



Second Issues Paper: Competitive Markets and Fair Trading

March 2016

prepared for

The Department of Treasury, PNG Government

by

The Review Team, Consumer and Competition Framework Review

CONSUMER AND COMPETITION FRAMEWORK REVIEW

Issues Paper: Competition and Fair Trading

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EXECUTIVE SUMMARY

The Consumer & Competition Framework Review (“**Review**”) was initiated by the Department of Treasury in 2014, to examine the laws and institutions that protect consumers and promote competition in PNG.

Fourteen years have passed since the *Independent Consumer and Competition Commission Act 2002 (ICCC Act)* was passed by Parliament. PNG’s economy and business environment have grown and developed in that time. The Government now considers that it is desirable to conduct a comprehensive review of the consumer protection and competition framework, to ensure it meets the needs of the public and businesses.

The purpose of this Issues Paper is to seek comments relevant to competition law and the competitive environment for business, from organisations and individuals in PNG (or who do business in PNG), by **Monday 16 May 2016**.

A number of questions are set out in **bold type**. Comments are also welcome on any other relevant matters.

In relation to PNG’s competition law (**Part II**), preliminary inquiries by the Review Team suggest that it will be important to address:

- The absence of an over-arching national competition policy defining the Government’s competition objectives and approach to achieving them.
- Various complexities and inconsistencies in the present law, which could be simplified by amendment or revision of the ICCC Act.
- Various procedural weaknesses leading to delays or difficulties in investigative and enforcement action, where infringements are suspected.

In relation to the competitive environment for business (**Part III**), it appears that various factors increase the costs or uncertainties of doing business and may therefore impede entrepreneurs from entering or expanding in PNG markets.

After considering all relevant comments received, the Review Team will publish for comment a draft of its report to Treasury, including recommendations for legislative and other reforms.

I. BACKGROUND

The Consumer & Competition Framework Review (“**Review**”) was initiated by the Department of Treasury in 2014.

The Review is examining the framework that protects consumers and promotes competition in PNG – including its legislation, institutions, regulatory settings and processes – and will provide the Department of

Treasury with recommendations for improvement of this framework.¹

Part I of this Issues Paper explains why Treasury has undertaken the Consumer & Competition Framework Review, why competitive markets are important, and what laws and agencies exist in PNG to promote competition.

Parts II and III of this Issues Paper raise questions for your consideration and comment, by 5:00pm on **Monday 16 May 2016**. These questions are *in bold type*.

A. Scope and Aims of the Review

Fourteen years have passed since the *Independent Consumer and Competition Commission Act 2002 (ICCC Act)* was passed by Parliament. PNG's economy and business environment have undergone significant growth and development in that time. The Government now considers that it is desirable to conduct a comprehensive review of the framework for consumer protection and the promotion of competition, in order to ensure that the framework is appropriate to meet the current and emerging needs of the public and businesses.

The Review Team is required to:

- (i) *review the effectiveness of the existing consumer protection and competition provisions and institutions;*
- (ii) *review the effectiveness of the current regime of economic regulation and regulatory administration;*
- (iii) *examine whether government business activities and services providers serve public interests and promote competition and productivity; and*
- (iv) *advise on appropriate changes to legislation, institutional arrangements and other measures.*²

In order to understand the issues faced by PNG consumers and businesses, the Review Team:

- is holding a series of meetings with businesses and organisations;
- has published a previous *Issues Paper: Consumer Protection and the Economic Empowerment of Women* and proposes to publish a further *Third Issues Paper: Industry Regulation and Price Oversight*;
- will be conducting focus group meetings with consumers; and
- will schedule Public Workshops to discuss competition and industry regulation issues with businesses and members of the public.

The Review Team will later issue a Draft Report for consultation, then a Final Report to the Government, setting out the Review Team's recommendations on ways to improve the framework for consumer protection and promotion of competition in PNG.

¹ Department of Treasury, *Terms of Reference: Consumer and Competition Framework Review* (2014) para 5. (Available online at: <<http://www.CCFReview.info>>.)

² Terms of Reference (Ibid.), paras 7 to 14.

The ability of the Review to make recommendations that bring positive results for PNG will depend to a significant degree on the information that is made available to the Review. The Review Team therefore welcomes comments, experiences, observations and ideas from organisations and individuals in PNG (or who do business in PNG), at all stages during the Review process.

In preparing this *Second Issues Paper*, the Review Team has been greatly assisted by information and comments provided by members of the public, academics, businesspeople, government departments and agencies including the ICCC. The Review Team has also had regard to various external evaluations and commentaries, including the report of the recent UNCTAD bipartite peer review.³

At this stage in the Review process, comments are sought in response to this *Second Issues Paper: Competitive Markets and Fair Trading*.

Please provide comments to the Review Team, before 5:00pm on **Monday 16 May 2016**, at:

telephone: (+675) 321 0400 (please ask for 'the Competition Review')

email: comment@CCFReview.info

website: www.CCFReview.info

Submissions will be treated as public unless confidentiality is requested.

Please do not identify other persons or businesses in your submission.

B. Current Framework of Competition Law

The main competition law in PNG is the *Independent Consumer and Competition Commission Act (ICCC Act)*. The main agency responsible for competition matters is the Independent Consumer and Competition Commission (ICCC).

Part VI of the ICCC Act prohibits various kinds of business conduct that are likely to have an anti-competitive impact. In summary, the following are prohibited:⁴

- agreements (i.e. contracts, arrangements or understandings, or covenants) that have the purpose or effect of substantially lessening competition in a market;
- "exclusionary provisions" in agreements between competitors (e.g. agreements not to supply to, or acquire from, a third party);
- provisions in agreements that have the purpose or effect of fixing, maintaining or controlling the price for goods or services;

³ UNCTAD *Voluntary Peer Review of Competition Law and Policy: Bipartite Report – Fiji and Papua New Guinea* (2015).

⁴ ICCC Act ss 50 – 67.

- taking advantage of a substantial degree of power in a market for the purpose of restricting a person from entering any market, or preventing or deterring a person from competing in any market, or eliminating a person from any market; and
- engaging in “resale price maintenance” (i.e. where a supplier requires its customer not to resell goods or services at a price that is lower than the supplier has specified).

The ICC Act expands on these rules through certain deeming provisions⁵ and exceptions.⁶ The Commission may grant “authorization” to engage in conduct that would infringe the above rules, where that conduct would bring offsetting benefits for the public.⁷

Under the ICC Act it is prohibited for a person to acquire assets or shares of a business (e.g. by a merger) if doing so would be likely to substantially lessen competition in a market.⁸ The Commission may grant “authorization” to make such an acquisition, on public benefit grounds, or give “clearance” if it is satisfied that competition will not be substantially lessened.⁹ The Commission may accept “undertakings” but only in connection with clearance or authorization of an acquisition.¹⁰

Where it is proved that a person has contravened (or been a party to a contravention of) the market conduct prohibitions, the National Court may impose a pecuniary penalty on that person. The National Court may also make a range of other orders relating to a contravention of Part VI, including:

- An order excluding a person from being a director, promoter or manager of a body corporate, for up to five years;
- An injunction restraining a person from conduct that would contravene Part VI of the ICC Act;
- Damages for loss or damage caused to a person by conduct that contravenes Part VI of the ICC Act;
- An order to divest assets or shares, where a person has breached the business acquisitions rule;
- An order to cancel or vary a contract, or to compensate another person who is a party to the contract.¹¹

It is timely now to review, and possibly to update, the laws on market conduct and business acquisitions. Balanced against this, the Government is concerned not to burden businesses, or the ICC, with additional laws unless they are of real benefit for consumers, businesses and the economy as a whole.

Some other Acts (e.g. the *Telecommunications Act 1996*) also include

⁵ ICC Act ss 44(5), 44(8), 45(6), 45(7), 45(8), 51(6), 51(7), 53, 57, 59(3), 60(2), 62, 63, 67(3), 102(2), 102(4), 135.
⁶ ICC Act ss 65 – 68.
⁷ ICC Act ss 70 – 84.
⁸ ICC Act s 69.
⁹ ICC Act ss 81 – 84.
¹⁰ ICC Act s 85.
¹¹ ICC Act ss 87, 89 -- 101.

provisions to promote competition in the particular industry to which they apply. (These are briefly discussed in Part II, H of this Issues Paper.)

Competition and consumer protection occupy an important place in PNG policy. The *Papua New Guinea Vision 2050* adopts, in addition to the five National Goals and Directive Principles enshrined in the Constitution, "Guiding Principle No. 6 – Papua New Guinea is Progressive and Globally Competitive".¹² The *Medium Term Development Plan 2011-2015* identified fair competition and consumer protection as "key elements".¹³ Finally, Goal 3.5 of the Papua New Guinea *Development Strategic Plan 2010-2030* is to "Promote competition that benefits PNG and protects consumers."¹⁴

Competition is affected by the legal, regulatory and administrative framework in which businesses operate. Selected competition issues connected with law, regulation and public administration are set out in Part III of this Issues Paper.

More generally, competition is affected by economic conditions such as input costs, taxes, access to inputs, access to finance and access to markets. The general conditions of the economic environment for competition are beyond the scope of the Review.

II. ISSUES IN COMPETITION LAW

This section of the Issues Paper discusses a range of competition issues that the Review Team has identified from its initial work. Other issues may also be important.

The *Third Issues Paper: Industry Regulation and Price Oversight* addresses regulation of the "declared entities" PNG Ports Corporation Ltd, PNG Power Ltd, Motor Vehicle Insurance Ltd and Post PNG, as well as price control and price monitoring. The *First Issues Paper Consumer Protection and Economic Empowerment of Women in PNG* addressed consumer protection matters. Please refer to the project website for copies of these papers (www.CCFReview.info).

The Review Team welcomes your comments on the issues discussed below, as well as any other relevant issues.

A. Competition Policy in PNG

"Competition" refers to the process of rivalry between businesses. Competition has been defined as: "...a process of rivalry between firms seeking to win customers' business over time by offering them a better

¹² Papua New Guinea *Vision 2050* para 1.8.

¹³ Papua New Guinea *Medium Term Development Plan 2011-2015*, p 15. "The Government will continue to supervise the free market to ensure it functions efficiently with clear rules and regulations, while at the same time intervening in areas where markets fail to work effectively to maximise the welfare of Papua New Guineans"; *ibid*, p 14.

¹⁴ Papua New Guinea *Development Strategic Plan 2010-2030*, p 36.

deal.”¹⁵

Competition is a “process rather than a situation”. It requires “that prices should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers and customers”.¹⁶

Competition normally is valued not as an end in itself but, rather, for the economic efficiency and other benefits that it brings. Under the pressure of competition, markets are 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** – continuing innovation in products and methods of production.

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 quite inefficient, however, effective competition policy and law can complement other policies and contribute to achieving other desirable objectives. For example:

- **Trade policy** – where government pursues an open trade policy by reducing formal barriers to trade (such as import tariffs, quotas, subsidies or export restraints), competition policy and laws should ensure that those public barriers are not replaced by private barriers created by businesses’ conduct (such as cartel conduct, refusals to deal or price predation).
- **Privatisation** – where government proposes to sell interests in state-owned businesses to private investors, competition policy and laws should ensure that private monopolies do not arise to take the place of the former state-owned monopolies.
- **Economic diversification** – where government aims to promote diversification in economic activity, competition policy and laws can facilitate the emergence of new markets and the entry of new providers.
- **Economic empowerment of women** – to the extent that women face barriers to participating in markets, the reduction or removal of entry barriers may serve to promote women’s economic participation and empowerment.
- **Job creation** – by reducing barriers to market entry and expansion, competition policy and laws can assist job creation policies.

It is necessary to recognise that competition policy and law are unlikely by themselves to deliver all of the benefits associated with competitive markets. Competition policy and law will often be necessary to economic

¹⁵ Competition Commission and the Office of Fair Trading *Merger Assessment Guidelines: OFT1254* (2010), para 4.1.2.

¹⁶ *Re QCMA* (1976) 25 FLR 169 at 188-9.

development but will seldom be sufficient by themselves. Competition policy and law should complement and work together with other legal and policy instruments and with the commercial framework generally, including finance, tax, consumer protection and trade.¹⁷

It is also necessary to recognise that objectives other than economic efficiency, productivity and growth may weigh heavily in national policy. For example, national objectives such as wage and price stability, peace and reconciliation, and distributional goals are sometimes (but not always) in tension with pro-competitive policy. Any such policy tensions should be made explicit and openly resolved.

In some countries, the competition regulator is required to consider the 'public interest' as a criterion of its decisions, although in most countries the regulator must focus on the impact of conduct or agreements on economic efficiency, when making its determinations. Under the ICC Act, the "primary objectives" of the ICC are:¹⁸

- (a) *to enhance the welfare of the people of Papua New Guinea through the promotion of competition, fair trading and the protection of consumers' interests; and*
- (b) *to promote economic efficiency in industry structure, investment and conduct; and*
- (c) *to protect the long term interests of the people of Papua New Guinea with regard to the price, quality and reliability of significant goods and services.*

These primary objectives are expanded on, by seven "facilitating objectives", to which the ICC must have regard.

Question 1: Is the Government's policy on competition in PNG sufficiently clear at present or should the Government develop an explicit National Competition Policy?

Question 2: Do you consider that promoting competition conflicts with any important policy objective for Papua New Guinea? If so, what would be the best way to respond to such a conflict?

Question 3: Do you consider that the ICC's "primary objectives" are defined appropriately? If not, how should they be changed?

B. Competitive Conduct Rules

The competitive conduct rules under the ICC Act are summarised in Part I B above. The main issues arising from the competitive conduct rules that have been identified by the Review Team to date are discussed below, in this Part II B.

Please comment on any additional issues regarding the conduct rules that you feel the Review should consider.

¹⁷ UNCTAD "The importance of coherence between competition policies and government policies" Note by the UNCTAD secretariat, 10 May 2011.

¹⁸ ICC Act s 5(1).

Updating and simplifying the ICC Act

The ICC Act was passed by Parliament in 2002. The competitive conduct rules have not been reviewed since then. Review is desirable in light of the subsequent experience gained by the ICC and businesses. Recent developments in competition law in other countries should also be taken into account.

The ICC Act contains much technicality and is repetitious in some respects. Simplification seems possible.

Question 4: Should the ICC Act and related Acts be updated and simplified? Please comment on any provisions that you consider to require updating and/or simplification.

Agreements that substantially lessen competition

Section 50(1) prohibits a person from entering into a contract or arrangement, or arriving at an understanding, containing a provision that has the purpose, effect or likely effect of substantially lessening competition in a market ('SLC provision'). Section 50(2) prohibits a person from giving effect to a SLC provision. Section 51 contains corresponding prohibitions in respect of covenants.

There is a substantial overlap between section 50 and section 51. The law in this area could be simplified by repealing section 51 and giving "agreement" in section 50 an extended meaning.¹⁹

Section 45 defines some aspects of the substantial lessening of competition test including the term "competition". However, considerable uncertainty surrounds the key term "substantial." For example, it is unclear whether or not the term relates to the amount of competitive rivalry affected or the extent of adverse impacts on price or product quality. It might be useful for the meaning of "substantial" to be explained in ICC guidelines. The guidelines could include worked examples to illustrate in a practical way where there is likely to be a "substantial lessening of competition".

The substantial lessening of competition test relates to the extent of competitive rivalry in a market. Situations can easily arise where an agreement may lessen the extent of competitive rivalry in a market but enhance consumer welfare by creating productive or dynamic efficiencies. It is possible in such cases to apply for authorization by the ICC under section 70 but authorization is costly and not always expedient. By contrast, a "rule of reason" is used in the US and the EU to allow conduct where a party proposing to enter an agreement judges that the likely reduction in competitive rivalry is outweighed by likely efficiency gains. A rule of reason (allowing parties to self-assess whether an exemption applies) could be introduced in PNG, as a defence.²⁰

Under section 45(2) the term "market" is "a reference to a market in the

¹⁹ Repeal of the equivalent section in the *Competition and Consumer Act 2010* (Cth) is recommended in the Australian Government *Competition Policy Review: Final Report* (March 2015) 3.2.

²⁰ For one possible model see *Competition Act 1998* (SA) s 4(1)(a).

whole of Papua New Guinea for goods or services...". That definition is too narrow: it would exclude liability in cases where conduct causes a "substantial lessening of competition" in some parts of PNG but not across the whole of PNG. The definition could be amended to reflect the fact that there may be many geographic markets within PNG.

Question 5: Should the meaning of 'substantial' in the substantial lessening of competition test be clarified by ICCC guidelines?

Question 6: Should a 'rule of reason' defence be introduced, for businesses to self-assess whether their conduct is exempt?

Question 7: Are there other changes that should be made to the ICCC Act provisions that relate to anti-competitive agreements?

Exclusionary provisions (collective boycotts)

Section 52(4) prohibits a person from entering into a contract or arrangement or arriving at an understanding, containing an "exclusionary provision". Section 52(5) prohibits a person from giving effect to an exclusionary provision of a contract, arrangement or understanding. An 'exclusionary provision' is a provision that restricts the supply of goods or services to a competitor or the acquisition of goods or services from a competitor (see s 52(1)). Under s 52(2) it is a defence to prove that an exclusionary provision does not have the purpose, effect or likely effect of substantially lessening competition in a market.

Section 52 is narrower in scope than the law against collective boycotts in many other countries. Thus, section 52 does not seem to catch collective refusals to supply consumers or other third parties. There appears to be no policy justification for excluding that type of conduct from the prohibition. (The equivalent section in New Zealand has been widely criticised and would be repealed under a Bill now before the NZ Parliament.²¹)

In PNG, the concept of an "exclusionary provision" under section 52 could be repealed and replaced by that of a "cartel provision". A "cartel provision" would be defined to cover price fixing, bid-rigging and collusive restrictions by competitors on the supply or acquisition of goods or services in a market. To be a cartel provision, the provision would need to have the effect or likely effect of restricting competition between two or more competitors.

The defence under section 52(2) would be unnecessary if the proposed concept of a "cartel provision" is carefully defined to require an anti-competitive effect.²²

Certain kinds of restrictions on supply or acquisition that are agreed between competitors could be exempted (e.g. collective bargaining) or permitted through clearance or authorisation.

Question 8: Should section 52 be amended to substitute a "cartel

²¹ Commerce Act 1986 (NZ) s 29; see *Commerce (Cartels and Other Matters) Amendment Bill 2014* (NZ).

²² For one model see the *Commerce (Cartels and Other Matters) Amendment Bill 2014* (NZ), proposed ss 30-30D of the *Commerce Act 1986* (NZ).

provision" rule and anti-competitive effect test, as described above?

Price fixing

Price fixing among competitors is generally regarded as the most serious type of anti-competitive conduct. Price fixing is defined by section 53 and prohibited by section 50. Similar provisions apply to covenants (sections 57 and 51).

Under section 53, a price fixing provision is deemed to be a SLC provision and is covered by the section 50 prohibitions that relate to SLC provisions. A price fixing provision is a provision that has the purpose, effect or likely effect of 'fixing, controlling, or maintaining' the price for goods or services to be charged by one or more competitors (section 53(1)). The price element includes a 'discount, allowance, rebate or credit' (section 53(1)).

Several improvements could be made.

First, it is unclear whether or not the element of "controlling a price" requires an analysis of what the price would probably have been without the alleged price fixing provisions. The better view is that such analysis is irrelevant and that the test is whether or not the freedom of a competitor to set a price independently of other competitors has been limited by the alleged price fixing provision. Section 53 could be amended to make that clear.

Secondly, the ICC Act does not include a prohibition specifically against bid-rigging. In many situations bid-rigging would be caught by a rule against price fixing. However, bid-rigging is a particular form of price fixing that is of serious concern in an economy that relies heavily on tendering and where genuine competitive bidding is essential to keep prices low and quality and innovation high. A specific prohibition against bid-rigging could help to highlight the seriousness of this conduct and to enhance deterrence.

Thirdly, the provisions relating to covenants (sections 51 and 57) could be repealed. An expanded definition of "agreement" could ensure anti-competitive "covenants" are covered adequately by sections 50 and 53.

Fourthly, section 55 exempts recommendations on price where there are 50 or more parties to the contract, arrangement or understanding containing the recommendation. Section 55 could be repealed. If a price recommendation is in fact likely to control a price to be charged it should be prohibited regardless of whether there are two or 50 or 100 parties to the recommendation. If a price recommendation is in fact unlikely to control a price to be charged it should not be prohibited regardless of whether a large or small number of parties is involved.

Question 9: Do you agree with the suggestions made above for improving the law relating to price fixing and other cartel conduct?

Question 10: Do you have any further comments about the law relating to price fixing and other types of cartel conduct?

Taking advantage of market power

Taking advantage of market power (misuse of market power) is prohibited by section 58 of the ICC Act. The prohibition has three elements:

- (a) a substantial degree of power in a market;
- (b) a taking advantage of that market power; and
- (c) for the purpose of
 - (i) restricting the entry of a person into that or any other market; or
 - (ii) preventing or deterring a person from engaging in competitive conduct in that or any other market; or
 - (iii) eliminating a person from that or any other market.

The “taking advantage” test has been found difficult to interpret in Australia and New Zealand. The test is not well suited to identifying misuse of market power. The test makes the conduct of a firm that does not have market power the benchmark for competitive behaviour. That is unsatisfactory:²³

Business conduct should not be immunised merely because it is often undertaken by firms without market power. Conduct such as exclusive dealing, loss-leader pricing and cross subsidisation may all be undertaken by firms without market power without raising competition concerns, while the same conduct undertaken by a firm with market power might raise competition concerns.

The purpose test is also unsatisfactory. The policy objective of the ICC Act is to protect competition, not individual competitors. The prohibition should focus on conduct that has the effect or likely effect of harming the competitive process.

The Review Team acknowledge that it is a difficult task to formulate a straightforward rule against abuse of market power. The effects test proposed in Australia has been widely criticised.²⁴ US antitrust law and EU competition law do not offer obvious answers for PNG.

One possibility would be to reformulate the rule on the basis of two basic principles:

- (a) conduct is exclusionary only if it limits production, marketing or technical development by competitors; and
- (b) a firm with market power may limit rivals’ possibilities if no prejudice to consumers is likely to result.

If a more general rule of this kind was enacted, it would be necessary to provide detailed guidelines, including worked examples, to clarify how the rule applies to different kinds of conduct. Such guidelines should be made available for public comment at the same time that the new rule is proposed for comment.

The current *Fairness of Transactions Act* provides for mediation and, if that fails, review by a court of a “transaction” that “was not genuinely mutual or

²³ Australian Government *Competition Policy Review: Final Report* (March 2015) 61.

²⁴ The proposal is to prohibit a corporation with a substantial degree of power in a market from engaging in conduct if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market; Australian Government *Competition Policy Review: Final Report* (March 2015) Recommendation 30.

was manifestly unfair to a party”.²⁵ This Act has occasionally been invoked by private parties. A party to proceedings under this Act “may appear in such proceedings either personally or by a representative”²⁶ but the ICCC does not formally have a role under this Act. Possibilities for reform of the *Fairness of Transactions Act* would include adding a power for the ICCC to initiate mediation under the Act or to bring proceedings on a representative basis on behalf of parties that may have been treated unfairly.

Another possibility is for some forms of misuse of market power to be addressed by introducing a new prohibition against ‘unconscionable’ or unfair conduct.²⁷ For example, oppression of small suppliers by large businesses could be prohibited as unconscionable or unfair conduct, which would be easier to prove than misuse of market power.²⁸

Question 11: Is the present PNG law on misuse of market power satisfactory? If it is not, what changes would be appropriate?

Question 12: Is the present PNG law on fairness of transactions satisfactory? If it is not, what changes would be appropriate?

Question 13: Should a prohibition against unconscionable or unfair conduct in trade be introduced in PNG?

Resale price maintenance

Resale price maintenance (**RPM**) is the practice of supplying goods or services to a person who “re-sells” them to another, and requiring that reseller to charge at or above a minimum resale price. RPM by suppliers is prohibited by s 59. RPM by third parties is prohibited by s 60. Sections 61-63 define the elements of RPM. Section 64 sets out RPM evidentiary provisions.

The RPM prohibitions are not subject to a SLC or rule of reason test but can be authorized under section 70. A rule of reason test might be introduced²⁹ but to do so would complicate the law and increase enforcement and compliance costs.

The concept of “price” under the ICCC Act provisions on RPM is narrow and creates a loophole. A better approach may be to define “price” as “a cost or charge of any description”, to reduce evasion of the rule.

The prohibition of RPM by third parties appears unnecessary, given that the ICCC Act imposes liability on those who are knowingly concerned in breaches of the Act (see sections 60 and 63) and so sections 60 and 63 could be repealed. Sections 59, 61 and 62 could also be simplified.

²⁵ *Fairness of Transactions Act 1993* (PNG) s 5(1).

²⁶ *Fairness of Transactions Act 1993* (PNG) s 10.

²⁷ See Consumer and Competition Framework Review, *Issues Paper: Consumer Protection and Economic Empowerment of Women in PNG* at 14-15.

²⁸ As in *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405.

²⁹ A rule of reason test has been introduced for RPM under US federal antitrust law: *Leegin Creative Leather Products Inc v PSKS Inc*, 551 US 877 (2007). The question has recently been debated in Australia; see Australian Government *Competition Policy Review: Final Report* (March 2015) 20.4.

There is no 'loss-leader' exception under the ICCA Act. On one view, the prohibition against RPM should not apply where a reseller has sold a supplier's goods or services below cost during the preceding year and the supplier withholds supply in order to protect his or her product brand.³⁰ Such an exception could be inserted in the ICCA Act.

Question 14: Is it necessary for RPM to be specifically prohibited or is that conduct adequately addressed by the rule against misuse of market power and/or other competition rules?

Question 15: Should the prohibition against RPM be qualified by a SLC test and/or a rule of reason?

Question 16: Do you agree that sections 60 and 63 should be repealed?

Question 17: Do you agree with the suggestion that a loss leader exception be introduced?

Question 18: Should "price" be defined as "a cost or charge of any description" for the purposes of the RPM rule?

Question 19: Are other simplifications of the RPM provisions desirable?

Territorial jurisdiction

Part VI of the ICCA Act extends to conduct engaged in outside PNG by any person resident or carrying on business in PNG, to the extent that such conduct affects a market in PNG (section 32(1)). It appears desirable to revise the test for territorial jurisdiction under section 32(1), for two reasons:

- (1) what matters is whether the conduct affects economic activity in PNG, not where relevant persons are geographically located; and
- (2) the term 'carrying on business' is not always easy to apply.

Section 32(1) could be amended to read: '...extends to the engaging in conduct outside PNG by any person to the extent that such conduct affects trade or a market in PNG'.

Question 20: Do you agree with the amendment of section 32(1) suggested above?

Question 21: Is there any other issue regarding the application of the ICCA Act outside PNG which requires attention?

Authorization and clearance

Authorization is possible under sections 70-80 of the ICCA Act. See also section 46 which requires efficiencies to be considered when applying the test of public benefit. The effect of authorization is to exempt from liability the person engaging in the authorized conduct.

³⁰ The approach taken in *Competition and Consumer Act 2010* (Cth) s 98(2).

Authorization is possible in relation to most of the prohibitions against anti-competitive conduct under the ICCA Act but does not apply to price fixing or misuse of market power. It seems undesirable to exclude the possibility of authorization for price fixing or misuse of market power. Cases of price fixing or misuse of market power where authorization is justified will be rare and difficult for an applicant to establish but the possibility should not be ruled out.

Interim authorization is not possible under the ICCA Act. It would be expedient for businesses and for the ICCA if the Act were to include the power to grant authorization on an interim basis.

The ICCA Act provisions on authorization are in many respects repetitious and unnecessarily complicated. There seems scope for them to be simplified.

“Authorization” of conduct that would otherwise infringe the ICCA Act requires that the anti-competitive effect of the conduct be outweighed by likely public benefit. “Clearance” is available where a merger or acquisition is unlikely to substantially lessen competition in a market.³¹ The “clearance” process could be extended to other forms of conduct, so that a party would have the option of seeking confirmation from the ICCA that their proposed conduct does not infringe the ICCA Act.

Question 22: Do you consider that authorization should be available for price fixing and misuse of market power?

Question 23: Do you consider that clearance should be available where the conduct is unlikely to substantially lessen competition in a market?

Question 24: Should the ICCA be able to grant authorization where it has received an application for clearance, if the grounds for authorization are made out? Should the ICCA be able to grant clearance where it has received an application for authorization, if the grounds for clearance are made out?

Question 25: Should denial of clearance or authorization be subject to review by a body independent of the ICCA?

Other exemptions

The ICCA Act provides for various other exemptions. Many of these exemptions could be modernised and some of them call for clarification. Additional exemptions need to be considered.

The joint venture exemption under section 54 applies only to price fixing and to joint ventures. The exemption could be extended to all types of cartel conduct and be available to collaborative ventures that are pro-competitive. The collaborative activity exemption proposed in NZ is a commendable

³¹ An approach recommended in Australian Government *Competition Policy Review: Final Report* (March 2015) Recommendation 38.

model.³²

The joint buying and promotion exemption under section 56 applies only to price fixing. It could be extended to all types of cartel conduct.

There is no exemption for genuine supply agreements between competitors. Such agreements are prevalent in normal commerce and almost always promote consumer welfare. Yet technically they can involve price fixing or other cartel conduct unless covered by an exemption. The supply agreement exemption proposed in NZ is a commendable model.³³

Section 65 provides for statutory exceptions that are specifically authorized by an Act or a regulation made under an Act. The meaning of "specifically authorized" is not clear. It could be defined to mean "authorized by specific reference to the provisions of the ICCA Act to which the exception applies."

Section 66 provides for various exceptions, which perhaps should be removed. These include, in summary:

- agreement provisions that require compliance with approved standards of dimension, design, quality, or performance;
- agreement provisions that relate to the remuneration, conditions of employment, hours of work or working conditions of employees;
- agreement provisions that relate exclusively to the export of goods from Papua New Guinea or exclusively to the supply of services wholly outside Papua New Guinea (if notified to the ICCA); and
- agreement provisions for the carriage of goods by sea from PNG to overseas or from overseas to PNG (but not loading or unloading a ship).

Section 67 exempts certain intellectual property licensing conditions from many of the prohibitions relating to anti-competitive conduct. On one view, intellectual property should be treated the same as other assets or property so no exemptions like those under section 67 should apply.³⁴ However, repeal of section 67 would result in the overreach of the prohibitions against anti-competitive agreements unless:

- (a) the SLC test in section 50 and other provisions is qualified by a rule of reason test; and
- (b) supply agreements (including IP licensing agreements) between competitors are exempted from prohibitions against cartel conduct.

Question 26: Should a general exemption be introduced for collaborative activity that is pro-competitive?

Question 27: Should the joint buying and promotion exemption

³² *Commerce (Cartels and Other Matters) Amendment Bill 2014* (NZ), proposed s 31 of the *Commerce Act*.

³³ *Commerce (Cartels and Other Matters) Amendment Bill 2014* (NZ), proposed s 32 of the *Commerce Act*.

³⁴ The approach taken in Australian Government *Competition Policy Review: Final Report* (March 2015) 9.2.

under section 56 be extended to other conduct besides price-fixing?

Question 28: Should a new exemption for genuine supply agreements between competitors be added to the ICCA Act?

Question 29: Should the section 67 exemption for certain intellectual property licensing conditions be repealed?

Question 30: Should the four s 66 exemptions referred to above be repealed?

Question 31: Should any other exemptions in the ICCA Act at present be repealed?

Question 32: Should any new exemptions be added to the ICCA Act?

C. Review of Mergers

Under section 69(1) of the ICCA Act a person is prohibited from acquiring assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market. Clearance may be given by the ICCA under section 81. Acquisitions may be authorized under section 82.

Section 69(5) lists various important factors (e.g. barriers to entry) that are to be considered when applying the substantial lessening of competition test.

One limitation of the current merger review process is that merger guidelines have yet to be published by the ICCA. Merger guidelines are used by many competition regulators³⁵ to assist business decisions on the need or otherwise to apply for clearance and on the information to be provided in a clearance application. Merger guidelines are also used to guide decisions by the regulator and help to promote transparency and consistency. The ICCA is currently preparing merger guidelines. That initiative is to be welcomed. Worked examples to clarify and explain what is meant by a 'substantial' lessening of competition would be useful.

The merger guidelines will help to promote transparency by setting out a 'Statement of Issues' process that will apply to clearance applications. Indicative timelines will be given to help guard against undue delay and business uncertainty.

Undertakings are another area where guidance in the merger guidelines would be useful. (For example: To what extent are behavioural undertakings likely to be accepted by the ICCA? What types of structural or behavioural undertakings are worth proposing to the ICCA for consideration?)

There is no mandatory merger notification requirement under the ICCA Act. This creates the opportunity for market participants to 'game' the system by not seeking clearance or authorization and proceeding in the hope that it will soon become too difficult for the ICCA or a court to 'unscramble' an acquisition. The ICCA Act could be amended to provide for "mandatory

³⁵

See eg Commerce Commission of New Zealand, *Mergers and Acquisitions Guidelines* (2013).

notification" to the ICCC of significant proposed acquisitions. The notification procedure should be straight forward and avoid the complexity of the notification procedures that apply in the US and EU.

The 20 day standard timeline that applies to clearance by the ICCC (section 81(3)) is very tight. A 30 day timeline might be more realistic.

Clearance or authorization is effective only for 12 months (section 81(6) and section 82(7)). Such a restriction seems inappropriate. On one view, if clearance or authorization is granted, the parties to an acquisition should be able to rely on that clearance or procedure unless and until the ICCC can show cause within 6 years of the acquisition why the clearance or authorization should be revoked.

The current dual-track processes of clearance and authorization would be more efficient if they were to be consolidated in a single track procedure.

Question 33: Is the current merger review process satisfactory? Please comment on your own experience and any particular respects in which the review process might usefully be improved.

Question 34: Do you consider that mandatory notification should be required in advance of significant acquisitions?

Question 35: Do you agree that it would be useful to clarify the meaning of 'substantial' in the SLC test under section 69(1)? If so, how should that best be done?

Question 36: What period of time should the ICCC have to grant or decline clearance or authorization?

Question 37: Should a clearance or authorization be effective only for 12 months or should it continue in effect until the ICCC shows cause for its revocation?

Question 38: Should denial of merger clearance or authorization be subject to review by a body independent of the ICCC?

Question 39: Are there other issues in relation to the process for review of mergers and acquisitions that need to be addressed?

D. Investigative Powers and Procedure

In order for competition laws to have the positive economic impact that they are intended to have, they must be enforced in cases where they have been infringed. In order for competition laws to be enforced, a person or body must be tasked with enforcing them (i.e. the ICCC) and must have the resources³⁶ and powers that the task requires.

The ICCC Act and other Acts that the ICCC administers confer investigative powers on the ICCC. Part IX of the ICCC Act gives the ICCC powers to:

³⁶ The ICCC intends to participate in late 2015 and early 2016 in a capacity assessment to identify its strengths and areas for improvement.

- summon a witness;
- take evidence on oath;
- require documents, books and papers to be produced to it;
- require a person to answer questions or to furnish information;
- with a Magistrate’s search warrant, enter and search any premises; inspect any documents, books and papers; and take samples of any goods;
- make copies or abstracts of documents, or impound documents, inspected during a search under a Magistrate’s warrant;
- require a “regulated entity” or a supplier of regulated goods or services to keep accounting records specified by the Commission; and
- prosecute offences against the ICCC Act (with the approval of the Public Prosecutor).

Under the current law and arrangements, the ICCC cooperates with other government agencies for the purposes of investigation and enforcement. For example:

- **Health** – the PNG National Department of Health (DOH) has responsibility for labelling of foodstuffs (under the *Food Sanitation Act 1991*). Since 2014 the ICCC has supplemented DOH enforcement efforts by imposing an interim ban on non-English labelled foodstuffs (under the ICCC Act).
- **Customs** – the ICCC has a Memorandum of Understanding with PNG Customs for information-sharing and collaboration on enforcement. The ICCC regularly provides its list of banned products to PNG Customs to monitor and take appropriate action at the port of entry.
- **Public Prosecutor’s Office** – to bring prosecutions, the ICCC cooperates with the Office of the Public Prosecutor (under the Ministry of Justice and Attorney General), which has overall responsibility for the prosecution of criminal offences in PNG.
- **Attorney-General’s Office** – the ICCC obtains occasional support from the Department of Justice and Attorney General, for example on matters of statutory construction.
- **Police** – the ICCC and Police occasionally co-operate, when the circumstances of a particular case so require.

The Review Team understands that it has been suggested the ICCC should secure a Magistrate’s search warrant (ICCC Act s 129) before entering a retailer’s premises that are open for trade and purchasing an item that the ICCC considers may be required as evidence of an infringement. This appears to exceed the requirements of the ICCC Act and the Constitution. In a case where it is necessary for ICCC investigators to enter premises forcibly, or to seize goods or documents, a warrant should be obtained.

An “immunity policy” (or “leniency policy”) is used by many competition agencies to encourage cartel participants to admit their involvement in a cartel and co-operate in subsequent investigation and enforcement activity,

in return for immunity from prosecution (or more lenient penalties than they would otherwise receive). An effective immunity policy can assist a competition agency to detect cartels; can reduce the investigative burden on the agency; and can make cartels more difficult for participants to establish and maintain. The ICCC is in the process of preparing a draft immunity policy for public consultation.

A “co-operation policy” could also be developed to encourage parties to infringements of the ICCC Act to report those quickly to the ICCC and to co-operate with ICCC investigations. Structured discounts on monetary penalties could be offered as an incentive to co-operate. If this approach were to be taken, the ICCC Act should be amended to enable the ICCC and a defendant to reach an agreement on penalty that would apply unless the National Court considered that penalty to be manifestly too low or too high.

It is possible that international cartel activity or other overseas conduct might occur that has an adverse impact on markets or consumers within PNG. Or that conduct in PNG might affect overseas markets. In such cases, the ICCC might seek assistance from an overseas competition agency, or be asked to give assistance to an overseas competition agency. Assistance to, and sharing information with, overseas agencies is contemplated by the ICCC Act.³⁷ Amendment of the ICCC Act to specifically authorise disclosure of information and provision of investigative assistance may be desirable.

Section 131 of the ICCC Act protects the confidentiality of information that has been designated as “confidential” by the person submitting it to the ICCC, unless the ICCC determines that disclosure is in the public interest. An alternative approach allows the party providing information to *request* that parts of it be treated as confidential. If the agency refuses confidentiality the party offering it may withdraw it from consideration.

Question 40: Does the ICCC have the powers it needs to perform its functions?

Question 41: Does the ICCC have any powers that it does not need or should not have?

Question 42: Should the ICCC Act be amended to specifically authorise investigative assistance and disclosure of information by the ICCC to overseas competition agencies?

Question 43: Should s 131 of the ICCC Act be amended so that the ICCC, rather than the provider of information, determines whether information is confidential?

Question 44: Could enforcement under the ICCC Act and related Acts be improved by changes to the powers of other government agencies or by changes to arrangements between them and the ICCC?

Question 45: Should the ICCC Act be amended to clarify that the

³⁷ ICCC Act ss 27, 106(m).

ICCC has the right to enter premises that are open to the public and acquire samples of goods or services available therein, on the terms on which they are offered?

Question 46: Would development of an immunity policy and co-operation policy assist the ICCC in enforcing the ICCC Act?

E. Remedies and Sanctions

The remedies and sanctions now available for breaches of the ICCC Act are outlined in Part I B above. There are several respects in which they might be improved.

The maximum penalty for corporations that breach Part VI of the Act (K10 million) seems too low to reflect the most serious potential breaches of the law. Consideration should be given to doubling the standard maximum penalty and for an alternative maximum penalty of double the gain or double the loss likely to be caused by a breach.

The provisions under sections 87 and 95 of the ICCC Act on pecuniary penalties under the Act could be consolidated in one section.

Non-monetary sanctions may also be needed against offenders. Injunctions under section 93 of the ICCC Act are an important non-monetary sanction. However, it is unclear whether or not section 93 allows a court to order, as a condition of an injunction, that a corporation take preventive measures to guard against repetition of breach. Such preventive measures could include adoption of a compliance program and taking disciplinary action against the individuals who knowingly engaged in the offending conduct. Section 93 might usefully be clarified in this respect.

A major gap in the sanctions and remedies now available under the ICCC Act is the lack of power to accept court-enforceable undertakings where a breach of the Act is apparent but where court proceedings would be costly or time-consuming. A power could be given to the ICCC to accept undertakings in relation to alleged breaches of Part VI (or Part VII) and to apply to the court to enforce the undertaking if the party fails to honour it.³⁸ Guidelines on the use of such undertakings could be developed by the ICCC.

The ban under section 88 on indemnification of pecuniary penalties imposed on directors, employees or agents applies only in relation to pecuniary penalties for price fixing under section 53. Penalties against individuals are unlikely to be effective if they can be indemnified by their employer. The ban could be extended to apply in relation to pecuniary penalties imposed on individuals for any breach of the ICCC Act.

The power of the National Court under section 90 to disqualify persons from participating in the management of a corporation applies only to price fixing (section 53) and exclusionary provisions (section 52) and not to other serious breaches of Part VI of the ICCC Act. The power could be extended to apply to breaches of section 50 and other Part VI prohibitions.

³⁸ One model is *Competition and Consumer Act 2010* (Cth) s 87B.

Enforcement of Part VI of the ICCA Act now depends almost entirely on the ICCA. Looking ahead, private actions may also assist enforcement. However, at present the Act does not provide for admissions of fact in litigation by the ICCA, or agreed by a party in a settlement with the ICCA, to be used as evidence in private actions for damages or other remedies. Consideration should be given to introducing such a provision.³⁹

Civil actions for damages are subject to a limitation period of 3 years (section 94(2) and section 97(2)). This appears very restrictive. It would be possible to extend the limitation period to 6 years.⁴⁰

Question 47: Are the maximum penalties for breaches of the Part VI of the ICCA Act adequate or inadequate?

Question 48: Should section 93 be amended to make it clear that a court must require a defendant to take specified precautions against repetition of the breach of the ICCA Act?

Question 49: Should the ban on indemnifying individuals for pecuniary penalties imposed apply in relation to any breach of the ICCA Act?

Question 50: Should the power to disqualify a person from participating in the management of a corporation apply in relation to any breach of Part VI of the ICCA Act?

Question 51: Should any improvements be made to civil damages actions and other remedies for breach of Part VI of the ICCA Act? If so, please describe the improvements that you would like to see made.

F. Review and Appeal

Decisions and actions of the ICCA are subject to various possible avenues of review or appeal by a party who is dissatisfied.

Where the Commission brings a prosecution in a court, the usual rules for appeals against decisions of that court will apply.

Certain decisions of the ICCA in relation to a “regulated entity”, declaration of goods or services as regulated goods or regulated services, terms of a regulatory contract or enforcement of a regulatory contract may be reviewed by an Appeals Panel, on application by the regulated entity or the Minister.⁴¹ An Appeals Panel is formed from members of a panel of experts appointed by the Head of State and has the power to confirm a decision or to return the matter to the ICCA with directions.⁴²

Where the Commission makes a decision exercising a statutory power, that decision is subject to judicial review in accordance with Order 16 of the

³⁹ See Australian Government, *Competition Policy Review: Final Report* (March 2015) 407-9.

⁴⁰ As under eg *Frauds and Limitations Act 1988* (PNG) s 16(1); *Competition and Consumer Act 2010* (Cth) s 82(2).

⁴¹ ICCA Act s 43.

⁴² ICCA Act s 43(8).

National Court Rules 1983.

In some countries, a specialist tribunal (comprising, for example, a mix of legal and economic experts) exists to determine appeals from decisions of the competition or regulatory authority.

Where the National Court is called on to review a decision of the ICCC, the Court (or a plaintiff or defendant) might seek to appoint an “assessor” who can “...give their opinion on any matters of fact, custom or usage, or any other matters, arising out of the evidence given at the trial, but shall not adjudicate in any proceedings before the Court.”⁴³ The Review Team understands this legislation applies in relation to the former Territory of New Guinea only, and is rarely used now.

Question 52: Are the existing avenues for review of, and appeal against, decisions of the ICCC adequate for consumers and businesses?

Question 53: Should decisions of the ICCC be subject to review by an expert tribunal, or by the National Court?

Question 54: Should review extend to the merits of the ICCC’s decisions?

Question 55: Should the National Court have the power to appoint an expert “lay member” or “assessor” to assist the Court in competition cases?

G. ICCC accessibility and procedure

In order to perform its statutory functions, it is important that the ICCC be accessible to businesses and members of the public, and that those who deal with the ICCC have confidence in its integrity and expertise.

The Review Team has been impressed by the commitment of the ICCC’s officials and staff. Like most organisations, the ICCC must work within a finite budget. Like most organisations, the ICCC endeavours to improve its performance over time. Views regarding both strengths and weaknesses of the ICCC are likely to assist it in improving its performance. For this reason, the Review Team seeks comments from businesses and members of the public based on their dealings with the ICCC.

Question 56: If you have sought information or guidance from the ICCC, have you found the ICCC to be accessible and responsive?

Question 57: Have you been treated in a courteous and professional manner by ICCC staff in dealings with the ICCC?

Question 58: Do you consider that ICCC staff and advisors bring appropriate expertise to matters the ICCC is required to address?

Question 59: Do you consider that ICCC systems and processes

⁴³ See the *National Court Assessors Act 1925* (PNG) s 5.

could be improved? If so, how?

Question 6o: Do you consider that the ICCC's composition (one Commissioner and two Associate-Commissioners) should be changed? If so, how?

H. The Telecommunications Act and other laws

The *Fairness of Transactions Act 1993* (discussed at Part II B, above) provides for mediation and, where mediation fails, review by a court of a transaction that “was not genuinely mutual or was manifestly unfair to a party”.⁴⁴ The ICCC has no explicit role under the *Fairness of Transactions Act* but the Act, if parties can invoke it effectively, may help to reduce abuses of market power and support market entry by small players.

Four state-owned enterprises are subject to regulation as “declared entities” under the ICCC Act: PNG Ports Corporation Ltd, PNG Power Ltd, Motor Vehicle Insurance Ltd, and Post PNG. The regulatory contracts which bind each of them limit their pricing freedom, to approximately competitive prices. The regulatory contracts will be discussed in greater detail in the *Third Issues Paper: Industry Regulation and Price Oversight*.

The telecommunications industry was declared a “regulated industry” for the purposes of the ICCC Act,⁴⁵ however the National Information and Communications Technology Authority (NICTA) now has primary responsibility for regulating the telecommunications sector, under the *National Information and Communications Technology Act 2009 (NICT Act)*. 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.⁴⁶ The NICT Act contains rules that support competition in markets for telecommunications services. Such rules include network access and interconnection obligations, a non-discrimination rule, reference interconnection offer provisions, and retail service and pricing rules.

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. Consultation and coordination between NICTA and the ICCC is therefore essential.

NICTA is required to consult with the ICCC “where it is appropriate and practical to do so” (s 42) and is permitted to share with the ICCC “any information that is relevant to the ICCC’s functions in the ICT industry” (s 44(5)). NICTA may consult with the ICCC regarding a retail service determination (s 159). NICTA must consult the ICCC before making rules relating to licensees’ dealings with international operators (s 220) and before registering an industry code (s 224).

⁴⁴ *Fairness of Transactions Act 1993* (PNG) s 5(1).

⁴⁵ *Telecommunications Act 1996* (PNG) s 19A.

⁴⁶ NICT Act s 9(c) and (e).

In recent years, major structural and regulatory reforms in telecommunications appear to have delivered benefits to the people of PNG. The introduction of mobile competition in 2007 with the entry of Digicel has been followed by lower service prices, improved network coverage and increased mobile penetration (to around 45 per cent of the population).⁴⁷ NICTA has expressed concern about Digicel's pricing practices and has intervened to limit the degree of discrimination practised.⁴⁸ NICTA has not intervened to mandate access to mobile roaming services or mobile network infrastructure sharing services, preferring to rely instead on competition remedies to address any abuse of market power.⁴⁹

In the fixed line sector, the major development has been the planning of a national transmission network, which is to supply wholesale connectivity to retail firms, including fixed and mobile retailers. This has involved the creation of PNG DataCo (established as a SOE), separate from existing fixed and mobile operators. In principle, this new entity should have good incentives to offer non-discriminatory access to the critical transmission infrastructure which is required by all service providers in PNG. However, the case for SOE provision of this service, as opposed to its funding, has not been made clear. In light of other issues reported with the performance of SOEs, it may be that private provision of these services would be preferable.

Question 61: Is it desirable for NICTA and the ICCC to continue operating as separate agencies or should their functions be consolidated in a single agency?

Question 62: What reforms to ICT industry regulation would be beneficial for ICT providers or ICT consumers?

III. COMPETITIVE ENVIRONMENT FOR BUSINESS

The Terms of Reference seek recommendations "to promote competitive and productive markets throughout the economy, including by identifying and removing impediments to competition that are not in the long term public interest."

In developing economies, competition policy and law cannot be based on an assumption that markets are already competitive, and aim merely to preserve existing levels of competition. Competition policy for a developing economy must aim to encourage the emergence of competition in markets that are not yet competitive. Many markets in Papua New Guinea might not yet be competitive because potential suppliers do not perceive an opportunity to earn profits or face barriers to entering those markets.

The Private Sector Survey conducted by the Institute of National Affairs (INA), most recently in 2012, asked business respondents to rate the impacts

⁴⁷ International Telecommunications Union, ICT Statistics database: <<http://www.itu.int/en/ITU-D/Statistics/Pages/default.aspx>>.

⁴⁸ NICTA, *Recommendation Report: A report to the Minister recommending the introduction of a retail service determination*, September 2012.

⁴⁹ NICTA, *Decision and Inquiry Report In relation to NICTA's consideration of the potential declaration of certain wholesale mobile telecommunications services*, 29th April 2014.

of a range of commonly cited issues. The INA found that:

*'[L]aw and order' problems are considered the most problematic issue and a major hindrance to businesses and investment. Following closely behind, businesses indicated that the next two major rated hindrances are 'corruption' and the 'state of transport infrastructure'. The (poor) state of electricity infrastructure came next, followed closely by availability of skilled labour and, in turn, by the 'state of telecommunications infrastructure' and 'political uncertainty on the stability of rules and regulations.'*⁵⁰

Issues of these kinds cannot be solved by competition law, though it might play some part in the overall mix of solutions. For competition policy purposes, however, it is essential to recognise that competition is unlikely to emerge and develop unless and until the major hindrances to business and investment have been overcome or significantly diminished.

Businesspeople around the world face a variety of challenges in starting, maintaining and expanding their businesses. Particular challenges to doing business normally become a focus of competition policy or law only where a particular barrier or impediment to competition can be identified.

"Impediments to competition" are considered below in three categories: (i) strategic conduct by rival businesses; (ii) delay and uncertainty in government processes; (iii) legislative restrictions.

A. Strategic conduct by rivals as an impediment to competition

The fact that a market does not appeal to a businessperson who sees no opportunity for profit does not normally engage competition policy, unless there is a particular impediment to competition that makes it unprofitable.

Apart from restrictive legislation, or administrative delay or uncertainty, businesses in Papua New Guinea might be deterred by various kinds of "strategic conduct" by other businesses that could prevent or limit competition. For example:

- A business proposing to enter a new market might expect that the current single supplier to the market would drop prices so low that the new business could not survive in that market.
- A new business needing access to a major piece of industrial infrastructure might be told by the infrastructure owner that "access is not available" except to companies who are affiliated with the owner.
- A new business requiring just one good or service might be forced to buy a bundle of goods or services, rather than just the one it needs.
- A new business that needs a particular raw material might be willing to pay a reasonable price for it but be told by the supplier that it

⁵⁰ Institute of National Affairs *The Business and Investment Environment in Papua New Guinea in 2012: Private Sector Perspective* (Discussion Paper No. 94, August 2013).

refuses to supply that material.

- A new business that needs a certain service might be willing to pay a reasonable price for it but be told: “there are only a few of us who can provide that service and we have all agreed not to sell it for a price less than Kina x”.

In general, the ICCA Act appears to prohibit economically objectionable kinds of strategic conduct, though there is scope for simplification of those prohibitions (as discussed in Part II, above).

Question 63: Are the existing conduct rules under the ICCA Act adequate to protect competitive entry to markets? If not, in what respect do they fall short?

Question 64: Have you encountered in business any “strategic conduct” by your rivals that has made it difficult for you to enter a market or expand your business? If so, what kinds of conduct? (Please do not identify any other person or business -- simply describe the kind of problem your business experienced.)

B. Administrative delay or uncertainty as an impediment to competition

Entrepreneurs seeking to enter a new market or expand their operations within an existing market will often require various permits, approvals or consents from government agencies. Entrepreneurs may also be concerned that the rules they will work under in the relevant market will in future be sufficiently stable to allow predictability in the conditions of their business. If government departments or agencies are slow in performing their functions or exercise their powers in unpredictable ways, entrepreneurs may be deterred from competing in the relevant market.

An ADB publication in 2015 observed that:⁵¹

Businesses are concerned that certain legislation adversely impacts and is detrimental to competition in various areas, and that administrative procedures impede businesses from entering and expanding in markets.

In preliminary consultations, businesspeople have identified to the Review Team certain features of the business environment in Papua New Guinea that they consider as constraints on competition. These include:

- Perceived lack of certainty in titles to real property;
- Costs of securing personnel and assets against the risk of criminal harm;⁵²
- Perceived slowness in the administrative processes of certain Government departments and agencies (e.g. in issuing permits); and

⁵¹ Asian Development Bank *Building a Dynamic Pacific Economy: Strengthening the Private Sector in Papua New Guinea* (2015) p 7.

⁵² See S Lakhani and AM Willman Gates, *Hired Guns and Mistrust: Business Unusual – The Cost of Crime and Violence to Businesses in PNG* (World Bank Research and Dialogue Series, May 2014).

- Perceived high cost and poor reliability of some public services (e.g. electricity supply).

It appears that the Government of PNG has recognised the potential impact of administrative delay or uncertainty on PNG businesses: the objectives of the National Working Group on Improving Business and Investment Climate include identifying impediments to business and investment that arise from (among other possible sources) “the activities of the public service”. This is a commendable initiative (and is discussed in more detail in Part III E, below).

Question 65: Is the ability of your business to compete limited by any issues in public administration?

Question 66: What kinds of changes in Government departments or agencies would make it easier for businesses to compete and expand?

C. Legislative restrictions that impede competition

An entrepreneur might identify a new market as potentially a profitable one to supply but be prevented from supplying it by legislation or by regulations made under legislation (for example, a requirement for a permit from Government, or an approval by a Minister).

Such restrictions might restrict competition but serve some other important public objective. Alternatively, such restrictions might restrict competition unnecessarily.

Often restrictions have the effect of limiting who participates in the market, or what they can do, or the standard of the product they can provide. Restrictions can take many forms, including:

- import restrictions, such as bans, tariffs and ‘anti-dumping’ measures;
- local content requirements;
- obligations to employ local labour;
- ‘single desk’ arrangements for the export of goods;
- restrictions on where certain products can be sold;
- restrictions on who can provide certain products or services;
- standards that goods must meet (design, safety, labelling, etc.);
- restrictions arising from the granting of intellectual property rights;
- restrictions on land sale and use (planning, zoning and development laws); and
- restrictions aimed against the risk of terrorist activity.

It is beyond the scope of the present Review to identify and evaluate every legislative restriction on competition. The Review Team aims, however, to understand the kinds of legislative restrictions that seriously impede competition in markets in PNG, as a basis for recommendations for future action to identify, assess, and remove or reduce legislative restrictions in

general.

The ICCC currently comments on legislation and regulation that it considers to be anti-competitive. Consideration should be given to formalising that role under sections 7 and 8 of the ICCC Act.

Question 67: Are there any features of legislation or regulation in PNG that you consider to unnecessarily limit the ability of your business (or others) to compete? Please provide details.

D. Economic Empowerment of Women

Several factors appear to restrict the ability of women in PNG to participate in the economy as producers, traders and employees. Competition policy and law can play a part in reducing the barriers to women's participation in the economy. Improving the ability of women to participate in the economy will promote competition and economic welfare.

First, a range of laws, policies and administrative practices may restrict the ability of women to participate in the economy as producers, traders and employees. For example, laws restricting the kinds of employment women can undertake, and bank lending policies that disfavour women borrowers (who often are less experienced in business) may be based on legitimate objectives but be more restrictive than is necessary. The advisory role of the ICCC will be important in such cases (see Part III H, below).

Secondly, anti-competitive conduct involving collusion or misuse of market power might weigh heavily on women in markets where women comprise the majority of small traders. For example, cartel conduct in a distribution network could have a serious impact on small fishing or agri-business enterprises. Small and micro-enterprises, including those run by women, can benefit from the ICCC's vigilance against infringements and from access to the ICCC as complainants.

Thirdly, women in general possibly may be less inclined than men to make a formal complaint. If so, the explanation may lie in cultural factors or lesser awareness of how to make a complaint or to whom a complaint should be directed. In PNG the majority of consumer complaints are made by men and virtually all competition complaints are made by companies. It is likely, however, that women in PNG are being adversely affected by anti-competitive conduct and hence would be entitled to raise competition complaints with the ICCC. Already the ICCC endeavours to inform and build awareness among members of the public (e.g. by joining radio broadcasts) and these efforts could include expanded outreach to women's groups.

Fourthly, it is important that competition enforcement should not inadvertently restrict women's economic participation. For example, the cooperatives and collectives in which women are often involved as small land holders should not bear the burden of authorisation for their normal trading activities. A possible exemption for joint buying and promotion could apply generally, including to groups that include women or are made up wholly of women (see, 'collaborative activity' discussion and questions in Part II B 'Other exemptions', above.)

Question 68: Are there particular laws or policies or administrative practices that affect women more than men as barriers to participating in the economy?

Question 69: Are there particular business practices that affect women more than men as barriers to participating in the economy?

Question 70: What could be done to assist women who have reason to complain about anti-competitive conduct to raise their complaint with the ICCC?

Question 71: Should the ICCC do more to raise awareness of the law and complaints process among women and women's groups? If so, what strategies and networks should the ICCC use to raise awareness?

Question 72: Do women in PNG have particular concerns regarding the ICCC Act or competition in general?

E. The National Working Group on Improving Business and Investment Climate

The National Working Group on Improving Business and Investment Climate (NWGIBIC) is a significant joint initiative of the Government and the private sector, with the objectives:⁵³

- To identify impediments to business operations and barriers to investment arising from laws and regulations and the activities of the public service;
- To contribute to tangible economic reforms leading to quantifiable impact for PNG economy; and
- To propose recommendations to the National Executive Council on how to remove these impediments to improve business and investment climate.

Achievement of these objectives would be likely to promote competition in Papua New Guinea. Since it was revamped in November 2011,⁵⁴ with a permanent secretariat established in 2012, the attention of the National Working Group has been drawn to a range of impediments to business, particularised in its periodic reports.

Because the emergence of competition in developing economies depends as much on the removal of impediments to competition as the introduction of laws to uphold competition, it appears to the Review Team that the National Working Group could in future play an important role.

Question 73: Do you consider the NWGIBIC has been effective in improving business and the investment climate? Why or why not?

⁵³ National Working Group on Improving Business and Investment Climate, Terms of Reference, clause 1.

⁵⁴ The National Working Group, formerly known as the National Working Group on Removing Impediments to Business and Investment, was established in 2003 to promote economic growth through increased exports and an improved climate for business and investment.

Question 74: What should be done to increase the ability of the NWGIBIC to have a positive impact on business and investment in Papua New Guinea?

Question 75: What other initiatives or actions are desirable to remove impediments to business operations or barriers to investment?

F. Competitive Neutrality

Competitive neutrality is essential for effective competition in markets. Where a government provides services in a market, allowing actual or potential competition from a private sector provider, it should do so on an equal footing, i.e. there should be a level playing field. Government business activities should not enjoy a competitive advantage over their private sector competitors simply because they are state-owned.

Recognizing and applying the principle of competitive neutrality is particularly important in PNG, given the significant role that SOEs currently play in the economy. Lack of competitive neutrality is likely to result in misallocation of the economy's resources and distortion of competitive processes. These are serious economic costs that should be avoided, except where a compelling justification for incurring them can be shown.

No formal competitive neutrality framework is in place in PNG at present. There is no SOE policy that sets out competitive neutrality principles or rules.⁵⁵ Relevant legislation does not require competitive neutrality.⁵⁶ Competitive neutrality is addressed in regulatory contracts by the ring-fencing of regulated services from non-regulated services.⁵⁷

Various options are open at this stage for giving effect to competitive neutrality in PNG:

- (1) continuing development of competitive neutrality through dialogue within Government and SOEs and liaison with donors;
- (2) development of a formal SOE policy that sets out competitive neutrality principles and rules;
- (3) development of a formal SOE policy that sets out competitive neutrality principles and rules, plus a mechanism for monitoring compliance and investigating and resolving complaints, and with guidelines to assist the interpretation and application of the competitive neutrality principles and rules;
- (4) introducing a legal framework under the ICCA Act similar to the court-enforceable rules against "state aid" under the EU Treaty.

Option (1) appears prone to delay and unlikely to succeed in the short term.

⁵⁵ See Government of Papua New Guinea, Ministry of Public Enterprises and State Investments, White Paper on State Ownership and Participation in Commercial Activities (2014); ADB, *Building a Dynamic Pacific Economy: Strengthening the Private Sector in Papua New Guinea* (2015).

⁵⁶ See eg *Independent Public Business Corporation of Papua New Guinea Act 2002* (PNG); *Independent Public Business Corporation of Papua New Guinea (Kumul Consolidated Holdings) (Amendment) Act 2015* (PNG).

⁵⁷ See eg Draft PNG Ports Regulatory Contract (2015) cl 9.1.

Option (2) would be helpful but may achieve little unless backed by compliance and complaints handling mechanisms. Option (3) would include compliance and complaints handling mechanisms but competitive neutrality principles and rules would not be enforceable by court action and that may hinder their efficacy. Option (4) would make competitive neutrality principles and rules court-enforceable but this approach would place additional demands on the ICCC and the courts and may be premature. Perhaps the best option is Option (3).

Question 76: Is the lack of a formal competitive neutrality framework in PNG a significant issue?

Question 77: Should competitive neutrality in PNG be promoted by one of the possible options identified above or a different option? (Please indicate the option preferred and why.)

Question 78: Do you have any further comments regarding competitive neutrality?

G. Third Party Access to Facilities

In some countries, laws against “monopolization” or the misuse of market power have been used to require the owners of “essential facilities”⁵⁸ to provide other parties with access to those facilities, on reasonable terms. Such cases may be based on a finding that the refusal to share access with third parties amounts to a misuse of market power, contrary to the law.

In many countries, third parties’ access to important infrastructure is regulated under laws that apply specifically to a particular facility (e.g. legislation for sharing of pipelines or telecommunications infrastructure). In Australia, a set of laws has been enacted to govern third parties’ access to facilities in general (Part IIIA of the *Competition and Consumer Act* (Cth)). Such laws support the sharing of key infrastructure assets by reducing parties’ need to rely on courts to determine the various commercial access terms that are involved in sharing access to infrastructure.

Mandated shared access to infrastructure facilities can promote competition but can also reduce incentives for investment in infrastructure, if applied without careful regard to economic efficiency.

Section 58 of the ICCC Act has not yet been invoked by a party seeking access to a facility in Papua New Guinea but such a case would appear to be possible.

The Review Team seeks comments on whether there is a need for laws to support businesses seeking access to “essential facilities” in Papua New Guinea and, if so, where responsibility should be placed for determining terms and conditions of access.

Question 79: Is competition in any market in PNG limited because

⁵⁸ In United States law, an “essential facility” has several elements: control of the facility by a monopolist; inability of competitors to duplicate the facility; feasibility of providing the facility to competitors; and absence of regulatory oversight of the facility.

of refusal to share infrastructure facilities?

Question 8o: Would competition in PNG markets be increased if the ICCC was able to determine a regulatory contract requiring a facility to be shared on specified terms and conditions and at specified charges?

H. Competition Impact Assessment

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.

The ICCC Act recognises that the ICCC can play a useful advisory role. The functions of the ICCC include:⁵⁹

- (g) to advise and make recommendations to the Minister in relation to any matter referred to the Commission by the Minister; and*
- (h) to advise and make recommendations to the Minister with respect to any matter connected with the Act or with respect to any matter connected to any other Act which confers functions on the Commission;...*

Overseas, other competition agencies have wider advisory functions, with the aim of assisting Ministers to consider fully the effects of proposed laws and decisions on competition in their economies. In the United Kingdom, for example, the Competition and Markets Authority (**CMA**) has the function of making proposals or giving information or advice to any Minister or other public authority, including on any law or change to the law. The CMA may carry out this function by making a recommendation to the Minister about the potential effect a legislative proposal could have in any market for goods or services in the UK.⁶⁰

Similar functions could be added to the ICCC's existing functions in PNG. While an expanded advisory role for the ICCC would place a further demand on its resources, the economic benefit from decision-makers having access to an expert view on competition implications could be significant.

The ICCC is authorised to undertake "productivity inquiries" at the request of the Minister or Parliament, or where the ICCC considers it necessary or desirable.⁶¹ To date, the ICCC has advised Government on various economic reforms relating to housing and real estate⁶², coastal shipping, airlines, tourism, and the general insurance industry. Productivity inquiry reports are

⁵⁹ ICCC Act s 6.

⁶⁰ *Enterprise Act 2002* (UK) s 7 (as amended by s 37 of the Small Business, Enterprise and Employment Act 2015 (UK)).

⁶¹ ICCC Act s 122.

⁶² The ICCC's report on housing and real estate is available at: <<http://www.iccc.gov.pg/index.php/about-us/inquiry-reports>>.

available publicly. Productivity inquiry reports may recommend new regulation or de-regulation, or provide recommendations about how to improve the performance of an industry sector.

In Australia, the recent Competition Policy Review suggested that market studies be undertaken by an independent body,⁶³ because the competition agency might tend to recommend regulation to expand its own role or might bring pre-conceived views to its studies. In PNG, however, competition expertise currently is concentrated in the ICCC and it would be costly to build capacity in another body to undertake this role.

Question 81: Is the ICCC the appropriate body to undertake productivity inquiries?

Question 82: What benefits have arisen from the productivity inquiries undertaken to date?

Question 83: Should the advisory role of the ICCC be expanded to include advising any Minister (not solely the Minister for Treasury); advising other agencies (not just the Minister); advising on the ICCC's own initiative (not just on request); and making its own proposals (not just responding to proposals)?

IV. CALL FOR SUBMISSIONS

The Consumer and Competition Framework Review is concerned to understand the needs of PNG consumers and businesses, and how the current laws and institutions could be improved to ensure that the needs of consumers and businesses are met.

Your comments on matters raised in this Issues Paper and other related matters are welcomed.

Please provide comments to the Review Team, by 5:00pm on **Monday 16 May 2016** at:

telephone: +675 321 0400 (please ask for 'the Competition Review')

email: comment@CCFReview.info

website: www.CCFReview.info

⁶³

Australian Government *Competition Policy Review: Final report*, (March 2015) p. 77.