To the extent that any particular future course of action is proposed or discussed in this paper, that action remains under consideration.
115. Submissions in electronic format should be sent by email to:
- Paul_Arutu@treasury.gov.pg and jarrod.harrington@adbpsdi.org
116. Submissions in hard copy format should be addressed to:
- Mr. Paul Arutu
Level 8, The Treasury
Islander Drive
P.O. Box 542
Waigani 131
National Capital District
Papua New Guinea
117. All submissions received will be treated as public, and made available on the project's website:
- www.CCFReview.info
118. Consideration will be given to requests to treat parts of a submission as confidential (by redacting them), where reasonable grounds are shown (e.g. commercial sensitivity of data).
119. All submissions must be received before **5:00pm on Friday, 15 June 2018**.

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