



Consumer and Competition Framework Review: Final Report and Recommendations

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prepared for

The Department of Treasury, PNG Government

by

The Review Team, Consumer and Competition Framework Review

CONSUMER AND COMPETITION FRAMEWORK REVIEW: FINAL REPORT AND RECOMMENDATIONS

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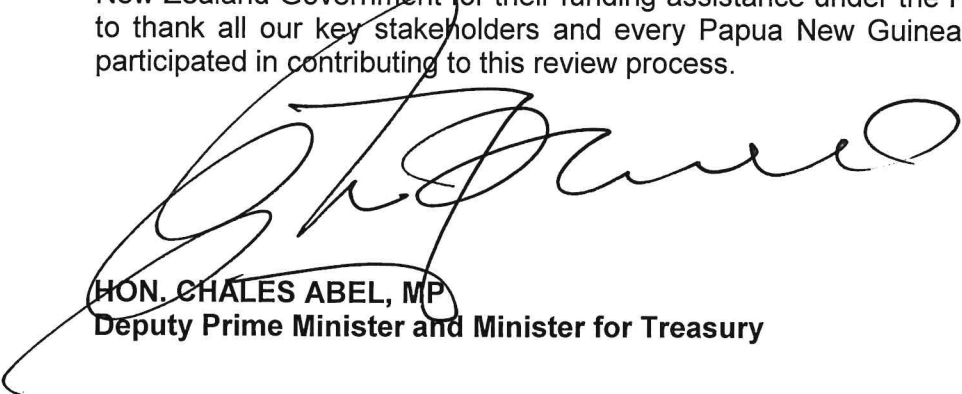
Many things have changed in Papua New Guinea's competition and consumer protection environment since the *Independent Consumer and Competition Commission (ICCC) Act* was passed by Parliament in 2002. Apparently, technologies have evolved and advanced in ways that completely changed the landscape in which businesses conduct themselves these days. New business ideas and models have emerged in marketing, sales, production, acquisitions, mergers, and even legislative amendments on business operating environments. Regrettably, PNG has progressed in the last 15 years without any attempt to review the consumer protection and competition laws, including the processes involved in administering these laws consistent with these changes.

Having recognized this problem, in 2014 the O'Neill-Dion Government through my Ministry, sanctioned the Consumer and Competition Framework Review (CCFR) to provide an assessment of whether existing laws appropriately protect consumers and the competitive process and whether current legislative provisions and institutional arrangements are functioning as intended in light of actual experiences and precedents. This report is the outcome of that review, and therefore contains key reform recommendations for the Government's considerations and approval.

The success of the review process indicates that our Government remains strongly committed with the view that effective consumer protection and competition laws will enable both consumers and traders to participate in the marketplace with confidence and contribute to a trading environment in which businesses can compete in a fair and effective way. On one end, our domestic consumers will become well educated and remain well informed of their rights as consumers in terms of product safety/standards, as well as what steps to take, and where to seek support in response to misleading and abusive conducts by businesses. On the other end our business will thrive within an even playing field where markets become more efficient in allocating resources to their best uses, reducing cost of production, and improving innovation of products and methods of production.

The CCFR was led by the Department of Treasury with technical assistance provided by the Asian Development Bank (ADB) through its Pacific Private Sector Development Initiative (PSDI). However, the success of this review process would not have been possible without the contributions or inputs and support from our key stakeholders, including the general public.

On behalf of the Government of Papua New Guinea, I would like to thank the hard working review team for completing this comprehensive and timely report. I would also like to thank ADB for the technical support provided in the review process as well as both the Australian and New Zealand Government for their funding assistance under the PSDI. And finally, I would like to thank all our key stakeholders and every Papua New Guineans who have in some ways participated in contributing to this review process.



HON. CHALES ABEL, MP
Deputy Prime Minister and Minister for Treasury

EXECUTIVE SUMMARY

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

Fifteen 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 has therefore determined to conduct a comprehensive review of the consumer protection and competition framework, to ensure it meets the needs of the public and businesses.

The Review’s proposed recommendations are set out at in the **List of Recommendations**, in the following section.

Part I of this Final Report sets out the background to the Consumer and Competition Framework Review, which the Department of Treasury engaged a panel of independent experts (the **Review Team**) to undertake.

Part II of this Final Report explores issues in the protection of consumers in PNG and makes recommendations for the improvement of the existing consumer protection regime.

Part III of this Final Report proposes a National Competition Policy for PNG and modernisation of existing competition laws under the ICCC Act.

Part IV of this Final Report examines the contribution that consumer protection and competition law can make to the economic empowerment of women, as consumers, employees and entrepreneurs.

Part V of this Final Report examines the regulatory contracts framework that applies to the providers of ports, electricity, third-party motor vehicle insurance and postal services and makes recommendations for better regulation of those sectors.

Part VI of this Final Report explores the price control and price monitoring measures that operate under the Price Regulation Act and makes recommendations for the more targeted application of these measures.

Part VII of this Final Report considers selected features of the business environment that affect the ability of PNG businesses to compete regionally and internationally, and makes or endorses recommendations

for improvement of those features.

In the course of undertaking the Consumer and Competition Framework Review, the Review Team¹ has met and spoken with many businesspeople, consumers and public servants in PNG. The Review Team has endeavoured to consult broadly, including by means of:

- the project website (www.CCFReview.info)
- three public Issues Papers, circulated for comments
- eight public workshops held in Port Moresby, Lae, Kokopo and Goroka
- consumer focus group discussions (coordinated by the Institute for National Affairs) in National Capital District, Lae, Mount Hagen, Alotau, Kokopo and Wewak.

The Review Team would like to thank all those who have contributed their time and comments to the Review. The Review Team also appreciates the support and cooperation provided throughout the Review by the Department of Treasury and the Independent Consumer and Competition Commission.

This document sets out the Review Team's Final Report and Recommendations to Treasury.

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.

LIST OF RECOMMENDATIONS

II. CONSUMER PROTECTION

B. Consumers' Awareness of Rights and Access to Assistance

Recommendation 1: The ICCC should step up its efforts to promote awareness among businesspeople and consumers of the ICCC's role and how to access the ICCC.

Recommendation 2: The ICCC should take steps to raise awareness of consumer rights at village, district and local government levels, including by the establishment of a Consumer Liaison Unit within the ICCC.

Recommendation 3: The ICCC Act should be amended to enable codes of practice to be recognised and promulgated under the Act.

C. Product Safety and Standards

Recommendation 4: Traders in all sectors (including those bound by a code or standards applicable to their particular industry or products) should be bound to comply with statutory fair trading provisions and consumer guarantees of general application.

Recommendation 5: The ICCC and Department of Health should work to achieve better coordination of their efforts to protect consumers, including by giving effect to a Memorandum of Understanding regarding their respective roles and cooperation between them.

D. Product Information

Recommendation 6: All products sold by traders should be labelled with sufficient information to inform consumers of the essential characteristics of the product, so consumers can make informed choices.

Recommendation 7: Products must be labelled in at least one of the official languages of PNG – English, Tok Pisin or Hiri Motu.

Recommendation 8: The Packaging Act should be updated and consolidated with other consumer protection provisions, either in

the Trade Measurements Act or in a revised ICCC Act.

E. Misleading or Deceptive Conduct

Recommendation 9: The CAPP Act should be repealed.

Recommendation 10: The ICCC Act should be amended to prohibit conduct in trade that is misleading or deceptive.

Recommendation 11: The ICCC Act should be amended to give courts the power to require a trader to prove the truth of an assertion that is allegedly misleading, deceptive or false.

Recommendation 12: The ICCC Act should be amended to give the ICCC the power to bring a "representative action" on behalf of parties who have suffered loss.

Recommendation 13: In civil proceedings it should not be necessary to prove intention to mislead or deceive, or to act unfairly, on the part of traders.

Recommendation 14: The rule against misleading or deceptive conduct should be explained and clarified by means of ICCC guidelines that include worked examples.

Recommendation 15: Traders should not be allowed to "contract out" of the rules against misleading or deceptive conduct or false or misleading representations in their contracts with consumers.

F. Unfair Conduct

Recommendation 16: The ICCC Act should be amended to prohibit pyramid schemes, bait advertising and coercion or harassment of consumers by traders.

Recommendation 17: The ICCC should have the power to bring proceedings against traders in respect of pyramid schemes, bait advertising, coercion and harassment of consumers.

Recommendation 18: The ICCC Act should be amended to make uninvited direct sales subject to strict disclosure requirements and cooling-off periods.

Recommendation 19: The ICCC Act should be amended to provide that, where unsolicited goods and services are delivered to

recipients, recipients are not obliged to pay for them, and may treat them as a gift after a fixed time (e.g. 14 days) has passed.

Recommendation 20: The Fairness of Transactions Act 1993 should be amended to give the ICCC power to bring proceedings on a representative basis on behalf of parties that may have been treated unfairly.

Recommendation 21: The Fairness of Transactions Act should be modernized in light of more recent overseas consumer protection legislation on unfair contracts.

G Consumer Guarantees

Recommendation 22: Consumer guarantees should apply to consumer transactions concerning goods, including sales of goods, hire and hire purchase transactions, and gifts provided by traders.

Recommendation 23: Consumer guarantees in respect of goods should include guarantees relating to title, quality and fitness for purpose, and correspondence with description or sample.

Recommendation 24: Consumer guarantees relating to quality of goods should apply to the manufacturer or the importer of goods, as well as to the retailer.

Recommendation 25: Consumer guarantees should apply to services supplied by traders to consumers.

Recommendation 26: Consumer guarantees in respect of services should include guarantees of reasonable care and skill, fitness for purpose, price, and timeliness.

Recommendation 27: Consumers and small businesses should be able to enforce consumer guarantees against traders who breach them.

Recommendation 28: Traders should not be allowed to “contract out” of the consumer guarantees.

H. Weights and Measures

Recommendation 29: The review of the NISIT Act should be completed at the earliest opportunity and NISIT and the ICCC should work to enhance their communication and cooperation (e.g.

by agreeing an MOU between them).

Recommendation 30: The Bread Act should be reviewed and consolidated with the Trade Measurement Act or revised ICCC Act.

Recommendation 31: The Trade Measurement Act 1973 should be amended to require uniform use of the metric system for consumer transactions.

Recommendation 32: The Trade Measurement Act should be reviewed and modernised to achieve harmony with revised consumer protection laws.

I. Remedies, Sanctions and Enforcement

Recommendation 33: The ICCC should not have adjudicative powers in consumer disputes but should be focused on investigative and prosecutorial roles.

Recommendation 34: The power of the ICCC under s 132 to prosecute offences under the ICCC Act with the approval of the Public Prosecutor should be extended to offences and civil infringements relating to consumer protection under PNG legislation generally.

Recommendation 35: The ICCC should be empowered to bring civil enforcement actions for remedies against breaches of the ICCC Act.

Recommendation 36: The ICCC should be empowered to bring "representative actions" on behalf of consumers.

Recommendation 37: The ICCC should be empowered to issue "infringement notices" alerting recipients that they will be liable to prosecution or civil penalties if they do not take immediate steps to end unlawful conduct.

Recommendation 38: Amendments to the ICCC Act should give the courts a full range of powers in consumer protection cases, including the powers to: impose fines, issue injunctions to prevent wrongful conduct; order compensation; order corrective advertising; and require substantiation of claims in advertising.

Recommendation 39: the levels of maximum penalties provided for offences against consumers should be examined and brought into line with contemporary levels for comparable offences.

Recommendation 40: Traders should be encouraged and assisted by the ICCC to respond to the new legislation by adopting procedures for dealing with consumers' complaints.

Recommendation 41: The judicial process for dealing with consumer issues should be simple, inexpensive and quick, and legal representation should not be required.

Recommendation 42: It is unnecessary to establish any new forum to enable the enforcement of consumers' rights (but traders are free to establish their own procedures or fora for consumer assistance).

Recommendation 43: The ICCC should encourage and assist in the development of dispute resolution capability and knowledge of consumer protection principles at a local level.

Recommendation 44: Access to local dispute resolution (such as village magistrates) should be an option for consumers and traders for dealing with disputes.

Recommendation 45: Village Magistrates should receive training by suitably qualified government appointees to enable them to resolve consumer disputes in accordance with "substantial justice," whether by way of enquiry, mediation or adjudication.

Recommendation 46: Jurisdiction should be expressly conferred on Village Courts to determine consumer protection issues, in accordance with their monetary limits, following the delivery of appropriate training for Village Magistrates.

Recommendation 47: The Government should commit resources to the revitalisation of Village Courts, including by the measures proposed in the White Paper on Law and Justice in Papua New Guinea.

Recommendation 48: Both Village Courts and District Courts should expressly be given jurisdiction to exercise powers under consumer protection legislation.

Recommendation 49: Parties to consumer disputes should be empowered to waive the monetary limits of the District Court if they agree to do so.

Recommendation 50: District Court Magistrates should be given

the power to deal with disputes under consumer protection legislation using the flexible and informal procedure provided in the Village Courts Act 1989.

Recommendation 51: District Court Magistrates should, when acting under the Village Courts Act procedure, act within the financial limit of the District Court, not the Village Court.

J. Particular Industries and Markets

Recommendation 52: Plain-language prohibitions against unfair consumer credit practices that are prevalent in PNG and that are likely to have significant adverse effects on consumers should be developed, as part of the reform of financial sector regulation in PNG.

Recommendation 53: "Financial services" should not be exempted from PNG's general consumer protection laws.

Recommendation 54: The ICCC should develop materials for the education and guidance of online consumers.

Recommendation 55: The ICCC should, following commencement of a prohibition on misleading or deceptive conduct, develop guidelines regarding the application of the prohibition in the context of real estate and residential building transactions.

Recommendation 56: The ICCC Act should be amended to enable the creation of mandatory codes of practice, enforceable by means of the penalties and remedies that apply to civil contraventions of the ICCC Act. The ICCC should cooperate with real estate and residential housing sector stakeholders, and consumers, to complete preparation of codes of conduct for those sectors, compliance with which should be mandatory.

K. Legislative Changes

Recommendation 57: "Consumer" should be widely defined to include companies as well as individuals.

Recommendation 58: "Goods" should be widely defined, so as to include some intangibles such as electricity, gas and computer software.

Recommendation 59: "Services" should be widely defined, so as to include services of a professional nature, as well as the provision of electricity and gas.

Recommendation 60: The concept of "in trade" should be widely defined, and aimed at encompassing those who are in business, regardless of whether they operate as individuals or by means of corporations, focussing on the substantial nature of the enterprise and its activities, rather than its form.

Recommendation 61: The Goods Act 1951 should be amended to provide that the conditions and warranties implied into contracts for sales of goods are replaced, in the case of consumer sales, with new consumer guarantees.

Recommendation 62: The provisions in s 11 of the Hire Purchase Act 1966, which imply certain warranties and conditions into hire purchase contracts, and s 12, which relate to false statements and misrepresentations, should be replaced by the new consumer guarantees and the new fair trading regime, respectively.

Recommendation 63: Provisions in the Bread Act 1974 that assist in protecting consumers should be incorporated in the Trade Measurement Act and the Bread Act should be repealed.

Recommendation 64: The Commercial Advertisement (Protection of the Public) Act 1976 should be repealed given the proposed coverage of misleading advertising by amendments to the ICCA Act on misleading or deceptive conduct and false or misleading representations.

Recommendation 65: Product information and consumer protection provisions in the Packaging Act 1974 should be included in amendments to the ICCA Act and the Packaging Act 1974 should be repealed.

Recommendation 66: The Trading Act 1949 should be repealed, upon implementation of the proposed amendments to the ICCA Act relating to consumer protection rules.

Recommendation 67: The Motor Car Dealers Act 1976 should be reviewed and amended to harmonize provisions aimed at protecting consumers with proposed amendments to the ICCA Act, e.g. regarding misleading conduct and consumer guarantees.

III. COMPETITION POLICY AND LAW

B. A National Competition Policy for PNG

Recommendation 68: A National Competition Policy for PNG should be formulated and introduced, following public consultation on a draft version.

Recommendation 69: The statement of objectives in ICCC Act section 5 should be recast as a statutory objects provision that applies generally to the interpretation and application of the Act, including by the courts.

Recommendation 70: The word "availability" should be inserted before the words "price, quality and reliability of significant goods and services" in ICCC Act section 5(1)(c).

Recommendation 71: The reference to "welfare" in ICCC Act section 5(1) should be clarified by inserting the word "total" to make it clear that total welfare is relevant, not merely the more limited standard of consumer welfare.

C. Competitive Conduct Rules

Recommendation 72: The ICCC Act should be modernized, including by simplifying the provisions as far as practicable and removing repetition wherever possible.

Recommendation 73: Section 51 (restrictive covenants) is unnecessary and should be repealed.

Recommendation 74: The meaning of "substantial" in the substantial lessening of competition test should be clarified by ICCC guidelines that include worked examples.

Recommendation 75: A rule of reason defence should be introduced to exclude liability in cases of alleged anti-competitive agreements where a defendant can prove that the anti-competitive effect of a provision in an agreement is outweighed by its efficiency or other pro-competitive gain. ICCC Guidelines should be issued to explain and illustrate the application of this defence.

Recommendation 76: The term "market" in ICCC Act section 45(2) should not be limited to one national market in PNG but should provide for the possibility of sub-national geographic markets, in

parts of PNG. The term "market" should be defined to require that the market be "substantial" in the sense of having an annual minimum volume of commerce.

Recommendation 77: ICCC Act section 52 should be amended by repealing the term "exclusionary provision" and substituting the term "cartel provision".

Recommendation 78: A "cartel provision" should 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.

Recommendation 79: Certain kinds of restrictions on supply or acquisition that are agreed between competitors should be exempted, including: a collaborative activity exemption; a collective bargaining exemption; and an exemption for vertical supply agreements between competitors.

Recommendation 80: ICCC Act section 53 should be amended to make it clear that the legally relevant test for the "controlling" of a price 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.

Recommendation 81: A specific prohibition against bid-rigging should be introduced to the ICCC Act.

Recommendation 82: ICCC Act sections 51 and 57 (restrictive covenants) are unnecessary and should be repealed.

Recommendation 83: ICCC Act section 55 (exempting recommendations on price where there are 50 or more parties to the contract, arrangement or understanding containing the recommendation) should be repealed.

Recommendation 84: ICCC Act section 58 should be redefined as a prohibition against unlawful exclusionary conduct, with these key elements:

- (a) "exclusionary conduct", as defined in the Act, by a corporation with substantial market power*
- (b) exclusionary conduct that has a SLC effect or likely effect;*

- and*
- (c) a rule of reason defence to exclude liability where a defendant can prove that the anti-competitive effect of the exclusionary conduct is outweighed by its efficiency or other pro-competitive gain.*

Recommendation 85: There should be detailed ICCC Guidelines, including worked examples, to explain and clarify how the redefined section 58 prohibition on exclusionary conduct applies to different kinds of conduct.

Recommendation 86: The Fairness of Transactions Act should be amended by adding a power for the ICCC to initiate mediation under the Act and to bring proceedings on a representative basis on behalf of parties that may have been treated unfairly.

Recommendation 87: The ICCC Act should be amended to include a prohibition against unconscionable conduct.

Recommendation 88: ICCC Act sections 60 and 63 are unnecessary and should be repealed. Sections 59, 61 and 62 should be simplified.

Recommendation 89: The prohibition against RPM should be retained. It should not be subject to a SLC or rule of reason test.

Recommendation 90: The prohibition against RPM should be subject to a "loss leader" exception.

Recommendation 91: ICCC Act section 47(1) should be amended to read: "...extends to conduct engaged in outside PNG by any person to the extent that such conduct affects trade or a market in PNG".

Recommendation 92: Authorization should be available for price fixing and misuse of market power, if the public benefit test is fulfilled.

Recommendation 93: The ICCC Act should be amended to provide for interim authorization.

Recommendation 94: On an application for authorization, the ICCC should be empowered to grant a clearance for conduct, if the ICCC considers that there is no SLC and no likely SLC.

Recommendation 95: ICCC Act section 74 should be amended to

require that conduct in breach of the Act unless authorised should not be engaged in unless authorization has been granted or, where the conduct is merely a preliminary step in a transaction, is conditional on authorization or interim authorization by the ICCC within 30 days.

Recommendation 96: The authorization process should be subject to an upper time limit of 3 months.

Recommendation 97: A collaborative activity exemption should be introduced and apply to all cartel-related prohibitions.

Recommendation 98: The joint buying and promotion exemption under ICCC Act section 56 should apply to all cartel-related prohibitions.

Recommendation 99: An exemption for genuine supply agreements between competitors should be introduced and apply to all cartel-related prohibitions.

Recommendation 100 The meaning of "specifically authorized" in section 65 should be clarified by statutory definition, e.g. "authorized by specific reference to the provisions of the ICCC Act to which the exception applies."

Recommendation 101: The exemptions under ICCC Act section 66 should be subject to the power of the ICCC to issue a 'notice of objection' requiring a specified person who is relying on a section 66 exception to apply for authorization within a specified period.

Recommendation 102: The ICCC Act section 67 exemption for certain intellectual property licensing conditions should be repealed but only if:

- (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.*

D Review of Mergers

Recommendation 103: ICCC Act sections 81 and 82 should be amended to provide the power to grant clearance or authorization on a condition, consistently with the power under section 77(2) to

grant conditional authorization under section 70.

Recommendation 104: The upper time limit for clearance by the ICCC (ICCC Act section 81(3)) should be increased to 30 days. Extension should be possible for the business days necessary to hold pre-decision conferences called under section 86 or where agreed between the ICCC and the applicant.

Recommendation 105: The processes and timelines for merger clearance and authorisation should be harmonised to the extent possible. Standard timelines should apply to authorization and interim authorization (e.g. a 3 month and 30 day upper time limit respectively). Extension should be possible for the business days necessary to hold pre-decision conferences or where agreed between the ICCC and the applicant

Recommendation 106: The ICCC Act should be amended to require mandatory pre-notification to the ICCC of mergers and acquisitions that exceed specified thresholds.

Recommendation 107: ICCC Act section 85 should be amended to allow for behavioural undertakings and structural undertakings other than undertakings relating to the disposal of assets or shares. Such undertakings should be court-enforceable. The nature and scope of such undertakings and the process governing their use should be covered in the proposed ICCC Merger Guidelines.

Recommendation 108: Provision should be made in the ICCC Act for withdrawal or amendment of an application for clearance or authorization.

Recommendation 109: The ICCC should be given the power under the ICCC Act to revoke or amend a clearance or authorization if the ICCC granted the clearance or authorization on the basis of materially false or misleading information supplied by the applicant or a third party or where there has been a material change in circumstances.

E. Investigative Powers and Procedures

Recommendation 110: ICCC Act section 6 should be amended to include, first and foremost, a specification of the major competition-related roles of the ICCC.

Recommendation 111: ICCC Act section 6 should be amended so that the ICCC is expressly empowered to initiate civil or criminal investigations and enquiries at its own discretion (e.g. without necessarily receiving a complaint) and, except where expressly legislated otherwise, to take civil or criminal enforcement action independently of any other person or authority.

Recommendation 112: ICCC Act section 132 should be amended to enable the ICCC to prosecute offences independently of the Public Prosecutor.

Recommendation 113: An ICCC "immunity policy" and a "co-operation policy" should be developed to encourage parties involved in breaches of the ICCC Act to report those quickly to the ICCC and to co-operate with ICCC investigations, with clear guidelines and structured discounts on monetary penalties available as an incentive to co-operate.

Recommendation 114: 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.

Recommendation 115: The ICCC Act should be amended so as specifically to authorise disclosure of information and provision of investigative assistance in relation to international cartel activity or other overseas conduct.

F. Remedies and Sanctions

Recommendation 116: The standard maximum penalty should be increased to K20 million and provisions should be made for an alternative maximum penalty of double the gain or double the loss likely to be caused by a breach.

Recommendation 117: ICCC Act section 93 should be amended to make it clear that a court may require a defendant to take specified precautions against repetition of a breach of the ICCC Act.

Recommendation 118: A power should be given to the ICCC to accept undertakings in relation to alleged breaches of ICCC Act Part VI (or Part VII) and to apply to the court to enforce the undertaking if the party fails to honour it.

Recommendation 119: The ban on indemnifying individuals for pecuniary penalties imposed should be extended to apply in relation to any breach of the ICCC Act.

Recommendation 120: The National Court's power to disqualify a person from participating in the management of a corporation should be extended to apply in relation to any breach of Part VI of the ICCC Act.

Recommendation 121: Admissions of fact in litigation by the ICCC, or agreed by a party in a settlement with the ICCC, should be admissible as evidence in private actions for damages or other remedies.

Recommendation 122: The limitation period on civil actions for damages should be increased to 6 years.

G. Reviews and Appeals

Recommendation 123: The "Appeals Panel" process should be extended to allow appeal from a decision of the ICCC to grant, modify or revoke a clearance or authorisation decision.

Recommendation 124: The court should have the power to appoint an expert "assessor" who can give his or her opinion on matters arising out of evidence in any ICCC Act proceeding.

IV. ECONOMIC EMPOWERMENT OF DISADVANTAGED GROUPS

B. Consumer Protection and Women Consumers

Recommendation 125: The ICCC should place emphasis on raising consumers' awareness of unfair sales tactics and 'scams' and how to avoid them.

Recommendation 126: ICCC advocacy should continue to emphasise advice to consumers on their rights and remedies.

Recommendation 127: The ICCC should make it a priority to include key women's representative bodies in its outreach activities and should report on this in its Annual Report.

Recommendation 128: The ICCC's training for investigators should cover the particular competition and consumer protection issues faced by women and ensure they can investigate women's

complaints effectively.

Recommendation 129: The ICCC should endeavour to ensure that its investigative team includes female investigators.

Recommendation 130: The ICCC should include in its consumer awareness programme advice for consumers regarding the risks associated with trading in the informal economy and sensible precautions.

C. Competition Policy and Women in Business

Recommendation 131: Gender-neutral pro-competitive reforms will be beneficial for the competitive process and for economically disadvantaged or excluded groups of people, including for women who currently are under-represented in the formal economy.

Recommendation 132: Programmes and initiatives that aim specifically to promote women's access to markets and participation in the formal economy can be expected to have a positive effect on the competitiveness of PNG's markets.

Recommendation 133: Informal economy businesses (many of which are operated by women) should have rights and recourse similar to those of consumers, in their dealings with other traders.

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.

Recommendation 137: Reforms to promote women's access to financial services are desirable not only on gender-equality grounds but also to promote competition and economic growth in PNG's domestic markets.

Recommendation 138: The ICCC should promote awareness among women consumers of the ICCC's role as a competition watchdog and contact points to raise with the ICCC possible breaches of the competition laws.

Recommendation 139: The ICCC should consider adopting as one of its strategic priorities the investigation of competition infringements that arise in markets for the goods and services on which households depend.

Recommendation 140: The ICCC should promote awareness among women business operators of the ICCC's role as a competition watchdog and contact points to raise with the ICCC possible breaches of the competition laws.

Recommendation 141: The ICCC should consider adopting as one of its strategic priorities the investigation of competition infringements that arise in markets for the goods and services on which small and micro-enterprises depend.

Recommendation 142: Exemptions for joint or collective buying and promotion, and for collaborative activities, should apply to cartel prohibitions. (See Part III, C).

D. Regulation and Economic Empowerment

Recommendation 143: The benefits of a CSO to all groups, including non-economic benefits and benefits to women, should be taken into account in costing CSOs under the CSO Policy.

V. INDUSTRY REGULATION

A. Factors in the Performance of Regulated Entities

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 146: Continuing SOE reforms should ensuring that each SOE has a clear, non-conflicting set of obligations with the overriding objective of delivering a commercial return to Government.

Recommendation 147: Legislation or regulation that reduces or prevents competition with SOEs in the provision of services should be removed.

B. Regulatory Contracts

Recommendation 148: The ICCC Act should be amended to provide for the ICCC to recover from regulated entities its direct and indirect costs (including overheads) associated with its functions in respect of regulatory contracts.

Recommendation 149: ICCC Act sections 32 – 34 should be amended to provide that the Minister may declare “regulated entities” only after an inquiry by the ICCC finding substantial market power and recommending declaration by the ICCC.

Recommendation 150: ICCC Act section 43(6) should be amended to require the Appeals Panel to decide a review within 90 days after the application is lodged.

Recommendation 151: The ICCC should explore whether and how it can increase the involvement of consumer and user groups in the regulatory contract process.

C. Ports Services

Recommendation 152: The Government should initiate a review of the ports sector, giving consideration to the feasibility of separating the ownership of the major PNG ports in order to facilitate competition between them.

Recommendation 153: The Government should ensure clarity and coherence in the objectives of PNG Ports, including by emphasis on PNG Ports’ obligation to behave commercially and maximise its profits.

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 155: ICCC Act section 35 should be amended so that specification of “pricing policies and principles” for successive regulatory contracts should be at the discretion of the ICCC.

Recommendation 156: ICCC Act section 36(6) should be amended to address the incentive to delay the implementation of a new regulatory contract by giving the ICCC the right to object to a draft contract and declare that prices under an expiring regulatory contract remain in effect until a new regulatory contract commences.

D. Electricity Services

Recommendation 157: The Government should clarify and ensure coherence of PPL's objectives, ensuring as the principal objective that PPL is required to operate as a successful business earn returns comparable to businesses not owned by the state.

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 159: The Government should consider partial or full divestiture of PPL's retail functions and the introduction of retail competition for small loads.

Recommendation 160: PPL should have more flexibility over its tariff setting and structure.

Recommendation 161: The ICCC should give consideration to alternative sanctions for PPL for not meeting service standard targets and to the relationship between the "reliability improvement fund" and asset base, so as not to inhibit PPL's ability to improve the reliability of its network.

E. Third-Party Motor Vehicle Insurance

Recommendation 162: MVTPI Act section 72 should be amended to clarify that insurers meeting the financial and technical requirements of the Act are eligible to offer CTP insurance.

Recommendation 163: The MVTPI Act should be reviewed and modernized, with consideration given to amendments to regulate service standards applying to all CTP providers.

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

Recommendation 165: The ICCC should, in the forthcoming regulatory contract review, consider using price monitoring rather than a regulatory contract to oversee the premiums charged by MVIL (and any competitors).

Recommendation 166: The Government should initiate a review of the motor vehicle insurance industry, giving consideration to the scope for increasing competition and the possible role for full or partial privatisation of MVIL.

F. Postal Services

Recommendation 167: The ICCC should keep under review whether Post PNG should continue to be regulated as a declared entity.

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 169: The Government should repeal Post PNG's statutory monopoly rights and consider partial or total privatisation of Post PNG.

G. Telecommunications

Recommendation 170: While the functions of NICTA and the ICCC overlap in relation to competition and consumer protection, and require some duplication of expertise, the Review does not recommend their consolidation in a single agency at this time.

Recommendation 171: As both competition and consumer issues arise within the respective jurisdictions of both NICTA and the ICCC both agencies must continue to work on arrangements for information sharing and cooperation between them.

VI. PRICE MONITORING AND CONTROL

C. Price Monitoring of Staple Foods

Recommendation 172: The PR Act should be amended to incorporate thresholds for declaring goods or services subject to price monitoring, such as requirements for: grounds to suspect market power; impracticality of promoting competition; and benefits of monitoring exceeding the costs.

Recommendation 173: The PR Act should be amended to require a report by the ICCC to the Minister confirming that the thresholds for declaring goods or services subject to price monitoring are satisfied, as a pre-condition for imposition of price monitoring.

Recommendation 174: Decisions of the ICCC in relation to price monitoring should be subject to review by the Appeals Panel.

D. Price Control of Water and Sewerage Charges

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

Recommendation 176: Eda Ranu and Water PNG should be regulated by regulatory contracts under the ICCC Act rather than by price control under the PR Act (with appropriate amendments to the National Water Supply and Sewerage Act 1986 and NCD Water Supply and Sewerage Act 1996). A reasonable transition period should be planned for this.

Recommendation 177: The Government should initiate a review of the water and sewerage industry, giving consideration to the possible consolidation of Eda Ranu and Water PNG Limited and the possible role of partial or full privatisation of the consolidated entity.

E. Price Control of Refined Fuels

Recommendation 178: The PR Act should be consolidated and modernised and should be amended to include economically-based thresholds for declaration of goods or services subject to price control.

Recommendation 179: The PR Act should be amended to require a report by the ICCC to the Minister confirming that the thresholds for declaring goods or services subject to price control are satisfied, as a pre-condition for imposition of price control.

Recommendation 180: Price control should only be imposed where the ICCC finds economically based thresholds (e.g. the "three criteria" test used in the EU) are satisfied.

Recommendation 181: Decisions of the ICCC regarding price control should be subject to review by an Appeals Panel. The

appeals processes under the PR Act should be harmonised with the appeals processes under the ICCC Act.

F. Public Motor Vehicle and Taxi Services

Recommendation 182: The ICCC, the Road Traffic Authority and the Police Department should jointly develop a coherent strategy for consumer protection in the PMV and taxi industry.

Recommendation 183: In place of price control over metered fares, reliance should be placed on price disclosure by PMVs and taxis of defined fares for defined routes or zones.

VII. COMPETITIVE ENVIRONMENT FOR BUSINESS

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).

Recommendation 185: The Government should initiate an independent review of the regime for titles, transfer and leasehold interests in land, including the Land Transfer Office (perhaps in conjunction with the National Lands Development Program).

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

C. Competitive Neutrality

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.

Recommendation 188: It is highly desirable that the government implement the recommendations that have been made in other contexts for: withdrawing state ownership from commercial enterprises where possible; restructuring SOEs to allow greater private sector participation; implementing the Public Private Partnership Act; giving SOEs a full commercial orientation; and ensuring community service obligations are contracted out to the

private sector and delivered on a cost-recovery basis.

D. Third Party Access

Recommendation 189: A general right of access to essential facilities should not be legislated for at the present time.

E. Competition Assessments and Competition Advocacy

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.

F. Crime and Insecurity

Recommendation 192: Improvement in law and order would be pro-competitive. The Review endorses recommendations made in other contexts toward this end.

I. BACKGROUND

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

In the 2013 National Budget, the Government stated it was "...looking at reviewing the ICCC Act in 2013 as one of its core focus to improve legislation that governs competition."² In the 2014 National Budget, the Government reaffirmed its commitment to pursue "a comprehensive national reform agenda to support greater private sector activity in 2014".² Also in the 2014 National Budget, the Government stated its commitment to undertake the present Review:

The Government has also committed to undertaking a comprehensive review of the competition policy framework, including the ICCC Act. Consumer protection goes hand in hand with competition - unethical traders who mislead and deceive consumers and reap profits should not erode the market position of ethical traders who provide good value for money. This area will form part of the review of the ICCC Act and while work on this review has commenced during 2013, implementation of any of the findings is likely to form the basis of a substantive reform agenda during 2014. The primary focus will be on ensuring PNG has an efficient and effective competition regulatory and policy regime.³

The Consumer & Competition Framework Review (**Review**) was initiated by the Department of Treasury, as a Treasury-led review, by a request to the Private Sector Development Initiative (**PSDI**) of the Asian Development Bank (**ADB**) in late 2014.

PSDI agreed to support the Review by engaging a panel of international experts in the policy, law and economics of competition and consumer protection (**Review Team**).

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

² PNG National Budget (2013), p 97.

³ PNG National Budget (2014), p 94.

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

A. SCOPE AND AIMS OF THE REVIEW

The Government attaches importance to effective consumer protection, promotion of competition and regulation of state owned enterprises. Choices by well-informed consumers drive the process of rivalry between businesses; and a competitive and dynamic private sector will drive PNG's economic growth.

In the *Terms of Reference* for the Review, the Department of Treasury has set out the objectives, scope and process for the Consumer and Competition Framework Review. 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.*⁴

B. REVIEW PROCESS

The Review Team undertook to complete the work required by the Terms of Reference, by:

- Reviewing legislation, and other publicly available written materials (cases, determinations, annual reports);
- Reviewing written materials provided on a confidential basis to the Review Team; and
- Interviewing public and private-sector stakeholders; and
- Consulting as widely as practicable with individuals and organisations across PNG.

While overseas experience in and reviews of consumer protection, competition and regulation have some relevance for PNG, and have been taken into account, the Review Team has been very much aware of the

⁴ Department of Treasury, *Terms of Reference: Consumer and Competition Framework Review* (2014), paragraphs 7 to 14.

necessity for laws, institutions and practices in PNG to be tailored to PNG's own needs, circumstances and resources. The Review Team has sought to engage with as many interested persons as possible by consulting at each stage in the Review, including by means of:

- Interviews with public sector and private sector stakeholders in Port Moresby and other regions;
- A website specific to the Review (at: www.ccfreview.info);
- Focus group discussions with consumers in large cities and small towns around PNG⁵ (with the assistance of the Institute for National Affairs);
- Advertisements and an op-ed article in national daily newspapers;
- Television interviews with regional broadcasters;
- Workshops with members of chambers of commerce, in Lae, Kokopo, Goroka and Port Moresby;
- Publication of *Issues Paper: Consumer Protection and Economic Empowerment of Women in PNG*, for public comment;
- Publication of *Second Issues Paper: Competitive Markets and Fair Trading*, for public comment;
- Publication of *Third Issues Paper: Industry Regulation and Price Oversight*, for public comment;
- Publication of this *Public Report*, for comment.

The Review Team is grateful to the many individuals and organisations who have generously contributed their time, information and opinions, at each step of the Review process.

C. EXISTING CONSUMER AND COMPETITION FRAMEWORK

This section briefly summarises the main features of the existing framework in PNG for consumer protection, competition, industry regulation and price oversight.

Consumer Protection Framework

PNG at present lacks extensive consumer protection legislation of the kind that exists in most other common law countries.

⁵ Specifically, in the three cities National Capital District, Lae and Mount Hagen and in the towns Kokopo, Wewak and Alotau.

The ICC Act gives the ICC consumer protection functions but very limited consumer protection powers (regarding product safety and information standards).

In addition to the ICC Act, the following Acts play a part in protecting PNG consumers' rights:

- *Prices Regulation Act 1949* – prohibits unfair pricing and restrictions on the circulation of goods, and regulates maximum retail prices for certain products and the display of such prices.
- *Goods Act 1951* – implies into contracts for the sale of goods conditions and warranties relating to quality and fitness for purpose of goods, the right to sell, the right to quiet possession by buyers, and the right to take goods free of any encumbrance.
- *Hire Purchase Act 1966* – prohibits false statements and representations in hire purchase agreements and implies certain terms into hire purchase contracts.
- *Trade Measurement Act 1996* – regulates units of measurement in sales of goods and the certification of weights and measures used in trade.
- *Packaging Act 1974* – regulates the labelling and packaging of goods.
- *Commercial Advertisement (Protection of the Public) Act 1976* – prohibits unfair statements in commercial advertising.
- *Bread Act 1974* – sets the minimum size and weight of loaves of bread supplied in towns and declared areas.
- *Fairness of Transactions Act 1993* – allows a party to seek a Court review of an economic or commercial agreement or dealing on the ground that it was not genuinely mutual or was manifestly unfair.
- *Telecommunications Act 1996* – regulates provision of services.
- *National Information and Communications Technology Act 2009* – provides mechanisms for the regulation of prices, service standards and other terms of provision of retail telecommunications services.
- *Personal Property Security Act 2011* – affords some protection to consumers who purchase or lease goods that are subject to security interests.

It appears that many PNG consumers have only very limited knowledge of their rights under the ICC Act and other laws and have little access to means of upholding those rights.

Competition Law Framework

The main competition law in PNG is the 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:

- 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;
- 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).

These rules are complemented by certain deeming provisions and exceptions under the ICCC Act. For instance, 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.

Under the ICCC 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. 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. The Commission may accept "undertakings" only in connection with clearance or authorization of an acquisition.

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 ICCA Act;
- Damages for loss or damage caused to a person by conduct that contravenes Part VI of the ICCA 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.

Some other Acts (e.g. the *Telecommunications Act 1996*) also include provisions to promote competition in the particular industry to which they apply.

Regulatory Framework

An entity can be required to comply with pricing rules and service standards set out in a “regulatory contract,” if it is declared by the Minister or the ICCA to be a “regulated entity” (ss 32, 33).

The Minister may declare a “regulated entity” (and regulated goods or services) without reference to any explicit declaration criteria, where that entity is an SOE (or was one, or received assets transferred from an SOE). The ICCA may declare a “regulated entity” (or regulated goods or services) only where satisfied the entity has a substantial degree of market power and the declaration is appropriate having regard to the ICCA’s statutory objectives.⁶

The regulatory contracts currently in place relate to service standards and pricing of services provided by PNG Ports Corporation Ltd, PNG Power Ltd, Motor Vehicle Insurance Ltd and Post PNG. Each of these entities is an SOE that has been declared a “regulated entity” by the Minister.

Price Oversight Framework

The *Prices Regulation Act 1949* (**PR Act**) provides that the Minister may declare any goods to be “declared goods” or “declared monitored goods” or any service to be a “declared service” or a “declared monitored

⁶ A ministerial declaration does not require a market power finding: ICCA Act s 33.

service”.⁷

In respect of a declared good or declared service, the ICCC may fix the maximum price for sale or supply, either nationally or in any part of PNG or any “proclaimed area.”⁸ It is an offence to sell goods or supply services (or to offer to do so) at a price that is greater than the maximum price determined by the ICCC under the PR Act.⁹

In respect of a declared good or a declared service, the ICCC must regulate, either by price monitoring or price control, the prices at which such a good or service is supplied and report to the Minister periodically on whether or not it is desirable to declare those goods or services for the purpose of controlling their prices.¹⁰

The prices that can be charged in PNG for certain goods (foods, fuels) and services (water, transport) are regulated by the ICCC under the PR Act. Both “price monitoring” and “price control” mechanisms are administered by the ICCC.

The ICCC also carries out “pricing inquiries”, on request by the Minister or a supplier of goods or services, or on the Commission’s own initiative.¹¹ In recent years, price control has been removed from many goods but a few remain controlled at present (i.e. refined fuels, PMV and taxi services, and water and sewerage services). Staple foodstuffs formerly were price controlled products but are now subject only to price monitoring.

EEOW

Promoting the participation of women in the economic life of PNG is an important objective of the government. Accordingly, this Report explores the potential for the consumer and competition framework to provide better protection for women as consumers, employees and business owners in PNG and to help expand women’s economic opportunities in the private sector.

Competitive Environment

The extent of competition in a market is affected not only by consumer

⁷ Prices Regulation Act ss 10, 32A.

⁸ Prices Regulation Act s 21.

⁹ Prices Regulation Act s 33.

¹⁰ Prices Regulation Act s 32A.

¹¹ Prices Regulation Act ss 25A-25C.

protection, competition, regulatory and price control rules but also by a range of laws and regulations, practices and circumstances that affect the way businesses get started, operate or grow.

In PNG the development of competition is inhibited by a range of statutory and administrative barriers, which will require a concerted effort to identify and eradicate over coming years. Reducing or removing bureaucratic uncertainty, inefficiency and corruption will have a positive effect on competition in PNG's markets but will require continuing and conscientious effort and unwavering political commitment. Competition will also be promoted by measures to ensure "competitive neutrality" as between state-owned and privately-owned enterprises, i.e. measures to ensure that SOEs do not benefit from privileges or advantages that are not available to their private sector rivals. The role of the ICCC as an advisor to government on competition issues and an advocate for competition can usefully be increased and supplemented by the National Working Group on Improving Business and Investment Climate, or an equivalent body, with political support.

II. CONSUMER PROTECTION

Contents of this Part:

- A. Introduction
- B. Awareness of Rights and Access to Remedies
- C. Product Safety and Standards
- D. Product Information
- E. Misleading or Deceptive Conduct
- F. Unfair Conduct
- G. Consumer Guarantees
- H. Weights and Measures
- I. Remedies, Sanctions and Enforcement
- J. Particular Industries and Markets
- K. Legislative Changes

A. INTRODUCTION

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 businesses¹² compete in a fair and effective way.

The Review Team was asked to consider “*whether existing laws appropriately protect consumers and the competitive process*” and “*whether current legislative provisions and institutional arrangements are functioning as intended in light of actual experience and precedents.*”¹³

The Review Team has taken account of comments received from organisations and individuals:

- in response to the *Issues Paper: Consumer Protection and Economic Empowerment of Women*;
- in interviews with representatives of a range of organisations;
- in workshops with businesspeople in Port Moresby and other centres; and

¹² The ICC Act binds the State except where provided otherwise. One submission has raised the question of whether or not the Act applies to Provincial and Local Governments businesses. The Act should apply to both; if clarification is required, this should be included among the amendments to the Act that would flow from adoption of this Report.

¹³ Terms of Reference, paras 9 and 10.

- in focus group discussions with consumers around PNG, coordinated by the Institute for National Affairs, on behalf of the Review Team.

The resources available to the ICCC to address consumer issues are discussed in the *ICCC Capability Assessment Report*. The following paragraphs discuss consumers' and businesses' needs, the effectiveness of existing PNG laws, and recommendations for reform of laws and practices.

Legal framework for consumer protection

PNG at present lacks comprehensive consumer protection legislation of the kind that exists in most other common law countries.

The ICCC Act gives the ICCC consumer protection functions but very limited consumer protection powers (regarding product safety and information standards). In addition to the ICCC Act, a range of other Acts (please refer to list at **Part I, C** above) play a part in protecting PNG consumers' rights.

It appears that many PNG consumers have only very limited knowledge of their rights under the ICCC Act and other laws and have little access to means of upholding those rights.

Institutions that protect consumers

Since enactment of the ICCC Act, the ICCC has been the main enforcement agency charged with the protection of consumers in PNG. The ICCC has a wide range of consumer protection "functions" under the ICCC Act, including:

- advising the Minister on consumer policy and legislation;
- receiving and considering complaints from consumers on matters relating to the supply of goods and services;
- investigating consumers' complaints or referring them to appropriate authorities;
- arranging for the representation of consumers in court proceedings relating to consumer matters;
- educating consumers about their rights and responsibilities;
- promoting consumer codes of practice among businesses;
- establishing systems for responding to consumer claims;
- encouraging the development of consumers' organisations;

- liaising with overseas consumer organisations;
- administration of the *Trade Measurement Act 1973*; and
- pricing monitoring of utility service providers.

The ICCC has enforcement powers under the ICCC Act that relate specifically to conduct affecting consumers, notably:

- to issue a warning notice under s 107 about unsafe goods;
- to issue a notice under s 108 declaring goods to be unsafe goods; and
- to issue a compulsory product recall notice under s 111.

The ICCC has enforcement powers under the ICCC Act that are relevant generally, including in relation to consumer protection:

- the Commission may conduct an inquiry if the Commission considers an inquiry is necessary or desirable for the purpose of carrying out the Commission's functions (s 122);
- the Commission has power under s 127 to summon witnesses, take evidence on oath and require the production of books, documents and records;
- the Commission has power to compulsorily obtain information under s 128;
- there is power to enter and search under warrant (s 129);
- the Commission may, in consultation with and with the approval of the Public Prosecutor, control and exercise the prosecution function of the State in relation to offences under the Act, and provide counsel to prosecute persons charged with an offence and to appear on behalf of the State in any appeal before the National or Supreme Court (s 132).

The National Information and Communications Technology Authority (**NICTA**) has primary responsibility for regulating the ICT and 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.¹⁴ While

¹⁴ NICT Act s 9(c) and (e).

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.

The National Institute of Standards and Industrial Technology (**NISIT**) is established under a 1993 Act with numerous (43) statutory functions, including:¹⁵ "to provide a fundamental and legal metrology service", "to provide for the examination, testing and calibration of instruments, appliances and apparatus in relation to their accuracy", "to inspect, examine or test materials, commodities, articles, processes and practices with a view to evaluating their quality, serviceability and other characteristics", "to hold custody of Papua New Guinea National Physical Measurement Standards as it considers necessary to enable the verification of means of measurement" and "to safeguard Papua New Guinea against the dumping and supply of unsafe, unhealthy and inferior or substandard products and to assure Papua New Guinea of quality products and services". Reliably accurate weights and measures, sound technical standards, and enforcement of both, are fundamental to consumer protection.

Consumer advocacy

Many overseas jurisdictions have "Consumer Councils", "Consumers' Institutes" or similar bodies. Such organisations have a broad consumer protection role. They test products, produce relevant publications, and generally advocate on consumers' behalf. No such organisation is currently active in PNG.

A Consumer Affairs Council formerly was provided for under the *Consumer Affairs Council Act 1993*. That Act was repealed in 2002 by the ICCC Act. Under the ICCC Act, the ICCC's functions include encouraging the development of organisations to further the interests of consumers and liaising and consulting with them in matters of consumer policy and interest.¹⁶ The ICCC has the further function of liaising with overseas consumer organisations, consumer affairs authorities and consumer

¹⁵ *National Institute of Standards and Industrial Technology Act 1993*.

¹⁶ ICCC Act s 106(k).

protection groups and exchanging information with those bodies.¹⁷ Apart from encouraging the establishment of consumer protection bodies, there is no specific provision for funding the establishment and operations of such bodies.

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. This might be the function of one or more staff within the ICCC’s communications team. Investigating complaints and taking enforcement action should remain the responsibility of the ICCC’s Consumer Affairs Division.

B. CONSUMERS’ AWARENESS OF RIGHTS AND ACCESS TO ASSISTANCE

For consumer protection laws to be effective, it is essential for consumers to be aware of their rights and have access to support in upholding their rights.

The ICCC Act states that consumers have the rights to: safety, choice, consumer education, information, representation and redress.¹⁸ Such rights have little value if consumers are unaware of them and unable to enforce them. Education of consumers and traders about their respective rights and obligations is therefore necessary, as is ready access to inexpensive and practical means of enforcement and remedy.

A consumer (or trader) may approach the ICCC in person, by telephone, by email or via social media. The ICCC does not at present receive a large number of complaints from individual consumers. (on average, around seven complaints are received per month, at present). Although the ICCC has been operating for 14 years, it appears that many consumers are still unaware of its existence and functions.

As part of the present Review, the PNG-based Institute of National Affairs (INA) was engaged by ADB to run focus group discussion sessions, with women consumers and mixed groups of consumers in six areas, including

¹⁷ ICCC Act s 106(m).

¹⁸ ICCC Act s 105.

rural and urban settings.¹⁹

The INA's report on its focus group discussions reveal that many (possibly most) consumers are unaware of the existence of the ICCC and of the role that it performs. Many of those consumers who had heard of the ICCC did not understand its functions or felt that it was difficult or impossible for them to contact the ICCC from their villages. Many also believed that making a complaint would not result in any useful outcome. Comments by focus group participants included:

- "there is nowhere to make complaints"
- "we don't know who to complain to or where to go"
- "we don't have any government agency to complain to"
- "we have never seen or heard of an ICCC officer doing anything"
- "[the ICCC] do their work but at the Village level there is no awareness done by them"
- "an office needs to be established; the office must stand out, where can we go"
- "we would like to make our complaint face-to-face"
- "we want a free call service – a hot line"
- "If we wrote a letter we would not get any response".

Many PNG consumers also feel that suppliers of goods and services, when approached directly, are unresponsive to their complaints:

- "I bought a flat screen TV at [store]. I went to claim my refund and they told me no refund because the product was faulty."
- "I bought a bicycle for K300 at a shop in [town]. The bicycle broke up. I took it back for a refund but the seller said that he would exchange it for a higher price bicycle at K400."
- "I bought an electric jug that did not work. When I asked the seller to replace it, he said that it would take time to get a new one from the place of origin. I waited and got fed up."

¹⁹ National Capital District/Central, Morobe, Western Highlands, Milne Bay, East New Britain and East Sepik. In total, there were six women-only focus groups including 56 women; 11 urban groups of mixed gender including 99 participants; and 4 rural groups including 40 participants. The total number of participants was 195. The characteristics of participants (including gender, age, current home, occupation, education level, marital status, number of children, where they frequently shop, and where they might complain if problems of quality or service are encountered) and their views they expressed were recorded and collated in each focus group discussion. See, Institute of National Affairs, *Report on Focus Group Study: Consumer Protection in Papua New Guinea* (November 2016).

The reports indicate that consumers would like to be able to make a personal approach to an enforcement agency to make a complaint. Consumers would also like a point of contact in their own locality to obtain advice. As the majority of PNG's citizens live in rural villages, it is unrealistic to expect that the ICCC can spread its resources widely enough to enable face-to-face meetings to occur throughout the whole country. Opportunities to make complaints can be improved, however, by the ICCC being active in spreading information about consumer rights and the role of the ICCC, using telephone hotlines, community radio and TV, sms broadcasts, websites, social media, community meetings or such other methods as will be effective.

Broad efforts to raise both consumers' and traders' awareness of consumer protection rules will be essential if the legislation is to be effective.

Traders should be encouraged to establish their own mechanisms to deal with complaints. Business houses may, for example, establish complaints departments, and staff them with people who are trained in the new consumer protection laws.

Codes of practice can also serve a useful purpose by reminding businesses of their obligations, and indicating a willingness to consumers to comply with them. The ICCC Act should be amended to enable codes of practice to be recognised and promulgated under the Act. Failure to comply with such codes should be subject to the sanction of adverse publicity in media reports by the ICCC. The ICCC should be authorized to make such reports.

Recommendation 1: The ICCC should step up its efforts to promote awareness among businesspeople and consumers of the ICCC's role and how to access the ICCC.

Recommendation 2: The ICCC should take steps to raise awareness of consumer rights at village, district and local government levels, supported by the establishment of a Consumer Liaison Unit within the ICCC.

Recommendation 3: The ICCC Act should be amended to enable codes of practice to be recognised and promulgated under the Act.

C. PRODUCT SAFETY AND STANDARDS

A consumer protection framework must protect consumers against goods or services that would present a hazard to their health or safety. Product

safety was raised as a concern among PNG consumers who participated in the INA focus group study:

- One consumer described PNG as a “dumping site” for dangerous goods, such as imported used cars.
- Several consumers mentioned dangerous or unhealthy hair dyes and other cosmetic and health products.

The safety or quality of some goods and services are specifically regulated in PNG. For example, medicines (under the *Medicines and Cosmetics Act 1999*) and electrical equipment (under s 21 of the *Electricity Industry Act* (Chapter 78)).

In addition, the ICCC Act currently provides for product safety, product information standards, and compulsory product recall (ICCC Act Part VII, Division 4). These provisions are useful when urgent action is required to curtail sales of unsafe goods or remove them from the market. This is a valuable part of the ICCC’s work.²⁰ In recent years the ICCC has been active in relation to product safety, including by: conducting store inspections; using media to raise public awareness of safety issues; issuing safety alerts (e.g. on scuba equipment, travel scams, food products, button batteries); recalling unsafe products (e.g. baby formula); issuing interim bans (e.g. aquatic toys, non-English labelled foods); and permanent bans (e.g. small magnets, yoyo water-balls and novelty lighters). The Review Team considers that the product safety provisions could be more clearly expressed but do not require substantial amendment.

Generally applicable “consumer guarantees” (see discussion at **Part II, Section G** below) help to promote safety of consumer goods and services. For example, electrical goods and building materials should be of “acceptable quality” and electrical work and building services should be provided with “reasonable care and skill”, under consumer guarantees.

Some goods and services will nevertheless require particular safety standards and product information standards to be set. The existing provisions of the ICCC Act and health legislation are adequate for this purpose but better coordination between the ICCC and Department of Health is required to achieve better enforcement and compliance.

Cooperation between the ICCC and Customs Service is also essential to ensure that, to the extent possible, goods which are subject to an interim ban or a permanent ban, or are not compliant with relevant PNG standards,

²⁰ See, ICCC, 2014 *Annual Report* p. 40; ICCC, 2015 *Annual Report* pp. 36-37.

or which otherwise are unsafe or hazardous are excluded from entry to PNG and kept out of the domestic market. In 2013 the ICCC and Customs Service signed a memorandum of understanding setting out their respective responsibilities and their mutual commitment to exchange information and to cooperate. This is a commendable initiative (adopted also with NICTA) and provides the basis for what appears to be an effective working relationship between the parties.

In some sectors (e.g. consumer finance, building and construction, public transport) additional rules or standards might be warranted for the protection of consumers. These are further discussed in **Part J**, below.

Recommendation 4: Traders in all sectors (including those bound by a code or standards applicable to their particular industry or products) should be bound to comply with statutory fair trading provisions and consumer guarantees of general application.

Recommendation 5: The ICCC and Department of Health should work to achieve better coordination of their efforts to protect consumers, including by giving effect to a Memorandum of Understanding regarding their respective roles and cooperation between them.

D. PRODUCT INFORMATION

The ability of consumers to make informed consumption choices is essential for healthy competition. Consumers must have information about goods and services that is accurate, complete and timely, in order to make meaningful comparisons and choices. Accordingly, products must be accurately labelled and described by traders.

As a general principle, the law should require traders to provide consumers with sufficient information regarding the price, nature, quantity, origin and characteristics of those goods or services before consumers decide whether or not to purchase them.

Comments by consumers participating in focus group discussions included:

- “We have to try it ourselves because most times we don’t trust what they say on the packet.”
- “We try to ask for information from the foreign sellers but they usually could not respond because they do not know how to speak English or Tok Pisin.”

- “Mipela planti ino kilia tumas lo ingrediens insait lo product tasol mipela i save stil baim lo ol.” (A lot of us do not know what ingredients are used to make these products, but we still buy the products.)

Labels written in foreign languages are of no help to consumers in PNG. Consumer goods should be labelled in an official language of PNG – English, Tok Pisin or Hiri Motu.

Where goods are improperly labelled, or inadequate product information is disclosed, it is essential that the ICCC be able to take prompt action to remove those goods from the market.

The *Packaging Act 1974* provides for several offences, including in relation to: unauthorised use of brands; marking incorrect weights or measures on packages; marking a pack “stating or implying that the article is for sale at a price less than that of its ordinary or customary sale price”; packaging articles in a way that misleads as to their size or volume; and marking a package at a misleading price. A general prohibition on misleading or deceptive conduct would apply in most of these circumstances. The *Packaging Act* should be updated and consolidated with other consumer protection provisions in the *Trade Measurements Act* or a revised ICCC Act.

Recommendation 6: All products sold by traders should be labelled with sufficient information to inform consumers of the essential characteristics of the product, so consumers can make informed choices.

Recommendation 7: Products must be labelled in at least one of the official languages of PNG – English, Tok Pisin or Hiri Motu.

Recommendation 8: The Packaging Act should be updated and consolidated with other consumer protection provisions, either in the Trade Measurements Act or in a revised ICCC Act.

E. MISLEADING OR DECEPTIVE CONDUCT

Misleading or deceptive conduct in trade disadvantages consumers and other businesses, and undermines consumer confidence and distorts the marketplace. It is fundamental to consumer protection that misleading or deceptive conduct be prohibited and subject to effective sanctions.

Internationally, fair trading laws typically prohibit misleading or deceptive conduct by traders and require information provided to consumers to be

accurate.²¹ Such laws can apply broadly, e.g. to conduct in trade generally and to a wide range of traders, including government agencies, local authorities and other associations, companies and individuals.

There is widespread concern among PNG consumers about misleading or deceptive conduct by traders and advertisers. Consumers participating in the focus group discussions complained, for example, of:

- Mobile phones that do not operate as the packet describes;
- “Carat gold” jewellery that causes skin reactions;
- Banks promoting services without disclosing fees;
- Health products that do not deliver claimed benefits;
- Beauty products that do not deliver claimed benefits; and
- Advertisements stating a price lower than that actually charged upon purchase.

The ICCA Act contains no rule against misleading or deceptive conduct.

The *Commercial Advertisement (Protection of the Public) Act 1976* (**CAPP Act**) makes it an offence to publish or cause to be published any unfair statement in any commercial advertisement. However, the CAPP Act does not adequately protect PNG consumers against misleading or deceptive conduct because:

- Breach of the CAPP Act is subject to criminal liability but there is no provision for compensation to consumers who have suffered loss.
- The CAPP Act does not apply to all advertising material that originates outside PNG (many consumer complaints concern imported products and internet sales).
- The pivotal concepts of “commercial advertisement” and “unfair statement” are pivotal under the CAPP Act but are not defined clearly or simply in terms of statements or conduct that is misleading or deceptive or likely to mislead or deceive.
- The ICCA does not have the power to prosecute an offence under the CAPP Act, even with the approval of the Public Prosecutor (s 132 of the ICCA Act applies only in relation to offences under the ICCA Act).

The ICCA Act should be amended to prohibit all forms of misleading or

²¹ See eg *Australian Consumer Law*, s 18; *Fair Trading Act 1986* (NZ) s 9.

deceptive conduct in trade. Civil liability would apply. The prohibition should be supplemented by guidelines developed by the ICCC which explain, using worked examples, the kinds of conduct that would be caught. A broad rule of this kind would apply to the kinds of misleading conduct currently prohibited by the CAPP Act, which should be repealed.

In addition to a civil prohibition against misleading or deceptive conduct, false or misleading representations about price and other factors typically of key importance to consumers should be subject to criminal liability.²²

A person who has suffered loss or damage as a result of misleading or deceptive conduct should have the right to claim compensation (damages) for his or her loss. Because individual parties' losses may be small, in many cases, and not worth the costs of suing for damages, the ICCC should have the power in appropriate cases to bring a "representative action" on behalf of all the parties who have suffered loss.

Traders should not be allowed to "contract out" of the rules against misleading or deceptive conduct or false or misleading representations in their contracts with consumers.

Recommendation 9: The CAPP Act should be repealed.

Recommendation 10: The ICCC Act should be amended to prohibit conduct in trade that is misleading or deceptive.

Recommendation 11: The ICCC Act should be amended to give courts the power to require a trader to prove the truth of an assertion that is allegedly misleading, deceptive or false.

Recommendation 12: The ICCC Act should be amended to give the ICCC the power to bring a "representative action" on behalf of parties who have suffered loss.

Recommendation 13: In civil proceedings it should not be necessary to prove intention to mislead or deceive, or to act unfairly, on the part of traders.

Recommendation 14: The rule against misleading or deceptive conduct should be explained and clarified by means of ICCC guidelines that include worked examples.

²²

For one example see *Australian Consumer Law* s 29.

Recommendation 15: Traders should not be allowed to “contract out” of the rules against misleading or deceptive conduct or false or misleading representations in their contracts with consumers.

F. UNFAIR CONDUCT

Some trading practices are unfair and harmful to consumers, particularly to vulnerable consumers such as young, aged, or less-educated consumers.

Fair trading conditions, and competitive markets, can be promoted by laws that prohibit and deter particular kinds of conduct that are inherently unfair to consumers.

Unfair practices in trade

Discussions with focus group participants revealed that PNG consumers often feel forced to accept shoddy goods or services, to buy counterfeit goods, or to pay an excessive price, because of unfair or coercive tactics of suppliers:

- “Our own local people put pressure on us to buy used car parts, carvings and stolen goods.”
- “We want to spend more, on genuine, long-lasting goods”
- “They push the things into our faces. There is no need, they put the things on the shelves. Put everything at the market. If we want to buy, we go to the market.”
- “I see the prices with 99t or 95t but we will not get the 1t or 5t change. This is stealing my money. I don’t need a lolly. I need my 1t or 5t.”

Unfair practices should be prohibited. The main types of unfair practices that need to be prohibited are:

- unfair contracts and other transactions;
- harassment and coercion;
- pyramid schemes;
- bait advertising (where traders lure consumers to premises with offers that they do not intend to fulfil);
- uninvited direct sales (in which traders approach consumers directly);
- provision of unsolicited goods and services (where recipients of goods involuntarily become custodians of those goods).

Other kinds of practices may potentially be detrimental to consumers in some circumstances but should be permitted subject to particular rights for consumers. For example:

- layby sale transactions, which should be on standardised terms; and
- sales by auction, where auction procedures should be standardised and notified in advance of the sale.

Unfair contracts and other transactions are regulated by the *Fairness of Transactions Act 1993*. This legislation is not enforceable by the ICCC; enforcement depends on private action by aggrieved parties. The Act should be amended by adding a power for the ICCC to bring proceedings on a representative basis on behalf of parties that may have been treated unfairly.

The *Fairness of Transactions Act* should also be modernized along the lines of the treatment of unfair standard form consumer contracts in Australian and New Zealand consumer legislation.²³ A term in a standard form consumer contract is unfair when:

- (a) it causes a significant imbalance in the parties' rights and obligations arising under the contract;
- (b) it is not reasonably necessary to protect the legitimate interests of the business; and
- (c) it would cause detriment to another party if it were to be applied or relied on.

Unfair standard form consumer contract rules should not apply to:

- the upfront price of the good or service provided under the contract;
- the main subject matter of the contract; or
- contract terms required or permitted by law.

Unconscionable conduct

Unconscionable conduct is conduct that "should not be done in good conscience."²⁴ The test is whether or not the conduct unfairly exploits another person who is plainly in a relatively weaker position. "High moral obloquy" is not necessary.²⁵

²³ Australian Consumer Law Part 2-3; *Fair Trading Act 1986* (NZ) ss 46H-46M.

²⁴ *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90 at [41].

²⁵ *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90 at [23].

Unconscionable conduct is prohibited in some consumer protection laws overseas.²⁶ However, the Review Team is of the view that a prohibition against unconscionable conduct in PNG is unnecessary given the law against unfair transactions under the *Fairness of Transactions Act 1993* and the recommendations in this Report that the ICCC be empowered to enforce that Act and that the *Fairness of Transactions Act* be modernised.

Frauds and scams

Some consumers have expressed concerns to the Review Team regarding scams and frauds perpetrated in PNG. For example, consumers are concerned about the promotion in PNG of “business opportunities” and motorcar raffles that allegedly are dishonest.

Three main problems arise:

- The lack of a general prohibition against misleading or deceptive conduct;
- Enforcement problems, e.g. where fraudsters are located overseas; and
- The vulnerability of unsophisticated and illiterate consumers.

The ICCC has an important role to play in alerting consumers to scams and frauds and educating people in how to avoid them.

The ICCC should also work with the industries most affected (including banking, ISPs, telecommunications operators) to ensure that they alert their customers promptly to scams.

Recommendation 16: The ICCC Act should be amended to prohibit pyramid schemes, bait advertising and coercion or harassment of consumers by traders.

Recommendation 17: The ICCC should have the power to bring proceedings against traders in respect of pyramid schemes, bait advertising, coercion and harassment of consumers.

Recommendation 18: The ICCC Act should be amended to make uninvited direct sales subject to strict disclosure requirements and cooling-off periods.

Recommendation 19: The ICCC Act should be amended to provide

²⁶ See eg *Australian Consumer Law* s 21.

that, where unsolicited goods and services are delivered to recipients, recipients are not obliged to pay for them, and may treat them as a gift after a fixed time (e.g. 14 days) has passed.

Recommendation 20: The Fairness of Transactions Act 1993 should be amended to give the ICCC power to bring proceedings on a representative basis on behalf of parties that may have been treated unfairly.

Recommendation 21: The Fairness of Transactions Act should be modernized in light of more recent overseas consumer protection legislation on unfair contracts.

G. CONSUMER GUARANTEES

Consumers need assurance that the goods and services that are offered to them by traders will be not only safe for them to use (see **Section C**, above, regarding product safety) but also of satisfactory quality.

Consumer focus group discussions revealed that:

- there are widespread concerns about shoddy goods and services, particularly imported goods;
- consumers who had been sold shoddy goods or services were often unsure what they could do about it;
- sub-standard goods seldom could be repaired, or spare parts were not available; and
- suppliers often refused to address consumers' complaints at all.

Many of the consumers who participated in focus groups expressed concerns about poor quality imported goods:

- "I have no confidence. There are no safety standards. Cheap products can be seen at the market every day, everywhere."
- "Sometimes these items break in the same day of purchase or only last for one or two weeks."
- "The [brand] bush knife. The material that was used to make the knife was bad. I sharpened the knife to use and it was still blunt."
- "The foreign sellers make a lot of money from selling poor quality products at very low prices so that people keep going back to buy."

"Consumer guarantees" apply to transactions in many jurisdictions. In

PNG the *Goods Act 1951* implies “conditions” and “warranties” into contracts for sale and purchase of goods. If a condition is breached, the *Goods Act* allows cancellation of the contract. If a “warranty” is breached, the *Goods Act* allows only recovery of damages.

A better approach would be for “consumer guarantees” to apply to transactions between consumers and traders. Guarantees are less confusing to customers and traders and avoid the unsatisfactory condition/warranty distinction.

The consumer guarantees typical under overseas laws regarding goods include guarantees that:

- the supplier has the right to sell or transfer the goods;
- the goods are of acceptable quality;
- the goods are fit for a purpose disclosed by the consumer;
- the goods comply with description (where they are sold by reference to a description); and
- the goods comply with a sample (where they are sold by reference to a sample).

At present PNG legislation does not provide general consumer protection in respect of *services*. (The *Goods Act 1951* covers goods only.) It is important that consumer guarantees should apply to services as well as to goods. The kinds of consumer guarantees typical under overseas laws regarding services include guarantees that:

- a service must be performed with reasonable care and skill;
- a service must be performed within a reasonable time;
- a reasonable price must be charged for a service (if the price is not agreed in advance).

Consumer guarantees are of little practical value to consumers unless adequate remedies are available. Appropriate remedies include:

- an obligation on the trader to replace the goods or refund the price paid for the goods (at the consumer’s choice) or repair the goods (if the consumer agrees to that); and
- an obligation on the trader to provide services again, reduce the price for providing the services or compensate the consumer for failing to provide the service properly.

Consumer guarantees should extend to *manufacturers* and *importers* of

goods. A consumer guarantee may be breached where a retailer has gone out of business and where there is no contract directly between the consumer and the *manufacturer*. Given that relatively few consumer goods are manufactured in PNG, the *importer* of a defective good should also be subject to consumer guarantees and the remedies that apply to breaches of those guarantees.²⁷

Consumer guarantees should apply to goods or services supplied to consumers or to small businesses in transactions below a specified minimum amount. The rationale for extending consumer guarantees to small business transactions is that such transactions are closely akin to consumer transactions, so similar protections should apply.

Recommendation 22: Consumer guarantees should apply to consumer transactions concerning goods, including sales of goods, hire and hire purchase transactions, and gifts provided by traders.

Recommendation 23: Consumer guarantees in respect of goods should include guarantees relating to title, quality and fitness for purpose, and correspondence with description or sample.

Recommendation 24: Consumer guarantees relating to quality of goods should apply to the manufacturer or the importer of goods, as well as to the retailer.

Recommendation 25: Consumer guarantees should apply to services supplied by traders to consumers.

Recommendation 26: Consumer guarantees in respect of services should include guarantees of reasonable care and skill, fitness for purpose, price, and timeliness.

Recommendation 27: Consumers and small businesses should be able to enforce consumer guarantees against traders who breach them.

Recommendation 28: Traders should not be allowed to "contract out" of consumer guarantees.

H. WEIGHTS AND MEASURES

Fair consumer transactions, and an efficient market economy, depend on accurate weights and measures for measuring, describing and labelling

²⁷ See, for example, the *Consumer Guarantees Act 1993* (New Zealand) s 2, which defines "manufacturer" as including "where goods are manufactured outside New Zealand and the foreign manufacturer of the goods does not have an ordinary place of business in New Zealand, a person that imports or distributes those goods".

products. The consumer's right to choice, which is recognised in the ICCA Act, is of little value if meaningful comparisons and distinctions cannot be made between different products and vendors. Moreover, competition will be impeded unless businesses and consumers can rely on weights and measures that are accurate.

The *Trade Measurement Act 1973* establishes a regime for the inspection of weights and measures and weighing and measuring instruments, and establishes a range of offences, including use of unjust weights, sales by short measure and false declarations as to weights. These offences appear to overlap with general consumer protection safeguards including the proposed general rule against misleading or deceptive conduct and existing provisions of the *Packaging Act*. The *Trade Measurement Act* should be reviewed and modernised to achieve consistency with revised consumer protection laws and with the *Prices Regulation Act*.

NISIT is responsible for certifying and maintaining standard weights. The Review Team understands that the ICCA has been delegated the responsibility for inspecting instruments used for weighing and measuring for trade purposes by the Department of Commerce and Industry, in order to ensure their compliance with the standards mandated by NISIT and reference measures certified by NISIT, though NISIT appears to have also been involved at times in testing and certifying instruments. Greater clarity of roles is needed in this area and a review of the NISIT Act (delayed due to vacancies on the NISIT Board) should be completed at the earliest opportunity.

Although some matters covered in the *Trade Measurement Act* would also come within the scope of the fair trading amendments to the ICCA Act that are recommended in this Report, the *Trade Measurement Act* should be retained. Accurate measurement systems and devices are essential to protect consumers. A specialised inspection regime also helps to *prevent* the misleading use of inaccurate weights and measures. (By contrast, general fair trading laws are not reinforced by a specialised inspection regime.)

The *Trade Measurement Act* should be amended to require a metric system of measurement. Currently, the Act recognises the use of "bushels" and "does not apply to or in relation to local or customary weights or measures in use by automatic citizens". It is unclear whether customary forms of measurement continue to be relied upon in any areas of PNG. Unless customary measures remain important, it would be desirable to standardise all measures on the metric system. Without a uniform system

of measures, consumers cannot make the comparisons necessary to enable them to make informed choices.

The *Bread Act 1974* provides for standardised sizes of loaves of bread and offences of selling underweight loaves or improperly labelling packages of bread. These provisions overlap with existing *Trade Measurements Act* provisions and proposed new consumer protection measures. The *Bread Act* should be reviewed and consolidated with the *Trade Measurements Act* or revised *ICCC Act*.

Recommendation 29: The review of the NISIT Act should be completed at the earliest opportunity and NISIT and the ICCC should work to enhance their communication and cooperation (e.g. by agreeing and MOU between them).

Recommendation 30: The Bread Act should reviewed and consolidated with the Trade Measurement Act or revised ICCC Act.

Recommendation 31: The Trade Measurement Act 1973 should be amended to require uniform use of the metric system for consumer transactions.

Recommendation 32: The Trade Measurement Act should be reviewed and modernised to achieve harmony with revised consumer protection laws.

I. REMEDIES, SANCTIONS AND ENFORCEMENT

Consumer protection legislation will be ineffective unless consumers are able to assert their rights and obtain remedies when those rights have been infringed. Nor is consumer protection law likely to deter traders from engaging in unlawful conduct unless there is a credible threat that such conduct is likely to result in enforcement action and punishment.

Generally, the ICCC has no power to impose a fine or to compel payment of compensation but must apply to the court for fines or other sanctions, in appropriate cases. The current laws give the ICCC very limited opportunity to prosecute conduct harmful to consumers in the courts. A further challenge for the ICCC is that consumers are geographically dispersed across PNG and the costs of trying to make ICCC staff available nationwide would be very high.

This section considers possible improvements to the remedies and sanctions for infringement of consumer protection laws and possible

approaches to helping consumers outside Port Moresby to obtain redress.

Remedies and sanctions

When it investigates consumer complaints, the ICCC at present will generally adopt the role of advising the parties involved and assisting them to reach an agreed resolution. The ICCC currently lacks “teeth” to take further action. Mediation of individual disputes consumes a significant proportion of ICCC resources, however, and has a lesser impact on the conduct of traders generally than does a successful prosecution. The small number of consumer complaints the ICCC currently receives monthly may be due, in part, to consumers’ awareness that the ICCC is constrained in what it can do.

The Review Team recommends that the ICCC should:

- be primarily an investigative and prosecutorial body, in consumer protection matters, rather than a mediator or adjudicator;
- have a general authority to prosecute any offence under a consumer protection provision of any PNG legislation;
- have a general authority to seek civil remedies, in consumer protection matters;
- have the power to issue “infringement notices” against traders, alerting them to remedy infringements; and
- have the power to bring a “representative action” on its own initiative on behalf of a group of persons who have been affected by conduct that infringes consumer protection laws.

The ICCC has no power to impose a fine or to compel payment of compensation. In cases of infringements, the ICCC should continue to prosecute in the courts traders who have breached the law. It is undesirable, in principle, for the ICCC to adjudicate in disputes between traders and consumers because the ICCC should visibly be an expert and impartial investigative and enforcement body.

The ICCC can be authorised under s 132 of the ICCC Act to prosecute consumer protection breaches (assuming those become offences against the ICCC Act) only “in consultation with and with the approval of the Public Prosecutor.” The ICCC currently has no power to prosecute offences under other consumer protection legislation such as the *Packaging Act 1974*, the *Bread Act 1974*, the *Commercial Advertisement (Protection of the Public) Act 1976*, or the *Trading Act 1949*. The Review Team recommends that ICCC

Act s 132 be amended to authorise the ICCC to exercise a prosecution function with respect to *offences against consumer protection provisions under any PNG legislation*.

The ICCC does not currently have an explicit power to apply to a court for civil remedies. The Review Team considers that there should be an explicit power for the ICCC to bring proceedings for any civil remedy that a court may make.

While the ICCC should not have the power to impose sanctions, the ICCC should be authorised to issue “infringement notices” of a limited kind. The effect of an infringement notice would be to alert the recipient that it will be liable to be prosecuted unless it takes immediate steps to put an end to conduct which the ICCC has identified as infringing the Act.

The ability to bring “representative actions” is important where the costs of bringing a civil suit will frequently exceed the monetary value of an individual consumer’s claim. In cases where individual claims are of low value but the unlawful practice giving rise to them is widespread, it may be unrealistic to expect that individual consumers will wish to take steps. The ICCC should have the power to do so in a representative action on behalf of the affected consumers. The ICCC should have the power to bring a “representative action” on its own initiative on behalf of a group of persons who have been affected by conduct that infringes consumer protection laws. Such a power would go further than the existing more limited “function” under s 106(n) of the ICCC Act “to arrange for the representation of consumers in court proceedings relating to consumer matters.”

Courts should have available in consumer protection cases before them a broad variety of orders similar to those available in competition cases, and including the powers:

- to award compensation to a consumer who has suffered loss;
- to issue injunctions;
- to require corrective advertising;
- to order traders who make assertions to prove the truth of them; and
- to ban repeat offenders from management of businesses.

Finally, in the course of reviewing and modernising consumer protection legislation, the levels of maximum penalties provided for offences should

be examined and brought into line with contemporary levels for comparable offences.

Recommendation 33: The ICCC should not have adjudicative powers in consumer disputes but should be focused on investigative and prosecutorial roles.

Recommendation 34: The power of the ICCC under s 132 to prosecute offences under the ICCC Act with the approval of the Public Prosecutor should be extended to offences and civil infringements relating to consumer protection under PNG legislation generally.

Recommendation 35: The ICCC should be empowered to bring civil enforcement actions for remedies against breaches of the ICCC Act.

Recommendation 36: The ICCC should be empowered to bring "representative actions" on behalf of consumers.

Recommendation 37: The ICCC should be empowered to issue "infringement notices" alerting recipients that they will be liable to prosecution or civil penalties if they do not take immediate steps to end unlawful conduct.

Recommendation 38: Amendments to the ICCC Act should give the courts a full range of powers in consumer protection cases, including the powers to: impose fines, issue injunctions to prevent wrongful conduct; order compensation; order corrective advertising; and require substantiation of claims in advertising.

Recommendation 39: The levels of maximum penalties provided for offences against consumers should be examined and brought into line with contemporary levels for comparable offences.

Private resolution of consumer issues

The most direct method of protecting consumers from unfair conduct is to empower consumers to complain to traders and for both parties to then resolve issues between themselves. Consumer protection legislation should be self-policing as far as possible. The role of the ICCC in civil matters should be aimed at: assisting and advising consumers in particular cases; investigating and warning traders; and undertaking civil proceedings where the public interest so requires (e.g. in more serious cases, with more widespread impact on the public).

Private resolution of consumer disputes is more likely where traders and consumers have a basic understanding of the law; and anticipate the ICCC or the courts becoming involved if they cannot settle the dispute themselves. The better consumers understand their rights the more likely they are to complain to traders and, if necessary, to seek redress. A realistic anticipation of action by the ICCC or courts will motivate traders to resolve disputes rather than face such action. Where consumers and traders cannot settle the disputes between them, legislation should enable consumers to bring their dispute either to the attention of the ICCC or before a court (by taking direct civil action).

The ICCC can also assist private resolution of consumer issues by promoting adoption of consumer complaints procedures among traders. This should be done by means of guidelines that include a standard form complaints handling procedure adapted from ISO 10002:2014 *Quality management - Customer satisfaction - Guidelines for complaints handling in organizations*.

Recommendation 40: Traders should be encouraged and assisted by the ICCC to respond to the new legislation by adopting procedures for dealing with consumers' complaints.

Local resolution of consumer issues

The population of PNG is very dispersed, with the majority of people living in small and often isolated villages. It is unrealistic to expect that people will be able to travel to the main cities to make complaints or to attend hearings. The cost, inconvenience and formality will often discourage them from doing so. The formal legal system is therefore not accessible to most consumers. Informal methods for dealing with disputes at a local level are important in PNG. Strengthening consumers' ability to obtain redress at the town or village level is essential for effective consumer protection.

A Just, Safe and Secure Society: A White paper on Law and Justice in Papua New Guinea found that the formal justice sector was incapable, on its own, of meeting the enormous challenges placed upon it, and that families, communities, traditional mechanisms, churches, NGOs, the private sector, and many others played an important part in meeting needs, including the resolution of disputes.²⁸ The White Paper advocated that this informal

²⁸ Ministry of Justice, *A Just, Safe and Secure Society: A White paper on Law and Justice in Papua New Guinea* (March 2007) p xii.

system be better recognised and more visible, and work alongside existing legal structures.

In principle, the Review Team supports the use of locally-based dispute resolution mechanisms.²⁹

The ICCC should support local resolution of consumer issues, for example by developing guidance and training materials for local leaders and mediators, in appropriate languages, to assist them in understanding the consumer protection principles.

The Review Team has considered whether a new “small claims tribunal” as now exists in many other jurisdictions, should be established in PNG with jurisdiction over smaller consumer claims.

The Review Team considers, however, that the existing Village Courts and District Courts can be assisted to effectively hear and resolve small claims by consumers. The following paragraphs discuss how Village Courts and District Courts could be assisted to provide fast, simple and inexpensive resolution of consumers’ disputes.

Recommendation 41: The judicial process for dealing with consumer issues should be simple, inexpensive and quick, and legal representation should not be required.

Recommendation 42: It is unnecessary to establish any new forum to enable the enforcement of consumers’ rights (but traders are free to establish their own procedures or fora for consumer assistance).

Recommendation 43: The ICCC should encourage and assist in the development of dispute resolution capability and knowledge of consumer protection principles at a local level.

Role of Village Courts in consumer protection

PNG Village Courts have responsibilities with regard to keeping the peace, mediation, resolution of disputes and the application of custom (*Village Courts Act 1989*, ss 43, 51, 53 and 57). The Village Courts provide a forum in which disputes can be resolved, contributing to the maintenance of a peaceful environment. Support for Village Courts to address consumer protection issues would promote the objectives of quick, accessible and

²⁹ This view is supported by UNCTAD, *Report on Voluntary Peer review of Competition Law and Policy: Bipartite Report – Fiji and Papua New Guinea* (2015), p 31.

inexpensive justice, in a familiar and relatively informal environment.

Village Courts have several advantages, including:

- The ability to recognise and give effect to local customs and expectations;
- Avoiding the need for parties to travel to attend court, which may act as a deterrent or barrier to obtaining a resolution; and
- Informality of process, which avoids the need for lawyers, reduces written documentation and helps with possible language or literacy issues.

Village Courts appear also have disadvantages, including:

- Village Court Magistrates may sometimes be too close to disputing parties so perceived as (or actually) lacking impartiality and independence;
- Decisions may lack uniformity, leading to differing expectations and outcomes for consumers in different places; and
- Village Court Magistrates may, in some instances, lack knowledge relevant to administering the laws.

The *White Paper on Law and Justice in Papua New Guinea*, cited above, states that the Government supported a rejuvenation, or revitalisation, of Village Courts. The report recognised that the courts had been subject to “provincial neglect”, but that such courts were perhaps the “only avenue for many citizens to receive justice when other customary measures fail”. Both Government and the judiciary considered that significant improvements in the operation of Village Courts was needed. It was recommended that Village Courts collaborate and cooperate with the District Courts in order to be effective. The report also stated (at p 19):

New approaches are needed in the mentoring of the court officers and the up-skilling of Village court judges. In addition, consultation is required to introduce new, affordable and efficient supervision of the courts through national, provincial and district governance mechanisms.

The Review team recommends that Village Court Magistrates be empowered (legally and by training) to administer consumer protection laws, in less serious matters, in order that consumers outside the main centres can have recourse to local dispute resolution. Village Court Magistrates should be paid by the Government (to help ensure their independence); trained in the laws they administer (including consumer

protection); trained to perform properly their functions of adjudicating and mediating disputes; and should be overseen by the District Court.

Recommendation 44: Access to local dispute resolution (such as village magistrates) should be an option for consumers and traders for dealing with disputes.

Recommendation 45: Village Magistrates should receive training by suitably qualified government appointees to enable them to resolve consumer disputes in accordance with "substantial justice," whether by way of enquiry, mediation or adjudication.

Recommendation 46: Jurisdiction should be expressly conferred on Village Courts to determine consumer protection issues, in accordance with their monetary limits, following the delivery of appropriate training for Village Magistrates.

Recommendation 47: The Government should commit resources to the revitalisation of Village Courts, including by the measures proposed in the White Paper on Law and Justice in Papua New Guinea.

Role of District Court in consumer protection

The ICCC Act and consumer protection statutes should make clear the powers that may be exercised by District Courts and the National Court, respectively.

District Court Magistrates may act as both adjudicators and mediators³⁰ in the District Court in civil matters. They may also exercise the jurisdiction of a Village court. Where this occurs, the procedure is less formal than that of the District Court, need not be adversarial, and the rules of evidence need not be strictly applied. This is an important advantage: it is undesirable that consumers should be obliged to employ legal counsel to enforce their rights in either Village Courts or District Courts.

In relation to District Court resolution of consumer issues, it would be appropriate to make training on consumer protection law available to District Court Magistrates, as part of the routine judicial training programme.

At the District Court level, three issues of jurisdiction may arise:

³⁰ Mediation in civil matters is encouraged in the District Court. The process is set out in s 22B of the *District Court Amendment Act 2009*. The mediation skills of District Court Magistrates in this respect are relevant to, and applicable in, the Village Courts: *Village Courts Act* s 53(1).

- In some cases, the value of the dispute may fall within the Village Court limit but the parties prefer their dispute to be handled by a District Court;
- In some cases, the value of the dispute may exceed the Village Court limit, falling instead within the District Court's jurisdiction, but the parties prefer their dispute to be handled in the less formal manner of the Village Court;
- In some cases, the value of the dispute may exceed the District Court limit and fall within the National Court's jurisdiction, but the parties prefer their dispute to be handled by the District Court.

In the first case, if a consumer dispute is within the civil jurisdiction of the Village Court (up to PGK 1,000), consumers should nevertheless have the option of submitting their disputes to the District Court to be dealt with under the provisions of Part VIII of the *District Courts Act*. Section 38 of the *Village Courts Act* provides that a District Court may exercise the jurisdiction of a Village Court but under that provision the District Court does not apply the rules of evidence. A consumer might prefer the more rigorous District Court procedure if, for example, the particular dispute is complex or for some reason he or she lacks confidence in the Village Court or its procedure.

In the second case, where the value of a consumer dispute exceeds the jurisdiction of Village Magistrates, the District Court would normally exercise jurisdiction under the *District Courts Act* and *Court Rules*. It appears desirable, however, for parties to have access to inexpensive, quick and informal procedure in consumer disputes, without the need to comply with the more daunting and formal District Court procedure. For consumer disputes, therefore, that are within the civil jurisdiction of District Court Magistrates or Principal Magistrates, parties should be entitled to request that the less formal procedure set out in the *Village Courts Act 1989* be adopted by the District Court. In such a case, the parties would be entitled to representation or assistance other than legal representation.³¹

In the third case, parties might prefer a District Court Magistrate or Principal Magistrate to determine a dispute that exceeds in value the normal limit on District Court civil jurisdiction. The current financial limit on the District Court's jurisdiction (PGK 8,000 for Magistrates or

³¹ As is currently the case when a District Court exercises the jurisdiction of a Village Court: *Village Courts Act* s 38.

PGK10,000 for Principal Magistrates³²) will not encompass all consumer disputes. For example, expensive consumer goods such as outboard motors or vehicles may be worth more than the District Court's financial limit. It is proposed that the parties to a consumer dispute should be permitted to apply for waiver of the monetary limit so that a District Court Magistrate or Principal Magistrate may determine the dispute, provided both or all parties agree.

The use of overlapping jurisdictions in this way is undertaken successfully in other jurisdictions, such as the UK and New Zealand. This would help to increase consumers' access to justice. Amendments to the *Village Courts Act 1989* and the *District Courts Act 1963* would be required.

Recommendation 48: Both Village Courts and District Courts should expressly be given jurisdiction to exercise powers under consumer protection legislation.

Recommendation 49: Parties to consumer disputes should be empowered to waive the monetary limits of the District Court if they agree to do so.

Recommendation 50: District Court Magistrates should be given the power to deal with disputes under consumer protection legislation using the flexible and informal procedure provided in the Village Courts Act 1989.

Recommendation 51: District Court Magistrates should, when acting under the Village Courts Act procedure, act within the financial limit of the District Court, not the Village Court.

J. PARTICULAR INDUSTRIES AND MARKETS

The Review is not required to investigate in detail issues arising within each particular industry and market in PNG. Nevertheless, comments by PNG businesspeople and consumers suggest that particular consumer protection measures, or some change in ICCC practice, should be considered in some areas of economic activity.

Consumer credit

Consumer credit is an important area of both consumer protection and financial services regulation. Comments have been made to the Review Team about alleged unfair consumer credit practices in PNG. Such

³² *District Courts Act 1963* s 21.

practices are said to include: failure to disclose the actual rate of interest to be charged; misleading statements about the rate of interest to be charged; false comparisons with competing consumer credit offers; usurious pay day lending; and unreasonable conduct to enforce loans, including harassment and oppressive repossession.

It appears that unfair consumer credit practices may be prevalent in PNG and may have significant adverse effects on consumers. At present, however, there is no comprehensive consumer credit regulation in PNG. For instance, there are no prohibitions against unfair consumer credit practices either in the ICCA Act or in financial services legislation such as the *Central Banking Act 2000* (PNG).

The development of specific proposals for consumer protection reforms specific to the consumer credit market in PNG should be undertaken as an integral part of the reform of financial services regulation. That reform will require extensive consultation with financial sector stakeholders, including the Bank of Papua New Guinea and other regulators. Financial services regulation in PNG is currently under review by Treasury. It is recommended that a set of plain-language prohibitions against unfair consumer credit practices should be developed, to supplement generally applicable consumer protection laws. Various possible models are available as a starting point.³³ It is desirable to monitor the review of consumer credit regulation that is underway in Fiji.³⁴

The consumer protection recommendations made in this Part II are intended to apply generally, including to the financial services sector. Particular attention is drawn to the recommendations made in this Part in relation to: misleading or deceptive conduct; false representations; and unfair standard contract terms. Exempting “financial services” from general consumer protection laws would be a recipe for difficult, costly and unnecessary disputes of the kind that have arisen as a consequence of such an exemption in Australia.³⁵ General application of the consumer protection recommendations made in this Part II would address at least some of the major kinds of unfair consumer credit practices as an interim measure, until comprehensive consumer credit regulation is developed.

³³ See, e.g., *Credit Contracts and Consumer Finance Act 2003* (NZ); B Allan *The Law of Secured Credit* (Thompson Reuters: Wellington, 2016).

³⁴ See, “Work Underway for a Simple Consumer Credit Law Act for Fiji”, October 13, 2016, at: <http://www.pfip.org/newsroom/in-the-news/2016-2/work-underway-simple-consumer-credit-law-act-fiji/>.

³⁵ See *Competition and Consumer Act 2010* (Cth) s 131A; Justice S Rares, “Competition, Fairness and the Courts” (2014) 39 *Australian Bar Rev* 79, 87-88.

Recommendation 52: Plain-language prohibitions against unfair consumer credit practices that are prevalent in PNG and that are likely to have significant adverse effects on consumers should be developed, as part of the reform of financial sector regulation in PNG.

Recommendation 53: "Financial services" should not be exempted from PNG's general consumer protection laws.

Online consumer transactions

PNG stakeholders have expressed to the Review Team their concerns about risks to which PNG consumers are exposed on the Internet. PNG consumers are exposed to the risk of unfair or abusive conduct online in connection with purchasing online (e.g. from Amazon, e-Bay and other online vendors); purchasing digital products (e.g. software, music, videos). Misleading or deceptive conduct in online transactions is said to be prevalent.

Some countries (e.g. Singapore) are considering laws to protect consumers' rights specifically in relation to purchasing online, digital products and online trader conduct. The Review Team does not consider that legislation specifically to protect online consumers is necessary at this time. In PNG, consumer protection laws should have general application, including to digital products and online transactions and trade conduct. However, general or specific PNG consumer protection laws are not a panacea. Much online conduct is trans-border and difficult or impossible to police by enforcement of national laws.

As PNG consumers increasingly make online purchases, acquire digital products and deal with online traders, the ICCC should develop materials for the education and guidance of online consumers and include information on issues and precautions for online consumers in its advocacy activities.

Recommendation 54: The ICCC should develop materials for the education and guidance of online consumers.

Building and construction

Some stakeholders expressed to the Review Team concerns regarding provision of real estate and building and construction services to individuals. The Review Team considers that the proposed prohibition against misleading or deceptive conduct in trade would have application at

least to some of the most serious conduct giving rise to concerns in the real estate and residential construction industries.

The Review Team notes that the ICCC proposed in its 2010 *Housing and Real Estate Industry Review* the development of “a co-regulatory framework, based on a mandatory code of conduct, approved by the ICCC and applying to all participants in the industry”. The ICCC has more recently stated it has commenced work on preparing codes of conduct for both the real estate sector and the residential housing sector.³⁶ The Review Team considers that if consumer protection laws are amended and supplemented in the ways recommended, it will usually be more effective for the ICCC to enforce those laws (e.g. the prohibition against misleading or deceptive conduct) than to rely on a code of conduct to promote compliance, particularly a voluntary code. The ICCC Act should be amended to empower the ICCC to negotiate and determine mandatory codes of practices and to give the ICCC powers to enforce them using the penalties and remedies that apply to civil contraventions of the ICCC Act.

Recommendation 55: The ICCC should, following commencement of a prohibition on misleading or deceptive conduct, develop guidelines regarding the application of the prohibition in the context of real estate and residential building transactions.

Recommendation 56: The ICCC Act should be amended to enable the creation of mandatory codes of practice, enforceable by means of the penalties and remedies that apply to civil contraventions of the ICCC Act. The ICCC should cooperate with real estate and residential housing sector stakeholders, and consumers, to complete preparation of codes of conduct for those sectors, compliance with which should be mandatory.

K. LEGISLATIVE CHANGES

The new or revised consumer protection laws recommended above should be located in the ICCC Act, to the extent possible, in Part VII of the Act (Consumer Protection). In preparing drafting instructions for those amendments, other legislation relating to consumer protection (eg *Bread Act 1974*; *Trading Act 1949*) should be repealed or consolidated, as appropriate. The consolidated provisions should be included in Part VII of the ICCC Act.

³⁶ ICCC, “ICCC brief” Issue 4, Vol 2 (2015).

To facilitate understanding of the legislation, and to promote consistency in interpretation, key terms should, as far as possible, have the same definitions in all consumer protection laws. Essential terms, such as “consumer”, “goods”, “services”, “in trade” and “supply”, should be defined widely:

- a trader may be a “consumer” provided the goods or services are not acquired for re-supply or use in his or her trade;
- “goods” should include some intangibles, such as electricity and software;
- “services” should cover all services, including professional services, provided in trade;³⁷
- an individual or a firm should be regarded as being “in trade” when engaged in any undertaking with a commercial flavour. Professional agents should be treated as “in trade”, whether their principals are or not; and
- the “supply” of goods and services should not be limited to sales, but should include hire and hire purchase transactions, and should cover “free gifts” if they are provided in connection with a trading transaction.

New consumer protection safeguards, including a new prohibition against misleading or deceptive conduct, should not come into force until the ICCC has had adequate time to make traders aware of their new responsibilities. A transition period of six months would be appropriate.

If new consumer protective legislation of the kinds described in this Part II is enacted, several Acts currently in force which have consumer protection functions could be repealed, amended or consolidated in the ICCC Act:

- *Bread Act 1974* – provisions that assist in protecting consumers should be incorporated in the *Trade Measurement Act*. The *Bread Act* should then be repealed.
- *Commercial Advertisement (Protection of the Public) Act 1976* – should be repealed, as the proposed prohibition of misleading or deceptive conduct and false or misleading statements will sufficiently cover misleading commercial advertising.
- *Motor Car Dealers Act 1976* – should be reviewed and amended to harmonize provisions aimed at protecting consumers with proposed

³⁷

The definition of services in s 44 of the ICCC Act is otherwise broad.

amendments to the ICCA Act, e.g. regarding misleading conduct and consumer guarantees.

- *Packaging Act 1974* –major product information and consumer protection provisions should be included in amendments to the ICCA Act, as part of the recommended modernization of the ICCA Act.
- *Trading Act 1949* – the licensing regime under the *Trading Act* would appear to have little purpose if the recommendations for new consumer protection laws are implemented. The conduct rules under the *Trading Act* should be incorporated in the ICCA Act as part of the recommended modernization of the ICCA Act. The *Trading Act* should be repealed

Recommendation 57: "Consumer" should be widely defined to include companies as well as individuals.

Recommendation 58: "Goods" should be widely defined, so as to include some intangibles such as electricity, gas and computer software.

Recommendation 59: "Services" should be widely defined, so as to include services of a professional nature, as well as the provision of electricity and gas.

Recommendation 60: The concept of "in trade" should be widely defined, and aimed at encompassing those who are in business, regardless of whether they operate as individuals or by means of corporations, focussing on the substantial nature of the enterprise and its activities, rather than its form.

Recommendation 61: The Goods Act 1951 should be amended to provide that the conditions and warranties implied into contracts for sales of goods are replaced, in the case of consumer sales, with new consumer guarantees.

Recommendation 62: The provisions in s 11 of the Hire Purchase Act 1966, which imply certain warranties and conditions into hire purchase contracts, and s 12, which relate to false statements and misrepresentations, should be replaced by the new consumer guarantees and the new fair trading regime, respectively.

Recommendation 63: Provisions in the Bread Act 1974 that assist in protecting consumers should be incorporated in the Trade Measurement Act and the Bread Act should be repealed.

Recommendation 64: The Commercial Advertisement (Protection of the Public) Act 1976 should be repealed, upon implementation of the proposed coverage of misleading advertising by amendments to the ICCC Act on misleading or deceptive conduct and false or misleading representations.

Recommendation 65: Product information and consumer protection provisions in the Packaging Act 1974 should be included in amendments to the ICCC Act and the Packaging Act 1974 should be repealed.

Recommendation 66: The Trading Act 1949 should be repealed, upon implementation of the proposed amendments to the ICCC Act relating to consumer protection rules.

Recommendation 67: The Motor Car Dealers Act 1976 should be reviewed and amended to harmonize provisions aimed at protecting consumers with proposed amendments to the ICCC Act, e.g. regarding misleading conduct and consumer guarantees.

III. COMPETITION POLICY AND LAW

Contents of this Part:

- A. Introduction
- B. A National Competition Policy for PNG
- C. Competitive Conduct Rules
- D. Review of Mergers
- E. Investigative Powers and Procedure
- F. Remedies and Sanctions
- G. Reviews and Appeals

A. INTRODUCTION

This **Part IV** proposes a National Competition Policy for PNG and addresses options for modernising the ICCA Act, in respect of:

- Rules on competitive conduct and review of mergers and acquisitions;
- Investigative powers and procedure;
- Remedies and sanctions;
- Reviews of, and appeals against, ICCA decisions.

B. A NATIONAL COMPETITION POLICY FOR 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 deal.”³⁸

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”.³⁹

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 likely to be more “efficient” in several respects:

- **Allocative efficiency** – the allocation of resources to their best uses;

³⁸ Competition Commission and the Office of Fair Trading, *Merger Assessment Guidelines: OFT1254* (2010), para 4.1.2.

³⁹ *Re QCMA* (1976) 25 FLR 169 at 188-9.

- **Productive efficiency** – the least costly production of goods and services; and
- **Dynamic efficiency** – continual 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 social 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 disadvantaged groups** – 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.

Competition policy and law are unlikely by themselves to deliver all benefits associated with competitive markets. Competition policy and law will often be necessary for economic development but will seldom be sufficient. Competition policy and law should complement and work together with other legal and policy instruments and with the commercial framework generally, including consumer protection, finance, tax, and trade.⁴⁰ For example, consumer protection goes hand-in-hand with

⁴⁰ UNCTAD, "The importance of coherence between competition policies and government policies", Note by the UNCTAD secretariat, 10 May 2011.

competition. Choices by well-informed consumers drive competition between businesses and effective competition is impeded if unfair trading is allowed in markets. Consumer protection is treated in this Report as being an inherent part of competition policy.

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 (although not always) in tension with competition policy. Any such policy tensions should be made explicit and resolved openly.

Under the ICCC Act, the “primary objectives” of the ICCC are:⁴¹

- (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 ICCC must have regard.

The statement of objectives in section 5 relates only to the ICCC. The section should be recast as a statutory objects provision that applies generally to the interpretation and application of the ICCC Act, including by the courts.

The reference to “welfare” in section 5(1) should also be clarified by inserting the word “total” to make it clear that total welfare is relevant, not merely the more limited standard of consumer welfare.

The word “availability” should be inserted before the words “price, quality and reliability of significant goods and services” in section 5(1)(c). The availability of significant goods and services is an important factor in many parts of PNG.

The revised statement of statutory objectives in s 5 recommended above should be complemented by a National Competition Policy for PNG. Several submissions supported the introduction of such a Policy. A

⁴¹ ICCC Act s 5(1).

National Competition Policy for PNG would set out the key elements of the Government's approach to competition, the total welfare and other impacts sought to be achieved, the means to be used to achieve those impacts, and guidance on the resolution of tensions that may arise between competition, efficiency, and other goals including social equity and social inclusion. An indicative suggested outline of the elements that could usefully be covered in a National Competition Policy for PNG is set out in **Appendix 2**. A National Competition Policy of this kind would 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. A draft National Competition Policy should be prepared and published for comments.

Recommendation 68: A National Competition Policy for PNG should be formulated and introduced, following public consultation on a draft version.

Recommendation 69: The statement of objectives in ICCA Act section 5 should be recast as a statutory objects provision that applies generally to the interpretation and application of the Act, including by the courts.

Recommendation 70: The word "availability" should be inserted before the words "price, quality and reliability of significant goods and services" in ICCA Act section 5(1)(c).

Recommendation 71: The reference to "welfare" in ICCA Act section 5(1) should be clarified by inserting the word "total" to make it clear that total welfare is relevant, not merely the more limited standard of consumer welfare.

C. COMPETITIVE CONDUCT RULES

The ICCA Act was passed by Parliament in 2002. The competitive conduct rules and other provisions have not been reviewed since then. Review is desirable in light of the subsequent experience gained by the ICCA and businesses. Recent developments in competition law in other countries are also worth taking into account. Ultimately, however, the approach taken must reflect PNG's needs and circumstances and be tailored to suit them.

The ICCA Act contains much technicality and is repetitious in some

respects.⁴² In addition to the changes recommended below, the Act should be simplified as far as practicable.

The main issues arising from the competitive conduct rules are discussed below.⁴³

Recommendation 72: The ICCC Act should be modernized, including by simplifying its language and structure as far as practicable and removing repetition wherever possible.

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 should be simplified by repealing section 51.⁴⁴ Section 51 is unnecessary. The term "provision" in section 50 is sufficiently broad to enable s 50 to cover the conduct prohibited by section 51 in relation to covenants.

Section 45 defines some aspects of the substantial lessening of competition test including the term "competition". However, 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 would be useful for the meaning of "substantial" to be explained in ICCC guidelines. The guidelines could include worked examples to illustrate in a practical way the kinds of circumstances in which 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

⁴² Examples include the treatment of covenants in ICCC Act s 51. As discussed below, s 51 can and should be repealed.

⁴³ One submission has raised the further question of whether or not the Act applies to Provincial and Local Governments' businesses. The Act should apply; if clarification is required, should be included among the amendments to the Act that would flow from adoption of this Report.

⁴⁴ Repeal of the equivalent section in the *Competition and Consumer Act 2010* (Cth) is recommended in Australia, *Competition Policy Review: Final Report* (March 2015) 3.2.

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 ICCC 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 in cases where the likely reduction in competitive rivalry is outweighed by likely efficiency gains. A rule of reason should be introduced in PNG.⁴⁵ The SLC test takes efficiencies into account only to a limited and inadequate extent. A workable approach would be to create a rule of reason defence requiring a defendant to prove that the efficiency or other pro-competitive gain of a provision in an agreement is sufficient to outweigh its anti-competitive effect. This rule of reason defence would allow considerable scope for self-assessment and self-regulation while also guarding against undue laxity and spurious excuses. ICCC Guidelines should be issued to explain and illustrate the application of this defence, including by means of worked examples.

Under section 45(2) the term “market” is “a reference to a market in the whole of Papua New Guinea for goods or services...”. That definition is too rigid: 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 should be amended to read “...a market in Papua New Guinea...” so as to provide for the possibility of geographic markets in only part of PNG. To guard against the possible risk of undue intervention by the law in minor geographic markets, the term “market” should be defined to require that the market be “substantial” in the sense of having a certain minimum volume of commerce.

Recommendation 73: ICCC Act section 51 (restrictive covenants) is unnecessary and should be repealed.

Recommendation 74: The meaning of “substantial” in the substantial lessening of competition test should be clarified by ICCC guidelines that include worked examples.

Recommendation 75: A rule of reason defence should be introduced to exclude liability in cases of alleged anti-competitive agreements where a defendant can prove that the anti-competitive effect of a provision in an agreement is outweighed by its efficiency or other pro-competitive gain. ICCC Guidelines

⁴⁵ For one possible model see *Competition Act 1998* (South Africa) s 4(1)(a). See further ABA, *Antitrust Law Developments (Seventh)* (2012) Vol I, ch 1 B3b; R Joliet, *The Rule of Reason in Antitrust Law* (Springer, 1967)

should be issued to explain and illustrate the application of this defence.

Recommendation 76: The term "market" in ICCA Act section 45(2) should not be limited to one national market in PNG but should provide for the possibility of sub-national geographic markets, in parts of PNG. The term "market" should be defined to require that the market be "substantial" in the sense of having an annual minimum volume of commerce.

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 section 52(1)). Under section 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.⁴⁶)

In PNG, the concept of an "exclusionary provision" under section 52 should be repealed and replaced by that of a "cartel provision". A "cartel provision" should 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 the effect or

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

likely effect of restricting competition between two or more competitors.⁴⁷

Certain kinds of restrictions on supply or acquisition that are agreed between competitors should be exempted. Apart from authorization, the necessary exemptions include: a collaborative activity exemption; a collective bargaining exemption; and an exemption for vertical supply agreements between competitors.

Recommendation 77: ICC Act section 52 should be amended by repealing the term "exclusionary provision" and substituting the term "cartel provision".

Recommendation 78: A "cartel provision" should 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.

Recommendation 79: Certain kinds of restrictions on supply or acquisition that are agreed between competitors should be exempted, including: a collaborative activity exemption; a collective bargaining exemption; and an exemption for vertical supply agreements between competitors.

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 are desirable.

First, it is unclear whether or not the element of "controlling a price"

⁴⁷ For one model see the *Commerce (Cartels and Other Matters) Amendment Bill 2014* (NZ), proposed ss 30-30D of the *Commerce Act 1986* (NZ).

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 should 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 would help to highlight the seriousness of this conduct and enhance deterrence.

Thirdly, the provisions relating to covenants (sections 51 and 57) are unnecessary and should be repealed. The ground is covered by the prohibitions under section 50 and section 53 (the term "provision" in those sections embraces covenants).

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 should 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.

Recommendation 80: ICC Act section 53 should be amended to make it clear that the legally relevant test for the "controlling" of a price 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.

Recommendation 81: A specific prohibition against bid-rigging should be introduced to the ICC Act.

Recommendation 82: ICC Act sections 51 and 57 (restrictive covenants) are unnecessary and should be repealed.

Recommendation 83: ICC Act section 55 (exempting recommendations on price where there are 50 or more parties to

the contract, arrangement or understanding containing the recommendation) should be repealed.

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:⁴⁸

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.

It is difficult to formulate a straightforward rule against abuse of market power. The effects test recently proposed in Australia has been criticised.⁴⁹ US antitrust law and EU competition law do not offer obvious answers for PNG.

One possible approach would be to create a new prohibition against unlawful exclusionary conduct. The new prohibition could be based on two

⁴⁸ Australia, *Competition Policy Review: Final Report* (March 2015) 61.

⁴⁹ Australia, *Competition Policy Review: Final Report* (March 2015) Recommendation 30.

basic principles.⁵⁰

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

Although such an approach would be based on sensible principles, it has yet to be tried and tested in practice.

A less ambitious and safer approach would be to modify the effects test proposed in Australia by addressing the main criticisms that have been made of it. Under that proposal, a corporation with a substantial degree of power in a market would be prohibited from engaging in conduct if the conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market. Three main criticisms have been made of that approach:

- the prohibition would apply to all forms of "conduct", and not only to exclusionary conduct;
- the SLC test is uncertain because of the vagueness of a "substantial" lessening of competition; and
- the SLC test extends the scope of liability too far because it catches cases where the lessening of competition is outweighed by efficiencies.

A further question is the need or otherwise for the element of "purpose". This element is unnecessary given that the SLC test applies to conduct that is likely to substantially lessen competition in the future. The element of purpose is also prone to overreach in cases where there is an intention to substantially lessen competition in an abstract or hypothetical sense but where, if carried out, the conduct intended will not in fact substantially lessen competition or be likely to do so.

The first of the criticisms above can be met by requiring exclusionary conduct as an element of the prohibition and by defining what is meant by "exclusionary conduct".⁵¹ The second criticism can be addressed by using detailed ICCG Guidelines, including worked examples, to explain and clarify how the SLC test applies in this context. The third criticism can be

⁵⁰ See R O'Donoghue & AJ Padilla, *The Law and Economics of Article 102 TFEU* (2nd ed, 2013) 4.2.

⁵¹ See eg *Competition Act 1998* (South Africa) s 8(d).

met by creating a rule of reason defence of the kind proposed above in the context of agreements that substantially lessen competition. Lastly, the element of “purpose” should not be included in the definition of the prohibition.

The *Fairness of Transactions Act* provides for mediation and, if that fails, review by a court of a “transaction” that “was not genuinely mutual or was manifestly unfair to a party”.⁵² This Act has occasionally been invoked by private parties.⁵³ A party to proceedings under this Act “may appear in such proceedings either personally or by a representative”⁵⁴ but the ICCC does not formally have a role under this Act. The *Fairness of Transactions Act* should be amended by adding a power for the ICCC to initiate mediation under the Act and to bring proceedings on a representative basis on behalf of parties that may have been treated unfairly.

Another possible way of addressing some forms of misuse of market power is to introduce a prohibition against ‘unconscionable’ or unfair conduct. For example, oppression of small suppliers by large businesses could be prohibited as unconscionable or unfair conduct, which will in many cases be easier to assess than misuse of market power. The introduction of a prohibition against unconscionable conduct is recommended.

Recommendation 84: ICCC Act section 58 should be redefined as a prohibition against unlawful exclusionary conduct, with these key elements:

- (a) “exclusionary conduct”, as defined in the Act, by a corporation with substantial market power***
- (b) exclusionary conduct that has a SLC effect or likely effect; and***
- (c) a rule of reason defence to exclude liability where a defendant can prove that the anti-competitive effect of the exclusionary conduct is outweighed by its efficiency or other pro-competitive gain.***

Recommendation 85: There should be detailed ICCC Guidelines, including worked examples, to explain and clarify how the redefined section 58 prohibition on exclusionary conduct applies to different kinds of conduct.

⁵² *Fairness of Transactions Act 1993* (PNG) s 5(1).

⁵³ See eg *Awesa v PNG Power Ltd* [2016] PGNC 168.

⁵⁴ *Fairness of Transactions Act 1993* (PNG) s 10.

Recommendation 86: The Fairness of Transactions Act should be amended by adding a power for the ICCC to initiate mediation under the Act and to bring proceedings on a representative basis on behalf of parties that may have been treated unfairly.

Recommendation 87: The ICCC Act should be amended to include a prohibition against unconscionable conduct.

Resale price maintenance

Resale price maintenance (**RPM**) is the practice of supplying goods or services to a person who “re-sells” them to another on condition that the reseller charge 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 conceivably might be introduced⁵⁵ but to do so would complicate the law and increase enforcement and compliance costs.

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). Sections 60 and 63 should be repealed. Sections 59, 61 and 62 should be simplified.

There is no ‘loss-leader’ exception under the ICCC Act.⁵⁶ 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.⁵⁷ Such an exception should be inserted in the ICCC Act.

Recommendation 88: Sections 60 and 63 are unnecessary and should be repealed. Sections 59, 61 and 62 should be simplified.

Recommendation 89: The prohibition against RPM should be retained. It should not be subject to a SLC or rule of reason test.

⁵⁵ 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). That approach has not been followed in Australia; see Australia, *Competition Policy Review: Final Report* (March 2015) 20.4.

⁵⁶ Loss leading is the practice of selling goods below cost in order to attract business and recoup the loss on profits made from the sale of other goods. For a statutory example of a loss leader exception, see *Competition and Consumer Act 2010* (Cth) s 98(2).

⁵⁷ The approach taken in *Competition and Consumer Act 2010* (Cth) s 98(2).

Recommendation 90: The prohibition against RPM should be subject to a "loss leader" exception.

Territorial jurisdiction

Part VI of the ICCC 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 47(1)). The test for territorial jurisdiction under section 47(1) needs to be revised, for two reasons:

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

Section 47(1) should 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'.

Recommendation 91: ICCC Act section 47(1) should be amended to read: "...extends to conduct engaged in outside PNG by any person to the extent that such conduct affects trade or a market in PNG."

Authorization and clearance

Authorization is possible under sections 70-80 of the ICCC 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.

Authorization is possible in relation to most of the prohibitions against anti-competitive conduct under the ICCC Act but does not apply to price fixing or misuse of market power. It is 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 ICCC Act. It would be expedient for businesses and for the ICCC if the Act were to include the power to grant authorization on an interim basis. Section 81 should be amended to add an interim authorization procedure to the provisions relating to authorization.

The ICC Act provisions on authorization are in some respects repetitious and unnecessarily complicated. They should be simplified.

Conduct that would otherwise infringe the ICC Act may be permitted by “*authorization*” where the anti-competitive effect of the conduct is outweighed by the public benefits that are likely to result from it.⁵⁸ “*Clearance*” for conduct that is not likely to cause a substantial lessening of competition in a market is not available under the Act, however, which provides for clearance only in respect of mergers or acquisitions.⁵⁹ Clearance should be available in respect of conduct, as well as mergers, where there is no substantial lessening of competition, i.e. whether or not there is any public benefit. It does not make sense to have a clearance process for mergers but not for comparable commercial agreements such as joint venture agreements.

Section 74 allows parties to apply for authorization in relation to conduct where that conduct has already occurred, prior to the application being made. This approach is too lax. If conduct would breach the Act, it must not be engaged in unless:

- authorization has actually been granted; or
- (where the conduct is merely a preliminary step in a transaction) is conditional on authorization or interim authorization being granted by the ICC within 30 days.

There is no time limit on the process of authorization. A time limit of 3 months would be desirable as an upper limit.

Recommendation 92: Authorization should be available for price fixing and misuse of market power, if the public benefit test is fulfilled.

Recommendation 93: The ICC Act should be amended to provide for interim authorization.

Recommendation 94: On an application for authorization, the ICC should be empowered to grant a clearance for conduct, if the ICC considers that there is no SLC and no likely SLC.

Recommendation 95: ICC Act section 74 should be amended to require that conduct in breach of the Act unless authorised should

⁵⁸ ICC Act s 77.

⁵⁹ ICC Act s 81.

not be engaged in unless authorization has been granted or, where the conduct is merely a preliminary step in a transaction, is conditional on authorization or interim authorization by the ICCC within 30 days.

Recommendation 96: The authorization process should be subject to an upper time limit of 3 months.

Other exemptions

The ICCC Act provides for various other exemptions. Some call for clarification. Many should be modernised. Some additional exemptions are desirable.

The joint venture exemption under section 54 applies only to price fixing and to joint ventures. The exemption should 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 model.⁶⁰

The joint buying and promotion exemption under section 56 applies only to price fixing. It should 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 one commendable model.⁶¹

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 should be defined to mean “authorized by specific reference to the provisions of the ICCC Act to which the exception applies.”

Section 66 provides for various exceptions. 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

⁶⁰ Commerce (Cartels and Other Matters) Amendment Bill 2014 (NZ), proposed s 31 of the Commerce Act.

⁶¹ Commerce (Cartels and Other Matters) Amendment Bill 2014 (NZ), proposed s 32 of the Commerce Act.

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 ICCC); 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).

These exceptions are questionable as they may be unjustifiably wide in some situations. However, their repeal may have some unintended consequences. A compromise approach would be to give the ICCC power to issue a 'notice of objection' requiring a party relying on a section 66 exception to apply for authorization within a specified period. In that way the justification or otherwise for a section 66 exception applying to the particular conduct could be tested. In cases where there is no apparent justification for exempting the particular conduct from the normal competition rules the exemption should not operate and the ICCC should be empowered to make a determination that the exemption does not operate.

Section 67 exempts certain intellectual property licensing conditions from many of the prohibitions relating to anti-competitive conduct. The better view is that intellectual property should be treated the same as other assets or property, so no exemptions like those under section 67 should apply.⁶² However, repeal of section 67 would result in the overreach of the prohibitions against anti-competitive agreements unless (as is proposed above):

- (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.

Recommendation 97: A collaborative activity exemption should be introduced and apply to all cartel-related prohibitions.

Recommendation 98: The joint buying and promotion exemption under ICCC Act section 56 should apply to all cartel-related prohibitions.

⁶²

The approach taken in Australia, *Competition Policy Review: Final Report* (March 2015) 9.2.

Recommendation 99: An exemption for genuine supply agreements between competitors should be introduced and apply to all cartel-related prohibitions.

Recommendation 100: The meaning of "specifically authorized" in section 65 should be clarified by statutory definition, e.g. "authorized by specific reference to the provisions of the ICCC Act to which the exception applies."

Recommendation 101: The exemptions under ICCC Act section 66 should be subject to the power of the ICCC to issue a 'notice of objection' requiring a specified person who is relying on a section 66 exception to apply for authorization within a specified period.

Recommendation 102: The ICCC Act section 67 exemption for certain intellectual property licensing conditions should be repealed but only if:

- (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.***

D REVIEW OF MERGERS

Under section 69(1) of the ICCC 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. The ICCC may give "clearance" (under s 81 of the ICCC Act) if the acquisition would not substantially lessen competition in a market, or may grant an "authorization" (under s 82 of the ICCC Act) if it will result or be likely to result in such a benefit to the public that it should be permitted.

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 ICCC. Merger guidelines are used by many competition regulators⁶³ 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

⁶³ See eg Commerce Commission of New Zealand, *Mergers and Acquisitions Guidelines* (2013).

guide decisions by the regulator and help to promote transparency and consistency. The ICCC 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 should be included in those guidelines.

The ICCC’s proposed 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: In what circumstances are behavioural undertakings likely to be accepted by the ICCC? What types of structural or behavioural undertakings are worth proposing to the ICCC for consideration?)

There is no mandatory merger notification requirement under the ICCC 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 ICCC or a court to ‘unscramble’ an acquisition. The ICCC Act should be amended to provide for “mandatory 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 ICCC has prepared a discussion paper on this question together with proposed amendments to the Act.⁶⁴

Section 81 initially was proposed to be amended to provide that: “(1) A person who proposes to acquire assets of a business or shares shall inform the Commission, and in so doing, the Commission will advise in writing, within 14 days, on whether or not a notice seeking clearance for the acquisition is required.” This proposed amendment would be too far-reaching: it would cover all acquisitions of businesses or shares including small acquisitions that would not conceivably be likely to substantially lessen competition in a market. The ICCC has since formed the view that thresholds must be set to limit the need for notification to mergers involving transactions that are sufficiently sizeable to raise a possible SLC issue. The future legislation should include realistic thresholds or refer to thresholds set under regulations.

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See: <http://www.iccc.gov.pg/index.php/competition/mergers-and-acquisition/proposed-amendments>.

There appears to be no power at present to grant clearance or authorization subject to a condition. Sections 81 and 82 should be amended to provide that power, consistently with the power under section 77(2) to grant conditional authorization under section 70.

The 20 day standard timeline that applies to clearance by the ICCC (section 81(3)) is very tight. A 30 day upper time limit would be more realistic. Extension should be possible for the business days necessary to hold pre-decision conferences called under section 86 or where agreed between the ICCC and the applicant.

Standard timelines should apply to authorization and interim authorization. A 3 month and 30 day upper time limit respectively would be realistic. Extensions of time should be possible for the business days necessary to hold pre-decision conferences or where agreed between the ICCC and the applicant.

Provision should be made for withdrawal or amendment of an application for clearance or authorization. The ICCC should have the ability to determine an application for authorisation by giving clearance, where it is satisfied that the acquisition would not substantially lessen competition in a market. Similarly, the ICCC should also have the ability to determine an application for clearance by granting authorisation, where it is satisfied that the transaction will result or be likely to result in such a benefit to the public that it should be permitted. The processes and timelines for merger clearance and authorisation should be harmonised to the extent possible.

Section 85 should be amended to authorize the ICCC to accept behavioural undertakings and structural undertakings other than undertakings relating to the disposal of assets or shares. Such undertakings should be court-enforceable. The nature and scope of such undertakings and the process governing their use should be covered in the proposed Merger Guidelines.

The ICCC should be given the power to revoke or amend a clearance or authorization if the ICCC granted the clearance or authorization on the basis of materially false or misleading information supplied by the applicant or a third party or where there has been a material change of circumstances.

Recommendation 103: ICCC Act sections 81 and 82 should be amended to provide the power to grant clearance or authorization on a condition, consistently with the power under section 77(2) to grant conditional authorization under section 70.

Recommendation 104: The upper time limit for clearance by the ICCC (ICCC Act section 81(3)) should be increased to 30 days. Extension should be possible for the business days necessary to hold pre-decision conferences called under section 86 or where agreed between the ICCC and the applicant.

Recommendation 105: The processes and timelines for merger clearance and authorisation should be harmonised to the extent possible. Standard timelines should apply to authorization and interim authorization (e.g. a 3 month and 30 day upper time limit respectively). Extension should be possible for the business days necessary to hold pre-decision conferences or where agreed between the ICCC and the applicant

Recommendation 106: The ICCC Act should be amended to require mandatory pre-notification to the ICCC of mergers and acquisitions that exceed specified thresholds.

Recommendation 107: ICCC Act section 85 should be amended to allow for behavioural undertakings and structural undertakings other than undertakings relating to the disposal of assets or shares. Such undertakings should be court-enforceable. The nature and scope of such undertakings and the process governing their use should be covered in the proposed ICCC Merger Guidelines.

Recommendation 108: Provision should be made in the ICCC Act for withdrawal or amendment of an application for clearance or authorization.

Recommendation 109: The ICCC should be given the power under the ICCC Act to revoke or amend a clearance or authorization if the ICCC granted the clearance or authorization on the basis of materially false or misleading information supplied by the applicant or a third party or where there has been a material change in circumstances.

E. INVESTIGATIVE POWERS AND PROCEDURES

Competition laws need to be enforced if they are to have their intended positive economic effect. Effective enforcement requires a person or body must be tasked with enforcement and must be given the resources and powers that the task requires.

The ICCC is the competition enforcement agency in PNG. An evaluation of the ICCC's capability and the resources available to it is underway.

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:

- 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.
- **ICT** – NICTA has a MOU with the ICCC for information sharing and effective collaboration on ICT matters.

The functions of the ICCC specified in section 6 do not focus on competition-related functions. Section 6 should be amended to include, first and foremost, a specification of the major competition-related roles of the ICCC.

Section 6 should be amended so that the ICCC is expressly empowered to initiate civil or criminal investigations and enquiries at its own discretion (e.g. without necessarily receiving a complaint) and, except where expressly legislated otherwise, to take civil or criminal enforcement action independently of any other person or authority.

Section 132 should be amended to enable the ICCC to prosecute offences independently of the Public Prosecutor. The requirement of consultation with and approval of the Public Prosecutor may have been appropriate during the infancy of the Commission but today unduly impedes the ability of the Commission to take enforcement action efficiently.

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. That suggestion goes beyond the requirements of the ICCC Act and the Constitution. Where it is necessary for ICCC investigators to enter premises without consent, or to seize goods or documents, a warrant can and should be obtained. The powers under section 129 of the ICCC Act are inadequate, however, in respect of the search and seizure of computer or other electronic evidence. Section 129 needs to be modernized.⁶⁵

An "immunity policy" (called a "leniency policy" in some jurisdictions) is used by 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

⁶⁵ Compare, for example, Part XIX of the *Competition and Consumer Act 2010* (Cth).

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 “leniency” policy for public consultation. For clarity, the policy should be retitled as an Immunity Policy.

A “co-operation policy” could also be developed to encourage parties involved in breaches of the ICCC Act (including, but not limited to breaches relating to cartels) to report those quickly to the ICCC and to co-operate with ICCC investigations. Structured discounts on monetary penalties should be offered as an incentive to co-operate. 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 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 to some extent.⁶⁶ Amendment of the ICCC Act specifically to authorise disclosure of information and provision of investigative assistance is desirable.

Recommendation 110: ICCC Act section 6 should be amended to include, first and foremost, a specification of the major competition-related roles of the ICCC.

Recommendation 111: ICCC Act section 6 should be amended so that the ICCC is expressly empowered to initiate civil or criminal investigations and enquiries at its own discretion (e.g. without necessarily receiving a complaint) and, except where expressly legislated otherwise, to take civil or criminal enforcement action independently of any other person or authority.

Recommendation 112: ICCC Act section 132 should be amended to enable the ICCC to prosecute offences independently of the Public Prosecutor.

Recommendation 113: An ICCC “immunity policy” and a “co-operation policy” should be developed to encourage parties involved in breaches of the ICCC Act to report those quickly to the

⁶⁶ ICCC Act ss 27, 106(m).

ICCC and to co-operate with ICCC investigations, with clear guidelines and structured discounts on monetary penalties available as an incentive to co-operate.

Recommendation 114: 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.

Recommendation 115: The ICCC Act should be amended so as specifically to authorise disclosure of information and provision of investigative assistance in relation to international cartel activity or other overseas conduct.

F. REMEDIES AND SANCTIONS

There are several respects in which the remedies and sanctions now available for breaches of the ICCC Act should be improved.

The maximum penalty for corporations that breach Part VI of the Act (PGK10 million) is too low to reflect the most serious potential breaches of the law. It would be desirable to increase the standard maximum penalty to PGK20 million and to provide 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 should be consolidated within one section.⁶⁷

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 term of an injunction, that a corporation take preventive measures to guard against repetition of breach. A court should be empowered to make such an order. 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 should be clarified in these respects.

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 should be given to the ICCC to accept undertakings in relation to alleged breaches of Part VI (or Part VII) and to

⁶⁷ This is one of numerous relatively minor points in the Report to be considered when preparing drafting instructions for amendments to the ICCC Act.

apply to the court to enforce the undertaking if the party fails to honour it.⁶⁸ Guidelines on the use of such undertakings should 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 on indemnification should 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 should be extended to apply to breaches of section 50 and other Part VI prohibitions.

Enforcement of Part VI of the ICCC Act now depends almost entirely on the ICCC. Private actions may also assist enforcement. However, at present the ICCC Act does not provide for admissions of fact in litigation by the ICCC, or agreed by a party in a settlement with the ICCC, to be used as evidence in private actions for damages or other remedies. Such a provision should be introduced.⁶⁹

Civil actions for damages are subject to a limitation period of 3 years (section 94(2) and section 97(2)). This is very restrictive. The limitation period should be extended to 6 years.⁷⁰

Recommendation 116: The standard maximum penalty should be increased to K20 million and provision should be made for an alternative maximum penalty of double the gain or double the loss likely to be caused by a breach.

Recommendation 117: ICCC Act section 93 should be amended to make it clear that a court may require a defendant to take specified precautions against repetition of a breach of the ICCC Act.

Recommendation 118: A power should be given to the ICCC to accept undertakings in relation to alleged breaches of ICCC Act Part VI (or Part VII) and to apply to the court to enforce the

⁶⁸ One tried and tested model is *Competition and Consumer Act 2010* (Cth) s 87B.

⁶⁹ See Australia, *Competition Policy Review: Final Report* (March 2015) 407-9.

⁷⁰ As under eg *Frauds and Limitations Act 1988* (PNG) s 16(1); *Competition and Consumer Act 2010* (Cth) s 82(2).

undertaking if the party fails to honour it.

Recommendation 119: The ban on indemnifying individuals for pecuniary penalties imposed should be extended to apply in relation to any breach of the ICCA Act.

Recommendation 120: The National Court's power to disqualify a person from participating in the management of a corporation should be extended to apply in relation to any breach of Part VI of the ICCA Act.

Recommendation 121: Admissions of fact in litigation by the ICCA, or agreed by a party in a settlement with the ICCA, should be admissible as evidence in private actions for damages or other remedies.

Recommendation 122: The limitation period on civil actions for damages should be increased to 6 years.

G. REVIEWS AND APPEALS

Decisions and actions of the ICCA are subject to various 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", 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.⁷¹ 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.⁷²

Several submissions to the Review advocate that there should be an independent merits-based review of ICCA decisions, especially decisions to deny clearance or authorization.

Clearance or authorisation decisions are not at present subject to review by an external independent panel, if a party does not agree with the determination. The review process that currently applies in relation to regulated entities should be consolidated and adapted so as to apply not only to ICCA determinations relating to regulated entities but also to ICCA

⁷¹ ICCA Act s 43.

⁷² ICCA Act s 43(8).

decisions on clearance or authorisation.

Where the Commission makes a decision exercising a statutory power, that decision is subject to judicial review in accordance with Order 16 of the *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.”⁷³ The Review Team understands this legislation applies in relation to the former Territory of New Guinea only, and is rarely used now. It should be available in competition law cases nationwide.⁷⁴

Recommendation 123: The “Appeals Panel” process should be extended to allow appeal from a decision of the ICCC to grant, modify or revoke a clearance or authorisation decision.

Recommendation 124: The court should have the power to appoint an expert “assessor” who can give his or her opinion on matters arising out of evidence in any ICCC Act proceeding.

⁷³ See the *National Court Assessors Act 1925* (PNG) s. 5.

⁷⁴ Under the *Commerce Act 1986* (NZ) ss 77, 78, expert lay members are appointed to the High Court. In PNG it may not be possible constitutionally to appoint economists as members of the National Court, but they can be appointed as assessors.

IV. ECONOMIC EMPOWERMENT OF DISADVANTAGED GROUPS

Contents of this Part:

- A. Introduction
- B. Consumer Protection and Women Consumers
- C. Competition Law and Women in Business
- D. Regulation and Economic Empowerment

A. INTRODUCTION

The Consumer and Competition Framework Review was required to consider, among other matters, "...whether existing consumer protection and competition laws continue to appropriately address the current and emerging developments in PNG's growing economy."⁷⁵ Promoting the participation of women and members of disadvantaged groups in the economic life of PNG is an important objective of the government. Accordingly, this section explores the potential for the consumer and competition framework to provide better protection for women and members of disadvantaged groups as consumers, employees and business owners in PNG and to help to expand women's economic opportunities in the private sector.

This section first examines the importance of economic empowerment of members of disadvantaged groups in PNG and discusses the role that consumer and competition law can play in helping women overcome barriers to women's entrepreneurship. Second, this section addresses the specific challenges that women and members of disadvantaged groups face in consumer transactions and accessing consumer protection remedies. Third, barriers to market entry, economic participation and recourse to remedies by women and members of disadvantaged groups are considered, together with proposals for reforms to help reduce such barriers.

The PNG Government recognises that encouraging women to participate in the economy as consumers, entrepreneurs and employees is essential for economic growth. It is committed to gender equality and has emphasised the need to create an enabling policy environment for translating this commitment into practice.⁷⁶

⁷⁵ Terms of Reference, para A.2.

⁷⁶ *National Policy for Women and Gender Equality 2011 – 2015*.

Over the past decade, PNG has achieved progress in narrowing disparities between women and men. In addition to becoming a signatory to a number of international treaties and conventions that protect the legal status of women,⁷⁷ PNG's Constitution and its Bill of Rights guarantee equal rights to women and men, expressly stating that "all citizens have the same rights" irrespective of gender.⁷⁸ Further, the preamble to the Constitution calls for every citizen to have equal access to legal processes and all services, including governmental services.

Nonetheless, women in PNG remain at a disadvantage to men in social, economic and political spheres of life. Gender inequality constitutes a major development challenge and causes significant loss in potential human development. PNG's Human Development Index score remains low with PNG ranking 158th out of 188 countries and territories in 2015.⁷⁹ PNG ranked only 140th out of 155 countries included in the 2015 United Nations Development Programme (UNDP) gender inequality index (GII).⁸⁰ While significant progress has been made in terms of promoting legal gender parity between women and men, women continue to face particular barriers to greater economic participation.

Significant opportunity remains for expanding women's access to and use of:

- Formal contractual employment opportunities (as a significant percentage of women are engaged in the informal sector);
- Formal business structures and registered business names;
- Land rights (as customary land ownership restricts women's ability to obtain collateral);
- Public procurement processes;
- Formal financial services (including digital financial services and

⁷⁷ PNG ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1991. PNG also endorsed a number of key international and regional policy framework of particular significance for women including the 1995 Beijing Platform for Action, the 2000 Millennium Development Goals (MDGs), the Commonwealth Plan of Action for Gender Equality 2005-2015, the Revised Pacific Platform for Action on Advancement of Women and Gender Equality (2005-2015), and the Sustainable Development Goals (SDGs) 2015.

⁷⁸ *Constitution of the Independent State of Papua New Guinea* (1975), s 55.

⁷⁹ UNDP, *Human Development Report* (2015) p 49. Papua New Guinea's HDI value for 2014 was 0.505, ranking PNG 158th on the HDI.

⁸⁰ The GII is an inequality index. The GII reflects how women are disadvantaged in key dimensions such as empowerment and economic status. The GII includes maternal mortality ratios, adolescent fertility rates, female representation in national parliament and gender-disaggregated data for educational levels and labour force participation rates. Maternal mortality rates and educational access for girls and women in the PNG are considered amongst the worst in the Pacific region.

tools that facilitate women's ability to obtain credit); and

- Consumer protection (including financial consumer protection) and competition law remedies.

PNG consumers, and especially women consumers, stand to benefit through the opportunities provided by open and competitive markets. Consumer protection and competition in markets benefit consumers directly through lower prices, better quality and improved choice of goods and services and indirectly by fostering economic development and growth. An effective consumer and competition framework is essential for economic growth, poverty reduction and inclusive sustainable development. To be fully effective, that consumer and competition framework must operate equally for women and men.

Consumer protection and competition are mutually re-enforcing policy tools that can promote the opportunities and rights of women and members of disadvantaged groups. Women consumers, business owners and entrepreneurs benefit from enhanced consumer protection and competition law and policies in several ways:

- First, the promotion of competitive markets supports greater employment and entrepreneurial opportunities for women.
- Second, competition law helps to reduce or remove barriers to market entry, which enables women to gain better access to markets.
- Third, a consumer protection framework that equally protects female and male consumers and ensures that women are able to take advantage of consumer remedies and dispute resolution mechanisms is essential for advancing women's economic empowerment in PNG. Access to remedies is a particular challenge for women in rural and remote areas.
- Fourth, financial consumer protection (in combination with technological innovations that enhance women's access to financial services) has the potential to significantly increase women's economic capabilities and enhance their participation in PNG's economy.

International research suggests that gender equality is an important driver of economic development and poverty reduction.⁸¹ In order to secure their

⁸¹ World Bank, *World Development Report 2012: Gender Equality and Development*, pp 5-7. See also United Nations, *Progress of the World's Women 2015 -2016: Transforming Economies, Realizing Rights* (New York: UN Women) available at: http://progress.unwomen.org/en/2015/pdf/UNW_progressreport.pdf

livelihoods and participate fully in the economy, women need better access to: the formal economy; an enabling business and investment climate that supports starting-up their own enterprises; secure legal rights to land and other property; and access to finance and financial services.

The promotion of gender equality is a precondition to the success of the 2030 Sustainable Development Agenda.⁸² The Sustainable Development Goals emphasise the importance of ending all forms of discrimination against all women and girls and integrating gender dimensions into the development agenda.⁸³ Gender equality is recognised both as a development goal in itself and is considered central to accelerating sustainable development.⁸⁴ Achieving gender equality depends on women being able to exercise fully their rights in economic life, as well as in health, education and political representation.⁸⁵

Women's access to waged employment in the formal sector and entrepreneurial opportunities has a vital role to play in addressing household poverty and reducing women's reliance on informal employment activities.

PNG's "dual economy" places women at a disadvantage relative to men. Women in PNG participate disproportionately in the informal sector in both rural and urban areas. They are mainly employed in low-value added industries and do not participate in and benefit from PNG's formal sector development to the same extent as men. In Port Moresby, for example, women do not work in key economic sectors (e.g. they dominate numerically in the small and micro-enterprise sector). Greater participation of women in the formal economy has the potential to significantly improve women's contribution to, and their benefits from,

⁸² United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development* (2015) UN document A/RES/70/1. See also *UN World Summit for Sustainable Development: Plan of Implementation*, World Summit for Sustainable Development, vol. UN Doc. A/CONF.199/L.1. available at: http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf

⁸³ Sustainable Development Goals 2015, Goal 5. Goal 5 addresses gender equality specifically and consists of nine specific targets, including the elimination of gender-based violence. Gender equality is also incorporated into numerous other goals.

⁸⁴ UN Women, "A Transformative Stand-Alone Goal on Achieving Gender Equality, Women's Rights and Women's Empowerment: Imperatives and Key Components" (2013), www.unwomen.org/en/what-we-do/~/_media/ACo4A69BF6AE48C1A23DECAEED24A452.ashx

⁸⁵ In 2016, only three women are Members of Parliament in PNG. Female political representation in the Pacific is among the lowest in the world. See UNDP, *Strengthening women's political participation in Papua New Guinea* (Media Release, October 7, 2016) available at: http://www.pg.undp.org/content/papua_new_guinea/en/home/presscenter/pressreleases/2016/10/07/strengthening-women-s-political-participation-in-papua-new-guinea/

economic growth in PNG.

B. CONSUMER PROTECTION AND WOMEN CONSUMERS

Women in PNG face particular challenges in relation to the consumer and competition framework. There is a need to improve women's awareness of, and access to, the existing laws and institutions. Unless women are aware of their rights as consumers and are able to exercise those rights, the consumer protection framework will not benefit women or the PNG economy as a whole.

Focus group study

The Review Team considered it essential to secure information on the views and experiences of consumers across PNG. The Asian Development Bank's Private Sector Development Initiative provided funding support for a project carried out by the Institute of National Affairs (INA) to survey PNG consumers by means of focus group discussions. As part of this survey project, discussions with 22 groups of consumers were held in six cities and towns around PNG.⁸⁶ In order to secure the views particularly of women, six focus groups comprised only of women were asked questions about women's issues and experiences. (Please refer to **Part II** for further details on the focus group study.)

The results of the focus group survey confirm that in some significant respects women consumers are treated differently from men consumers or consider themselves to be at a disadvantage relevant to men consumers.

A total of 47 female participants took part in six focus group discussions, in six survey sites. In particular, the focus group survey among women showed that women in PNG face a number of gender-specific challenges in consumer dealings. Key results of the survey are summarised below:

- 90 percent of participants in women-only focus groups considered that traders are more likely to try to mislead women customers than men customers.
- 71 percent of participants in women-only focus groups considered that it is harder for women than for men to get truthful responses from traders to queries about goods and services.
- 81 percent of participants in women-only focus groups considered that traders are more likely to apply pressure to women customers

⁸⁶ Specifically, in National Capital District, Lae, Mount Hagen, Kokopo, Wewak and Alotau.

than men customers to make a purchase.

- 69 percent of participants in women-only focus groups reported having paid a higher price for a good or service than a male customer had to pay.
- 82 percent of participants in women-only focus groups considered that dishonest traders target scams to women consumers more than to men consumers.
- Having bought goods that did not work or that were not as described, 66 of participants in women-only focus groups said they had tried to obtain a remedy, compared to 77 percent of participants in mixed groups.

Informed choice

For all consumers, access to product information that is accurate and reasonably complete is necessary to enable an informed choice to be made. Evidence from the INA consumer focus group survey indicates that women consumers in PNG consider themselves less well informed than men consumers. Of the 47 participants in the women-only focus groups:

- 90 percent of participants considered that traders are more likely to try to mislead women customers than men customers.
- 71 percent of participants considered that it is harder for women than for men to get truthful responses from traders to queries about goods and services.

While only 26 percent of participants in women-only focus groups felt that men consumers are given more information by traders than women consumers, the large majority of participants in women-only groups considered traders were more likely to attempt to mislead them and less likely to respond truthfully to their questions. Women participants reported a perception that “women are seen as easy to trick,” particularly if they are not literate or educated.

The widespread use of signs such as ‘No returns’ or ‘No refunds’ is less likely to be challenged by women, who are less likely to have information about the status of such signs under PNG’s existing consumer laws.⁸⁷

One submission stated that illiteracy makes people particularly susceptible to unfair conduct.⁸⁸ It was also pointed out that illiteracy makes it difficult

⁸⁷ Submission to Consumer and Competition Framework Review, by an individual.

⁸⁸ Submission to Consumer and Competition Review, by an individual.

to read labels and infringement notices. The ICCC has acknowledged in a submission to the Review the need to provide greater assistance to people with low literacy skills.⁸⁹ In a country where literacy among both men and women is comparatively low, materials that use visual examples, such as recognisable icons rather than words, are likely to be more effective.

Data from the focus group discussions tends to confirm the need for: (i) more effective consumer information safeguards (e.g. a rule against misleading or deceptive conduct generally), for the benefit of all consumers; and (ii) enforcement and awareness-raising activities to help guard against traders withholding information from, or giving misleading information to, women or men consumers.

At present, many products are not labelled in an official language of PNG, or are not clearly labelled, or do not provide sufficient product information to enable reasonable decisions to be made by consumers. Clarifying the labelling rules and issuing guidelines (see the discussion in **Part II, D**) would benefit women consumers and consumers in general.

Unfair pressure and scams

The INA found in its consumer focus group survey that consumers generally, and women in particular, are commonly pressured by traders to make consumption choices:

- 81 percent of participants in women-only focus groups considered that traders are more likely to apply pressure to women customers than men customers to make a purchase.
- 69 percent of participants in women-only focus groups reported having paid a higher price for a good or service than a male customer had to pay.
- 82 percent of participants in women-only focus groups considered that dishonest traders target scams to women consumers more than men consumers.

Data from the focus group discussions indicates women perceive aggressive sales methods and outright scams to be targeted more at women than men consumers. Women also perceive they are targeted for pyramid schemes more often than men.

Participants in the focus groups reported that they had observed taxi

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ICCC Submission (see 160713 Submission ICCC IPL1) response to Q 15.

drivers charging women more than men. In interviews ICCC staff stated that PMV drivers often charged women a higher rate as they were seen as an “easy target”.⁹⁰ That a majority of women participants reported having paid higher prices (or received lower discounts) than men for the same goods or services tends to corroborate women’s perception that traders may tend to apply pressure to women consumers more than to men consumers.

It appears from the INA survey evidence that all consumers and women in particular would be likely to benefit from awareness raising and better enforcement against high-pressure sales tactics and dishonest (‘scam’) practices. Better enforcement of explicit pricing of goods (not withholding the price or changing it at the cash register) would benefit consumers generally.

Recommendation 125: The ICCC should place emphasis on raising consumers’ awareness of unfair sales tactics and ‘scams’ and how to avoid them.

Readiness to complain to traders

Having bought goods that did not work or that were not as described, 66 of participants in women-only focus groups said they had tried to obtain a remedy, compared to 77 percent of participants in mixed groups.

The majority of the respondents in women-only groups stated that it is harder for a woman than for a man to complain about services. The reasons given by the respondents were based on gender inequality. Some participants commented that consumers have to use aggression or be outspoken to have a deal put right. Some participants considered it “depends on the woman” and how outspoken she is or who she knows. Comments included:

- “We do complain as women but people do not hear us. Our voices are not heard. For example at [bank] it is who you know.”
- “It is harder for women to complain about services. Women need information and a basis to argue. Need to know about what is right and wrong. And also how confident.”
- “Women are quieter to speak up, rush in. Men are stronger to push in.”
- “If the women are confident and informed can talk and be more

⁹⁰ Interview on 13 November 2014.

vocal than men.”

Some participants in the women-only groups commented that women are reluctant to complain to traders because they fear harassment or threats in response.

The consumer focus group survey confirms that women consumers would benefit (as would men consumers) from the further publication of general advice on consumers’ rights and remedies.

Recommendation 126: ICCC advocacy should continue to emphasise advice to consumers on their rights and remedies.

Awareness of the ICCC

In the mixed focus groups, more than half of participants (53%) said that they were not aware of any agency or office where they could lodge a complaint if they had been sold an unsafe product.

Participants in the women-only groups indicated that they were more likely to make a complaint to the town urban authority than the ICCC. Conversely, male consumers preferred to use the ICCC first, then the urban authority, followed by the police.

Participants in the women-only groups expressed a very strong desire to be aware of their consumer rights and to have access to the ICCC and other offices.

Consumers are unaware of where to get advice on faulty goods and services. This is further complicated by the fact that multiple bodies regulate consumer rights in PNG. For example, complaints about expiry dates on food are dealt with by the Health Department, and complaints about education services have to go to the Education Department. Better coordination among agencies in dealing with consumer complaints and joint awareness-raising measures would assist.

The ICCC’s Consumer Protection Division currently provides information to the community using brochures, guidelines and seminars.⁹¹ Women’s groups and organisations in which women are heavily involved might assist the ICCC in circulating that information to women consumers.

Overseas experience has been that women tend to be less aware of their rights as consumers than men, and rural dwellers less aware than urban

⁹¹ ICCC, 2013 Annual Report, p 28.

dwellers. In overseas countries, television programs and radio plays have been more successful in raising awareness than traditional newspapers and printed brochures.⁹² Accordingly, consumer awareness efforts in PNG should be focused on these means of communication.

PNG does not at present have an organised consumer representative body (though there is at least one social media group organized for consumer interests).

It is important for the ICCC to build awareness among traders and members of the public about the existence and role of the ICCC. These efforts should include a focus on outreach to women's groups.

Recommendation 127: The ICCC should make it a priority to include key women's representative bodies in its outreach activities and should report on this in its Annual Report.

Access to remedies

Consumers must have access to remedies, for their rights to be meaningful. The evidence considered by the Review Team indicates that women consumers generally find remedies more difficult to obtain than men consumers do. (And consumers in rural areas generally find it more difficult to access remedies than do consumers in urban areas.)

ICCC records show fewer consumer complaints are made by women than men: thus, out of 34 consumer complaints received by the ICCC during 2014, only 5 were made by women.⁹³

Members of the ICCC staff have indicated in interviews that the complaints process is not as accessible to women as it is to men and are seeking to understand the reasons for this. The ICCC advises that it is in the process of revising the complaints register to disaggregate data by gender and age group.

Consumer protection rules that are 'principle based', rather than drafted as very prescriptive rules, are easier for consumers to understand and remember (see further discussion in **Part II**). Consumers and retailers need to be aware of these laws, and understand how they will be applied, at least at a basic level.

⁹² GIZ and Federal Ministry for Economic Cooperation and Development *Promoting equal participation in sustainable economic development* (2015).

⁹³ ICCC data, for period 29 January 2014 to 29 January 2015.

Recommendation 128: The ICCC’s training for investigators should cover the particular competition and consumer protection issues faced by women and ensure they can investigate women’s complaints effectively.

Recommendation 129: The ICCC should endeavour to ensure that its investigative team includes female investigators.

Consumer protection in the informal economy

Women consumers, who mainly have responsibility for purchasing goods and services for family consumption, deal with traders from both the formal and informal economies. It appears that urban PNG households acquire a growing proportion of the goods and services they require from informal suppliers.⁹⁴ Rural PNG households rely to an even greater extent on informal suppliers.

Those engaged in the informal economy tend not to heed legal obligations imposed on businesses generally. Informal economy businesses typically are not incorporated or licensed, do not keep books and records, do not have audited accounts, do not pay taxes (with the exception of GST), and do not have procedures for complying with reporting or insurance requirements. Informal economy businesses generally lack access to governmental services and present difficulties for enforcement of laws. It is therefore difficult for consumer protection laws to influence the behaviour of businesses in the informal economy.

Non-compliance by informal economy businesses with product and safety standards has been identified as a significant area of concern for consumers.⁹⁵ Participants in the focus group survey indicated that they would be much less likely to return goods and seek a refund from a vendor in the informal economy. Informal suppliers tend to be temporary businesses and are unlikely to provide consumers with remedies or refunds.

Data from the focus group survey also show that informal sector sellers are more likely to advantage of women consumers and subject them to pressure.

Promoting compliance with product and safety standards is important, as it affects the safety and health of all consumers. In light of the challenges

⁹⁴ Department for Community Development and Institute for National Affairs, *National Informal Economy Policy 2011- 2015* (2011), p 9.

⁹⁵ Department for Community Development and Institute for National Affairs, *National Informal Economy Policy 2011- 2015* (2011) p 29.

that the informal economy presents to conventional enforcement, consumer education is particularly important in this field.

Recommendation 130: The ICCC should include in its consumer awareness programme advice for consumers regarding the risks associated with trading in the informal economy and sensible precautions.

C. COMPETITION POLICY AND WOMEN IN BUSINESS

Competition laws in PNG as elsewhere are framed in gender-neutral terms. However, women in PNG appear to face barriers to starting and expanding businesses that men do not, or that men face to a lesser degree. Improving the environment for women entrepreneurs is therefore important, to enable greater participation by women in PNG's formal economy. Improving the ability of women to participate in the economy, in turn, will promote competition and economic welfare, and enable women to contribute more to PNG's economic growth and development.

A number of barriers appear to constrain women's ability in PNG to participate in local value chains, including as producers, traders, service providers or employees. The competition framework can play a part in reducing some of these barriers, in order that women have the opportunity to use their skills, talents and productive potential.

Formal economy participation

Fewer women than men participate in PNG's formal economy.⁹⁶ The substantial majority of formal sector enterprises are run by men, and women are more likely than men to be engaged in informal economic activities.⁹⁷ Women participate in formal employment at a lower rate than men.⁹⁸

As a consequence, women realise a lesser share of the benefits of PNG's recent strong economic performance. The mining, petroleum and palm oil industries have performed well in recent years but few women are

⁹⁶ ADB, *2011-2012 PNG Country Gender Assessment Report* at p 5 states that men are almost twice as likely as women to hold a wage job (40% of men vs. 24% of women nationally), The gender gap persists in both urban areas (43% of men vs. 23%) and rural areas (36% of men vs. 18% of women). See: <https://www.adb.org/sites/default/files/institutional-document/33859/files/cga-png-2011-2012.pdf>

⁹⁷ Only one in eight persons with access to cash income is female. See the *2011-2012 PNG Country Gender Assessment Report* at p 5.

⁹⁸ Women in formal sector jobs in PNG report average net monthly pay that is less than half that reported by men (682.17 kina vs. 1404.12 kina for men, based on answers from 2,381 respondents nationwide). See *2011-2012 PNG Country Gender Assessment Report* at p 53.

involved in these.⁹⁹ Instead, the majority of women in business operate small and informal enterprises, which are not integrated in the formal cash economy. Enabling greater participation by women in PNG's formal economy will help to promote gender equality.

Women entrepreneurs are less likely than men to formalise their businesses. Women appear to face different barriers to formalization than men. Relevant factors include: less awareness of relevant formalisation requirements; the time and cost required to register a business and comply with formalities; unequal access to resources such as technology, information and land; higher levels of illiteracy; and difficulties in accessing financial services (savings, credit and insurance). Women also face the risks of gender-based and sexual violence. It is important for the promotion of competition in PNG to address the underlying causes of informality.

A variety of pro-competitive initiatives could encourage entrepreneurship in PNG, and would be likely to have a positive impact for women. Initiatives to reduce informality such as lowering compliance costs, reviewing regulations that unnecessarily restrict entry to formal markets, tax regime simplification, and streamlining the business registration process would be beneficial for entrepreneurs in PNG generally, and for women in particular. As an example, in Botswana micro and small businesses have been exempted from compliance with licensing requirements, reducing the regulatory burden on businesses in which many women are involved.

The Review Team considers that promoting women's access to and participation in the formal economy is highly desirable not only for the important objective of gender equality but also as a key means of promoting the development of competition in PNG's domestic markets.

In principle, informal economy traders compete in the same markets as formal economy traders where they offer goods or services that are close substitutes in the same geographic areas. Comments by consumers participating in the focus group survey suggest that informal economy traders are responsive to price changes by traders in the formal economy. Hence, competition in the formal economy has a positive effect on the competitiveness of informal markets.

⁹⁹ PNG's extractive industries sector employed around 30,000 people in 2010, of whom only 10% were women. See United Nations, *Falling through the Net? Gender and Social Protection in the Pacific* (Discussion Paper, 6 September 2015) at p 13.

The competition laws apply equally to formal and informal businesses but enforcement against informal economy traders is problematic in practice. In reality, enforcement of competition rules against informal economy traders is unlikely to be a high priority. Recognising that informal economy traders can be the victims of anti-competitive practices or unfair conduct by other traders, it is desirable that they should have rights and recourse similar to those of consumers, in their dealings with other traders.

Recommendation 131: Gender-neutral pro-competitive reforms will be beneficial for the competitive process and for economically disadvantaged or excluded groups of people, including for women who currently are under-represented in the formal economy.

Recommendation 132: Programmes and initiatives that aim specifically to promote women's access to markets and participation in the formal economy can be expected to have a positive effect on the competitiveness of PNG's markets.

Recommendation 133: Informal economy businesses (many of which are operated by women) should have rights and recourse similar to those of consumers, in their dealings with other traders.

Public procurement

It appears to the Review Team that gender imbalances in the public procurement process might adversely affect the competitiveness of procurement markets. Policies and practices in public procurement that are gender-equitable may therefore be one important means of promoting women's economic empowerment.

Women's businesses are disproportionately represented within the informal and SME sectors so may, in the context of public procurement requirements, suffer disadvantages associated with the size and composition of their businesses. Women entrepreneurs who run small- and medium-sized enterprises should be given assistance to participate in public tenders.

Unlocking procurement opportunities for women-owned enterprises could significantly enhance women's participation in the formal economy. Overseas, attempts to address these issues have included increasing transparency by requiring all such opportunities to be advertised on an electronic gateway.

The Review Team considers that public procurement policies and procedures should be reviewed to ascertain:

- whether existing procurement rules unnecessarily exclude unincorporated undertakings from participation; and
- whether tenders can be structured or advertised in ways that increase the opportunities for women's businesses (and SMEs generally) to participate.

For example, it might (at least in some cases) be possible to de-bundle large tenders into smaller parts and thereby increase the opportunities for bids to be submitted and contracts to be fulfilled by smaller, unincorporated firms. Capacity-building activities may also be helpful, to provide women with access to information about public tenders.

It is also recommended that PNG amend its procurement monitoring system to gather information on the participation, and success, of women and SMEs in public procurement. Such information would be useful to assist efforts to increase the participation of SMEs in public supply chains for goods and services.

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.

Land rights

Gender inequalities in respect of land rights are a significant constraint on women's ability to secure finance and start or expand businesses. This necessarily affects the competitiveness of businesses owned by women.

Land is a critical source of livelihood in PNG but women have limited independent access to land and enjoy only limited rights over land that is held under customary tenure.¹⁰⁰ Group holdings of land under customary law appear to disadvantage women. Generally, women can only access

¹⁰⁰ See ADB, 2011-2012 PNG Country Gender Assessment Report at p 56.

land through fathers or husbands.¹⁰¹ Men usually have control over land resources and its products.¹⁰²

Further, women's rights to access and use land are also being eroded, including by the development of extractive resources, migration and urbanisation.¹⁰³

Addressing gender gaps in the ability to access and utilise land will therefore be important to increasing access to collateral and secure finance to start or expand their businesses.

Women's financial empowerment

The government of PNG has made financial inclusion one of its development priorities, incorporating it in its national plans.¹⁰⁴ The, *National Informal Economy Policy (2011–2015)* considers increased levels of financial literacy and inclusion to be a key economic policy objective.

Women in PNG (and rural women in particular) tend to have less access than men to financial services such as savings, access to credit and insurance.¹⁰⁵ Financial services account ownership is low, with women accounting for only 30% of formal accounts in the country.¹⁰⁶ Increased financial inclusion of women could boost women's access to credit, and overall participation in PNG's formal economy, thereby contributing to PNG's economic growth.

Better access to financial services, including through digital financial services, has the potential to increase women's opportunity to save and to

¹⁰¹ United Nations, *Falling through the Net? Gender and Social Protection in the Pacific* (Discussion Paper, 6 September 2015) at p 11.

¹⁰² Ibid.

¹⁰³ United Nations, *Falling through the Net? Gender and Social Protection in the Pacific* (Discussion Paper, 6 September 2015) at pp 7-9. See also the 2011-2012 PNG Country Gender Assessment Report at p 68.

¹⁰⁴ Department of National, Planning and Monitoring, 2010, *The Development Strategic Plan 2010–2030*. See also, National Strategic Plan Taskforce 2011, *Vision 2050*.

¹⁰⁵ World Bank, Bank of Papua New Guinea and INA, *Financial Inclusion and Financial Capability in Morobe and Madang Provinces, Papua New Guinea: An initial report of the Papua New Guinea National Financial Capability Survey* (June 2015) at pp xvii-xix. The Report examined financial inclusion and financial capability for both women and men in PNG. The Report found that women appear to be significantly more likely to be financially excluded than men (at p xix). A very high percentage of rural respondents (60–80 percent) owned no financial products, with women being more likely to report owning no financial products than men (at p xvii). The Report also found a very significant difference in mobile phone ownership or access, and usage, between urban and rural communities. Rural women in particular appear to be at a significant disadvantage in respect to the opportunity to use a mobile phone for financial services (at p xix).

¹⁰⁶ Bank of Papua New Guinea, *Papua New Guinea National Financial Inclusion and Financial Literacy Strategy, 2014–2015* at p 10, available at: http://www.bankpng.gov.pg/wp-content/uploads/2014/06/PNG_NFI_FIL_STRATEGY_2014-2015_eCopy.pdf

establish a credit history that will improve their ability to borrow. Efforts to develop women's knowledge and skills regarding financial services and products, combined with policy and regulation that supports women's financial inclusion, are likely to make a positive contribution to women's participation in the formal economy and hence to competition and economic growth.

Recommendation 137: Reforms to promote women's access to financial services are desirable not only on gender-equality grounds but also to promote competition and economic growth in PNG's domestic markets.

Competition and family consumption

Women are largely responsible for their families' day-to-day consumer purchases of goods (e.g. food and household items), services (e.g. health and education) and utilities. Competitive markets help to ensure families do not pay more than they should for the goods and services they consume.

Effective competition and consumer protection therefore can produce real results and benefits help to improve individuals' and families' economic welfare. Accordingly, it is desirable that women should be aware of the ICCC's role as a competition watchdog and able to raise with the ICCC possible breaches of the competition laws. The ICCC should also be vigilant to investigate and take action against competition infringements that arise in markets for the goods and services on which households depend.

Recommendation 138: The ICCC should promote awareness among women consumers of the ICCC's role as a competition watchdog and contact points to raise with the ICCC possible breaches of the competition laws.

Recommendation 139: The ICCC should consider adopting as one of its strategic priorities the investigation of competition infringements that arise in markets for the goods and services on which households depend.

Enforcement and exemptions

Anti-competitive conduct is likely to have a profound impact on small and micro-enterprises, many of which are operated by women. For example, cartel conduct in a distribution network could have a serious impact on

small fishing or agri-business enterprises run by women. Women's businesses stand to benefit from the ICCC being vigilant against anti-competitive conduct that adversely affects small and micro-enterprises.

As for women consumers, the ICCC should take steps to ensure that women business operators are aware of its role as the competition watchdog and aware of contact points at which they can raise complaints with the ICCC.

It is also important that enforcement of competition laws should not inadvertently restrict women's economic activities. For example, the cooperatives and collectives in which women are often involved will require some agreements between participants (who might otherwise be competitors) to coordinate their activities. Such cooperatives and collectives should not bear the burden of formal authorisation for their normal trading activities. Exemptions for joint or collective buying and promotion, and for collaborative activities, should apply to cartel prohibitions (see **Part III, C**).

Recommendation 140: The ICCC should promote awareness among women business operators of the ICCC's role as a competition watchdog and contact points to raise with the ICCC possible breaches of the competition laws.

Recommendation 141: The ICCC should consider adopting as one of its strategic priorities the investigation of competition infringements that arise in markets for the goods and services on which small and micro-enterprises depend.

Recommendation 142: Exemptions for joint or collective buying and promotion, and for collaborative activities, should apply to cartel prohibitions. (See Recommendation 79).

D. REGULATION AND ECONOMIC EMPOWERMENT

In the past, SOEs have been required to fulfil many economic and social goals, including provision of electricity and postal services at uniform prices to all consumers in PNG. (Please refer to **Part V, B** for further detail.)

An effective competition policy calls for SOEs to behave commercially in delivering social objectives explicitly identified as 'community service obligations,' which should be funded in a transparent manner.

For example, PNG Power supplies electricity at the same price to all PNG

consumers, even through the cost of supplying electricity to rural areas is greater than the cost of supplying urban centres. Electrification can bring multiple benefits to women, such as:

- reducing the time spent on fuel collection and increasing the time to engage in economic activities;
- allowing women to access information related to health and education through TV and radio;
- increasing women's security through the lighting provided in community spaces and public streets; and
- increasing employment opportunities for women (rural electrification in KwaZulu-Natal led to increased employment for women by 9 – 9.5%, without a corresponding effect on men's employment).

The non-economic benefits that rural electrification brings to women should be taken into account in costing the electricity CSO: failing to do so would lead to under-funding the CSO with an adverse impact on women's economic opportunities.

Recommendation 143: The benefits of a CSO to all groups, including non-economic benefits and benefits to women, should be taken into account in costing CSOs under the CSO Policy.

V. INDUSTRY REGULATION

Contents of this Part:

- A. Introduction
- B. Factors in Performance of Regulated Entities
- C. Regulatory Contracts
- D. Ports Services
- E. Electricity Service
- F. Third-Party Motor Vehicle Insurance
- G. Postal Services
- H. Telecommunications

A. INTRODUCTION

This **Part V** addresses the following aspects of the consumer and competition framework in PNG:

- Strengths and weaknesses of current regulation of state-owned infrastructure industries by means of “regulatory contracts”;
- Options for improving the framework for industry regulation; and
- Options for improving the incentives and ability for regulated industries to perform better.

The regulatory contracts framework aims to ensure that end-users in PNG are protected from high prices or poor service by monopoly or near-monopoly entities. However, regulation is second-best to competition. This Report examines both the ways in which regulatory contracts are used at present and options for non-regulatory reforms that would help to drive better economic performance in regulated industries.

B. FACTORS IN PERFORMANCE OF REGULATED ENTITIES

The Review is required to “examine whether government business activities and service providers serve the public interest and promote competition and productivity”.¹⁰⁷ In relation to the regulated industries (ports, power, postal services and CTP motor vehicle insurance), the Review has considered the efficacy of the “regulatory contract” to which each regulated industry is subject. The Review has also had regard to the role of SOEs in the PNG economy and their governance.

¹⁰⁷

Department of Treasury, *Terms of Reference: Consumer and Competition Framework Review*, para 12.

Many infrastructure-based industries in PNG are state-owned and several are regulated on the basis that they are monopolies or near-monopolies. These industries are subject to:

- Regulatory contracts in force under the ICCA Act;
- Conduct rules which apply to businesses generally, under the ICCA Act;
- Industry-specific legislation (e.g. the *Electricity Industry Act 2002*, *National Capital District Water Supply and Sewerage Act 1996*);
- Shareholder accountability, including oversight of SOEs by Kumul Consolidated Holdings;
- Public scrutiny, including by Parliament and the media.

SOE performance

Regulated SOEs in PNG currently face strong public expectations of service improvement. However, in relation to the SOEs that are subject to regulatory contracts, there are ongoing concerns about their financial and service performance:

- The ADB's recent assessment of the performance of PNG's SOEs in aggregate indicated returns on capital used of only 3.4% during 2007–2012 – well below market or commercial rates of return. This study includes all SOEs regulated by regulatory contracts and these comprise more than 50% of PNG's SOE asset portfolio.¹⁰⁸
- The ADB and the ICCA have suggested that some SOEs are not responsive to incentives sought to be imposed by regulation, to lower costs and improve efficiency.¹⁰⁹
- There is evidence that in some instances SOEs do not behave in a manner that is consistent with good commercial performance (or are constrained from acting in this way).¹¹⁰

The causes of these performance issues are complex. Good performance requires that the obligations to which regulated SOEs are subject are appropriate and coherent:

- obligations may be regarded as “appropriate” if they apply to the correct entities or activities and encourage enterprises to operate

¹⁰⁸ Asian Development Bank, *Building a dynamic Pacific economy, Strengthening the private sector in Papua New Guinea* (2015) p 55. No regulated SOE recorded a return on equity of more than 4.5%.

¹⁰⁹ See comments regarding the Water sector, below, **Part VI, D**.

¹¹⁰ See comments regarding PNG Power, below, **Part VI, E**.

efficiently, meet the standards of safety and service expected of them, and provide returns that meet their investors' reasonable expectations;

- regulated industries' obligations will be "coherent" if the incentives they create are aligned rather than contradictory.

SOE performance is affected by factors including the regulatory framework (e.g. regulatory contracts); community service obligations (CSOs); the governance structure and obligations placed on SOEs (through the Kumul structure); and restrictions on competition.

The effect of regulation on SOE performance

SOEs performance issues are not necessarily attributable to problems with economic regulation.

Economic regulation is focused on using incentives to drive efficient performance, including incentives to reduce costs and improve quality. If SOEs are not responsive to the incentives set by the ICCC in regulatory contracts, regulation will not be effective at producing good performance outcomes. For example, in some instances, it appears that prices are set below those allowed in applicable regulatory contracts, which allow for recovery of efficiently incurred costs. Where prices are not cost-reflective, the result is poor use of existing infrastructure. Moreover, without cost-reflective pricing signals, investment in new infrastructure can be unduly delayed, or occur in the wrong areas.

The Kumul scheme

For regulation to be effective, SOEs need to behave in a commercial manner. This is necessary even if constraints are imposed which hinder their ability to earn the fully commercial returns that would be expected in private businesses. To promote commercial behaviour by an SOE would require firms to price in a cost-reflective way as much as is feasible, and to offer systems of reward and performance to management that resemble those that apply in commercial entities.

The PNG Government has recently implemented the Kumul Trust structure to address SOE governance and performance issues. The change in oversight structure from the IPBC to Kumul Consolidated Holdings was intended to improve the transparency and independence of decision making by SOEs. The Prime Minister, Mr Peter O'Neill, said:

“The Kumul Structure reasons are very simple. It is aimed at giving more preference to SOEs, and less interference from Government, and making sure that the board of directors and the management take ownership of the decisions that they make. We are restructuring the IPBC so that it gives more flexibility to SOEs when making business decisions so they are done on a timely basis.”¹¹¹

This objective is appropriate. However, the Review Team notes that this must be underpinned by legislative and policy requirements that address the activities of the SOEs themselves. The Kumul Trust amendments focus on governance and the appointment of directors. The changes place direct oversight responsibility for the SOEs (e.g. approval of corporate plans, director appointments) with the National Executive Council (**NEC**) rather than Kumul Consolidated Holdings, which replaced IPBC. This appears to increase political oversight of SOEs by the NEC, rather than by a commercial holding company board. Enterprises that are majority state-owned must declare and pay dividends from time to time (*Kumul Consolidated Holdings Authorisation Act 2002* s 46G). Further reforms specifically addressing each SOE are required. The key requirements noted by bodies including the OECD¹¹² and the ADB¹¹³ include:

- A specific and overriding objective that SOEs behave commercially by maximising profits.¹¹⁴
- The government should allow SOEs full operational autonomy to achieve their defined objectives and refrain from intervening in SOE management. The government as a shareholder should avoid redefining SOE objectives in a non-transparent manner.
- Mandatory public reporting of SOE performance through the publication of annual reports and audited accounts.
- Clarity in respect of funding arrangements, CSOs and consequences for poor performance.
- Separation of any regulatory functions from commercial functions.

¹¹¹ <http://pidp.org/pireport/2015/May/05-05-11.htm> , accessed July 2016.

¹¹² OECD, *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (Paris, 2015) p 26.

¹¹³ ADB, *Finding Balance: Benchmarking the Performance of State-Owned Enterprises in Papua New Guinea*, 2012, p 31.

¹¹⁴ This is consistent with existing Government policy. The Government’s 2012 policy statement on CSOs stated that legislation would be prepared to require that all SOEs operate on commercial terms, with each SOE having a “principal objective”. This objective would be to “operate as a successful business and to that end to be as profitable as comparable businesses not owned by the state”. *PNG Community Service Obligation Policy For State Owned Enterprises*, 18 October 2012.

- A commitment to competitive neutrality (please refer to **Part VII,D**).

Community Service Obligations

A community service obligation (**CSO**) exists where an entity is required to supply a service to a group of end-users, despite it being unprofitable to provide that service to some or all of those end-users.

CSOs are often in the form of a requirement to offer services to all users at the same price. Where there are different costs in serving different groups of users, cross-subsidies result. Some users pay more than the costs of serving them, while other users pay less. Cross-subsidies effectively act as a tax on one group of users and a subsidy to another set of users.

SOEs in PNG have been required to provide various CSOs. PNG Power, Post PNG, PNG Water and Ports PNG offer their services at the same prices nationwide, even though it is much costlier to provide services outside the major population centres. Because it is unprofitable to provide CSOs, the SOEs have normally met the costs of providing them by using cross-subsidies from their other, more profitable activities. Often SOEs have been granted a monopoly over particular services as a means of funding such cross-subsidies. For example, Post PNG has a statutory monopoly over letter delivery.¹¹⁵

The Review Team recommends that CSO reform be implemented as a high priority for PNG.¹¹⁶ The Government's approved CSO Policy for SOEs (2012) is a positive step.¹¹⁷ That CSO Policy was piloted in one SOE in 2015/16 but did not receive a budget allocation for full implementation. The CSO Policy should be funded and implemented, in order to enable further commercialization and improvement in SOE performance.

The CSO Policy requires explicit and direct funding of CSOs that are provided by SOEs. This means that the entity providing the CSO can do so without needing to cross-subsidise that CSO by a monopoly over other services. This is more transparent (by revealing the true costs of the CSO) and enables the introduction of competition in the formerly monopolised good or service. To the extent that CSOs are funded explicitly and directly, SOEs' objectives are better aligned. By contrast, at present SOEs face

¹¹⁵ *Postal Services Act 1996* s10.

¹¹⁶ The National Executive Council on 6th October 2016 endorsed a recommendation that National Airports Corporation as the State Owned Entity come under the first leg of the National Community Service Obligation Policy pilot implementation.

¹¹⁷ PNG Government, *PNG Community Service Obligation Policy for State Owned Enterprises* (October 2012); PNG Government, *Community Service Obligation Guidelines* (October 2012).

contradictory expectations to deliver CSOs and to maximize profits, with management struggling to reconcile these objectives.

Comprehensive implementation of the CSO Policy can be expected to promote better management of SOEs and increased competition. The CSO Policy should be implemented as soon as possible in the regulated industries of electricity, ports, postal services and water.

It will be very important (as one submission to the Review commented) that a funding source for CSOs be identified and applied consistently over the longer term, as the lack of sustained funding has been a downfall of measures to implement previous CSO measures.¹¹⁸ As recognised in the CSO Policy, direct funding is the preferred means of financing CSO obligations as it is the least distortionary approach, and does not distract an SOE from meeting its performance objectives. The Government should also recognise that CSOs will be unsustainable if adequate funding is not budgeted.

There are five main ways of funding CSOs:

- Direct funding from the annual budget (using tax receipts and other income sources);
- Accepting lower rates of return from the SOE (indirect funding);
- Levy-based funding from service users in profitable areas to those in unprofitable areas;
- Internal cross-subsidies through charging uniform prices regardless of profitability of serving different users;
- Funding losses from other revenue sources that might be connected with the delivery of the service (e.g. coverage rollout obligations which must cover both profitable and unprofitable to serve areas).

If compromises must be made in order to provide CSOs, the Government should consider ways to fund CSOs without the use of cross-subsidies. This might include accepting a lower rate of return from SOEs. However, the targeted return should be transparent to consumers and the SOE, and be calculated using a commercial rate of return less the costs of providing the CSO (there is still a requirement to cost the CSO).

Another possible approach is to maintain a cross-subsidy, but to make the cross-subsidy explicit by identifying the required 'levy' on users in lower

¹¹⁸ Submission by PNG Ports Corporation Ltd.

cost (i.e. more profitable) areas.¹¹⁹ This approach is preferable to non-transparent or un-costed cross-subsidisation: first, it requires a transparent calculation of costs that can be monitored by users and government; secondly, it is compatible with the introduction of greater competition, because the levy can be applied to all users regardless of suppliers and the supply can even become contestable.

One possible concern is that privately owned enterprises may selectively serve a market and leave SOEs to perform CSOs. This concern can be addressed by competitive tendering of the services required for the purposes of CSOs.

Privatisation

A further option for addressing governance problems is to transfer the regulated assets into private ownership (i.e. privatisation). This would remove the conflict between the pursuit of commercial and non-commercial objectives. The removal of such conflict improves performance: a private owner will be far more likely to seek efficiencies, because these will increase profit. This means we could expect a private owner to be more responsive to incentive regulation. This will deliver benefits to both consumers, who will pay lower prices and receive better quality of service, and to the Government, which will receive funds from the purchaser which can be used elsewhere. Non-commercial objectives, such as CSOs, would need to be explicitly funded.

The Review Team recognises that political sensitivities are often associated with the privatisation of state assets. Privatisation should continue to be considered among the options for improving the performance of SOEs.¹²⁰

Restrictions on competition

SOE performance can also be hindered by legislative or regulatory restrictions on competition. Restrictions on competition remove SOEs'

¹¹⁹ A similar approach is used in the context of universal service funding for telecommunications services in PNG and elsewhere. In this case, the levy is imposed on providers of competing or similar services (and based on a share of total revenues) to fund the supply of services in high cost areas. This approach has also recently been proposed for the funding of NBN Co's obligations to provide broadband services in high cost areas of Australia. See <https://www.communications.gov.au/have-your-say/consultation-telecommunications-reform-package> (accessed December 2016).

¹²⁰ The Harper Review in Australia considered similar issues to those in PNG, and concluded that: "Well-considered contracting out or privatising remaining infrastructure assets is likely to drive further consumer benefits through comparatively lower prices flowing from greater discipline on privatised entities. Governments need to approach privatisation carefully, ensuring that impacts on competition and consumers are fully considered and addressed": Australia, *Competition Policy Review: Final Report* (March 2015) 196.

incentive to keep prices low and improve service over time. In principle, competition between SOEs and private providers of services should be encouraged where possible.

In some industries (e.g. electricity distribution) natural monopoly characteristics might prevent the emergence of competition to the regulated SOEs. In other cases, however, competition may be feasible if regulation is liberalised (e.g. compulsory third party insurance) or as a result of technological change enabling new entry (e.g. in the postal sector).

Legislative or regulatory restrictions on competition have sometimes been created in order to fund CSOs. The reform of CSOs as discussed in the previous section will mean that such restrictions can be removed. The Government should be vigilant to identify features of legislation or regulation that shield SOEs from competition and remove those. (Please refer to further discussion in **Part VII.**)

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 146: Continuing SOE reforms should ensuring that each SOE has a clear, non-conflicting set of obligations with the overriding objective of delivering a commercial return to Government.

Recommendation 147: Legislation or regulation that reduces or prevents competition with SOEs in the provision of services should be removed.

C. REGULATORY CONTRACTS

Prices and service standards of several monopolies and near monopolies in PNG are regulated through “regulatory contracts” issued by the ICCC. Relevant entities can be required to operate in compliance with a regulatory contract, upon declaration by the Minister or the ICCC (ICCC Act ss 32, 33). The ICCC may issue a regulatory contract for a “declared entity” after consultation with the entity concerned and with the public, and after taking into account the particular characteristics of the industry in deciding on an appropriate form of price control. The required process

for review of regulatory contracts is set out in each of the regulatory contracts currently in use.

Regulatory contracts currently govern service standards and pricing of services provided by four “regulated entities”: PNG Ports Corporation Ltd, PNG Power Ltd, Motor Vehicle Insurance Ltd and Post PNG.

Evaluation of “regulatory contracts”

The ICCC issues regulatory contracts after consultation with the regulated entities and the public, and takes into account the particular characteristics of each industry in deciding on an appropriate form of price control.

The regulatory contract approach has the following strengths:

- Transparency – regulatory contracts provide a transparent process of decision-making, with requirements for public consultation and appeals as a check on ICCC decisions.
- Certainty – regulated entities have certainty about the path of their prices over the five year regulatory period, which encourages investment and continuation in supply of services that meet the prescribed service standards.
- Flexibility – regulatory contracts are flexible, as they do not require the ICCC to impose any particular form of price control.¹²¹ This is important because each industry has different requirements that can be reflected in how prices are set. For example, the ICCC can choose between revenue or price caps depending on whether it is more appropriate for the regulated entity or consumers to bear the risk that volumes are different to forecast.

The Review did not receive any submissions suggesting that the regulatory contract approach should be abandoned.

In the Review Team’s view, the framework for “regulatory contracts” provides a generally suitable approach to regulating infrastructure-based monopolies (or firms with significant market power). The Review Team has identified, however, a number of respects in which the regulatory contracts framework should be improved and better applied, which are further discussed in the sections that follow:

- thresholds for declaration of regulated entities and services;

¹²¹ ICCC Act s 35(4).

- incentives for efficiency;
- transitions between expired and new regulatory contracts;
- Appeals Panel review of ICCC decisions regarding regulatory contracts; and

engagement with consumers in regulatory contracts renegotiation. The ICCC appears to incur substantial costs in administering and re-negotiating regulatory contracts. Internationally, the costs of regulation are commonly recovered from the regulated firms or industries. Some of the regulatory contracts provide for the ICCC to invoice the regulated entities for the reasonable costs of the five-yearly reviews, though this appears not to have occurred to date. It is highly desirable that the ICCC Act should provide an unequivocal statutory basis for recovery by the ICCC of its reasonable costs incurred in regulating declared entities. To the extent that specific provision is then required for a particular entity, future regulatory contracts should each include clear provisions for the ICCC to recover all relevant costs from the regulated entity concerned. These costs relate not just to the five yearly renegotiation of the contract but include monitoring and preparation for each review.

Recommendation 148: The ICCC Act should be amended to provide for the ICCC to recover from regulated entities its direct and indirect costs (including overheads) associated with its functions in respect of regulatory contracts.

Declaration of entities and services

The Minister may declare a “regulated entity” (and regulated goods or services) without reference to any explicit declaration criteria where that entity is an SOE or was one on commencement of the Act (ICCC Act s 32). A Ministerial declaration does not require a market power finding. The ICCC may declare a “regulated entity” (or regulated goods or services) if certain criteria are met including that the entity has a substantial degree of market power and the declaration is appropriate having regard to the ICCC’s statutory objectives.¹²²

One submission argued that Ministerial declarations should cease to have effect except in relation to entities originally declared by the Minister in 2002. Another submission suggested that the Ministerial declaration powers should be linked to the Minister’s power to direct the ICCC to

¹²²

ICCC Act s 33.

undertake an inquiry (s 123).

The powers for Ministerial declaration may have initially been useful to expedite the introduction of economic regulation under the ICCC Act but these powers are no longer appropriate. The Review Team considers that declaration should always depend on the entity concerned having a substantial degree of power in a relevant market and that the ICCC is best positioned to assess this. The power of declaration should continue to reside with the Minister but should be exercised by the Minister only where the ICCC has inquired into the markets concerned and reported to the Minister recommending declaration and issuance of a regulatory contract.

Recommendation 149: ICCC Act sections 32 – 34 should be amended to provide that the Minister may declare "regulated entities" or "regulated goods" or "regulated services" only after an inquiry by the ICCC finding substantial market power and recommending declaration by the ICCC.

Incentives for efficiency

It is important that regulated entities be incented by regulatory contracts to operate and invest efficiently and that regulated entities have the commercial flexibility to respond to the incentives they face.

Regulatory contracts should create incentives for the management of regulated entities to pursue objectives desired by the Government. For example, the contracts should offer benefits to the entities, or management, or both, for behaviour that lowers costs or increases service quality. Such incentive is usually provided by allowing a regulated entity to share in some of the gains in profits that arise from cost-reduction efforts. For example, prices may be set for a defined period on the basis of expected costs but, if the actual costs incurred are lower than expected, the regulated entity may keep some or all of the resulting increase in profit.

Incentive-based regulation assumes that the regulated entities will be able and willing to respond to the incentives. In turn, this requires that:

- the entity must have sufficient freedom of action to respond to incentives; and
- the managers' objectives must be related to the financial performance of the entity.

Privatization of regulated entities assists incentive regulation, as managers of SOEs typically have less incentive to achieve efficiencies than managers of private firms. This is because private managers can usually capture a greater share of the profits generated by efficiency gains. Private ownership also gives regulated entities greater freedom to make decisions that improve financial performance.¹²³

If privatisation of PNG's regulated entities is not viable in the near term, commercialisation of regulated entities' operations will be essential, requiring: (a) that a commercial return be made on investments; and (b) independence SOE boards and management from political influence. In the absence of reforms of this nature, it is unlikely that incentive-based regulation as implemented in regulatory contracts will be effective.

Transition to new regulatory contract

Delay experienced in replacing PNG Ports' regulatory contract raises issues about the incentives for delaying regulatory contract negotiations.

Under ICCC Act section 36(1), a regulated entity must propose a draft regulatory contract prior to expiry of its current contract. If the ICCC does not issue a new regulatory contract before the current one expires, then "the draft regulatory contract (if any) submitted by the regulated entity ... shall be deemed to be a regulatory contract issued by the Commission ... and shall apply until such time as the Commission issues a regulatory contract..." (ICCC Act s 36(6)). In practice, this has enabled regulated entities to substitute their own draft contract for an expiring existing contract.

Two alternatives are available, to address the incentive for delay:

- First, a 'placeholder' arrangement can be used. Prices would be set on the basis of a preliminary view of the direction of future tariffs, with any difference in revenues earned under the placeholder arrangement and the final pricing arrangement being recoverable at a later time, after prices have been finalised.¹²⁴ Such an approach would remove any incentives to delay introduction of the regulatory contract, while ensuring that the regulated entity can recover its efficient costs as determined by the ICCC in the review process.

¹²³ Privatisation may make it more difficult, however, to achieve non-financial objectives. Regulation may still be used but it can be less effective at achieving other objectives due to information problems which may make the monitoring of outcomes difficult.

¹²⁴ This is the approach taken, for example, under the Australian National Electricity Rules, available at: <http://www.aemc.gov.au/Energy-Rules/National-electricity-rules> (accessed 22 November 2016).

- Secondly, rather than the draft regulatory contract being deemed to operate until the new contract is issued, the expiring contract could be deemed to remain in effect until the new contract is issued.

In light of the additional calculations required by the first of these alternatives, the Review Team recommends that the second alternative should be implemented.

Appeals Panel review of regulatory contracts decisions

The ICCC Act provides for review of certain decisions of the ICCC by an Appeals Panel (ICCC Act s 43). The Appeals Panel must make a determination within six weeks of receiving an application for review.

Some comments to the Review recommended extending the period for determination of a review by the Appeals Panel. One submission noted that delays in the current system have been caused by not maintaining an established panel of experts ready and funded to sit as the Appeals Panel when required.

The Review Team's view is that the ICCC decisions in respect of regulatory contracts should remain subject to Appeals Panel review. The right of review is important as a check on the ICCC's reasoning and analysis in support of determinations. A six week period for such reviews is relatively short. In many jurisdictions, time limits on appeals can be significantly longer (e.g. the timeframe for review of access declarations by the Australian Competition Tribunal under Part IIIA of the *Competition and Consumer Act 2010* (Cth) is 180 days). The Review Team proposes that ICCC Act be amended to provide that the Appeals Panel have 90 days to determine a review.

Recommendation 150: ICCC Act section 43(6) should be amended to require the Appeals Panel to determine a review within 90 days after the application is lodged.

Engagement with consumers

In recent times, regulators and policy makers in many jurisdictions have set prices using resource-intensive regulatory methods such as building block models. The ICCC makes use of building block models in regulating prices for electricity, post and ports services.

In light of consumer concern regarding SOEs' performance in PNG, it is desirable that the ICCC should endeavour to promote greater involvement by customers in the process of regulatory contract development, including

regulated entities determining their spending priorities and ultimately setting prices.¹²⁵ This would not require any legislative change. However, it will require the ICCC and policy makers to prioritise the involvement of end users more directly into the regulatory process.

Recommendation 151: The ICCC should explore whether and how it can increase the involvement of consumer and user groups in the regulatory contract process.

D. PORTS SERVICES

PNG Ports Corporation Ltd (**PNG Ports**) is licensed under the *Harbours Act* (Chapter 240) to provide port facilities for loading and unloading vessels at declared ports and to provide berths and berth reservation services for vessels at declared ports. PNG Ports operates the larger ports at Port Moresby and Lae, and fourteen smaller declared ports. PNG Ports is a declared regulated entity for the purposes of the ICCC Act, providing a range of essential port services, pursuant to a regulatory contract. In 2002, the then Minister declared the following services to be regulated:

- Wharfage services;
- Berthage services;
- Berth reservation services; and
- Stevedoring access.

In 2016, the ICCC determined that charges for the following services would also be regulated, on the basis that there were “tied to” wharfage services or stevedoring access, or both:

- Cleaning of wharf;
- Ash levy removal;
- Yard maintenance;
- Commercial vehicle and tourist bus passes;
- Casual labour pool maintenance;
- Stevedoring Tonnage Fee;
- Security passes – personal;
- Equipment passes – forklift and crane equipment;
- Surcharge generator;

¹²⁵ See eg Essential Services Commission, Position Paper, *A new model for pricing services in Victoria’s water sector* (2016, May).

- Security charges; and
- Gate passes.¹²⁶

The Review Team considers that the key issues in respect of regulation of PNG Ports are:

- Whether greater competition can be encouraged in markets for ports and stevedoring services;
- Whether cross-subsidisation of loss-making ports is appropriately handled within the regulatory contracts framework; and
- Whether pricing principles should be determined for succeeding regulatory contract periods.

Potential competition in ports and stevedoring

The first issue in relation to improving performance in the delivery of ports services in PNG is whether it would be possible to introduce more competition into ports and stevedoring services. If a greater degree of competition could develop, this might be expected to reduce the need for regulation.

Competition in port services generally relies on the possibility of substitution between different cargo destinations. If one port offers high prices for its services, users can get a lower price if they can switch to another port and use land-based transport to get the cargo to the alternative port. For ports to be effective substitutes, good transport links between them are needed. Given the limited road and rail infrastructure in PNG, the potential for this form of competition currently is limited.

Another possibility is that certain ports may compete for ‘trans-shipment’ traffic, whereby larger vessels use a port to transfer cargo to smaller feeder vessels. These smaller vessels then transport cargo to smaller ports.¹²⁷ This may apply in the case of Port Moresby and Lae ports, which are both used by international shipping lines.

Competition of this form would place further pressure on the operation of higher cost, unprofitable ports. Such competition could create pressure for

¹²⁶ ICCR Review of the PNG Ports Regulatory Contract: Final Report (2016) p 2.

¹²⁷ OECD, *Competition in Ports and Port Services*, DAF/COMP (2011) 14.

lower prices and greater efficiency,¹²⁸ and permit a reduced reliance on regulation to set port charges. This highlights the need to establish CSO arrangements, if the Government deems that there is benefit in maintaining operation of all existing ports.

Intra-port competition would arise where two or more service providers compete within the same port area. This could potentially occur at various levels within the ports value chain. For example, competition could develop between two terminals within a port, or between stevedores within one terminal.

Finally, Intra-terminal competition, refers to two or more operators within the same terminal (usually stevedoring providers but potentially providers of other port services).

At the most fundamental level, Government should keep under review whether it continues to be desirable for the many ports operated by PNG Ports to be consolidated in the hands of a single operator. The issue of consolidated ownership of the ports is intertwined with the issue of cross-subsidies between ports.

The recent *Diagnostic Report* by Castalia specifically addressing port competitiveness¹²⁹ usefully illuminates a number of issues and makes a range of recommendations, to which this Review has had regard. While noting that sector performance may be restrained by several factors, Castalia concludes that:¹³⁰

- Competition among cargo handlers might be restricted by arbitrary or anti-competitive conduct in the issuance of permits for third-party access to ports, so should be subject to external oversight and regulated standard terms of access.
- The terms of port terminal concessions and the process for their allocation might not be consistent with competition objectives, so the ICCC should be empowered to regulate terminal concessions and have the role of reviewing and certifying both the procurement process and the contractual terms.

Conduct that reduced competition among stevedores or other third-party

¹²⁸ These efficiencies could be undermined if ports were subject to economies of scope, such that it was less costly to operate more than one port. We are not aware of such efficiencies being important to port operation generally, or in PNG specifically.

¹²⁹ Castalia Papua New Guinea Port Competitiveness: Diagnostic Report (October 2016).

¹³⁰ See, *ibid.*, pp iii – iv.

suppliers at ports would potentially infringe Part 6 of the ICCA Act. While this Review makes numerous recommendations for the improvement of Part 6, the ICCA Act is capable of applying to anti-competitive conduct in the ports sector without the need for specific regulation. The ICCA should be vigilant to ensure that competition among stevedores is not constrained by restriction of access permits or otherwise and, if necessary, should exercise its powers to protect competition in that sector.

The Castalia *Diagnostic Report* proposes that:

PNGPCL should be restructured into a platform for competition in port services. PNGPCL should adopt a port landlord model where all its major ports' operations, maintenance and development would be contracted to the private sector, under concession arrangements negotiated and monitored by PNGPCL. If possible, ports should be split into competing terminals.

This Review sees merit in that proposal and would support further investigation and consultation on concrete proposals grounded in pro-competitive objects and sound public-private partnership principles.

This Review agrees with the view of Castalia that CSO reform should be progressed (with care) in the ports sector.¹³¹ This Review does not consider that a regime for regulation of third-party access to facilities should be legislated for in PNG (for the reasons set out in the text accompanying **Recommendation 189**) but if serious access issues are found to persist in relation to ports, a regulatory intervention specific to ports could be considered. The need for such intervention has not been shown at the present time.

Cross-subsidies and CSOs in port services

Historically, port services in PNG's smaller ports have been cross-subsidised by the prices charged in the larger ports. This treatment of loss-making ports is likely to have had an adverse impact on PNG Ports performance.

PNG Ports is obligated to keep unprofitable ports open – which it would not do if it were a purely commercial business – but PNG Ports does not presently receive any CSO funding to cover the costs of running unprofitable ports. Rather, the regulatory contract allows PNG Ports to fund its loss-making ports by cross-subsidising them from prices charged

¹³¹

Ibid, p 46.

in larger ports including Port Moresby and Lae.

The “levy” required to keep unprofitable ports open is not indicated on customers’ bills for port services. This has been due to customer resistance.¹³² This is unfortunate, because it conceals from customers the size of the cross-subsidy between the different ports. Non-transparency in the cross-subsidy also makes it more difficult for PNG Ports to make economically informed decisions about the use of and investment in ports.

Again, the Review Team considers there is a pressing need for implementation of the Government’s CSO Policy for SOEs, in relation to PNG Ports.

Price setting principles for future contracts

Section 35(3)(e) of the ICCA Act requires that a regulatory contract must “specify pricing policies and principles that are to be adopted in any regulatory contract that is issued in replacement of that regulatory contract on the expiry of its term.”

Principles that outlast a particular regulatory contract are useful where regulatory contracts have a relatively short duration. As the ACCC has noted with respect to its power to use analogous ‘fixed principles’ under the Australian telecommunications access regime, such principles provide commercial certainty, encourage investment and reduce regulatory burden.¹³³

There is a trade-off, however, between the certainty of approach that longer-lived pricing principles offers, and the risk of implementing principles that might no longer be optimal by the time they come into operation. The relatively long period of a regulatory contract in PNG (five years) might make it difficult for the ICCA to define principles for the future regulatory contract that offer a degree of certainty valuable to the regulated entity.

The Review Team considers that the ICCA should have *discretion* to include

¹³² ICCA, *Review of the PNG Ports Regulatory Contract, Final Report*, February 2016, p 57.

¹³³ The ACCC argues that: “The benefits of locking in these terms and conditions is that it provides the regulated business with certainty about the framework used to set access prices and how it may recover its expenditure over time, thereby encouraging investment. In addition, by specifying particular values or methodologies that the ACCC must adopt, it reduces the burden on the ACCC and stakeholders from having to periodically reassess these matters.” ACCC, *Submission to the Independent Cost Benefit Analysis Review of Regulation Telecommunications Regulatory Arrangements Paper (s.152EOA Review)*, 14 April 2014, p. 18.

such future pricing principles in regulatory contracts. (Such an approach is permitted by the telecommunications provisions in the Australian *Competition and Consumer Act 2010*.)¹³⁴

Recommendation 152: The Government should initiate a review of the ports sector, giving consideration to the feasibility of separating the ownership of the major PNG ports in order to facilitate competition between them.

Recommendation 153: The Government should ensure clarity and coherence in the objectives of PNG Ports, including by emphasis on PNG Ports' obligation to behave commercially and maximise its profits.

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 155: ICCC Act section 35 should be amended so that specification of "pricing policies and principles" for successive regulatory contracts should be at the discretion of the ICCC.

Recommendation 156: ICCC Act section 36(6) should be amended to address the incentive to delay the implementation of a new regulatory contract by giving the ICCC the right to object to a draft contract and declare that prices under an expiring regulatory contract remain in effect until a new regulatory contract commences.

E. ELECTRICITY SERVICES

Four main functions are involved in electricity supply:

- *Generation* of power, which in PNG is produced through a combination of hydro, gas and diesel sources.
- *Transmission* of power, through high voltage conductors between generators and major supply points (e.g. cities and towns).
- *Distribution* of power, through low voltage wires to homes and businesses.

¹³⁴ *Competition and Consumer Act 2010* (Cth) Part XIC, s 152BCD.

- *Retailing* of power, including billing and payment functions.

PNG Power Ltd (**PPL**) performs all four functions in PNG and has a statutory monopoly over the transmission and distribution of power. The transmission and distribution functions are often considered to be natural monopolies, in the sense that it is less costly to have a single transmission and distribution network. However, the generation and retailing functions are potentially competitive. Multiple sources of generation capacity are desirable, to efficiently serve peak and off-peak demand and to deliver reliable supply.

Electricity Industry Policy

The *Electricity Industry Policy 2011* (**EIP**) set a new course for the electricity industry to meet growing demand and improve upon the management and performance of PPL. The EIP aims for the introduction of competition into the retail and generation segments of the previously-monopolistic sector. The ICCC is responsible for implementing elements of these reforms, including licensing entrants, and developing a Third Party Access Code for network infrastructure and Grid Code (both in force since 2014).

The EIP recognises the limitations in the current electricity industry structure in producing good outcomes for PNG electricity consumers and the limited external discipline on PPL to manage its costs and seek efficiencies.¹³⁵ The EIP also identifies the multiple objectives the Government has sought to achieve through PPL as imposing constraints on PPL that it cannot readily manage and which undermine PPL's efforts to exercise commercial discipline.¹³⁶ Further problems were noted with the ability of PPL to finance investments in needed generation investments.

The EIP proposals sought to introduce competition in different market segments:

- For new generation in PPL's exclusive licence areas (small loads),¹³⁷ competition is to be facilitated by a compulsory competitive tendering process from which PPL is excluded (thereby creating new independent power producers (**IPPs**)).
- For larger loads (customers with 10MW loads or greater) within the

¹³⁵ PNG Government, *Electricity Industry Policy* (2011) p 1.

¹³⁶ Ibid.

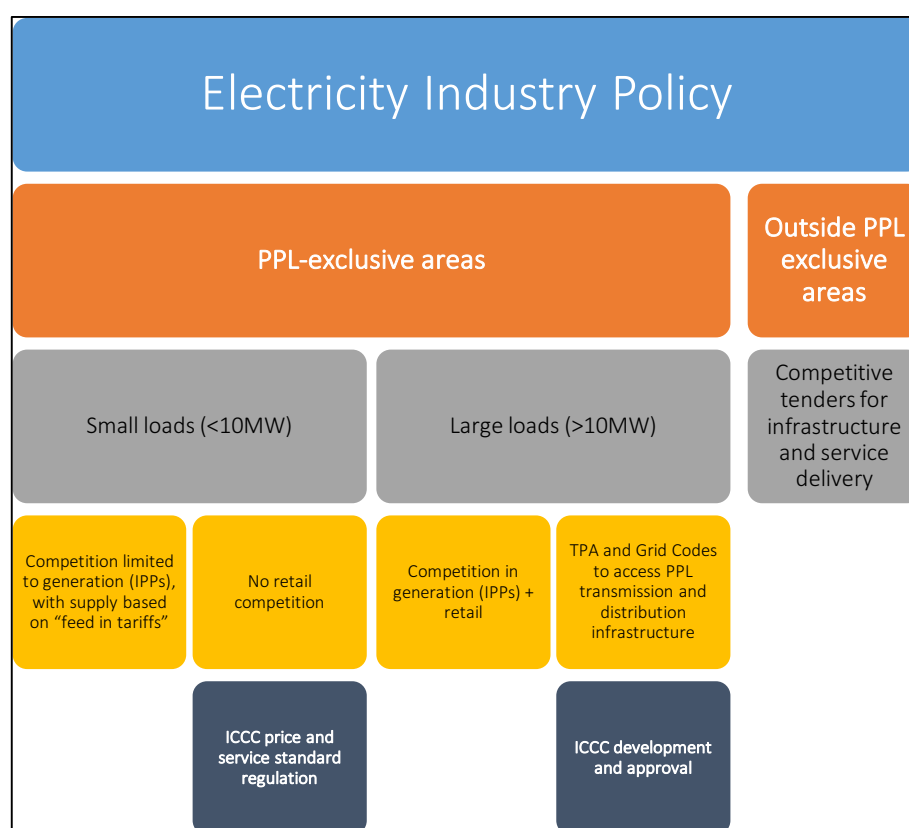
¹³⁷ PNG Power has the exclusive right to supply small customers (<10 MW load) within 10km of its network throughout PNG.

exclusive supply areas, competitors will be encouraged to enter the generation market and retail electricity directly, by development of an access code to facilitate competitors' use of PPL's transmission and distribution networks.

- In areas outside the PPL licence areas, competition is to be facilitated using competitive tender processes.

The EIP did not propose retail competition for small loads.

Figure 1 Industry structure resulting from EIP



PPL regulatory contract

The current regulatory contract between the ICCC and PPL has the following key characteristics:¹³⁸

- A standard building block model is used to determine an annual revenue requirement, based on the ICCC's review of PNG Power's cost and demand forecasts.
- Prices are set using a price cap, of the form CPI-X, based on a weighted average of the different prices applying to different kinds of customers.

¹³⁸ ICCC, *Final Report on PNG Power Limited's Electricity Regulatory Contract Review* (November 2013).

- PPL has the discretion to differentiate in prices between service areas, on the basis of the different costs of providing services in different areas, but must maintain the same relativity of charges between different customer groups.
- Substantial increases in capital expenditure and prices are forecast. New investments in infrastructure are envisaged to address reliability concerns, with the price cap being set at CPI+6.57 per cent (meaning that prices are to rise by this amount in each year of the 5-year regulatory period).¹³⁹
- PPL faces incentives to lower costs because its price path is fixed. If PPL is able to be more efficient in its operating costs while still meeting the minimum service standards, it will be able to retain the financial benefit achieved over the remainder of the regulatory period.
- Service quality measures are imposed, including on the reliability of supply, with penalties for poor performance.

Coherence of PPL's objectives

Conflict between commercial and other goals is a material issue for PPL.

The conflict between PPL's commercial objectives and political expectations has become apparent through Government directions to PPL not to increase its tariffs, although tariff increases are permitted under the regulatory contract. This has left tariffs below the levels needed to recover average costs, and necessitated the former IPBC providing PPL with additional funding to cover the shortfall.¹⁴⁰

The freeze on retail tariffs would constitute a CSO under the Government's CSO Policy for SOEs, but has not been explicitly costed and funded. The Government urgently needs to clarify PPL's commercial and other objectives to provide certainty for PPL's operations.

A second area where objectives need to be clarified is the extensive cross-subsidisation by PPL through geographically uniform tariffs. As a result, PPL is unprofitable in 14 of the 17 main centres within which it operates; those 14 centres account for around 10% of PPL's sales.¹⁴¹ These centres

¹³⁹ This relates to the non-fuel components of costs. Prices are adjusted to reflect changes in fuel costs as a pass-through.

¹⁴⁰ See, PNG Power Ltd 2014 media release: <<http://www.pngpower.com.pg/index.php/news/126-2014-news/262-electricity-tariff-remains-the-same>>.

¹⁴¹ ICCC submission, p 26 and ICCC, Final Report, 2013, p 41.

are subsidised by the Port Moresby, Ramu and Gazelle grids. This cross-subsidisation detrimentally affects PPL's ability to invest and increase service reliability.¹⁴²

The EIP allows for the introduction of cost reflective tariffs, and PPL is permitted under its regulatory contract to geographically de-average tariff structures.

De-averaging tariffs geographically would improve PPL's financial ability to operate and invest in existing infrastructure. It would also provide greater incentive for it (or other suppliers) to invest in new infrastructure. Such a change need not be introduced at once but could be gradually phased in over a period of several years. In the absence of CSO Policy implementation and funding, uniform pricing can only be sustained by cross-subsidies. As identified in **Section B**, cross-subsidies hamper performance, including by preventing PPL from making the investment required to improve service reliability and coverage.

Tariff flexibility

Commercial flexibility was identified above as a necessary pre-condition for effective incentive regulation. The Review Team considers that PPL should have greater flexibility in setting its tariffs.

The ICCC currently uses a maximum average price cap, which requires average prices to change by no more than an 'X' value (set at 6.57% in the current regulatory contract). However, the ICCC also sets the specific tariff structures including the fixed and variable charge components. If PPL complies with the overarching price control, there is no apparent benefit in the ICCC setting individual tariffs. A better approach would be for the ICCC to lay down principles for tariff setting by PPL. This approach would reduce the administrative burden on the ICCC and give PPL greater flexibility to respond to incentives.

Technical regulation

The EIP proposes that, in accordance with regulatory best practice, technical regulation of the electricity network should be the responsibility of an independent agency, rather than a function performed by PPL, as it is at present. This approach avoids conflict between PPL's commercial roles and technical regulatory roles.

¹⁴² Ibid.

The Review Team recommends that the transfer of technical functions to the ICCC should be undertaken as a priority and that additional resources should be allocated to the ICCC to enable it to properly perform those functions.

Electricity service standards

In monopoly industries, the level of service is not subject to competitive pressure, so is usually set by regulation, based on historical standards or the regulator's assessment of consumers' willingness to pay for service improvement. As required by current legislation, the ICCC has set service standards in PPL's regulatory contracts, with penalties for non-compliance to be directed into a "reliability improvement fund". It is unclear whether this reliability improvement fund is a beneficial policy. Future projects funded by the reliability improvement fund are excluded from PPL's regulatory asset base and therefore do not earn a return, which further lowers tariffs below true costs.¹⁴³

The ICCC has also previously recommended to the Government (as shareholder) that it reduce remuneration for PPL's senior management if service standards were not achieved.¹⁴⁴ This kind of policy could be pursued but should form part of an explicit performance framework, clarifying PPL's commercial and other performance objectives. It should lead to longer-lasting improvements in service performance than a reliability fund.

Recommendation 157: The Government should clarify and ensure coherence of PPL's objectives, ensuring as the principal objective that PPL is required to operate as a successful business earn returns comparable to businesses not owned by the state.

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

Recommendation 159: The Government should consider partial or full divestiture of PPL's retail functions and the introduction of retail competition for small loads.

¹⁴³ This is seen as a form of penalty for poor performance in not meeting reliability targets. Previously, rebates to customers were offered but this was seen to detract from PPL's financial performance. A reliability fund means that PPL does not pay the rebates, but PPL does not receive compensation in tariffs for this expenditure, so it is unclear how this does not suffer from the same drawback. See ICCC, Final Report, p 68.

¹⁴⁴ ICCC, *Final Report on PNG Power Limited's Electricity Regulatory Contract Review* (November 2013) p 40.

Recommendation 160: PPL should have more flexibility over its tariff setting and structure.

Recommendation 161: The ICCC should give consideration to alternative sanctions for PPL for not meeting service standard targets and to the relationship between the "reliability improvement fund" and asset base, so as not to inhibit PPL's ability to improve the reliability of its network.

F. THIRD-PARTY MOTOR VEHICLE INSURANCE

Motor Vehicles Insurance Ltd (MVIL) was established by the *Motor Vehicles (Third Party Insurance) Act (MVTPI Act)* to provide Compulsory Third Party (CTP) motor vehicle insurance. Third party insurance is mandatory in PNG for all motor vehicle owners.¹⁴⁵ At present, MVIL is the sole CTP insurer in PNG.

MVIL is regulated under a regulatory contract, the most recent of which commenced in January 2013 for a five year term. A regulatory contract is now considered to be necessary because the MVTPI Act gives MVIL a statutory monopoly over the provision of CTP insurance in PNG.

Competition in the provision of CTP should be beneficial for PNG consumers, and remove the need for the ICCC to regulate CTP premiums.

The ICCC's regulation of MVIL's prices is very different from that applied to other network industries. The pricing of CTP insurance is not subject to the 'building block' price regulation that characterises other SOEs (PNG Ports and PNG Power) under regulatory contracts. Rather, the ICCC applies a price cap because the pricing of CTP requires estimation of the cost of claims which have been incurred (including claims on accidents that have happened but are yet to be paid). The necessity for estimation of future claims introduces an element of uncertainty into the determination of appropriate premiums.

The monopoly status of MVIL

Many jurisdictions require operators of motor vehicles to have CTP, because this addresses a concern about the costs imposed by uninsured drivers. However, it is uncommon to have a monopoly provider of these insurance services.

In most regulated industries cost conditions favour having only one

¹⁴⁵ *Motor Vehicles (Third Party Insurance) Act 1974* s 48.

supplier: 'natural monopoly'. CTP insurance is unlikely to be a natural monopoly, as cost conditions do not make it cheaper to have one insurer rather than many. In many other jurisdictions, CTP insurance is compulsory but motorists may choose among a number of insurers when purchasing it.

While MVIL is currently the sole provider of CTP insurance in PNG, the MVTPI Act allows for more than one provider of CTP services.¹⁴⁶

The MVTPI Act allows insurers other than MVIL to provide CTP cover. The Minister may nominate another company to carry on CTP insurance business if another company is able and willing carry on that business and the Minister is satisfied that the company has the capacity to do so. At least one general insurer has indicated to the Review Team that it would like to provide CTP vehicle insurance cover in PNG but so far no provider other than MVIL has been authorised.

The Review Team is not convinced that provision of CTP insurance should be monopolised. There are no fundamental efficiency reasons for having a single supplier and in many countries this market is supplied by a number of insurers.

The Review Team considers that section 72 of the MVTPI Act should be amended so that any insurer that satisfies the capital and other technical requirements of the Act has the right to offer CTP insurance.

A transitional arrangement to unwind the regulation of premiums under the regulatory contract would be beneficial. The current regulatory contract expires in 2017. That would be an appropriate time to consider the impact of competition on the appropriate form of control over MVIL's prices. If competition has been effectively established, this could include reverting to price monitoring and reporting on industry profits rather than direct premium regulation.¹⁴⁷

CSOs and funding

Unfunded CSOs can result in poor outcomes as entrants seek to serve the profitable customers without serving the unprofitable customers.

In the CTP market, MVIL currently regards it as an obligation to: (a)

¹⁴⁶ *Motor Vehicles (Third Party Insurance) Act 1974* s 72.

¹⁴⁷ As noted in the Issues Paper, schemes used in Australia commonly give a regulator some oversight of fees charged, but not necessarily a premium-setting role.

indemnify owners of uninsured and unregistered vehicles for any legal liability; and (b) pay “Bel Kol” compensation for the deceased, which operates as a “no fault” scheme (meaning that it is paid regardless of the fault of the driver).¹⁴⁸ In a competitive environment, the cost of these obligations should be borne by all competitors rather than just MVIL. This could be achieved through a specific fund to which all CTP insurers contribute.

If uniform premiums are to be maintained across PNG,¹⁴⁹ this should be done by implementation of the CSO Policy rather than through regulatory contracts. The ICCC’s role should be limited to determining whether service standards are met.

The introduction of competition would not imply that no regulation or service conditions is necessary. The principle would be that entry should be granted to all those that meet the minimum conditions required for effective supply of services. Primarily, these conditions should relate to the technical and financial capacity to provide the services. If allowing further insurers to offer CTP cover for motorists is regarded as necessitating safeguards to protect consumers, conditions relating to terms and conditions of insurance, service coverage, or service standards, could be specified.¹⁵⁰

Privatisation of MVIL

A final issue is whether there is a case for wholly or partly-privatising MVIL.

Privatisation of MVIL could offer a number of benefits:

It is likely to enhance competition between CTP providers, as some insurance providers may be wary of entering to compete with an SOE that has explicit or implicit government protection against financial losses. The introduction of competition would increase the risk of MVIL making losses, which would ultimately be borne by PNG taxpayers, and these risks could be passed to shareholders through privatisation.

Privatisation might remove restraints that presently hinder MVIL’s ability to raise capital to make further investments and compete effectively with private providers, and to respond to incentives in the regulatory contract

¹⁴⁸ These provisions are contained in the *Motor Vehicles (Third Party Insurance) (Basic Protection Compensation) Act 1974*.

¹⁴⁹ See also Section 8 of the ICCC’s final report, *Review of the Compulsory Third Party Motor Vehicles Insurance Regulatory Contract*, 2013.

¹⁵⁰ Id, p 5.

which might favour greater efficiency. This is because the SOE ownership structure has not allowed MVIL to be sufficiently independent to act in the business's own interests.¹⁵¹

Recommendation 162: MVTPI Act section 72 should be amended to clarify that insurers meeting the financial and technical requirements of the Act are eligible to offer CTP insurance.

Recommendation 163: The MVTPI Act should be reviewed and modernized, with consideration given to amendments to regulate service standards applying to all CTP providers.

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

Recommendation 165: The ICCC should, in the forthcoming regulatory contract review, consider using price monitoring rather than a regulatory contract to oversee the premiums charged by MVIL (and any competitors).

Recommendation 166: The Government should initiate a review of the motor vehicle insurance industry, giving consideration to the scope for increasing competition and the possible role for full or partial privatisation of MVIL.

G. POSTAL SERVICES

Postal services are supplied in PNG by Post PNG, an SOE created under the *Postal Services Act 1996*. Post PNG has a monopoly over "reserved services," including the delivery of smaller letters (under 250 gm)¹⁵² and also supplies private mailbox, parcel delivery and logistics services.

In 2002, the Minister for Treasury declared Post PNG to be a regulated entity and the supply of postal services to be regulated services (under ICCC Act s 32). Post PNG's current regulatory contract commenced in 2012 and expires at the end of 2016. The current regulatory contract covers:

- a standard letter service for delivery in PNG;
- a standard letter service for delivery from PNG; and
- rental of private letter boxes and private mail bags.

¹⁵¹ MVIL submission, p 6.

¹⁵² *Postal Services Act 1996* ss 10, 11.

Other services, such as parcel delivery, are not regulated because these are subject to competition from freight and logistics companies.

Necessity for regulation of postal services

The financial performance of Post PNG (like many postal operations around the world) has been poor over the past few years.¹⁵³ The traditional business model for postal operators has been seriously affected by digitalisation. Letter volumes in particular are in decline due to the use of alternative media such as email, mobile telephony, internet telephony and fax machines.

It is therefore necessary to keep under review the appropriateness of maintaining postal regulation, in light of the changing market circumstances. To the extent that some prices oversight is required, alternative means should be considered for providing residual protection for consumers that continue to rely on postal services.

As Post PNG's small letter business is loss-making there is no apparent need for regulation of that monopoly. Because that business faces intense competition from alternative means of communication, continued protection of that business as a monopoly appears unjustified.

In March 2016, Post PNG proposed to the ICCC that it should "seriously consider whether now is a good time to cease oversight of these few [postal] products in an industry heading rapidly into the sunset".¹⁵⁴ That is, rather than proposing a new Regulatory Contract in compliance with Clause 14.1 (a) of the existing Regulatory Contract, Post PNG proposed that the Commission cease regulation of reserved postal services. A further submission (on behalf of Post PNG) was prepared by NERA Economic Consulting assessing the possibility of legislative and regulatory changes to ensure the ongoing viability of Post PNG.

The increasing use of alternative forms of communication in substitution for letters raises a fundamental question about the 'monopoly' status of letter delivery. The ICCC's Draft Report on postal services regulation states that competition from electronic communications is likely to act as a sufficient restraint to prevent Post PNG from exploiting its letter service customers and that Post PNG's letter services are no longer essential for

¹⁵³ Kumul Consolidated Holdings Limited, portfolio notes: <https://www.kch.com.pg/portfolio/post-png-limited/>.

¹⁵⁴ ICCC *Review of the Postal Services Regulatory Contract: Issues Paper* (May 2016) p 2.

the majority of PNG's population.¹⁵⁵ That is, while Post PNG has exclusive rights to deliver certain mail services, this does not give it market power in the broader market for communications services, and so raises questions about whether price regulation is necessary.

The Review Team agrees with the ICCC that there is a strong case to be made that the benefits of comprehensive price-cap regulation no longer outweigh the costs to both ICCC and Post PNG.¹⁵⁶ The ICCC is of the view that price monitoring through the regulatory contract is appropriate, because letter mail possibly remains an essential service for some remote, rural communities.

The ICCC has adopted simplified regulation of Post PNG, in order to reduce the regulatory burden on both Post PNG and the ICCC, and to improve Post PNG's flexibility to adapt to a changing commercial environment.¹⁵⁷ This appears well warranted. Following the December 2016 Review of the Postal Services Regulatory Contract, a new regulatory contract for the period 2017-2021 will apply price monitoring in place of price control.¹⁵⁸

The ICCC's Issues Paper in the postal services review notes that "letter mail possibly remains an essential service for some remote, rural communities."¹⁵⁹ There is no necessary connection between the essentiality of a service and the need for regulation, however. The risk of monopoly pricing seems very low and price monitoring only delivers useful information about monopoly conduct where it essentially 'shadows' a full regulatory process (such as a building block model). Accordingly, while the application of price monitoring is a move in the right direction, the ICCC should keep under review whether PNG Post should continue to be a regulated entity.

CSOs in postal services

A better approach to addressing service concerns in remote rural communities would be to subsidise Post PNG (or another provider of the relevant services) directly for the provision of services to these

¹⁵⁵ Id, p 7.

¹⁵⁶ ICCC Issues Paper, May 2016, p 8.

¹⁵⁷ Id, p 10.

¹⁵⁸ ICCC *Review of the Postal Services Regulatory Contract: Final Report* (December 2016).

¹⁵⁹ Ibid.

communities.¹⁶⁰ These subsidies can be delivered as a CSO that requires Post PNG to adhere to maximum prices in remote rural areas or uniform pricing across PNG, if necessary.¹⁶¹

Service standards

In the past, and as provided for in legislation, the ICCC has taken an active role in defining and enforcing compliance with service standards, including the hours of post offices' operation, and postal network expansion or closure.¹⁶²

Given that the majority of customers now have alternative forms of communication (email and mobile telephony services) and are not reliant solely on postal services, reductions in service standards will not significantly impact these customers. Service standards must therefore be more closely linked to the commercial provision of services by PNG Post. If necessary, the provision of any subsidies by Government to serve the needs of customers that might be poorly-served by a more commercial operation can be linked to service standards (as discussed, this may apply to remote rural communities).

Recommendation 167: The ICCC should keep under review whether Post PNG should continue to be regulated as a declared entity.

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 169: The Government should repeal Post PNG's statutory monopoly rights and consider partial or total

¹⁶⁰ A further example of relevant services is "Salim Moni Kwik" a service provided by PNG Post, which allows for nationwide mobile money transfers. It is provided at a low cost and is likely to be cross-subsidised. Advertising material and anecdotal evidence suggests that husbands and sons employed in cities use this service to transfer funds to their families in rural areas.

¹⁶¹ As described in the ICCC's final decision on Post PNG's regulatory contract in 2014, Post PNG was subject to CSO arrangements from 1996 to 2002, which did not include specific funding arrangements as it was intended the cross-subsidies from commercial services could compensate for any losses incurred. However, the Review Team understands that 2002 reforms changed Post PNG's obligation to state that it must make postal service available to as many people in PNG as is commercially practicable. Given that Post PNG's financial position and performance had improved since 2002, government support payments were no longer deemed necessary. Competitive conditions have clearly changed and it is unreasonable to expect Post PNG to bear losses as it will be unable to recover these in other markets.

¹⁶² Detail is important when regulating prices because in the absence of well-defined standards, regulated entities can decide to cut standards to maintain or increase profits with no fear of substitution to other services.

H. TELECOMMUNICATIONS

The telecommunications industry was declared a “regulated industry” for the purposes of the ICCC Act.¹⁶³ 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.¹⁶⁴ 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).

In recent years, major structural and regulatory reforms in telecommunications have delivered benefits to the PNG businesses and consumers. 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).¹⁶⁵ NICTA has expressed concern about Digicel’s pricing practices and has intervened to limit the degree of discrimination

¹⁶³ *Telecommunications Act 1996* (PNG) s 19A.

¹⁶⁴ NICT Act s 9(c) (e).

¹⁶⁵ International Telecommunications Union, ICT Statistics database: <<http://www.itu.int/en/ITU-D/Statistics/Pages/default.aspx>>.

practised.¹⁶⁶ 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.¹⁶⁷

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.

Recommendation 170: While the functions of NICTA and the ICCC overlap in relation to competition and consumer protection, and require some duplication of expertise, the Review does not recommend their consolidation in a single agency at this time.

Recommendation 171: As both competition and consumer issues arise within the respective jurisdictions of both NICTA and the ICCC both agencies must continue to work on arrangements for information sharing and cooperation between them.

¹⁶⁶ NICTA, *Recommendation Report: A report to the Minister recommending the introduction of a retail service determination*, September 2012.

¹⁶⁷ NICTA, *Decision and Inquiry Report In relation to NICTA's consideration of the potential declaration of certain wholesale mobile telecommunications services*, 29th April 2014.

VI. PRICE MONITORING AND CONTROL

Contents of this Part:

- A. Introduction
- B. Role of Price Monitoring and Price Control
- C. Price Monitoring of Staple Foods
- D. Price Control of Water and Sewerage Services
- E. Price Control of Refined Fuels
- F. Price Control of PMV and Taxi Services

A. INTRODUCTION

The prices that can be charged in PNG for certain goods (e.g. foods, fuels) and services (e.g. water, transport) are regulated by the ICCC under the *Prices Regulation Act* (Chapter 320) (**PR Act**). Both “price monitoring” and “price control” are administered by the ICCC.

The PR Act provides that the Minister may declare any goods to be “declared goods” or “declared monitored goods” or any service to be a “declared service” or a “declared monitored service”.¹⁶⁸ The ICCC may fix the maximum price for sale or supply of a declared good or declared service, either nationally or in any part of PNG or any “proclaimed area.”¹⁶⁹

It is an offence to sell goods or supply services (or to offer to do so) at a price greater than the maximum price fixed under the PR Act.¹⁷⁰ The ICCC must monitor the prices of supply a declared monitored good or a declared monitored service and report to the Minister periodically on whether or not it is desirable to declare those goods or services for the purpose of controlling their prices.¹⁷¹

The ICCC also carries out “inquiries”, on request by the Minister, or on the ICCC’s own initiative. Inquiries provide the opportunity for the ICCC to assess the level of competition in a market and make recommendations to the Minister on whether price regulation should be considered.

The ICCC also carries out pricing reviews on request by the Minister or a

¹⁶⁸ Prices Regulation Act ss 10, 32A.

¹⁶⁹ Prices Regulation Act s 21.

¹⁷⁰ Prices Regulation Act s 33.

¹⁷¹ Prices Regulation Act s 32A.

supplier, in respect of prior ICCC decisions on periodic reviews.¹⁷²

B. ROLES OF PRICE MONITORING AND PRICE CONTROL

Price control directly addresses a problem of excessive pricing by a firm or firms with market power. 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.

Price monitoring may also affect monitored firms' pricing decisions. This can occur through adverse publicity in the event of price rises that cannot be justified by cost increases.

Price monitoring may be used for various purposes, including:

- To improve information on market performance, such as whether prices are too high, with a view to imposing price controls if exercise of market power is contributing to poor performance.
- As a transitional measure to determine whether reforms are working or to demonstrate the benefits of competition.

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).

C. PRICE MONITORING OF STAPLE FOODS

In the past, many staple foods were produced in PNG or imported to PNG by only one or two key suppliers. Tariffs applied to many imported products. Price controls were applied in response to power over price that was enjoyed by the small numbers of domestic suppliers protected by high barriers to entry.

Reforms in the PNG economy to remove tariffs and other barriers to entry¹⁷³ have led the ICCC progressively to scale back price control and

¹⁷² Prices Regulation Act ss 25A – 25C.

¹⁷³ For example, with respect to sugar, the tariff was reduced from 70 per cent to 40 per cent in 2010 and later to 35 per cent. See ICCC, *2012-13 Sugar Industry Pricing Review Final Report* (October 31, 2013). The tariff on Wheat

substitute price monitoring. Flour, rice and sugar continue to be “declared monitored goods” (under PR Act s 32A) and the ICCC has responsibility for monitoring the prices of these three staple foods.

Price monitoring involves the collection and analysis of price data and changes in benchmark costs, so that the ICCC can assess whether the firms selling monitored products are responding competitively to changes in costs. If competitive behaviour is not observed, the ICCC may recommend to the Minister that price controls be imposed (by Ministerial declaration under PR Act s 10).

In relation to price monitoring, the Review has considered:

- Whether the statutory threshold for imposing price monitoring is appropriate;
- Whether the statutory process for declaration remains appropriate; and
- Whether there is adequate provision for review of ICCC decisions on price monitoring.

Threshold for imposing price monitoring

Price monitoring imposes costs on the ICCC and on firms supplying monitored products.¹⁷⁴ It is important that the costs associated with monitoring are taken into account in the decision about whether to monitor prices or not. The ICCC has only limited resources and those resources need to be put to best use.

Currently, the Minister’s declaration powers (s 27A of the PR Act) do not specify criteria for the imposition of price monitoring. This means that monitoring might be imposed where: (a) there is no substantial market power; or (b) the costs of monitoring outweigh the benefits; or (c) there is substantial market power but monitoring is not an effective means of preventing consumers from being exploited.

In respect of rice, the ICCC appears to have proposed price monitoring despite the relevant market being competitive:

Flour was reduced from 40 to 15 per cent in 2010. This was then reduced to 12.5 per cent on 1 January 2012, and then to 10 per cent from 1 January 2015. Imports of rice are not subject to tariffs or quotas.

¹⁷⁴ “The Commission is also proposing to continue to monitor the retail price of one kilogram packages of Roots rice in stores around PNG. The Commission uses its own staff for this purpose, but can also require retailers to provide this information directly to the Commission.” Ibid.

The Commission's draft position is that the rice market is competitive at all levels of the value chain. That is, competition appears to be effective among growers, importers and retailers. However the Commission does have some concerns about retail competition in particular. The Commission is therefore of the view that continued monitoring in some form is appropriate.¹⁷⁵

The ICCC's power to recommend regulation of prices should be exercised only after considering the costs of regulation (e.g. administration and enforcement costs, compliance costs, risk of failure of service if prices are set too low, and risk of possible corruption).

The benefits of price monitoring may outweigh the costs. Large resources are not needed to monitor "factory gate" prices against benchmark overseas prices. However, monitoring has not always been effective in holding prices down and the ICCC incurs costs in fielding staff to monitor prices and taking enforcement action against breaches of the monitoring rules.

The indirect benefits of price monitoring must also be recognised. The ICCC's price monitoring activities have enabled it to comment on other policies relevant to consumers and to act as an advocate for competition. For example, the ICCC has analysed the impacts of tariff levels on domestic rice production policies.¹⁷⁶ Even where competition is not effective, regulation should be recommended only if the benefits of regulation are likely to exceed the costs. When considering the benefits of regulation, it is important also to consider whether interventions other than regulation might address the problem at lesser cost – in particular, whether pricing issues might be solved by actions to increase competition in the relevant market. There have been increasing levels of competition in the supply of staple foods. These have been driven by innovations in the economy and increasing numbers of importers entering the market.

Experience with price monitoring in relation to staple foods indicates that thresholds should be legislated for declaration of "declared monitored goods" or "declared monitored services" under the PR Act. Thresholds for price monitoring could include requirements such as the following:

- a firm or firms have substantial market power in the market for the goods or services in question;
- it is not reasonably practicable in the short term to promote

¹⁷⁵ ICCC *Draft Report Rice Industry Pricing Review* September 2015, p 68. The Review Team has been advised that the review in respect of price monitoring of rice was completed in March 2016 but the Final Report had not been issued at the time of writing.

¹⁷⁶ ICCC *Draft Report Rice Industry Pricing Review* September 2015, s 9.

competition in the market for the goods or services in question; and

- The Commission estimates that the benefits associated with price monitoring will exceed the costs associated with price monitoring, for the goods or services in question.

Such thresholds should help to ensure that monitoring is not imposed where market power is minor or transitory or where it is unlikely to be a cost-effective way of preventing consumers from being exploited.

Declaration process

At present, the Minister is assisted in exercising price monitoring functions by the ICCC's pricing review reports. If the recommendation is adopted to legislate for thresholds for declaration of goods or services subject to monitoring, a report by the ICCC specifically addressing the threshold criteria would assist the Minister in exercising the power of declaration.

The Review Team recommends that the Minister should be able to request the ICCC to investigate, and the ICCC should be able to investigate on its own initiative, specifically whether thresholds are satisfied for declaration of a good or service have been met or continue to be met.

The Review Team further recommends that a report by the ICCC recommending the imposition of price monitoring should be a necessary pre-requisite to the Minister exercising the power of declaration.

Appeals

It is desirable that ICCC decisions in the exercise of its price monitoring powers should be reviewable by the Appeals Panel.

Recommendation 172: The PR Act should be amended to incorporate thresholds for declaring goods or services subject to price monitoring, such as requirements for: grounds to suspect market power; impracticality of promoting competition; and benefits of monitoring exceeding the costs.

Recommendation 173: The PR Act should be amended to require a report by the ICCC to the Minister confirming that the thresholds for declaring goods or services subject to price monitoring are satisfied, as a pre-condition for imposition of price monitoring.

Recommendation 174: Decisions of the ICCC in relation to price monitoring should be subject to review by the Appeals Panel.

D. PRICE CONTROL OF WATER AND SEWERAGE CHARGES

Water and sewerage services are supplied in PNG by two utilities: Eda Ranu (which supplies the NCD) and Water PNG Limited (which supplies areas outside the NCD).

Economic regulation of water utilities is common in other jurisdictions, by reason of natural monopoly characteristics of the infrastructure employed. The trunk and reticulation networks of water utilities are not economical to duplicate and, in many cases, the same is true of bulk water supply or sewerage treatment. In some countries, such as Australia and the United Kingdom, there have been attempts to introduce competition in some parts of water and sewerage supply but competition has not flourished.

Eda Ranu and Water PNG Limited are subject to price control which seeks to prevent excessive pricing. However, the main concern is not excessive prices or profits but the poor financial performance of these SOEs. ADB indicators for return on equity show average returns of less than 5 per cent between 2002-2012;¹⁷⁷ these are well below commercial returns. The ICCC has observed that operating costs for Eda Ranu and Water PNG Limited have continued to rise at rates well in excess of the rate of inflation.¹⁷⁸ Overall volumes of water delivered and the number of customers supplied have not increased materially nor have service levels improved over the same period.

Cross-subsidies

Universal and affordable access to water and wastewater services is an important and entirely legitimate government objective for both efficiency and equity reasons. The Review Team is concerned, however, that achievement of this objective is not supported by Water PNG Limited's current pricing policy. Water PNG Limited's pricing appears to be significantly affected by extensive cross-subsidies from high-use to low-use water customers, and within areas of the Water PNG network.

It will be necessary to reform to Water PNG Limited's geographic cross-subsidies, given that the mandate for Water PNG Limited to extend its network inevitably will lead it to serve areas which cost more to serve than existing service areas.

Price averaging between high and low cost areas creates inherent conflict.

¹⁷⁷ Asian Development Bank, *Finding Balance 2014: Benchmarking the performance of state-owned enterprises in island countries* (2014), Appendix 2, p 46.

¹⁷⁸ ICCC, *Water and Sewerage Pricing Review: Final Report* (July 2015) p 112.

Average prices will benefit one set of consumers but harm other consumers. This can only be resolved by an explicit commitment of funds by the Government to address high cost service areas. For example, if water reticulation infrastructure in high cost areas is directly subsidised, commercial returns can be earned by the entities and prices can reflect efficient costs. Alternatively, the Government could target a below-commercial rate of return overall but seek a commercial return in lower-cost areas (such as those served by Eda Ranu).

In this context as elsewhere, there is a pressing need for implementation of the CSO Policy for SOEs, in the water and sewerage industry.

Price control versus regulatory contracts

Should Eda Ranu and Water PNG Limited be subject to regulatory contracts, rather than price control?

The current price controls seek to hold costs at current levels while focusing on service level indicators and a price cap to promote consumer interests.¹⁷⁹ The ICCC previously found no evidence that Eda Ranu or Water PNG Limited were responding to incentives to reduce costs and costs were increasing without improvements in service levels. Using a price cap rather than a revenue cap may provide some incentive for Eda Ranu and Water PNG Limited to increase service delivery.

Regulatory contracts under the ICCC Act (s 35) and price controls under the *Prices Regulation Act* serve similar functions:

- Both can be applied to goods or services upon declaration by the ICCC and both enable the ICCC to limit the prices that may be charged by suppliers of those goods or services.
- The thresholds for the ICCC declaring an entity subject to a regulatory contract, or subject to price control, are both premised on the existence of market power. (In the case of regulatory contracts, the regulated entity must have a substantial degree of power in a market (ICCC Act s 33(2)); and for price control orders the ICCC must take into account the need to protect consumers and users of the declared goods or services from misuse of market power (PR Act s 21(2)(a).)
- Both regulatory contracts and price orders can be used to set price paths for single entities over a period of years.

¹⁷⁹

Id p 115.

The main differences between regulatory contracts and price controls are:

- A regulatory contract applies only to a particular “regulated entity”, whereas a price order applies to all suppliers of the declared good or service.
- Regulatory contracts must include certain mandatory provisions (s. 34(2) or s 35(3)) (e.g. a limited term, service standards, and provisions for future regulatory contracts).
- Regulatory contracts are subject to a mechanism for Appeals Panel review of ICCC determinations (ICCC Act s 43).

It would be desirable in future to regulate Eda Ranu and Water PNG Limited (or a single, consolidated provider) under the regulatory contract provisions in the ICCC Act rather than the price control provisions of the PR Act. The ICCC has also recommended this change.¹⁸⁰ The regulatory contract machinery provides for a more sophisticated and nuanced process that is better adapted to regulation of a single (or two) specific infrastructure providers, whereas the PR Act machinery is designed to apply generically to whichever traders offer the declared goods or services. Effective management of the transition will require constructive dialogue between the ICCC and Eda Ranu and Water PNG Limited.

Possible industry consolidation

Are there good reasons to have separate water utilities in PNG? Should the operations of Eda Ranu and Water PNG be merged in a single entity?

There appears to be no convincing rationale for having separate monopolies in the NCD (Eda Ranu) and the remainder of PNG (Water PNG Limited). The current structure results in duplication of core functions such as administration. The entities do not compete against one another or provide “regulatory benchmarks” for one another.¹⁸¹ Maintaining separate entities offers no apparent economic benefits¹⁸² F Merger is not a panacea but could well achieve worthwhile efficiency gains. It might, alternatively, be possible for scale economy gains to be realised by allowing one entity

¹⁸⁰ ICCC, *Water and Sewerage Pricing Review: Final Report* (July 2015).

¹⁸¹ Where similar firms can be compared, regulators may use “yardstick regulation” to improve their ability to identify efficient costs and so induce better performance from regulated entities.

¹⁸² Another entity, PNG Water Limited supplies bulk water to Eda Ranu under a concession agreement; bulk water payments to PNG Water Limited represent about 20% of Eda Ranu’s revenue. ICCC, *2015 Water & Sewerage Services Final Report*, p. 34. The water treatment plant supplying Eda Ranu is to revert to Eda Ranu ownership in 2019 once the BOT contract matures.

to provide services in an area traditionally reserved to the other.¹⁸³

The Review Team recommends that the Government consider the consolidation of Eda Ranu and Water PNG Limited and the possible future partial or full privatisation of the consolidated entity.

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

Recommendation 176: Eda Ranu and Water PNG Limited should be regulated by regulatory contracts under the ICCC Act rather than by price control under the PR Act (with appropriate amendments to the National Water Supply and Sewerage Act 1986 and NCD Water Supply and Sewerage Act 1996). A reasonable transition period should be planned for this.

Recommendation 177: The Government should consider the consolidation of Eda Ranu and Water PNG Limited and the possibility of partial or full privatisation of the consolidated entity.

E. PRICE CONTROL OF REFINED FUELS

The ICCC currently administers price control in respect of three oil-based refined petroleum products: petrol, diesel, kerosene and applies price monitoring in respect of “Jet A1” fuel.

The supply of fuel to retail customers depends on several functions or activities, including:

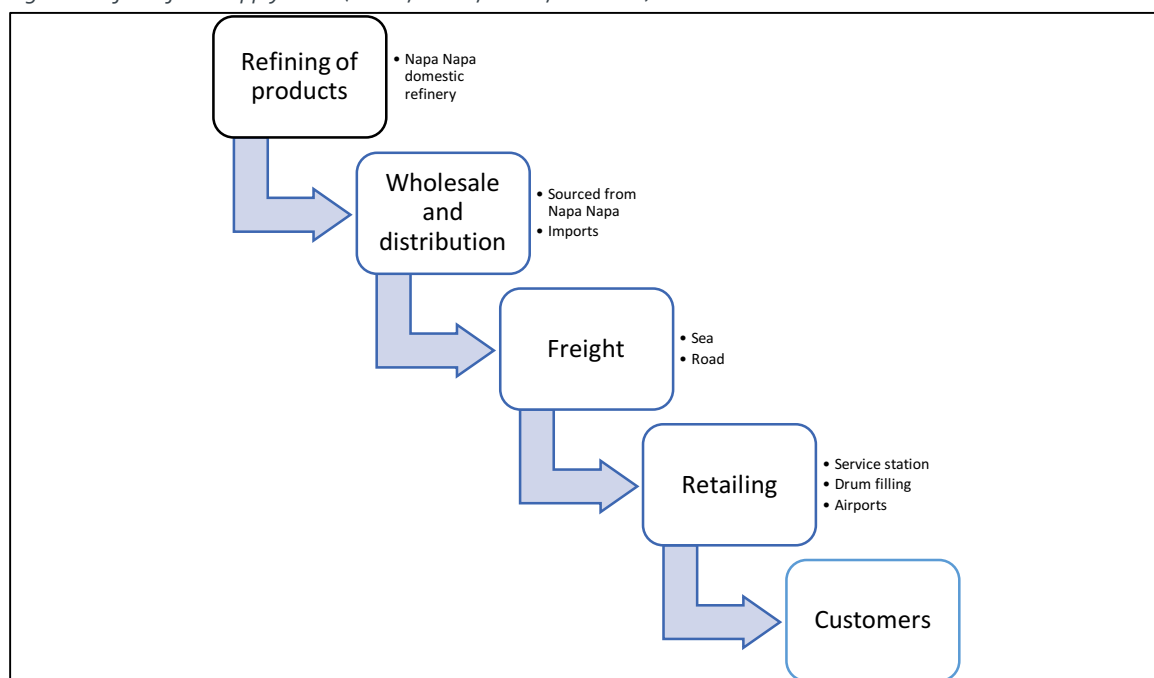
- *Refining* – fuel products are refined in PNG from crude oil, or imported as refined fuels from overseas. There is one refinery in PNG, operated by Puma Energy Refining Limited at Napa Napa, and a number of importers of refined fuels, including Mobil Oil New Guinea Limited and Niugini Oil Company.
- *Wholesale and distribution* – fuels are purchased, stored and transported in bulk to retail sites. These activities are capital intensive but are capable of sustaining more than one operator. Data collected by the ICCC indicates that two or more wholesalers are present in nearly all areas across PNG.¹⁸⁴

¹⁸³ A 2015 MOU is said to have permitted Eda Ranu to deliver services to parts of Central Province.

¹⁸⁴ ICCC *Petroleum Industry Pricing Review: Final Report* (May 2016) section 4.1.

- *Freighting* – fuel is freighted by land or sea to fuel retailers around PNG. The ICCC considers that there is limited competition in the market for sea or road freighting of wholesale fuel,¹⁸⁵ although the barriers to entry in this market are not obviously high.
- *Retailing* – fuels are sold to retail customers by service stations and drum-filling operations. These functions tend to be less capital intensive and more competitive. This market seems to have low barriers to entry although there may be few retailers in less populated areas.

Figure 2 Refined fuels supply chain (Petrol, Diesel, Jet A1, Kerosene)



The regulatory and price setting arrangements for petroleum products expired in December 2014. Following consultations during 2014 and 2015, the ICCC released a Final Report on the new regulatory arrangements and prices for petroleum products, in May 2016.¹⁸⁶ The ICCC recommended continued regulation of the monthly retail prices for petrol, diesel and kerosene (under PR Act s 21(2)(g)) and monitoring of key input prices (ex Napa Napa refinery prices and prices for freight) (under PR Act s 32A).

The ICCC’s Final Report indicates that price control at the retail level (i.e. not for “commercial customers”) would be achieved by continuing to

¹⁸⁵ ICCC Petroleum Industry Pricing Review: Final Report (May 2016), chapters 7 and 8.

¹⁸⁶ ICCC Petroleum Industry Pricing Review: Final Report (May 2016).

regulate a wholesale margin¹⁸⁷ for petrol, diesel and kerosene ex Napa Napa Refinery, and for drum filling (which is a common method of purchasing retail fuel in centres outside Port Moresby, especially rural and remote areas). The ICCC recommended that Avgas should cease to be a declared monitored good but price monitoring should continue in respect of Jet A1, freight rates and other key input costs.¹⁸⁸

The ICCC also proposes to continue price monitoring of jet fuel (known as Jet A1). This reflects concern about market power in the supply of Jet A1 by Puma Energy outside Port Moresby.¹⁸⁹

The economic basis for the ICCC's proposal to continue regulating retail fuel prices is that the wholesale and retail markets are not effectively competitive and so are not operating efficiently.¹⁹⁰ The proposed price control approach is to regulate wholesale and retail margins, based on estimates of the efficient costs of wholesaling and retailing fuel (inclusive of a commercial return on invested capital and differentiated by geographic region).

The Review Team considers that regulation of fuel prices in PNG has been (and continues to be) too intrusive, for two main reasons:

- It is not clear that firms operating in the fuel industry (at various levels of the supply chain) meet a threshold (e.g. substantial market power) that justifies the imposition of price control.
- It is not clear that price control is likely to realise benefits in excess of the significant costs it imposes on the ICCC and the firms concerned.

Costs of price control

The complexity of the refined fuels industry means that the ICCC has had to devote considerable resources to its price control activities, and industry participants have had to bear significant compliance costs.¹⁹¹

For price control to deliver maximum benefits, it should allow firms to recover their efficient costs. Determining the 'efficient costs' of supplying

¹⁸⁷ By "margin", the ICCC means the costs associated with that activity. See Final Report, p 24 for discussion of this point and which costs are included in each activity.

¹⁸⁸ ICCC *Petroleum Industry Pricing Review: Final Report* (May 2016), final decisions, section 1.3.

¹⁸⁹ Id p 131.

¹⁹⁰ Id pp 31-32.

¹⁹¹ The ICCC's current review commenced in March 2014 and took more than two years to complete.

wholesale or retail fuel is complex and prone to error. In markets like those for fuel in PNG, there are a number of existing wholesalers, transport companies and retailers. Ascertaining the efficient costs is complex, because each business tends to be organised differently (for example, some sell fuel as well as other products), and prone to error because the costs of gathering information are high.¹⁹² Further, selecting the lowest cost firm as the benchmark for efficient cost, or using an efficient cost model, reduces the viability for other firms which might still be reasonably efficient.

Control of wholesale and retail fuel margins of the kind implemented (and proposed to be implemented) by the ICCC creates a considerable burden on the ICCC to gather information on the costs of supply and how those differ across geographic regions. It also increases the probability of regulatory error: if regulated prices are too high excess profits or excess entry are likely; but if regulated prices are too low, fuel may be undersupplied in wholesale or retail markets.

It is therefore essential that the administrative and compliance burdens of price control be taken into account in determining whether or not control should be imposed.

Thresholds for imposition of price control

The ICCC considers that price control in refined fuels is necessary because (in summary):

- There is limited competition at different levels in the supply chain: the ICCC considers refining to be a monopoly; wholesale / distribution to be somewhat more competitive; sea and road freight not competitive; and the retail market not competitive (at least on price). Only limited competition for Jet A1 is apparent (with the majority of airports having one or two suppliers).
- The Napa Napa project refinery agreement is considered by the ICCC to cause a number of distortions. This agreement is said to create barriers to entry and make it difficult for regulation to be effective.

The Review Team's view is that the evidence for regulating the *wholesale* supply of fuel is relatively weak. The Napa Napa refining agreement does not create a monopoly over the wholesale supply of refined fuels in PNG. (Other wholesalers are not parties to the Project Agreement.) There is

¹⁹² For example, the ICCC received only six responses to a survey on retail fuel margins. Id, p 124.

importation of refined fuels and discounts from the wholesale price have been offered. The industry is oligopolistic (with a few large suppliers) but this does not mean that prices necessarily are excessive. For example, in a market with two firms, a variety of theoretical possibilities can arise, including perfect competition (pricing at marginal cost).

With regard to *retail* supply of fuels, it is not apparent to the Review Team that there is an overwhelming case for price control. There are no large sunk costs or other barriers to entry. The ICCC has suggested that there is a lack of price competition. However, parallel pricing can be indicative of highly competitive pricing. High prices also can provide important signals for entry, particularly in areas where there is currently little competition.

The Review Team recommends that the threshold at which price control can be imposed under the PR Act requires reconsideration and amendment. Thresholds are important role because they limit regulation to areas in which the benefits of control are likely to be high relative to the costs and risks involved.

A useful example of the kind of approach that should be included in the PR Act is the “three criteria” test used in the European Union.¹⁹³ Regulation in EU telecommunications markets is permitted:

1. Where there are high and non-transitory barriers to entry (whether of structural, legal or regulatory nature); and
2. Where the structure of the market does not tend towards effective competition within the relevant time horizon; and
3. Where the application of competition law alone would not adequately address the potential market failure(s) identified.

Table 1 Relevant indicators in the application of the three criteria test

Test	Indicators
Whether there are high and non-transitory barriers to entry	• Level of sunk costs • Asymmetries between operators (scale and scope economies; control of an infrastructure not easily duplicated and technological advantages), and • Switching costs and product diversification
No tendency to effective	• Evolution of market shares

¹⁹³ ERG “Guidance on the Application of the Three Criteria Test” (June 2008).

competition

- Price trends and pricing behaviour
- Control of infrastructure that may not easily be duplicated
- Product/services diversification
- Barriers to expansion, and
- Potential emergence of further competition

Competition law an insufficient remedy

- Degree of generalisation of non-competitive behaviour
- Degree of difficulty likely to arise in addressing non-competitive behaviour
- Whether non-competitive behaviour brings about irreparable damage in related or connected markets, and
- Whether there is need of intervention to ensure the development of competition in the long run

Source: European Regulators Group (2008): "Guidance on the Application of the Three Criteria Test", June 2008.

Specific statutory thresholds for price control should assist the ICCC and the Minister to apply price control in circumstances in which it is most likely to prove beneficial.

Recommendation 178: The PR Act should be consolidated and modernised and should be amended to include economically-based thresholds for declaration of goods or services subject to price control.

Recommendation 179: The PR Act should be amended to require a report by the ICCC to the Minister confirming that the thresholds for declaring goods or services subject to price control are satisfied, as a pre-condition for imposition of price control .

Recommendation 180: Price control should only be imposed where the ICCC finds economically based thresholds (e.g. the "three criteria" test used in the EU) are satisfied.

Recommendation 181: Decisions of the ICCC regarding price control should be subject to review by an Appeals Panel. The appeals processes under the PR Act should be harmonised with the appeals processes under the ICCC Act.

F. PUBLIC MOTOR VEHICLE AND TAXI SERVICES

Public Motor Vehicle (PMV) and taxi transport services are each "declared services" under the PR Act. The ICCC is therefore required to apply price (fare) controls to them. The ICCC undertook its first major review of the PMV and taxi industry in 2007, and imposed price controls which expired in

2012. The ICCC completed a second review in 2014 and has adopted a five-year price path for PMV and taxi fares.

The ICCC has successfully brought legal prosecutions against PMV operators in Port Moresby to enforce its price control. This enforcement was in response to PMVs on the Gordons - 9 Mile Cemetery route charging fares in excess of the gazetted fares. The defendant's reason for charging the higher amount was because road works were slowing the traffic flow during peak hours considerably. The Commission's view was that PMVs should have contacted the ICCC to support additional cost claims so that fares could be modified, if necessary.¹⁹⁴

Justification for control of fares

The economic case for applying price control to PMV and taxi fares is different from the case for regulating SOE monopolies using regulatory contracts. In contrast to monopoly network industries, such as electricity distribution or water reticulation, there are many suppliers of PMV and taxi services.¹⁹⁵ Barriers to entry are low. Necessary inputs such as vehicles can be acquired at relatively low cost and these costs can be recovered if an operator wishes to leave the market.

These market conditions should mean that price control is unnecessary, because the market is workably competitive. However, competition might be insufficient to restrain fares to reasonable levels, at least in certain places at certain times. The OECD has noted that monopolistic pricing for taxis is possible even in the presence of substantial numbers of providers because of search and other transaction costs, which give rise to short-lived market power.¹⁹⁶

The ICCC has suggested that price controls may be needed in order to keep prices at or below the competitive equilibrium level during periods of high demand:

[W]hile commuters may have some form of countervailing power for taxi services, they are limited to exercise such powers when services are offered during night hours or when there is a high demand. As for PMVs, it appears that commuters have limited countervailing power.¹⁹⁷

¹⁹⁴ ICCC, *PMV & Taxi Fare Review: Final Report* (December 2014), pp 29.

¹⁹⁵ ICCC, *PMV & Taxi Fare Review: Final Report* (December 2014), pp 39-40.

¹⁹⁶ OECD Transport Research Centre, *(De)Regulation of the Taxi Industry: Round Table No 133* (2007).

¹⁹⁷ Ibid.

Misalignment of fares and costs

ICCC fare reviews have concluded that price control of fares is justified and that price monitoring would not be an effective alternative given the large numbers of operators.

Under the existing price control regime, fares are adjusted each 12 months to reflect the general price level in the economy (CPI) less a specific 'X' factor which represents efficiency gains over the forthcoming period. Account is also taken of the significant impact of the price of diesel fuel (on PMVs) and petrol (on taxis) by directly including this in the CPI-X formula. The X factor has been set at zero in the current 5 year period: price increases occur in line with cost increases estimated by CPI, with no efficiency gains assumed.

The ICCC's approach avoids the need for a detailed assessment of the current costs of taxi and PMV operators. That presumption is questionable. The ICCC has noted that fares are not closely aligned with the "true costs" of running services.¹⁹⁸ There is no certainty that the base price level is cost reflective or geared to an efficient level of capacity in the industry. Prices in particular areas or for particular journeys may be well above or below "cost", and lead to problems of excess demand or excess supply in particular locations or at particular times of the day or week.

Alternative regulatory approach

It is not clear to the Review Team that price control of PMV and taxi fares is the most effective or least-cost means of protecting consumers from periodic fare-gouging behaviour. The Review Team has also been told that standards of safety and service are a significant issue with many PMV and taxi operators. The ICCC has commented extensively about conduct and standards in the PMV and taxi industry outside its fare-setting role.¹⁹⁹

Imposing price regulation addresses potential over-charging but risks causing detriment by determining prices at levels that are too high or too low and does not increase public trust in the safety and quality of services. Considerable staff time is required to effectively police compliance with price controls and the costs involved are significant. Compliance issues

¹⁹⁸ ICCC, *PMV and Taxi Fare Review – Final Report*, December 2014, p. 46.

¹⁹⁹ The ICCC's concerns relate to operators not meeting service standards; taxis and PMVs operating illegally (unlicensed); taxis operating without taxi meters installed; new taxi licences not being issued; overcharging contrary to regulated fares; and anti-competitive price-fixing among operators. There is a connection between pricing and service, as fares are set to recover the costs of delivering a defined service level.

appear to be widespread, with many taxis not using meters,²⁰⁰ and the ICCC does not appear to have sufficient staff to police compliance outside Port Moresby.

Consumers' issues with PMV and taxi fares, service standards and safety should be addressed by a coherent strategy for consumer protection in that sector. Such a strategy should involve efforts not only on the part of the ICCC but also the newly-created Road Traffic Authority²⁰¹ and Police. Addressing these problems to increase price transparency, competition, safety and consumer trust is likely to be more effective than price control in isolation. The Review Team recommends that a PMV and Taxi Industry Working Group should be established to focus on solutions to the varied problems experienced in that industry. Consideration should be given to ceasing price control of fares and implementing instead a combination of price transparency and price monitoring measures.

As one element of such a PMV and taxi industry consumer protection strategy, fare transparency issues might be increased by reliance more on defined fares for defined routes, or zones, rather than metered fares. Such defined fares could be published online, in taxi-stand signage, and on tables displayed for passengers' inspection.

Recommendation 182: *The ICCC, the Road Traffic Authority and the Police Department should jointly develop a coherent strategy for consumer protection in the PMV and taxi industry.*

Recommendation 183: *In place of price control over metered fares, reliance should be placed on price disclosure by PMVs and taxis of defined fares for defined routes or zones.*

²⁰⁰ In September 2013, only around half the licensed taxis in Port Moresby appeared to be using calibrated meters. See ICCC, *PMV & Taxi Review Final Report*, 2014, p 30.

²⁰¹ The *Road Traffic Authority Act 2014* replaces the *Motor Traffic Act 1967* and establishes an authority to administer the regulation, safety and efficient use of land transport in the country.

VII. COMPETITIVE ENVIRONMENT FOR BUSINESS

Contents of this Part:

- A. Introduction
- B. Statutory and Administrative Barriers to Competition
- C. Competitive Neutrality
- D. Third Party Access
- E. Competition Assessments and Competition Advocacy
- F. Crime and Insecurity

A. INTRODUCTION

The extent of competition in a market is affected not only by the consumer protection, competition, regulatory and price control rules addressed in previous Parts of this Draft Report but also by a range of laws, practices and circumstances that help or hinder businesses in getting started, operating and growing.

This **Part VII** briefly considers features of the legal and commercial environment, outside those covered in previous Parts, affecting the ability of businesses to compete in PNG markets. As previous studies have recognized, PNG businesses face a variety of challenges and impediments:

“The [INA PNG] survey highlights that PNG is not generally an easy place for doing business, at least for those companies intending to comply with the rule of law, pay their taxes, mandatory minimum wages, and meet social and environmental standards...”²⁰²

Where the circumstances for carrying on business can be improved, the competitiveness of PNG’s markets can thereby be increased.

B. STATUTORY AND ADMINISTRATIVE BARRIERS TO COMPETITION

Formal sector businesses are obliged to comply with a wide range of business regulations, such as obtaining business registrations when starting a business, registering property, dealing with construction permits and other business licenses, getting credit, paying taxes, enforcing contracts, resolving insolvency, complying with trade regulations and labour market laws.

²⁰² INA, *The Business and Investment Environment in Papua New Guinea in 2012: Private Sector Perspective* (2013) p 108.

To comply with the diverse regulatory obligations, businesses must interact with government departments and agencies on a regular basis. The ability of businesses to compete is necessarily affected by:

- delay, expense or uncertainty caused by laws and regulations (statutory barriers); and
- delay, expense or uncertainty caused by the manner in which government departments and agencies administer laws and regulations (administrative barriers).

These kinds of conditions affect competition in at least two ways. First, some businesses may be more affected by poor public administration than others (e.g. smaller businesses or those entering more regulated markets). Secondly, PNG's regional and international competitiveness are constrained if poor public administration forces costs onto PNG businesses that are not faced by their overseas rivals.

Statutory Barriers

Opportunities for new entry to many markets are likely to be constrained by statutory barriers that either expressly close the market to new entrants or that raise obstacles in the form of significant costs, qualifications, etc.

As an example of a statutory barrier that formally closes a market, s 10 of the *Postal Services Act 1996* provides that "Post PNG has the exclusive right to carry letters" in PNG and has a range of other exclusive rights, such as to insure postal articles, erect post boxes and market postage stamps. An example of a statutory barrier that does not close a market but which creates a hurdle that new entrants would have to overcome in order to enter the market is s 72 of the *Motor Vehicles (Third Party Insurance) Act 1974*, which requires the Minister to *Gazette* a nomination for an insurer to offer insurance products of the defined type.

In some cases statutory barriers will be necessary or desirable (e.g. to ensure public safety) but in others they are likely to unnecessarily restrict the growth of competition. The identification, evaluation and removal of unnecessary statutory barriers is a time-consuming but important process. It can yield significant gains for consumers and businesses, by permitting competitive supply where previously there has been monopoly.

The Review Team considers that a body such as the National Working Group on Improving Business and Investment Climate (please refer to discussion at **Section E** of this chapter, below), or an equivalent body,

could perform a valuable role in relation to the identification and removal of unnecessary statutory barriers to entry, if properly resourced and supported by the Government.

Administrative Efficiency

Government effectiveness is fundamental for creating an enabling business environment that promotes private sector development and economic growth.²⁰³ Conversely, weak economic, legal and social institutions encourage informality, deter and delay foreign investment and have a negative impact on the ability of domestic businesses to grow and develop.

PNG compares unfavorably with other major economies in the Southeast Asia and Pacific region, according to the World Governance Indicators (WGI) review of government effectiveness. In 2015, PNG's percentile rank on the WGI was 29.81 (compared with 28.37 in 2014; 29.38 in 2013; and 26.54 in 2012).²⁰⁴ PNG's 2015 score was substantially lower than that of Thailand (65.87), the Philippines (57.69), Viet Nam (55.29), Malaysia (76.92) and Indonesia (46.15).²⁰⁵ The underlying reasons for this finding are complex but include, among other things, a lack of administrative capacity, inadequate infrastructure at lower levels of government and a lack of accountability.²⁰⁶

At the same time, businesses favour policy action to improve the quality of public services in PNG. Surveyed businesses give government services generally poor ratings overall, with infrastructure and utilities provision rated as very poor.²⁰⁷ Although some improvements have been made in the delivery of postal and telecommunications services since 2007, these improvements are largely attributable to these services now being substantially provided by the private sector rather than public sector.²⁰⁸ Businesses indicate a desire in particular for greater transparency in government's financial operations, and improved public sector

²⁰³ ADB, *Papua New Guinea Critical Development Constraints* (2012) p 41.

²⁰⁴ Worldwide Governance Indicators (2015), available at: <http://info.worldbank.org/governance/wgi/index.aspx#home> (last accessed November 2016).

²⁰⁵ Id p 41.

²⁰⁶ Id p 42.

²⁰⁷ INA, *The Business and Investment Environment in Papua New Guinea in 2012: Private Sector Perspective* (2013) p 4.

²⁰⁸ INA, *The Business and Investment Environment in Papua New Guinea in 2012: Private Sector Perspective* (2013) p 20.

management and oversight.²⁰⁹

Political and administrative uncertainty

Complicated, burdensome or unpredictable rules and procedures increase compliance costs for businesses and discourage formal participation in the economy.

Surveys conducted by INA, reporting on the business environment in PNG, have revealed significant concern about regulatory instability.²¹⁰ In 2013, INA reported that 84.6% of businesses surveyed expressed concern about the stability of government rules, regulations and policies in PNG.²¹¹ In particular, respondents expressed concern about retrospective changes to rules and regulations.²¹² Respondents were also generally skeptical about the full implementation of new policy announcements and continuity of existing policy arrangements.²¹³

To the extent that perceptions of political risk and uncertainty can improve, the competitiveness of PNG's markets is likely to increase due to: increased attractiveness of PNG as an investment destination; greater capital availability; and improved domestic business confidence.

Compliance burdens

If administrative and regulatory practices place heavy compliance burdens on businesses, entry barriers and costs of operation will be higher, so fewer businesses will compete.

The INA 2013 Report points to difficulties in complying with government regulations and compliance burdens that are a substantial deterrent to investment: in 2012, 30% of businesses reported that they had cancelled planned investments in PNG owing to compliance burdens.²¹⁴

²⁰⁹ INA, *The Business and Investment Environment in Papua New Guinea in 2012: Private Sector Perspective* (2013) p 20.

²¹⁰ See INA, *The Business and Investment Environment in Papua New Guinea in 2012: Private Sector Perspective* (Discussion Paper No. 94, August 2013); 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). For an earlier report see INA, *The Business and Investment Environment in PNG in 2007: Private Sector Perspective, A Private Sector Survey Report*; Discussion Paper No. 93.

²¹¹ INA, *The Business and Investment Environment in Papua New Guinea in 2012: Private Sector Perspective* (2013) p 35.

²¹² Id p 38.

²¹³ 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 13.

²¹⁴ Id p 14.

Businesses cited two key factors influencing their decision not to invest in PNG: (1) complex regulations; and (2) the time needed to complete administrative processes.²¹⁵ Out of the 30% of survey respondents who decided against major investments in PNG because of regulatory compliance problems, 44% indicated 'long processing time' as the main factor that influenced their decision.²¹⁶ In addition, 20% indicated that they decided against further investments because the process was 'too complex and haphazard', whilst 18% indicated that 'excessive compliance fees' were the main reason against investing.²¹⁷ The INA Survey also indicates that SMEs are more concerned than large businesses about regulation and compliance issues (36.2% compared to 23.2%), when deciding whether to invest.²¹⁸

PNG has made mixed progress since 2007 in promoting greater collaboration between government and the private sector. In 2012, 40% of the INA Survey respondents described bureaucratic and government relationships as 'highly unhelpful' or 'very highly unhelpful'.²¹⁹ There appears to have been little or no improvement since 2002 and 2007, when similar results were reached.²²⁰ In fact, in 2012, 70% of the respondents described their relationship with government as 'generally unhelpful', with 31.5% of respondents indicating that government is 'fairly unhelpful' and around 38.5% viewing government as 'highly unhelpful' or 'completely unhelpful' to the private sector.²²¹

The policy implication from this data is that greater investment and hence greater competition can be promoted by simplifying regulation, speeding up administrative processes, and making bureaucracy more helpful to business. The role that could be played by the National Working Group on Improving Business and Investment Climate (or an equivalent body) is discussed below (please refer to **Section E**).

Land and titles administration

Land is a key input for virtually all businesses so difficulty in gaining access

²¹⁵ Ibid.

²¹⁶ INA, *The Business and Investment Environment in Papua New Guinea in 2012: Private Sector Perspective* (2013) p 45.

²¹⁷ Ibid.

²¹⁸ Id p 46.

²¹⁹ Id p 17.

²²⁰ Ibid.

²²¹ INA, *The Business and Investment Environment in Papua New Guinea in 2012: Private Sector Perspective* (2013) p 70.

to land is a critical constraint on business investment and expansion,²²² and hence on competition. Problems in the property rights framework in PNG are not conducive to ease of doing business.

The key impediments faced by businesses in PNG include delays owing to lack of registration of landowners and land compensation claims; and bottlenecks in land administration.²²³ Government land administration “appeared to be a focal point for corruption”, according to a report published jointly by the ADB and INA in 2014.²²⁴

One of the main recommendations in the joint ADB and INA Report is for the PNG Government to conduct an urgent review into the land-leasing framework and land administration issues to make land more readily accessible for business.²²⁵ Improvement in land administration would assist to facilitate market entry and expansion and, hence, would promote competition.

Public Sector Corruption

It is well known that the economic and social costs of corruption are substantial.²²⁶ 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.

PNG is perceived as a jurisdiction that presents a high risk of corruption. In 2015, PNG was ranked 139 out of 168 countries on the Corruption Perceptions Index.²²⁷

PNG has taken a number of steps to address corruption in public

²²² A majority of businesses (56%) view difficulties in gaining access to land as a ‘big’ to ‘very big’ hindrance to their business and investment; and “corruption over land was viewed as having the highest impact by far on business.” INA, *The Business and Investment Environment in Papua New Guinea in 2012: Private Sector Perspective* (2013) p 3.

²²³ 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.

²²⁴ 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. 18. The proportion of businesses reporting that difficulty in accessing land had significantly hindered their expansion rose from 38% in 2002 to 58% in 2012.

²²⁵ 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 23.

²²⁶ 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>.

²²⁷ United Nations, General Assembly Resolution 58/4 of 31 October 2003, available at: https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/o8-50026_E.pdf

administration, including:

- ratifying the UN Convention Against Corruption in 2007;²²⁸
- adopting a National Anti-Corruption Strategy 2010-2013;²²⁹ and
- establishing an Independent Commission Against Corruption (ICAC), the independence of which is constitutionally guaranteed.²³⁰

Despite these progressive reforms at a policy and constitutional level, corruption nevertheless remains a significant constraint to doing business in PNG.²³¹ Business respondents surveyed by INA in 2012 considered they had been 'fairly', 'highly', or 'very highly' affected by instances of government corruption.²³² Moreover, irregular payments to government officials appear to have become more common since 2002, and respondents considered corruption as one of the main hindrances to business and investment in PNG.²³³

Further, businesses appear to have little recourse when government officials demand irregular payments, with 22% of respondents in the INA survey reporting never seeking recourse against such conduct, and only 14% reporting that they could 'mostly' or 'always' seek recourse.²³⁴

Further efforts are therefore required to tackle corruption in PNG, in the interests of promoting the development of competitive markets.

Recommendation 184: The Government should renew efforts to simplify and streamline administrative processes and eliminate

²²⁸ However, Papua New Guinea is not a state party to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, and has not signed the Palermo Convention on transnational organised crime of 2000.

²²⁹ PNG, 2010-2030 *National Anti-Corruption Strategy* (2010), available at: <http://www.pcabii.org/resources/newsletter/2012/PNG%20National%20Anti-Corruption%20Strategy%202010.pdf>. The Strategy focuses on 8 key areas including: strengthening and promoting honest leadership; strengthening transparency and public exposure of corruption; strengthening accountability and oversight; and strengthen compliance and enforcement. It expresses the vision of: "establish[ing] a self-sustaining system of national integrity in which corruption is eliminate and the principles of honesty and ethical conduct, effective application of the rule of law, fair play and openness and accountability are established and practiced in PNG."

²³⁰ *Constitution of the Independent State of Papua New Guinea* (1975) s 220F. ICAC is not subject to the direction or control of any person or authority, or to judicial review on the ground that it has exceeded its jurisdiction.

²³¹ 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 3-4.

²³² 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 17.

²³³ Id p 3 and p 18. 'Irregular additional payments' to government officials increased from 17% in 2002 to 30% in 2012. Nevertheless, the benefit of making 'irregular payments' is limited; with only 30% of businesses reporting actual service delivery without further demands for payments.

²³⁴ Id p 18.

administrative inefficiencies (including by re-establishing the National Working Group on Improving Business and Investment Climate, or an equivalent body).

Recommendation 185: The Government should initiate an independent review of the regime for titles, transfer and leasehold interests in land, including the Land Transfer Office (perhaps in conjunction with the National Lands Development Program).

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

C. COMPETITIVE NEUTRALITY

In PNG, a range of important and essential services are provided by state-owned enterprises (SOEs), such as power, water, telecommunications and port services, among others. (Please refer to **Part V** and **Part VI** for further detail.) Most SOEs face little or no competition in the markets they supply.

SOEs' competitive advantages

SOEs currently enjoy a variety of advantages relative to privately owned enterprises, which tilt the playing field in SOEs' favour. For example:

- ADB's "Finding Balance" study shows that during 2002-2009 the average cost of debt of SOEs in PNG was 4.5% compared with an average commercial debt rate of 11.4%.²³⁵
- PNG's SOEs receive ongoing equity contributions from the government which are provided to finance assets, retire debt, or simply absorb accumulated losses.²³⁶
- SOEs often enjoy greater access to, or bidding advantages in, tenders for government contracts.
- Some SOEs enjoy statutory monopolies (intended to give them revenue to fund loss-making community service obligations CSOs – see **Part V,B**).

Such advantages often enable SOE providers to "crowd out" private sector

²³⁵ ADB, *Finding a Balance, Benchmarking the Performance of State-Owned Enterprises in Papua New Guinea* (2012) p 4.

²³⁶ Id pp 4-5. During the FY2002–FY2010 period, the Government of PNG made equity contributions totalling K697 million to the SOEs. In exchange for these contributions, the SOEs generated a total profit of K501 million, of which K23 million was paid back to Treasury in the form of a dividend.

providers, preventing competition from developing.²³⁷ Crowding out means that SOEs can price below their private sector competitors and exclude them from markets, even though the SOEs may be *less efficient* than private suppliers. Taxpayers and consumers ultimately bear the cost of the inefficient supply and foregone competition.

A lack of competitive neutrality is a fundamental impediment to effective competition between SOEs and the private sector. To promote competition in essential services and key infrastructure-based industries, it will therefore be important for the PNG government to actively promote competitive neutrality.

Competitive neutrality

“Competitive neutrality” exists where SOEs compete on a level playing field with privately owned enterprises. Competitive neutrality requires that SOEs must not enjoy advantages or privileges (such as those listed immediately above) which are unavailable to privately owned enterprises.²³⁸

Promoting competitive neutrality between SOEs and private enterprises would be an important step in promoting the development of competition in essential services and infrastructure-based industries in PNG. Competitive neutrality would also help SOEs to benefit from the incentives and disciplines that are faced by private enterprises.

Competitive neutrality, can be promoted in various possible ways. The Review Team considers that:

- ‘Competitive Neutrality Principles applicable to all SOEs should be agreed between Kumul Consolidated Holdings and the ICCC;
- The ICCC should have responsibility for investigating any complaints regarding infringement by an SOE of the Competitive Neutrality Principles;
- The government should be required to respond publicly to the findings of the ICCC following investigation of a complaint;
- SOEs should be required to include in their annual reports a

²³⁷ Id p 4.

²³⁸ “Competitive neutrality” may be defined as “policies undertaken by a competition enforcer and/or regulator to remove any unfair competitive advantages or disadvantages that public undertakings, which are involved in commercial activities, may experience over their privately-owned competitors, simply as a result of government ownership or involvement.” See European Commission, *Discussion on Corporate Governance and the Principle of Competitive Neutrality for State-Owned Enterprises* (28 September 2009) at p 2, available at: <http://ec.europa.eu/competition/international/multilateral/corporategovernance.pdf>

statement on compliance with the Competitive Neutrality Principles.

Given the limits on what competitive neutrality can reasonably be expected to achieve, the government should continue to pursue opportunities for privatization, commercialization and public-private partnerships (PPPs), where possible.²³⁹

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.

Recommendation 188: It is highly desirable that the government implement the recommendations that have been made in other contexts for: withdrawing state ownership from commercial enterprises where possible; restructuring SOEs to allow greater private sector participation; implementing the Public Private Partnership Act; giving SOEs a full commercial orientation; and ensuring community service obligations are contracted out to the private sector and delivered on a cost-recovery basis.

D. THIRD PARTY ACCESS

In some markets, competition might be enhanced by requiring the owner of a unique facility to share access to that facility with third parties, on commercially reasonable terms. Such sharing might be mandated in three ways:

- First, laws against “monopolization” or the misuse of market power have been used in some countries (e.g. US and Australia) to require the owners of “essential facilities” to share access to those facilities with other parties, 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.
- Secondly, 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 2010 (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.

²³⁹ ADB, *Papua New Guinea Critical Development Constraints* (2012) p 93.

- Thirdly, in some industries, access is so fundamental to the development of competition that there are clear benefits from laws that require the sharing of the facilities on reasonable terms. (E.g. in telecommunications, where network interconnection is essential so that telephone calls can be completed from different networks and where market power would otherwise mean that some network owners might refuse to interconnect without such laws.)

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. Moreover, because the case for mandated access is often finely balanced, there are costs associated with ensuring that decisions appropriately balance the interests of the access provider and the interests of access seekers.

In the course of consultations, the Review Team received submissions (from infrastructure operators) opposed to mandated access. The ICCC's submission generally supported an infrastructure access regime.

The Review Team does not consider that the regulatory contract framework provides an effective substitute for an economy-wide access regime. Nor does it consider that the general misuse of market power rule under ICCC Act s 58 adequately addresses essential facilities access issues. However, a general right of mandated access to key infrastructure assets is complex to administer with a significant risk of deterring efficient investment.²⁴⁰

On balance, the Review Team concludes that there is no sufficient justification for the introduction of a general right of access to essential facilities. In cases in which there is a strong public interest in particular facilities being shared, the Government should legislate for a statutory access regime for those facilities, as it has in the cases of the telecommunications and electricity networks.

Recommendation 189: A general right of access to essential facilities should not be legislated for at the present time.

E. COMPETITION ASSESSMENTS AND COMPETITION ADVOCACY

A number of the laws considered by Parliament each year, and many of the decisions made by Ministers under Acts of Parliament, have important

²⁴⁰

The Harper Review of the Australian access regime recommended that the access regime be retained but modified in certain respects to limit the coverage of the regime to those services where the greatest net benefits could be attained; see Australian Government *Competition Policy Review: Final Report* (March 2015) ch 24.

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.

Advisory role of ICCC

The ICCC Act currently gives the ICCC an advisory role, with functions including:²⁴¹

- (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...

The ICCC is also authorised to undertake “productivity inquiries” at the request of the Minister or Parliament, or where the ICCC considers such necessary or desirable.²⁴²

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.²⁴³

The Review Team considers that an expanded advisory role for the ICCC is desirable. It is likely that legislators and decision-makers would benefit from having access to an expert view on the competition implications of decisions, which is likely in turn to have an economic benefit, and would justify the further demand this role would place on the ICCC’s resources.

In Australia, the Competition Policy Review suggested that market studies be undertaken by another independent body rather than the competition agency,²⁴⁴ because the competition agency might tend to recommend

²⁴¹ ICCC Act s 6.

²⁴² ICCC Act s 122.

²⁴³ *Enterprise Act 2002* (UK) s 7 (as amended by s 37 of the *Small Business, Enterprise and Employment Act 2015* (UK)).

²⁴⁴ Australian Government *Competition Policy Review: Final Report* (March 2015) p 77.

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 try to build capacity in another body to undertake this role.

Competition advocacy within government

The National Working Group on Improving Business and Investment Climate (**NWGIBIC**) was a joint initiative of the Government and the private sector, with these objectives:²⁴⁵

- 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 PNG. Since it was revamped in November 2011,²⁴⁶ with a permanent secretariat established in 2012, the attention of the National Working Group has been drawn to a range of impediments to business, though it is not clear that the Group has been successful in removing such impediments.

Because the emergence of competition in PNG will depend as much on the removal of impediments to competition as the enforcement of competition law, the Review Team considers that the National Working Group (or an equivalent body) can play an important role if it is adequately resourced and if the government acts on that body's advice and decisions.

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***

²⁴⁵ National Working Group on Improving Business and Investment Climate, Terms of Reference, clause 1.

²⁴⁶ 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.

(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.

F. CRIME AND INSECURITY

Concerns regarding law and order are inhibiting investment and economic development in PNG. High rates of crime and violence not only impact on the quality of life in both rural and urban communities but also add to the costs and risks of doing business. (Please refer to **Section E**, above, regarding the impact of corruption on competition.)

Businesses incur both direct and indirect economic losses from criminal activities:

- *Direct financial costs of crime:* substantial costs arise from crimes against property, arson, assault, theft, kidnapping, misappropriation of funds and extortion.²⁴⁷
- *Direct financial costs of safeguarding against criminal activities:* Businesses' costs of providing goods and services are driven up by the costs of preventative measures, such as security services and insurance.²⁴⁸

²⁴⁷ The most frequent crimes affecting businesses in PNG have been surveyed, the first type being theft by staff (27%), followed by break-ins, theft without violence, vandalism, theft of vehicles, as well as assault of staff (15%); and some firms also reported incidents of kidnapping (2%). Respondents in the INA Survey indicated that losses made from 'replacement of stolen merchandise and property', on average, amounted to K84,700 in annual losses; up to K60,885 annually owing to 'petty theft by employees'; losses were also incurred due to 'broken security infrastructure, such as windows, gates, alarms, CCTV etc.' amounting to around K22,230 annually on average. See INA, *The Business and Investment Environment in Papua New Guinea in 2012: Private Sector Perspective* (2013) p 3, p 57.

²⁴⁸ INA found security-related costs amounted to 5.8% of total sales. Businesses indicated that they on average spend K14,548 per year on installing and maintaining lock and gates to protect their business from crime. In addition, businesses spend an average of K25,528 yearly on installing and maintaining security cameras and each firm spends K12,214 yearly on security alarms system. See INA, *The Business and Investment Environment in Papua New Guinea in 2012: Private Sector Perspective* (2013) p 54. By comparison, firms in East Asia spend on average 3.2 percent of annual sales on security. Cambodian and Vietnamese firms spend about 1 percent of annual sales on security, whereas firms in Timor-Leste report spending 6.9 percent of annual sales: see World Bank, *Gates, Hired Guns and Mistrust: Business Unusual. The Cost of Crime and Violence to Businesses in PNG* (May 2014) p ix.

- *Lost productivity:* High crime rate impact the productivity of businesses and result in loss of output (reduced working hours, and absence of employees).²⁴⁹
- *Impact on the informal sector:* Criminal activities are likely to have a severe impact on informal sector business activities. Owing to the need to employ different forms of security, informal vendors may be deterred from investing into more expensive equipment or new product lines, for example.
- *Impact on the formal sector:* Criminal activities increase the cost of operating businesses in the formal sector. Established businesses in PNG view crime as a major impediment to business and investment.²⁵⁰
- *Impact on consumers:* Consumers also bear the costs of crime as additional costs (crime prevention, loss of productivity and foregone business opportunities) are passed on to customers and reduce businesses' ability to innovate.
- *SME vulnerability:* SMEs are particularly vulnerable to crime, regarding 'corruption' and 'law and order' as their main hindrances to doing business in PNG.²⁵¹
- *Investment climate:* Criminal activities also have a negative impact on the investment climate, deterring both domestic and foreign investment.²⁵² As a long-term consequence, firms may not decide to expand into new markets and foreign investment may be diverted to jurisdictions with lower crime rates.

Lastly, it is important to note that confidence in law enforcement bodies is low in PNG.²⁵³

²⁴⁹ For example, firms may be required to close their business temporarily due to security concerns. Respondents in the INA Survey indicated losing, on average, around K69,360 per year, because they 'closed their business temporarily' mainly for security reasons. Employees may also avoid night shifts due to security concerns and violence outbreaks. Businesses indicated that the loss incurred because of 'staff time off work due to injuries and security reasons' on average amounted to an annual loss of K25,420: see INA, *The Business and Investment Environment in Papua New Guinea in 2012: Private Sector Perspective* (2013) p 57.

²⁵⁰ INA, *The Business and Investment Environment in Papua New Guinea in 2012: Private Sector Perspective* (2013) p 2. In fact, in 30% of responding businesses in the survey indicated that law and order was a top reform priority for them, followed by corruption (17%).

²⁵¹ Id p 90.

²⁵² Id p ix. According to the study conducted by the World Bank, 81 percent of businesses reported that their decisions for further investment or expansion of their operations in PNG were affected by the poor law and order situation in the country.

²⁵³ In the INA survey, fewer than 10% of the companies surveyed were either 'highly' or 'very confident' in law enforcement, and the majority of businesses indicated a lack of confidence: ADB and INA, *The Challenges of*

High crime rates have a negative impact on the business environment in PNG. In addition, poor law and order undermines the efficacy of reforms aimed at promoting business development.

Recommendations have been made in other contexts with the aim of improving law and order in PNG. Stronger law and order would have a positive effect for competition in PNG. The Review Team therefore endorses the importance of work to enhance law and order.

Recommendation 192: Improvement in law and order would be pro-competitive. The Review endorses recommendations made in other contexts toward this end.

Appendix 1

TERMS OF REFERENCE

Independent State of Papua New Guinea

TERMS OF REFERENCE

CONSUMER AND COMPETITION FRAMEWORK REVIEW

Introduction

1. Since its introduction in 2002, the competition policy of Papua New Guinea (PNG) has contributed significantly to the welfare of Papua New Guineans. The telecommunications industry is one example of a sector where an increase in competition resulted in price reductions, wide spread increases in access and significantly improved the environment for business. The introduction of similar reforms would result in increases in productivity and price changes that enables the general public or users of services greater access to the services needed.
2. Competition law has been in operation in PNG for the past eleven years and there is a great need for this review to take place. The fact that the PNG economy has grown and changed since the introduction of the Independent Consumer and Competition Commission Act (**ICCC Act**) makes it timely to assess whether existing consumer protection and competition laws continue to appropriately address the current and emerging developments in PNG's growing economy.
3. Competition policy and other similar microeconomic reforms contribute to long term market competitiveness, increase productivity, support real wage growth, promote investment and improve living standards for Papua New Guineans.
4. On that note, the Government in its 2014 Budget announced looking at a proactive microeconomic reform agenda that will enable private sector led growth in the economy; competition was given particular emphasis as an area of policy reform that would strengthen this agenda. The Government announced its intention to review the competition framework to ensure broadened public benefit through enhanced competition while at the same time ensuring consumer protection against hazardous and unsafe products or practices. The findings of the review will aim to foster economic prosperity, stimulate efficient business activities including small to medium enterprises and promote PNG as an attractive destination for investment.

Objective

5. The objective of the technical assistance is for a Review Team to assist the Department of Treasury by reviewing the current competition and consumer protection framework, including its institutions, regulatory settings and processes, and related legislation, and reporting its findings to the Department of Treasury, including recommendations for any

changes the Review Team considers necessary or desirable in existing policies, laws, institutions or practices.

Scope

6. The Review Team will, in the interests of the PNG economy and the welfare of PNG's people, inquire into and make recommendations on appropriate reforms to improve the institutional and legislative frameworks that underpin PNG's competition policy. The aim of any recommendations for reform will be 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. The Review Team must have regard to the following principles:
 - no participant in the market should be able to engage in anti-competitive conduct within that market and its broader value chain;
 - productivity-boosting microeconomic reforms should be identified, centered on the realization of fair, transparent and open competition that drives productivity, stronger real wage growth and higher standards of living;
 - government should not be a substitute for the private sector where markets are or can function effectively or where contestability can be realized; and
 - the need to be mindful of removing or lessening, wherever possible, the regulatory burden on businesses when assessing the costs and benefits of regulation.

The ICCC

7. The Review Team should consider and make recommendations where appropriate, aimed at ensuring that PNG's competition and consumer regulatory settings and agencies, particularly the ICCC Act and the Independent Consumer and Competition Commission (ICCC), are effective in protecting and facilitating competition and consistent with international best practice.
8. The Review Team should consider how effective current legislation is in addressing access to essential market infrastructure.
9. The Review Team should assess the appropriateness, or otherwise, of existing consumer protection provisions in addressing information asymmetry and encouraging fair business practices.
10. The assessment as to whether existing laws appropriately protect consumers and the competitive process should include:
 - Examining whether current legislative provisions and institutional arrangements are functioning as intended in light of actual experience and precedents;
 - Considering whether areas that are currently uncertain or rarely used in PNG law could be framed and administered more effectively; and

- Considering whether the framework for industry regulation provides adequate mechanisms to encourage reasonable business dealings across the economy – particularly in relation to small businesses.

Business regulation

11. The Review Team should consider whether the current regime of economic regulation and the agencies administering such regulation are operating effectively, having regard to increasing globalization, changing markets and social structures, technological changes and the need to minimize business compliance costs, including:
 - whether business regulation in PNG is responsive, effective and certain in its economic policy objectives;
 - whether the operations and processes of regulatory administration are appropriately transparent, efficient, subject to appropriate external scrutiny, provide reasonable regulatory certainty, and encourage/allow for international agency cooperation; and
 - whether business regulations, enforcement arrangements and appeal mechanisms are consistent with international best practice, given PNG's present level of development.

Government business activities

12. The Review Team should also examine whether government business activities and service providers serve the public interest and promote competition and productivity, including consideration of separating government funding of services from service provision, privatization, corporatization, price regulation that improves price signals in non-competitive segments, and competitive neutrality.

Reforms

13. The Review Team should inquire into and advise on appropriate changes to legislation, institutional arrangements and other measures in relation to the matters above, having regard to the impact on long term consumer benefits in relation to value, innovation, choice and access to goods and services, and the capacity of PNG businesses to compete both domestically and internationally.
14. The Review Team should consider and make recommendations on the most appropriate ways to enhance competition, by removing regulation and by working with stakeholders to put in place economic measures that ensure a fair balance between regulatory expectations of the community and self-regulation, free markets and the promotion of competition.

Process

15. The Review Team should consider overseas experience insofar as it may be useful for the review.
16. The Review Team may, where relevant and appropriate, draw on (but should not duplicate or re-visit) the work of other recent or current competition reviews, in PNG or overseas.

17. The Review Team is to ensure thorough engagement with all interested stakeholders. At a minimum level, the Review Team should publish an issues paper, hold public hearings and receive written submissions from all interested parties.
18. The Review Team should subsequently publish a draft report and hold further public consultations, before providing a final report to the Government within 9 months.

Appendix 2

INDICATIVE ELEMENTS OF NATIONAL COMPETITION POLICY FOR PNG

1. Introduction

- Why competitive markets are important for PNG.

2. Competition policy objectives

- The objectives that competition policy are intended to achieve in PNG.
- Competition as one goal among other social goals, including development, inclusive economic growth and economic empowerment of women.

3. Competition principles

- The general principles that are to underpin administrative and legislative decisions by the Government on competition-related issues.

4. Coordination of initiatives

- How pro-competitive reforms will be coordinated with other economic reform work that is underway in PNG.

5. Reviewing and rectifying impediments to competition in existing laws

- Addressing possible fragmentation and inconsistency in laws and regulations in that affect competition and consumer protection.
- Reviewing existing laws and regulations, identifying barriers to entry that can be reduced or removed, and responsive action.

6. Application to Government activities

- Commitment of the Government to public-sector compliance with pro-competitive objectives.

7. Procurement

- Ensuring that public procurement is carried out in a competitive manner.

8. Institutional arrangements

- Agency responsible for administering and enforcing consumer protection and competition safeguards, and undertaking public education and awareness-raising.

9. Consumer protection

- Practical and administratively feasible proposals for consumer protection that respond to the needs of the public.

10. Competition legislation

- Liberalization/deregulation to follow review of laws and regulations.
- Modernization of ICCA Act including rules against anti-competitive conduct.

11. International trade

- International trade agreements and other arrangements – application and furtherance.

12. Timeframe

- Timetable for ongoing reform/review process.

13. Progress review

- Independent assessment of progress with implementation of the National Competition Policy at regular intervals.

Appendix 3

PARTIES CONSULTED BY REVIEW

Allens-Linklaters

ANZ Bank

Ashurst

Mr Joelson Anere

Mr Emmanuel Auru

Bank of PNG

BSP Bank

Business Council of PNG

Capital General Insurance Limited

Catholic Mama Group

CHOICE (Australian Consumers' Association)

Consultative Implementation and Monitoring Council

Customs Service

Department of Health

Department of Justice and Attorney General

Department of Treasury

Digicel PNG Limited

Eda Ranu

Elmere-Ravrav Bigroup

ENB DC

European Union, Delegation to PNG

Gadens

Goroka Chamber of Commerce

Independent Consumer and Competition Commission

Independent Public Business Corporation / Kumul Consolidated Holdings Limited

Institute of National Affairs

Mr Thomas H Kekeao

Dr Elizabeth Kopel

Lae Chamber of Commerce

Lowy Institute

Manufacturers' Council of Port Moresby

Marlins Ltd

Motor Vehicles Insurance Limited

Nakanai Ranges Tours

National Information and Communications Technology Authority

National Institute of Standards and Industrial Technology

National Working Group on Improving Business and Investment Climate

Nationwide Microbank Limited

Nojanah Integrated

Office of the Public Prosecutor

Paradise Foods Limited

PNG Ports Corporation Limited

PNG Womens' Chamber of Commerce

Port Moresby Chamber of Commerce and Industry

Post PNG

Powerboss PNG Limited

Puma Energy

Rabaul Adventure & Historical Tours

Steamships Trading Company Limited

Telikom PNG Limited

Travel the Pacific Ltd

University of Goroka

University of Papua New Guinea, School of Business and Public Policy

Water PNG

Westpac Bank