UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

UNCTAD

BIPARTITE VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY:

FIJI AND PAPUA NEW GUINEA

Comparative Report

UNITED NATIONS

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY:

BIPARTITE REPORT - FIJI AND PAPUA NEW GUINEA

Comparative Report

UNITED NATIONS
New York and Geneva, 2015

NOTE

UNCTAD serves as the focal point within the United Nations Secretariat for all matters related to competition policy. UNCTAD seeks to further the understanding of the nature of competition law and policy and its contribution to development and to create an enabling environment for an efficient functioning of markets. The work of UNCTAD is carried out through intergovernmental deliberations, capacity-building activities, policy advice, and research and analysis on the interface between competition policy and development.

UNCTAD's voluntary peer review of competition law and policies falls within the framework of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the "UN Set"), adopted by the General Assembly in 1980. The set seeks, inter alia, to assist developing countries in adopting and enforcing effective competition law and policy that are suited to their development needs and economic situation.

The views expressed in this report are those of the authors and do not necessarily reflect the views of the United Nations Secretariat or the University of New South Wales, Australia. The designations employed and the presentation of the material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations or the University of New South Wales, Australia, concerning the legal status of any country, territory, city or area, or of its authorities, or concerning the delimitation of its frontiers or boundaries. Material in this publication may be freely quoted or reprinted, but acknowledgement is requested, together with a reference to the document number. A copy of the documentation containing the quotation or reprint should be sent to the UNCTAD secretariat.

UNCTAD/DITC/CLP/2015/2

ACKNOWLEDGEMENTS

Voluntary peer reviews of competition law and policy are conducted at the annual meetings of the Intergovernmental Group of Experts on Competition Law and Policy or the five-yearly United Nations Conference to Review the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices. The substantive preparation is carried out by the Competition and Consumer Policies Branch (CCPB) of UNCTAD.

The comparative report was prepared for UNCTAD by Deborah Healey, Associate Professor, University of New South Wales, Australia. It is based on the national self-assessment reports prepared for the bipartite voluntary peer review of competition law and policy in Fiji and Papua New Guinea. The substantive backstopping and review of the report was the responsibility of Graham Mott, CCPB, and Hassan Qaqaya, former Head of the CCPB.

UNCTAD would like to acknowledge the enriching assistance of the Fiji Commerce Commission, particularly Bobby Maharaj, of the Independent Consumer and Competition Commission of Papua New Guinea, particularly Billy Manoka and Elastus Geroro, and of other officers who contributed to this report, as well as all the persons and representatives of different public and private sector institutions who were interviewed.

Table of Contents

Preface

This comparative report is part of the bipartite voluntary peer review of competition law and policy in Fiji and Papua New Guinea. The purpose of this review is to assess the legal framework and enforcement experiences in each jurisdiction; draw lessons and best practices from each jurisdiction and examine the potential for cooperation between the two jurisdictions.

The national self-assessment reports review the competition policy systems in each country and serve as a basis for this comparative report, which addresses pertinent issues from an overall perspective. This report assesses current progress and proposed legislative and policy amendments. In addition, this report makes various recommendations with regard to the proposals and additional issues, including future policy. While it has been termed a bipartite review and the approaches of both jurisdictions to their competition laws have some similarities, there are significant differences in location, policy and approach, which make a combined approach to analysis challenging and lacking utility in some respects. The suggestions of the individual jurisdictions are therefore considered separately and in detail, though the report also notes areas where lessons may be learned by one jurisdiction from the experience or approach of the other jurisdiction.

This comparative report is divided into three parts, as follows: part I introduces the two jurisdictions; part II makes general recommendations for Governments and individual regulators, based on an overall assessment of the individual self-assessment reports; and part III provides commentary and analysis on the individual self-assessment reports.

Part I: Introduction

The comparative report on the bipartite voluntary peer review of competition law and policy in Fiji and Papua New Guinea is based on the national self-assessment reports of the individual jurisdictions, referred to as the Fiji report and the Papua New Guinea report. The comparative report assesses these reports and makes comments and recommendations as appropriate.

It is now well accepted that "the size of a market necessarily affects the competition policy it should adopt".[1] A small market economy is one "which can support only a small number of competitors in most of its industries".[2] Both of the subject jurisdictions fall under this and other definitions of a small market economy. Both are also developing countries with the associated competition law issues.[3] This means that the traditional competition law and policy frameworks of larger developed market economies are unlikely to be entirely appropriate for either Fiji or Papua New Guinea. The political economies of the two jurisdictions are important to the content and operation of their competition laws. They share some similarities, but there are also important distinctions.

The Independent Consumer and Competition Commission (ICCC) Act of Papua New Guinea was enacted in 2002. The Papua New Guinea report describes its approach to the peer review and the possible amendment of the ICCC Act in a practical way, outlining the need not to over-emphasize comments concerning the simplicity of the laws of other jurisdictions. Papua New Guinea needs to assess its own requirements.

The Commerce Commission Decree of 2010 of Fiji is a more recent law. The Commerce Commission itself, however, was established under the Commerce Act of 1998, and re-established in 2000. The Commerce Act was enacted to "promote effective competition and informed markets, encourage fair trading, protect consumers and businesses from restrictive practices and control prices of regulated industries and other markets where competition is lessened or limited". Various entities and laws were merged, and the Act was amended in 2010, when the Commerce Commission Decree was enacted.

Papua New Guinea has been an independent country for 39 years, and the Papua New Guinea report states that the country "is still involved in nation building and development" and that it seeks a "better distribution of economic benefits", as well as economic development. The unusual nature of the country's economy is well described in the Papua New Guinea report. The diversity of economic conditions includes highly concentrated industries in which well-resourced operators engage in conduct that disadvantages competitors, small business, farmers and the community. The Papua New Guinea report also notes the "mammoth task" of economic management in a country with seven million people and more than 800 languages, 75 per cent of whom live in rural settings in rugged terrain. The small size, isolation and

[1] MS Gal, 2003, *Competition Policy for Small Market Economies*, Harvard University Press, Cambridge, Massachusetts.
[2] Ibid.
[3] See EM Fox, 2012, Competition, development and regional integration: In search of a competition law fit for developing countries, in J Drexl, M Bakhoum, EM Fox, MS Gal and DJ Gerber, eds., *Competition Policy and Regional Integration in Developing Countries*, Edward Elgar publishing, Cheltenham, United Kingdom of Great Britain and Northern Ireland.

fragmentation of the country mean that it is unlikely to be a market that will attract large numbers of competitors, or even multiple competitors, in many of its industries.

Fiji is a sovereign democratic State that describes itself as a middle-income country and one of the more developed of the Pacific island economies. The four largest islands are surrounded by coral reefs and have centrally located mountains that cover a large proportion of the land mass. There are a total of 330 islands, of which approximately 100 are inhabited; 83 per cent of the land is owned communally by indigenous Fijians and 9 per cent by the State, while 8 per cent is freehold land. Fiji is a developing country with a large subsistence agriculture sector. However, only 16 per cent of the land is suitable for intensive agriculture. The country's economy is mainly based on agriculture and tourism, with tourism and sugar providing over 50 per cent of employment. Poverty is a key Government challenge.[4] Issues of size, relative isolation from other markets and fragmentation raise similar concerns to those in Papua New Guinea about the nature of its markets.

Despite their enactment as economic statutes to engender competitive conduct in markets, the objects, forms, contents and interpretations of different competition laws vary greatly. The objects of laws set out their underlying purposes and assist regulators and courts to resolve uncertainty and ambiguity in meaning.

In this regard, the ICCC Act has three primary objectives and seven facilitating objectives set out in section 5 (1) and section 5 (2). The primary objectives are to enhance the welfare of the people of Papua New Guinea through the promotion of competition, fair trading and protection of consumer interests, to promote economic efficiency and efficiency in industry structure, investment and conduct and 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. The facilitating objectives set out in section 5 (2) overlap some of the primary objectives as well as the content of the ICCC Act. It may be that the facilitating objects could be simplified.

The Fiji Ordinance has relatively common objectives in terms of competition law (promoting the interests of consumers, the effective and efficient development of industry, trade or commerce and effective competition in industry, trade or commerce) except for the objective in section 2 (1) of the Commerce Commission Decree of ensuring "equitable returns for businesses with fair and reasonable prices charged to consumers". This may be linked to its price regulation function, although the Ordinance has separate objectives in relation to regulated industries and access regimes, as follows: promote effective competition in the interests of consumers; facilitate an approximate balance between efficiency and environmental and social considerations; and ensure non-discriminatory access to monopoly and near-monopoly infrastructure or services.

Regulators have the key role in enforcing competition laws. In Papua New Guinea, the regulator is the Independent Consumer and Competition Commission, an independent

[4] Fiji, Ministry of Finance, 2014, *Economic and Fiscal Update: Supplement to the 2015 Budget Address*, available at http://fijitradela.com/pdf/2015budgetsupplement.pdf.

statutory authority established under the ICCC Act. Its main functions relate to competition, consumer protection and economic regulation, and it administers the ICCC Act and other laws such as the Prices Regulation Act, Commercial Advertisement (Protection of the Public) Act and Trade Measurements Act. The Fiji Commerce Commission is an independent statutory body established under the Commerce Commission Decree. It has roles related to competition, consumer protection, price regulation and monitoring. Each regulator is thus responsible for competition, consumer protection and price regulation, as well as some other matters.

Aspects of the laws of the two jurisdictions are modelled to a significant extent on the competition and consumer laws of Australia and New Zealand. Comparisons are made throughout the detailed analysis to these laws and their application as relevant, on the assumption that the experience of the initiating jurisdictions, including reviews conducted there, might inform further consideration of the laws of Fiji and Papua New Guinea. However, no assumption is made that the laws of Fiji and Papua New Guinea should continue to reflect the laws in Australia and New Zealand. There is also no assumption made that the laws of Fiji and Papua New Guinea should or will be interpreted as the laws of Australia and New Zealand have been interpreted by their regulators or their courts.

Part II: Findings and recommendations

Various suggestions and recommendations for the amendment and improvement of the laws of Fiji and Papua New Guinea are made in the individual peer reviews. This part of the comparative report draws together the most important issues arising from the individual peer reviews, and makes various recommendations, which are more fully discussed in the individual country recommendations in part III.

2.1. General recommendations

Substantive provisions: Recommendations

The objects of the laws of Fiji and Papua New Guinea are similar. Both contain provisions on competition, consumer protection and price regulation. Price regulation has been raised as an issue and is discussed in the individual reports; it is generally judged to be appropriate to the current circumstances of the individual jurisdictions at this stage. However, this report cautions against expanding the price regulation role without significant consideration and recommends regular review by the regulators and the Governments to determine whether price regulation is and continues to be the most effective approach in relation to particular markets. The report makes no other comments regarding price regulation.

Both jurisdictions make multiple suggestions as to possible amendments to the competition (restrictive trade practices) provisions of their laws. These provisions have not been used regularly in either jurisdiction during the relatively short time the laws have been in existence. Some suggestions for amendment that involve adding provisions appear to have been made merely because other competition laws include such features. With regard to one specific provision, one jurisdiction wishes to take the provision out while the other wishes to insert a similar provision. Given the difficulties of entrenching and enforcing these relatively new laws, both jurisdictions are cautioned against making amendments at this point, unless a real shortcoming in the law exists or a real need for an amendment is shown in practice.

Subject to the foregoing, some fine tuning of the substantive legal provisions appears warranted. The major recommendations are summarized below.

Competition (restrictive trade practices) provisions: Recommendations

A definition of the term “market” and a clearer definition of the term “consumer” should be included in the Fiji Ordinance.

Both jurisdictions are considering new cartel laws. Careful consideration is required to determine whether the jurisdictions should enact more specific cartel provisions, or whether the current provisions should be modified to modernize them. The issue of criminalizing cartel conduct is raised by both jurisdictions, but the utility of this approach needs to be carefully examined to weigh the benefits and disadvantages of conducting criminal trials, as discussed in detail in the individual country recommendations.

Further consideration of the provision on the misuse of market power in each jurisdiction is essential. This is a difficult area in all jurisdictions. The willingness of courts to take an economic view in interpreting these provisions will prove crucial in determining their ultimate effectiveness. The current Australian Government Competition Policy Review (Harper Review) is considering similar provisions and may provide useful information for consideration in each jurisdiction (see http://competitionpolicyreview.gov.au/).

Third line forcing, if prohibited, should be subject to a competition test.[5] The proposed provisions should not be placed in Papua New Guinea consumer laws. Resale price maintenance provisions in Papua New Guinea should be simplified to the extent possible, subject to the detailed comments in the individual country recommendations.

Price discrimination prohibitions in Fiji should be repealed, as the current economic view is that they inhibit price flexibility. Price discrimination by players with substantial market power is already addressed by the provision on the misuse of market power. The Australian provision on which this provision was modelled has been repealed.

Merger regulation in each jurisdiction should only be made subject to a mandatory notification process over a set turnover threshold if the benefits of such an approach clearly outweigh the increased workload imposed on regulators who must review each notification. Merger factors should be added to the Fiji provision. The single joint process of formal clearance and authorization suggested for Papua New Guinea is a good idea.

Both jurisdictions have authorization in relation to some or all of their competition (restrictive trade practices) provisions. While it is noted that this approach has been criticized as not promoting compliance, experiences in small market economies suggest that it may be useful and workable where further market entry is not particularly likely. Authorization should be transparent and appealable. For these reasons there should be a public register of authorization documents in Papua New Guinea. In addition, there should be a process of appeal to a tribunal by the applicant or interested third parties.

Consumer protection: Recommendations

It is appropriate that in both jurisdictions, competition and consumer laws should be administered by a single regulator that has adequate resources.

A general prohibition on misleading or deceptive conduct is essential in both jurisdictions. This has proven overwhelmingly beneficial in Australia and New Zealand. However, the general provision is not criminal in either of these jurisdictions, due to its extremely general nature.

Broader consumer protection provisions along the lines suggested in the Papua New Guinea report should be implemented in Papua New Guinea, subject to the comments and

[5] Third line forcing denotes a supplier making it a condition of the supply of goods or services that the goods or services of an unrelated third party must also be acquired, or refusing to supply without third party acquisition.

recommendations in the individual country recommendations. Detailed comments on other suggestions for amendments in Fiji are made in the individual country recommendations.

Provisions for post-sale protection should be introduced in Papua New Guinea. While a scheme of consumer warranties and guarantees mirroring earlier Australian provisions, and already in place in Fiji, is suggested in the Papua New Guinea report, the country should carefully consider Australia's replacement statutory consumer guarantees before implementing a scheme. These recent provisions have been designed to update the earlier warranties and guarantees and seek to address a variety of issues that arose in relation to the previous scheme. Fiji should consider examining this consumer guarantees scheme, which may avert the likely shortcomings of its current scheme, although it is understood that Fiji's current provisions are much used and that amendment may not be considered necessary.

The regulators

Various changes to the natures and procedures of the individual regulators should be made, as noted in the individual country recommendations.

Investigative powers: Recommendations

A major difficulty in competition law cases is the lack of evidence supporting a violation of the law. Both jurisdictions have substantial powers to obtain information and evidence. While some suggestions are made for amendment to these powers, it is difficult to draw conclusions as to why they are needed, given the information provided. Further consideration should be given to the individual suggestions. It is unclear whether the authorities have received specialized training for conducting dawn raids, but if they have not, then this should be prioritized, as it is a complex process with a number of risks for the inexperienced. Specialized training in other aspects of obtaining evidence and dealing with potential defendants, witnesses and informants should be given a high priority.

Enforcement: Recommendations

A number of broad additional enforcement powers, remedies and relief are sought in the Papua New Guinea report. Some of these are aimed at taking the emphasis off the court as the decision maker in enforcement and providing the ICCC with flexible powers to issue various notices, with potential offences for non-compliance. The ICCC states that such new provisions would increase the timeliness and flexibility of enforcement. This sounds good in theory but further consideration should be given to all implications of this major change in approach. Appeals to the courts in relation to notices would be essential to ensure procedural fairness, should the notice suggestion be adopted.

Enforceable undertakings, however, should certainly be an option to settle any proceedings in Papua New Guinea, as should a general power in the ICCC to seek compensation for breaches, which should also be introduced.

Both jurisdictions should consider the introduction of a leniency policy for cartel conduct. The approach to this issue will differ if cartel conduct is criminalized.

Both jurisdictions have made efforts to publicize the laws and enforce them. These efforts should be increased, with a careful selection of cases with circumstances likely to be influential and with substantial publicity regarding enforcement actions and outcomes. This, coupled with the education of consumers and business through methods including vibrant websites, should increase awareness, emphasize the risk of contravention and increase compliance.

The judiciary

It is difficult to assess the role of the judiciary in either jurisdiction given that few cases have been taken and finalized. Both countries are common law jurisdictions, which give the courts the primary role in decision-making. However, the suggested changes to the Fiji law would remove much of the responsibility for enforcement action from the courts at first instance. Given that one merger case has been held up long term in the Papua New Guinea courts, that the ICCC has sought broader powers to enforce outside the court at first instance and that the Fiji Commerce Commission resolves many complaints by conciliation, it appears that the courts are not yet an efficient resolution mechanism for competition law matters in either jurisdiction.

Effectiveness of merger control

It is difficult to determine how effective merger processes are at this early stage of enforcement of the laws. There were three merger authorizations in Fiji in 2013. There have been a number of merger authorizations in Papua New Guinea. One merger case is in the courts, as detailed in the following subsection.

Enforcement records to date

The two jurisdictions have similar records with regard to enforcement.

The Papua New Guinea report notes that there have only been two competition cases since the enactment of the ICCC Act in 2002, one “a merger case stuck in the Papua New Guinea National Court at interlocutory stage for two years and the other a challenge to a statutory notice that was settled”. There have been several consumer protection, labelling and price-related decisions. No written decisions are available. In late 2014, the ICCC prosecuted two public motor vehicle operators (which are declared services) for breaches of chapter 320 of the Prices Regulation Act in charging higher than the maximum set fares. Several other potential consumer protection cases have been settled with businesses giving written understandings to address the consumer detriment. They will be liable to prosecution for non-compliance.

While there appear to be significant numbers of complaints, court enforcement is not producing decisions that could assist in interpretation of the law or serve as a deterrent to others in business. The ICCC has dealt with a large number of complaints on competition matters, including eight authorizations and 17 clearance applications. It has investigated 15 cases without prosecuting any in court, with four still in progress. As noted in the Papua New Guinea report, five cases have been closed due to lack of information or insufficient

evidence, two due to the difficulty of proving intent or purpose and four with an administrative remedy.

The ICCC notes that it is a young competition authority with limited resources, which have been focused on building its capabilities and achieving a balance between prosecution and voluntary compliance. The agency has engaged in "information bridging and advocacy efforts to educate stakeholders" about the law. The ICCC expects the number of cases to increase over time. However, after 12 years, it seems the focus of the ICCC should change to more visible enforcement outcomes. This may be achievable if the new enforcement notices are adopted.

While the ICCC has created both short and long summaries of the ICCC Act, it seems that these could be enhanced through the use of practical examples to illustrate conduct and situations that are likely to infringe the laws. Brochures and guides should do more than paraphrase the wording if they are to be truly effective for consumers and business to understand their rights and obligations. The proposed guide on advertising and selling seems particularly appropriate, but must contain examples based on real-life situations if it is to be truly effective. Many new jurisdictions have done this particularly effectively. For example, Singapore engaged in an effective strategy to inform consumers and business following the enactment of its law in 2006. Formal guidelines are important, as are staff manuals, but informing consumers and business is particularly important. Informing business about consumer product safety requirements is also particularly important.

The Fiji report encouragingly notes that there is already substantial evidence of the benefits of the competition regime in Fiji vis-à-vis economic development, greater efficiency in international trade and consumer welfare. The Fiji Commerce Commission has stated that it approaches compliance by encouraging business to comply, "acting decisively to stop hard core or flagrant offenders" and "empowering consumers with the knowledge and skills to make informed choices" and that, in practice, this entails a "business consultation programme balancing business and consumer needs, one to one discussion on compliance requirements during mediations, targeting areas where consumers are more at risk, conciliating consumer complaints and developing guidelines and monitoring their compliance".[6]

Court actions that have been taken are listed in the annual reports of the Fiji Commerce Commission, but most of the cases are in relation to consumer protection and fair trading and price regulation. Part 6 of the Fiji Ordinance has yet to be tested in court.[7] There have been no cases on competition (restrictive trade practices) provisions. All matters of this nature have been resolved via Commission decisions and the stakeholders have complied with the resolutions.[8] Most cases have been in relation to consumer protection and fair trading and price regulation.[9]

[6] Fiji Commerce Commission, 2013, *Annual Report*, available at http://www.commcomm.gov.fj/wp-content/uploads/2015/02/2013-annual-report-Final-Copy.pdf.
[7] Responses to questions of reviewer.
[8] Ibid.
[9] Ibid.

The comprehensive annual reports of the Fiji Commerce Commission provide an overview of what the Commission has been doing. The annual report for 2013 notes that the Commission authorized three mergers in 2013. The provisions on conditions and warranties in consumer transactions have been regularly used. In the annual report for 2013, the Commission summarized its role in the following way: "The Commission successfully completed major pricing activities, strengthened its enforcement in relation to the determinations and fair trading cases, handled numerous unfair and restrictive trade practices cases and also carried out the market surveillance and research on a number of consumer protection issues."

Complaints are another indicator of the vigour with which the law has been implemented. The annual report for 2013 notes that the Fiji Commerce Commission received 720 complaints from the public related to fair trading, of which 666 were successfully closed during the year, that substantial work was undertaken in relation to regulated industries and that a large number of rent complaints were dealt with and almost 30,000 inspections of traders carried out. A table entitled "Fair Trade Section Highlights" confirms the large number of complaints related to consumer protection, while a small number concerned the misuse of market power and exclusive dealing. This suggests a lack of public awareness about the competition (restrictive trade practices) provisions of the Fiji Ordinance.

No guidelines on any issue have yet been prepared, although a number of forms have been prepared related to making complaints and various types of authorization applications. Many awareness workshops and seminars, and campaigns through the Fiji Commerce Commission website and Facebook, have been conducted to inform consumers of the conditions and warranties in consumer transactions, and the Fiji Commerce Commission plans to hold 180 consumer awareness workshops in 2015.[10]

The Fiji Commerce Commission must extend its awareness workshops and seminars to compliance in areas in the competition (restrictive trade practices) provisions, to raise the level of understanding of consumers and business about this area of the Fiji Ordinance.

The key to obtaining benefits for the economy and consumers from implementing competition law is in achieving a credible enforcement record through professional decision-making. This gives credibility and respect to the authority. Most authorities have a combination of training and capacity-building programmes in cartel detection, investigative methods and merger assessments for operational staff and instruction in case management and assessment techniques for senior officials. All of these areas are important for both jurisdictions. The status and credibility of the regulators in each jurisdiction could be enhanced through more effective investigation and enforcement of relevant cases.

Public resources dedicated to enforcement

The allocation of resources is always difficult in relatively new agencies that have many competing priorities.

[10] Ibid.

The regulator in each jurisdiction is relatively small. Besides enforcing the competition (restrictive trade practices) provisions, each regulator has a myriad of other tasks to address, such as consumer protection, pricing, monitoring and consumer and business education, as well as other issues. All of these are relevant to the overall competitive environment.

The Papua New Guinea report contains a list of 17priorities, each of which is noteworthy. There are many, however, and it is unclear whether they have been sufficiently clarified or whether the priorities have been effectively listed. Whether an agency of the size of the ICCC can effectively deliver on 17 priorities is questionable.

The Fiji report refers to a list of 16 priorities contained in section 15 of the Commerce Commission Decree and a further five in relation to regulated industries. While there are a number related to protecting the interests of consumers, provision of advice and investigations, there is none related to the enforcement of provisions that deal with anticompetitive conduct. This focus should be addressed in these priorities, along with the other tasks that the Commerce Commission is charged with pursuing.

In Papua New Guinea, the ICCC has a staff of around 50, although a higher number of positions are currently being filled. The Fiji Commerce Commission has a staff of 52. In each jurisdiction, the number of staff currently dedicated to enforcement of the competition (restrictive trade practices) provisions of each law is disturbingly small. In Fiji, for example, it is currently five. This likely constitutes a substantial reason for the lack of focus on enforcement in these matters.

The regulators need to be able to dedicate sufficient numbers of staff to this area if headway is to be made in education, awareness and enforcement.

Detailed questions in peer reviews

A number of detailed and important questions are raised by the peer reviews. Most are unable to be answered, given the understandably brief nature of the self-assessment reports provided and the review process that has been undertaken. It is recommended that further consideration be given to these questions as part of an ongoing process of external review of the laws, the regulators and their processes.

2.2. Recommendations for Governments

In relation to competition law, Fiji and Papua New Guinea have a number of issues in common. Both have relatively new laws, although the ICCC Act in Papua New Guinea has been in existence for longer than the Fiji Ordinance. Their competition regulators have a number of different mandates besides competition (restrictive trade practices) provisions. This puts pressure on the amount of resources allocated to antitrust enforcement. Dealing with provisions that are relatively unknown and based on economic principles also creates significant difficulties for both regulators and the courts. The regulators are relatively small institutions. Antitrust enforcement is a professional activity and the quality of the staff of a regulator is an asset on which every Government can rely for the development of a more market-oriented regulatory environment. Staff salaries should be comparable with those for

other important economic portfolios. If staff members are not well trained, the quality of the enforcement cannot be guaranteed to enable these regulators to make a difference in their jurisdictions.

In order to increase their effectiveness, the authorities need more resources and better funding. It is not easy to convince Governments to provide more resources, but the best way to do this is to conclude a few high-impact cases. Such cases may emphasize the importance of competition law and policy to the public and to the Government. Improving the resources and funding of the national competition authorities constitutes the core recommendation in this report.

2.3. Recommendations for competition regulators

The competition regulators must enforce the law more effectively, starting with some high-profile cases, initiated by dawn raids and ending with important sanctions. The reputation of the authorities would benefit as a result, and obtaining additional funding would be made politically easier. Dawn raids are the most common way to discover whether a firm has actually violated the competition provisions, especially with regard to cartel violations. They should come as a surprise to the firm; otherwise evidence will likely be destroyed.

In addition, and despite the relatively small numbers of staff members dedicated to this area, the regulators must prioritize competition (restrictive trade practices) provisions in their enforcement activities. Currently, neither regulator has achieved a final court decision in a matter related to competition provisions. This should be a top priority, and additional staff should be deployed in this area until such an outcome has been achieved. The balance between pursuing offenders to a successful court outcome and a fine must always be weighed against the benefit of settling a matter on terms that remove the anticompetitive conduct, but this is all done quietly. Consumers and business need to see a high-profile company shamed in court for breaching such provisions from time to time, to reinforce the importance of the law and the power of the regulator, as a deterrent to further conduct in breach of the law.

Some comments have been made about the training of staff and the judiciary. While it is recognized that some training has been undertaken to date, further training should be conducted and focus on the competition (restrictive trade practices) provisions of the law. The pursuit of high-profile offenders provides regulatory staff with the experience and confidence to pursue others effectively. Training should also be focused on drafting and implementing guidelines and communications on how to interpret substantive provisions of the law.

The enforcement problems in the two jurisdictions are somewhat similar, and their laws have a common genesis. Communications with regard to common issues and good and bad experiences would be of great benefit to both regulators. In addition, both regulators should strengthen their ties informally, in order to exchange experiences and possibly cooperate at the enforcement level. Joint training activities aimed at increasing expertise should enhance networking and the development of professional relationships.

Part III: Individual country recommendations and comments

3.1. Introduction

Both laws contain provisions squarely aimed at combating anticompetitive conduct, and these will be discussed individually in more detail in the following subsections. In addition, both laws have provisions that deal with aspects of pricing and provisions on aspects of consumer protection and fair trading.

The genesis of many of the provisions in both laws is the competition law of Australia, which also strongly influenced the development of a similar but not identical competition law in New Zealand. Both of these laws are established and regarded as effective. The close links in geography and politics between the four jurisdictions makes this unsurprising. However, the Australian law in particular is a complex piece of legislation, which may create interpretational difficulties for a newer jurisdiction. Neither the Australian law nor the law in New Zealand is simple for business or consumers to understand, in a number of respects. In addition, competition law is an economic statute, which adds to its complexity. However, both Fiji and Papua New Guinea are common law jurisdictions and may be guided by established interpretations in Australia and New Zealand.

Both jurisdictions make useful suggestions for amendments with regard to the substantive provisions of the laws. Comments about the wording and operation of the laws have been added as considered useful, in particular based on experiences in the originating jurisdictions.

3.2. Individual self-assessment report: Fiji

3.2.1. Definitions

Authorization. The Fiji report notes that the definition of authorization is currently limited to authorized prices with respect to controlled goods. This definition is currently incomplete, and it should be expanded to capture the Fiji Commerce Commission function of authorization under section 41. The amendment as suggested should be made.

Consumer. The current definition is unclear as it uses the defined term (consumer) as part of the definition. If the amendment seeks to include business-to-business transactions, then additional limits should be considered. Clarification should be made as to whether this means that all businesses may be consumers or that this should be limited by the value of the transaction, as well as whether businesses acquiring goods or services for the purposes of on-supply or using up in a process of production are consumers for the purposes of the definition. Fiji should consider the comments on the definition of consumer in the Papua New Guinea subsection.

Market. As the Fiji report states, market is an essential concept for a competition regulator. The suggestion is for a general definition. The Australian Competition and Consumer Act contains the following general definition of market: “For the purposes of this Act, unless the contrary intention appears, market means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or

services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services." The Act also contains an additional definition for the purposes of the merger provision (section 50), which states: "(6) In this section: market means a market for goods or services in: (a) Australia; or (b) a State; or (c) a Territory; or (d) a region of Australia."

The first definition, applicable to the whole of the Australian Competition and Consumer Act, refers to a market in Australia, with the implication that there may be smaller markets as substitutability dictates. This provides general guidance on the principles to employ in determining a market. It does not contain the elements of a market (product, geography, function and time), but has proved useful in Australia. The second definition means that for the purposes of a merger, larger markets will generally be relevant, but that an area as small as a region may constitute a relevant market in some cases. These definitions may provide some assistance in considering the issue of a market for the purposes of the Fiji act.

3.2.2. Establishment of the Commission

Membership of the Commission. The suggestions on naming members Commissioners and on qualifications or specializations of Commission members should be adopted.

Procedure. The Decree should be amended to allow the Commission to determine its own procedure at meetings. The suggestion should be adopted.

Functions of the Commission. Amendments should be made, subject to comments elsewhere on the multiplicity of functions.

Access agreements. The suggestions on offences for not furnishing or notifying agreements should be adopted.

Arbitration of access disputes. Further consideration should be given to these suggestions based on further information and advice as to possible applications and suitable limits.

Control of prices. See the comments on price control in relation to Papua New Guinea, which are equally applicable to Fiji. The Fiji report notes that the number of items subject to price control has fallen from around 10,000 previously to around 450–500 today. This is to be commended and, as stated in relation to Papua New Guinea, the Commission should regularly consider the appropriateness of price regulation for particular items and seek to encourage the introduction of competition into regulated markets where this may be achieved. The Commission should seek to attack anticompetitive conduct in other ways before it identifies markets for possible price regulation, as the preferred option should be for competition to regulate the market. Market failures arising out of government policies (licences, quotas, tariffs, etc.) may be addressed in conjunction with reviewing and revising such policies rather than by simply introducing price control to deal with a discontinuity.

Telecommunications services. The suggestion that a telecommunications specialist should be appointed to the Commission should be adopted.

Provisions relating to prices for goods and services. The suggestions for amendment to procedures relating to sections 53–55 make practical sense and should be adopted.

Restrictive trade practices. The current provisions relating to restrictive trade practices are civil provisions dealt with by civil courts. Each is treated individually in the comments in this subsection.

Cartels. The Fiji report suggests that there should be new criminal cartel provisions.

The Papua New Guinea report focuses on the issue of cartel provisions. Whether it is necessary to call provisions "cartel provisions" is debatable. Hard core cartel provisions are generally price fixing, market sharing, bid-rigging and output restriction. Price fixing and exclusionary provisions are already in the Ordinance as per se provisions. The current provisions on anticompetitive contracts, arrangements and understandings mirror the earlier provisions in the Australian Competition and Consumer Act. They contain, in effect, cartel provisions; see the comments for Papua New Guinea and the potential for a change of name. If this approach is not adopted and another approach taken, a definition of "cartel provisions" will need to be added.

Given the stage of development of Fiji and the Commission, it is difficult to recommend criminal cartel provisions for reasons discussed in relation to Papua New Guinea.

Exclusionary provisions. An exclusionary provision is an agreement by competitors not to acquire goods or services from, or supply goods or services to, a third party. One or more of the parties to an agreement must be in competition in relation to the goods or services that are the subject of the agreement. Exclusionary provisions are per se, and there is thus no consideration of the impact on competition of an exclusionary provision, as it is per se or deemed to have an anticompetitive purpose. The prohibition on exclusionary provisions is similar to the former and current Australian provision. They are therefore treated as they would be in a standard cartel-type provision, but are not criminal in nature.

The amendments described are not likely to be necessary as, in circumstances where the dominant purpose of an agreement is for public or consumer interests or environmental protection, it is unlikely that the parties to the agreement would be in competition in relation to the products or services that are the subject of the agreement. Alternatively, authorization could be obtained on public benefit grounds.

Price fixing. Price fixing is also a per se prohibition, as it would be in a standard cartel provision, but it is not criminal in nature. Joint ventures are exempted from the per se test and subjected to a competition test if they fall under the terms of a joint venture exception. The issue of criminal sanctions has already been addressed.

The suggestion is that authorizations should be available for some price-fixing conduct or where there is a collective acquisition of goods or services. It appears that this is one of the few types of conduct that cannot be authorized and for this reason authorization is recommended.

The exemption from per se price fixing liability for collective acquisitions of goods or services is ironically in the ICCC Act of Papua New Guinea and they suggest that it should be removed.

Covenants affecting competition and/or fixing prices. The Ordinance deals with covenants affecting competition. The Australian provisions on covenants are recommended for removal in the Harper Review. The Papua New Guinea report suggests removing them. Before any amendments are made to this provision, the Commission should provide evidence of the need for the provision. If the current provision remains, it should not be criminalized. The same comments are relevant to restrictive covenants related to price fixing (section 63 of the Ordinance).

Secondary boycotts. Before any amendments are made to this provision, the Commission should provide evidence of the need for the provision and the need for the amendments.

Misuse of market power. The provision on the misuse of market power in section 66 in the Fiji Ordinance is almost identical to an earlier version of such a provision in the Australian Competition and Consumer Act. No amendments to this provision seem to be proposed.

Anticompetitive conduct. An additional provision in section 67 focused on a substantial degree of market power that has an anticompetitive effect. It is suggested that more clauses should be added to this general provision related to "specific types of anticompetitive behaviour such as price signalling and predatory pricing". These suggestions are problematic. Price signalling is generally not confined to persons who have a substantial degree of market power. It is more common in oligopoly markets, where it is usually somewhat difficult to show that persons have a substantial degree of market power. The Australian Competition and Consumer Act has enacted problematic provisions on price signalling that currently apply only to banks but have not been applied to date. As noted in the Fiji report, issues in relation to "providing information disclosures to push prices up" are similar to price signalling issues. The Harper Review in Australia may provide some assistance to further considerations on the enactment of a price signalling type of provision, should Fiji be committed to enacting such a provision.

With regard to predatory pricing, one of the most basic problems with this issue is that there are different views on what predatory pricing actually is. The relevant United States of America law provides that pricing is predatory only if the person engaging in below-cost pricing has the capacity to recoup earlier losses once the competitors have been driven out of the market. This then requires high barriers to entry in that particular market. This theory is based on the idea that consumers are better off with lower prices until they are raised by the powerful incumbent once other competitors have been driven out. If barriers to entry are not high, once prices have been raised, other competitors will enter the market to drive prices down again.

Predatory pricing law under the Australian version of the provision on the misuse of market power has proven problematic. Despite judicial comment that the concept of recoupment was a useful consideration in predatory pricing cases, amendments were enacted to emphasize

that it was not necessary to show predatory pricing under the Australian Competition and Consumer Act. Australia has had no successful cases on predatory pricing under the version of the provision on the misuse of market power that is mirrored in section 66 of the Fiji Ordinance. Following a number of unsuccessful cases, other provisions were inserted in the Australian Competition and Consumer Act and, after a number of years, have not been used. The Harper Review in Australia may provide some assistance to further considerations on the enactment of a provision on this issue in Fiji. Many of the submissions to the review and much of the surrounding discussion have been on improving the existing provisions on the misuse of market power in the Australian Competition and Consumer Act. This matter is suggested for background information, in order that Fiji may develop the most appropriate provision for the jurisdiction.

Collective tendering. There is a description of collective tendering, which is described as "collusive tendering or bid-rigging" but there are no real suggestions for a definition of the conduct.

Exclusive dealing. Once again, exclusive dealing is described, but no suggestion is made as to how or whether it should be amended.

Price discrimination. Price discrimination is prohibited in Fiji, although provisions relating to it have been deleted in many other countries on the grounds that price discrimination provisions inhibit price flexibility. Price discrimination by players with substantial market power is already addressed by the provision on the misuse of market power. There are no cohesive suggestions for amendment. Consideration should be given to deleting it.

Mergers. The merger provision in section 72 of the Ordinance prohibits the acquisition of shares or assets if the acquirer would be in a position to dominate a market. The Fiji report suggests the inclusion of merger factors, which are common in other merger jurisdictions. The proposed factors include most of the factors contained in section 50 (3) of the Australian Competition and Consumer Act. Consideration should be given to including all of them, unless there is good reason not to include an individual factor. In this regard, factor (g) is suggested as "the threshold" and its meaning is unclear.

Authorization is available, as is clearance. Three mergers were authorized in 2013.[11]

Acquisition outside Fiji. This provision is mentioned, but there is no suggested amendment.

3.2.3. Consumer protection and unfair practices

Division 1: Consumer protection. The suggestion is to allow the Fiji Commerce Commission to arbitrate on matters under part 7 (on consumer protection and unfair practices). Access to justice for consumers and business is extremely important, and this provision should be given further consideration. However, it seems that the implications in terms of time and effort would be great. Subject to this qualification, it should be adopted.

[11] Fiji Commerce Commission, 2013.

Interpretation. It is suggested that section 74 should be amended to provide definitions of what is representation and what is misleading. Section 74 is based on the Australian Competition and Consumer Act provisions that deal with representations as to the future and which party has the onus of proving that they were unreasonable at the time they were made. It reverses the onus to clarify that the person making representations as to the future must show that they were not unreasonable at the time they were made. As such, they are helpful as they stand. Whether the definitions of representation are necessary is debatable.

With regard to when conduct is misleading, it is difficult to import a definite definition or test.

The provision on misleading or deceptive conduct in section 75 of the Ordinance is identical to the Australian provision, which is discussed in relation to Papua New Guinea. It sets a norm of conduct, and has proven extremely effective in combating misleading conduct in a wide range of circumstances in Australia, with case law having developed over more than 40 years. All of the cases referred to in the Fiji report on this issue are Australian decisions on the identical provision. Reference is made to CRW v Sneddon (1972), which contains an oft-quoted definition of mislead as being to "lead into error". The part of the decision quoted is part of the test used in Australia to determine whether conduct is misleading or deceptive or likely to mislead or deceive. The Australian provision is not criminal in nature, the decision having been taken that it was inappropriate to criminalize such a general provision. For this reason, criminalization of this particular provision is not recommended. In Australia, pecuniary penalties may be awarded by a court for a breach. Private actions for damages or other orders may be taken by persons injured by the conduct.

The imposition of pecuniary penalties by the Fiji Commerce Commission is suggested in relation to a number of the provisions. These are not discussed individually, unless other issues also arise. The issue of whether the Fiji Commerce Commission should be able to impose pecuniary penalties for a breach should be the subject of further detailed consideration. There may be advantages in the lower burden of proof making breaches easier to prove.

False or misleading representations. The scheme of having criminal contraventions mirrors the previous Australian provisions. The criminal misrepresentation provisions are now in a different form for reasons relating to the structure of the Crimes Act, which would not be relevant in Fiji. All of the cases mentioned are Australian cases.

False or misleading representations in relation to land. A similar provision about land was inserted into the Australian law to counter arguments that land was not a good or a service under the definitions that existed at the time, and which are the same in the Ordinance. It does not extend to the areas suggested in the Fiji report, although it is noted that there have apparently been many complaints in this area.

Misleading conduct to which the Paris Convention for the Protection of Industrial Property applies. This provision is identical to an Australian provision that was included to broaden the reach of provisions on misleading conduct and misrepresentation, relying on an

international convention that would allow the provision to be aimed at persons and not just corporations, which was a major constitutional limitation. For this reason, it seems doubtful that it is at all necessary in the Ordinance.

Cash price to be stated. The rationale for this provision is unclear following the explanation in the comment. However, as more products are removed from price regulation, this may be more useful. Further consideration is suggested.

Certain misleading conduct in relation to goods and/or services. This provision on goods appears similar to section 80 and it is unclear why both provisions are necessary. "Liable" has a similar meaning to "likely", and there is no test for this in relation to other provisions.

Door-to-door sales. Further consideration should be given to the issues raised in relation to these provisions (division 4 of the Ordinance). The Australian provisions on door-to-door sales have been amended, and consideration should be given to these for the purposes of information.

Other suggested amendments. Some of the other suggested amendments that are not discussed individually appear reasonable but others are unclear or lack sufficient support. It is unclear how the recommendations on arbitration would work if implemented in relation to some of the provisions. These suggestions need further consideration.

Conditions and warranties in consumer transactions. In relation to these provisions, reference should be made to the comments for Papua New Guinea.

Information. The power to obtain information under the Ordinance is broad (section 119). It is a power "in relation to any matter relevant to the operation or enforcement of this Decree". There is currently an offence for failure to comply and imprisonment for natural persons. It would be difficult to impose a prison term for a corporation as suggested in the Fiji report. Whether the fine and the imprisonment go hand-in-hand is unclear as suggested. This could be corrected by changing "and" to "and/or".

The suggestions about the use of information in other agencies are complex and should be further considered.

In relation to this part of the Ordinance, there appears to be two sections 121, which should be amended by naming the former section 121A.

The suggestions in relation to renumbering and also compelling attendance for interviews should be adopted.

Enforcement and remedies. The suggestions in relation to supplementation of on-the-spot penalties that already exist under penalties in part 10 should be further explored in the context of setting up a tribunal with appeals to the Court of Appeal as appropriate.

3.3. Individual self-assessment report: Papua New Guinea

The Papua New Guinea report recognizes that the ICCC must operate in the "political, commercial and legal environment of the country" and that proposals for change must be "pragmatic, comprehensive and effective in addressing issues that have arisen and are likely to arise in the future". The report notes the importance of timeliness, the marketplace and Government policy in the Papua New Guinea market.

3.3.1. Substantive provisions

Application. Conduct in Papua New Guinea and also outside Papua New Guinea that has an impact on competition in the country is included. Section 3 states that the ICCC Act binds the State unless otherwise provided. The Papua New Guinea report states that it is important for the commercial activities of the State to be covered, especially in Papua New Guinea where the State has heavy involvement in the economy. This is a particularly important issue and a correct approach.

Section 48 of part VI on competitive market conduct applies part VI to the State to the extent that it engages in trade. The Papua New Guinea report states that this provision applies the part to the State which it "engages in business". For the purposes of Australian law, which has been a significant influence on the wording of the ICCC Act, these two words mean quite different things, as the word trade has significant constitutional implications. Presumably this is not the case in Papua New Guinea. Whether it is better to have an inclusive or exclusive definition of trade should be considered. It is more difficult to include everything in such a large concept than it is to exclude the smaller group of activities that may be left out. For example, sections 2B and 2C of the Australian Competition and Consumer Act note items that should be excluded. While other things may also be omitted depending on the way the definition is drafted, this is a helpful starting point in seeking to define the term in Australia. Of course, the way the concept is defined may also be influenced by other Papua New Guinea decisions on the issue if they exist.

It is essential that the commercial activities of the State be caught by the ICCC Act and that the application should be clear. Further consideration should be given to the best way to do this, whether through an inclusive or exclusive definition of trade.

Statutory exemptions. The comments on statutory exceptions focus on the issue of when conduct is specifically authorized. The report notes that in Australia, which is the model for these provisions, the relevant act or regulation must specifically say that the Competition and Consumer Act does not apply. This is correct and, in Australia, has meant that there is no longer litigation in relation to whether or not particular acts are exempt.

The wording of the exception provision should state that conduct is excepted if it is "specifically authorized by a law" and specifically authorized should be defined to mean that the ICCC Act should be mentioned by name. Other statutory exemptions should be reviewed to determine whether or not they are still appropriate.

Extraterritorial provisions. It is recommended that these be considered in consultation with Papua New Guinea government legal advisors. The nature of the legal opinion foreshadowed on this issue may force reconsideration of an extraterritorial provision for mergers.

Market conduct provisions. As noted in the Papua New Guinea report, "law is about conditioning behaviour, not punishment". The references to "unfair market conduct" are broad, and it would be useful to have a better idea of what is meant by them. Comments on the various suggestions made in the Papua New Guinea report are set out below:

The ICCC Act has market conduct rules that prohibit certain conduct that lessens competition. This includes the standard categories of horizontal, unilateral and merger conduct. The law also prohibits resale price maintenance. Each are discussed in turn following some general information in the following subsections.

Market definition. The definition in section 45 (2) should be amended to cover parts of Papua New Guinea as well as the whole country. The current provision is modelled on the original definition in Australia, which has since been amended to refer to states and regions. This has enabled the Australian Competition and Consumer Commission to take a narrower (and more targeted and realistic) view of a market where appropriate, and has been particularly useful in merger analysis.

Cartel conduct. The amendments suggested in the Papua New Guinea report are as follows:

(a) A change of name for the basic horizontal and/or vertical provision to cartel provisions is appropriate. The provision is in a similar form as that of New Zealand. This would remain a civil provision.
(b) Certain specified conduct would be deemed anticompetitive, as follows: price fixing; market sharing; bid-rigging; output controlling; and primary boycotts.

Contrary to the comments made to a draft version of the self-assessment report, this suggested approach is similar to the Australian approach, prior to the introduction of criminal cartel provisions in 2009, except that the former Australian approach did not specifically list all of the conduct suggested in the Papua New Guinea report as deemed anticompetitive conduct. It only listed price fixing and primary boycotts, which it called exclusionary provisions.

While it has been suggested that the deemed anticompetitive (or hard core) conduct should become criminal provisions, it is difficult to see what this could add in the current Papua New Guinea environment. Australia, a well-established competition jurisdiction, adopted this approach in 2009. There is only one case to date in which the new civil cartel provisions have been considered in full, and no cases involving criminal liability. The criminal standard is difficult to satisfy in court. The dual process (civil and criminal liability) is subject to a high level of procedural complexity, involving issues such as the relationship between the Australian Competition and Consumer Commission and criminal prosecutor, the Commonwealth Department of Public Prosecutions, and complexity with information gathering and use of evidence in the parallel civil and criminal systems. Coupled with the

higher standard of proof for criminal cartels, it is questionable whether the procedural intricacies would make a criminal cartel system worthwhile in Papua New Guinea. Before embarking on the introduction of criminal cartel provisions, Papua New Guinea should carefully quantify the perceived advantages and weigh them against the disadvantages. A lot of time and effort are required to create a workable system.

Joint venture pricing. The joint venture pricing provisions mirror the former Australian provisions which worked reasonably well. Another method would be to reverse the onus so that the joint ventures have the burden of showing that the pricing does not have an anticompetitive purpose or effect. The introduction of authorization or notification creates additional administrative burdens of time and expense for business in circumstances where many joint ventures are pro-competitive.

Recommended pricing. Recommended pricing may assist small businesses with pricing decisions. While it can hide anticompetitive conduct, it is also often easier to prove that pricing has been agreed where there is a recommended price. Unless there is a compelling reason to remove it, it should be retained.

Covenants. These provisions are based on the Australian provisions, which have rarely been used in the last 40 years. There are proposals to remove them in Australia. They should be deleted as suggested.

In summary, the changes to the substance of the ICCC Act should be made as suggested, subject to comments on primary boycotts, joint venture pricing, recommended pricing and joint buying and promotion. It is recommended that the provisions remain civil in nature only at this stage. The ICCC Act should not increase the ICCC workload at this stage unless absolutely necessary, given its already large workload.

Provisions covering secondary boycotts should not be enacted at this stage but the position should be reviewed if circumstances change.

Resale price maintenance. The provisions on resale price maintenance are modelled on the Australian provisions.

These have been relatively unchanged since their introduction 40 years previously. If the provisions may be simplified, it would be productive, but there are currently no suggestions to indicate the approach. It is important, however, to emphasize the importance of the concept of a specified price in the Australian approach. These provisions do not work without this concept. In Australia, there is an additional definition, which does not appear to be part of the ICCC Act. Under section 4 of the Australian Competition and Consumer Act, price means “a cost or charge of any description”. Coupled with the existing section 59 (3), this would mean that the determination of price specified would be flexible. The definition of price in the ICCC Act should be amended to give it the broader focus of the Australian Competition and Consumer Act. If there is a need to delete the concept of specified price, the entire provision should be redrafted.

Another important current issue in relation to resale price maintenance is whether it should be per se or subject to a competition test. Economic views on the impact of resale price maintenance have shifted over the last few years, with the recognition that it is not always a bad thing. The Supreme Court of the United States, in a close split decision, recently determined that it should be assessed under a rule of reason. This has difficulties for certainty, in that each instance of resale price maintenance needs to be tested on its own merits. The Harper Review in Australia does not propose at this stage to change resale price maintenance from a per se provision to one that has a competition test. However, in Australia, the Competition and Consumer Act allows authorization. This may be sufficient to allow for efficiency, enhancing resale price maintenance. It has been a little used option for quite some time. This option should be further considered in the Papua New Guinea context.

Unilateral conduct: Taking advantage of market power. Provisions aimed at the misuse of market power are always problematic since it is difficult to identify particular conduct in advance. It is also particularly difficult to draw a "bright line" between the highly competitive market conduct that competition law seeks to encourage and the anticompetitive misuse of market power. This Papua New Guinea provision is modelled on part of the current Australian provisions on this issue. It was the original provision, but piecemeal amendments that have never been used have been made in Australia. The amendments have made many aspects of the provision unclear. While there are a substantial number of decided cases on the original, and hence the Papua New Guinea provision, the operation of the Australian provision has been difficult and contentious. It is the subject of detailed consideration in the Harper Review. With regard to the suggested amendments, the following may be noted:

- The change of name would be appropriate.
- The Australian position is not described accurately. The provision has always been aimed at competition and not competitors, although if competitors who compete effectively are damaged then competition is also damaged. There are a number of cases, including in the High Court, which make this point clearly. The impact on competitors may therefore be relevant if the overall effect is to damage competition. If the provision was focused on competitors outside this framework, it would mean that the provision could be used to protect inefficient competitors, which would not be efficiency enhancing for the market. While not all competitors will be protected, the provision will apply where effective competitors are damaged by a misuse of market power.
- As market power is key to the operation of the provision, the reversal of the onus on the question of market power is not recommended. In Australia, this has been considered and rejected, to date. Competition law is aimed at fostering competitive conduct. To reverse the onus would certainly chill vigorous competition by large but efficient competitors. Even if they were ultimately cleared of any breach of the provision, time and expense would have a chilling effect.
- A change to dominance would not resolve the majority of issues raised in the Papua New Guinea report. The substantial degree of market power standard was used in Australia as the nature of the political economy meant a propensity for industries to be

characterized by oligopolies. No player in an oligopoly market is likely to be dominant and the test was therefore lowered to substantial degree of market power. The test should not be changed.

- The list of specific prohibitions suggested is too broad. Some of the conduct may be efficiency enhancing and should not be prohibited generally. If the provision is made subject to a competition test, which is part of current debate in Australia, this list may be more acceptable.
- The test in relation to intellectual property should be retained. If there is little intellectual property to protect in Papua New Guinea it will have little impact at this stage, but will be there if needed.
- Unfair conduct is not part of the misuse of market power. If the Papua New Guinea Fairness of Transactions Act of 1993 covers unfair conduct and a prohibition is required, it is better placed in a statute that is not based on economic considerations.

The provision on taking advantage of market power should be reviewed for possible amendments, and the nature of these amendments should be considered holistically following consideration of the Harper Review in Australia. It is not necessarily assumed that what is good for Australia is appropriate for Papua New Guinea, but the outcome and discussion in the final report of the Harper Review should provide further information to assist in a decision on this provision. The threshold test of substantial degree of market power should not be changed to one of dominance. The statutory exemption in section 58 (3) for intellectual property should remain.

Mergers. Acquisitions of shares or assets are prohibited if they would have or are likely to have the effect of substantially lessening competition in a market in Papua New Guinea.

There is no compulsory notification of mergers over a particular turnover threshold under the ICCC Act. Rather, individuals may seek clearance from the ICCC if they believe there is a risk that a proposed merger may have the likely effect of substantially lessening competition in the market or that the ICCC may assess the impact of the merger as such. Authorization may be sought if a merger is likely to substantially lessen competition but is likely to result in such a benefit to the public that it should be allowed. The ICCC may accept undertakings to allow a merger to proceed. If no clearance or authorization is sought and a merger goes ahead, the ICCC may take action against the parties in court for breach of the merger provisions. This occurred, for example, in November 2011, in relation to the merger of Steamships Trading Company, which acquired a controlling interest in Consort Express Lines through its subsidiary company Papua New Guinea Mainport Liner Services Limited.[12] The two parties were involved in coastal shipping and stevedoring services, and Steamships Trading Company increased its stake in Consort Express Lines to more than 50 per cent. The

[12] B Manoka, 2015, Papua New Guinea: Independent Consumer and Competition Commission, *The Asia-Pacific Antitrust Review*, available at http://globalcompetitionreview.com/reviews/69/sections/235/chapters/2760/papua-new-guinea-independent-consumer-competition-commission/.

court heard an application by Steamships Trading Company to dismiss the case on procedural grounds in August 2012, and the judgement on this issue is still pending.[13]

Clearance and authorization were considered more recently in a merger involving port facilities and services.[14] In this case, the ICCC refused clearance on the basis that the merger would be likely to substantially lessen competition in a number of markets, but granted authorization on the basis of public benefit.[15]

The lack of mandatory pre-merger notification and clearance (i.e. over a particular turnover) is noted in the Papua New Guinea report as an issue. There are two sides to this argument. The voluntary notification system has been used in Australia and New Zealand for many years and works well in both countries. In Papua New Guinea this may mean that parties do not notify. The ICCC may then take action against them. Alternatively, notification could become compulsory over a set turnover threshold. This may encourage parties to notify but it would also mean that many mergers would be notified where there is no likelihood of an anticompetitive impact. Compulsory notification involves time and resources on the part of the applicants which is wasted if there is no real risk. It also involves effort on the part of the ICCC. The ICCC should consider whether it would prefer to expend resources on publicizing the obligation to notify in cases of risk or use the resources to review a range of mergers that have no real risk. Arguably, in such a small jurisdiction, mergers with an anticompetitive impact are unlikely to go unnoticed or unreported, which suggests that the status quo should remain. Informal clearance as in Australia is not favoured in the Papua New Guinea report, but in any event this would only work where there is no compulsory notification.

Another suggestion is that there should be a single joint process of formal clearance and authorization to speed up the process, as there is in New Zealand. This should be considered.

There should be no special provision to catch off-shore mergers having an impact on Papua New Guinea. The effects test may catch most of these. Australia enacted its off-shore merger provision almost 30 years previously, when it was thought that the court might take a narrow view of jurisdiction. The court took a broad view, and the provision has never been used. Clearly, the need for this provision depends on the likely court view.

Other issues with regard to market conduct provisions are as follows:

- Section 46 of the ICCC Act requires the specific consideration of efficiency when considering whether conduct has a public benefit in relation to conduct referred to under part VI. It seems sensible to ensure that other types of public benefit are considered in all cases.
- The Papua New Guinea report suggests that provisions on the restraint of trade and a breach of confidence should be removed. These provisions mirror current Australian provisions. The provision on the restraint of trade is linked to provisions on the

[13] Ibid.
[14] The parties were Papua New Guinea, Independent Public Business Corporation Limited and Papua New Guinea Ports Corporation (acquirers) and Curtain Brothers Papua New Guinea Limited (vendor).
[15] B Manoka, 2015.

restraint of trade in the exceptions (section 66 (1) (b) and (c)), and the implications of amending one or the other need to be considered together. Retaining the provision on a breach of confidence means that it may be considered on its merits, rather than having a breach of confidence raised as an issue in competition law cases to complicate matters.

Authorization. The ICCC Act contains detailed provisions on authorization. This is a process of administrative permission granted for conduct that would otherwise be in breach of the ICCC Act but may be justified on the grounds that public benefit arising from the conduct outweighs the anticompetitive detriment arising from it. Authorization is available for all types of prohibited market conduct. This process is transparent. An authorization may be revoked or varied only after giving an applicant the opportunity to be heard by the ICCC on the issue prior to further action.

The Papua New Guinea report notes that authorization is not favoured by some in the competition law fraternity, yet it has operated effectively in Australia for more than 40 years. The rationale behind authorization is that there are areas of market discontinuity where competition does not provide the best outcomes for consumers. In this limited range of situations, authorization works well. In 1993, the Hilmer Report on the national competition policy review affirmed that the provisions of the competition law should apply to all (see http://www.australiancompetitionlaw.org/reports/1993hilmer.html). It also affirmed authorization as a process that was appropriate in a small number of situations where individual approval could be given on the basis of public benefit after thorough and transparent consideration. There is no reason why this general approach should not be successful in Papua New Guinea, particularly given the current nature of its economy. While it has apparently been suggested that the authorization process is "interventionist", it is transparent and should be appealable, which is far more desirable than, for example, a system of discretionary "letters of comfort".

Notification in Australia is a simpler process for seeking approval but available for a limited range of conduct. The notification process is not recommended generally, as it would impose a further regulatory burden on the ICCC. The notification process for collective bargaining by small business has, however, proven useful in Australia and is worth considering. As to particular suggestions in the Papua New Guinea report, the following comments are made:

- Interim authorization. This is a flexible mechanism that has rarely been used in Australia but may be useful from time to time. It should be implemented if a need is shown.
- Forms. Prescribed forms are useful tools that give applicants a strong indication of the information requirements for seeking authorization. There needs to be a good reason why they may not be necessary.
- Public register. This is an important issue related to transparency and accountability in the authorization process. Provisions should be implemented covering a public register, along with rules about business confidentiality for parts of applications, etc.

Applicants should be given the opportunity to withdraw material if a claim for confidentiality is rejected.

- The ICCC should expressly be given the power to impose conditions on authorization.
- Clearance. This should be timely but workable for the ICCC and applicants. Twenty (non-business) days seems to be a short time frame for, for example, a complex merger clearance, as does 72 days for a merger authorization.
- There is no reason in principle why the ICCC should not be both the enforcer and decision maker on authorization. This has occurred in Australia and New Zealand where the Competition and Consumer Commission and the Commerce Commission, respectively, have adjudicated authorization for many years with good results.
- There should be an appeal process, from authorization to a tribunal, separate from the ICCC. Detailed consideration should be given to the nature of the appropriate test to be employed on appeal in the tribunal (Australia and New Zealand have different approaches) and the role of the ICCC in the process should be set out in legislation.
- Fees. The ICCC should be able to set fees for certain of its services such as authorization and retain these fees for use by the agency.

Codes of conduct. The Papua New Guinea report suggests the introduction of enforceable codes of conduct to "allow effective industry self-regulation with ICCC oversight and enforcement, allows flexible and cost effective co-regulation". Industries suggested at the outset are real estate and building services. Services in these two industries are essential to the functioning of communities and for this reason the suggestion is a good one. Industry codes of conduct bring parties together to work through issues of difficulty and reach conclusions that in theory work for both sides. Codes in these two industries would assist consumers on a general level and allow both sides to understand their obligations in a more detailed way, with an industry-specific focus. The codes would presumably be developed by the ICCC after consultation with industry and their customers or consumers. Regular review of codes is essential to ensure that they are still of benefit to business and consumers.

Consumer protection. General consumer protection problems identified in the Papua New Guinea report range from poor service standards by State-owned enterprises, public transport and taxis, high prices for fuel, poor product labelling, misleading commercial advertisements, housing and real estate service standards and scams such pyramid selling. Current provisions dealing with consumer protection are limited to those related to consumer product safety (sections 103–121 of the ICCC Act).

The Papua New Guinea report emphasizes that competition and consumer laws should continue to be administered by the one regulator. The report also calls for a broader range of consumer issues to be covered in the ICCC Act. There are a number of countries in which one regulator covers both areas, such as Australia and New Zealand. The United Kingdom has recently moved to this model. The reasons enunciated in the Papua New Guinea report are clear. In countries such as Australia, the basic rationale has always been that both aspects of regulation are aimed at ensuring a level playing field for competition, and it is therefore appropriate that the same regulator deals with both. In Australia, both areas are regulated under the Australian Competition and Consumer Act and the Australian Competition and

Consumer Commission deals with both (although there are state consumer law regulators). In New Zealand, the Commerce Commission is the regulator, but the consumer law is generally contained in the Fair Trading Act, not the Commerce Act.

The Papua New Guinea report identifies gaps in the current consumer protection provisions, which are discussed in the following subsections.

Misleading or deceptive conduct law. The Papua New Guinea report notes that it does not suggest the adoption of the gamut of consumer legislation that exists in more developed countries but states that there is a case for basic consumer protection laws and administration to cover unfair conduct aimed at consumers and to some extent small businesses. As a general proposition, this approach to consumer protection for Papua New Guinea sounds eminently sensible.

The Papua New Guinea report suggests a general provision on misleading or deceptive conduct, which could be accessed by both consumers and business. This would be a simple yet comprehensive way of tackling a range of problems in circumstances where one would not want to overcomplicate the law. Such a provision exists in both the Australian Competition and Consumer Act and the New Zealand Fair Trading Act and has proved extremely flexible and effective when enforced by the regulator or used by consumers and business. The Papua New Guinea report suggests wording that appears suitable, but which should be considered further. One particular issue is that "deceptive" has generally been judged to a higher standard by courts, and it may be that the use of the two words in the alternative, as used in the laws in Australia and New Zealand, would be a better approach to the wording of the provision. This is the approach taken in Fiji.

The use of the phrase "unfair or likely to be unfair" as part of this provision, however, creates a greater issue. The term "unfair" is subjective, and it is suggested that the wording should contain some factors that might assist decision makers in deciding whether conduct falls under the provision. Whether such a provision would be useful or would create additional uncertainty should be carefully considered.

Unfair conduct law. In the Australian and New Zealand contexts, the types of additional specific prohibited conduct listed in the Papua New Guinea report are viewed as types of general unfair conduct. Each is prohibited in Australia, which has recently amended its consumer laws. Reference should be made to these new laws as a starting point in drafting legislation for these issues, as they contain updated and more understandable wording to address these areas, which are assumed would be helpful in a new jurisdiction such as Papua New Guinea. Once again, it should be emphasized that the reference to Australian law does not assume that Papua New Guinea will wish to enact identical provisions. Rather, there may be information available that will assist Papua New Guinea in making decisions.

The one area which would not be recommended for incorporation is that of third line forcing. In simple terms, this is the bundling of the goods or services of one party with those of another unrelated party. This area has been extremely problematic in Australia, where the approach has been to prohibit it absolutely (make it per se), but then to quite illogically allow

it by way of notification on public benefit grounds. Third line forcing was originally categorized in Australia as per se since, at the time, it was assumed that such conduct is almost always anticompetitive. The background to this view is that, at the time, it was founded in behaviour such as kick-backs and commissions between two suppliers and resulted in a lessening of choice for consumers. General developments in economic thinking about vertical restrictions, and examples in practice that actually benefited consumers, have forced a change of views internationally. The treatment as per se and the ability to notify on public benefit grounds in Australia has, however, resulted in an enormous number of notifications to the Australian Competition and Consumer Commission annually arguing public benefit, with most being allowed, which undermines the argument that the conduct is almost always detrimental to consumers. This adjudication has taken up considerable time and resources in the Australian Competition and Consumer Commission and has exposed business to time and expenses when the outcome is that most conduct is allowed anyway.

Few other jurisdictions prohibit third line forcing absolutely. Most subject it to some type of effects test. A number of formal inquiries into competition law in Australia have recommended that third line forcing be subject to a competition (effects) test in recognition of the efficiencies and benefits that might accrue to consumers depending on the circumstances. A competition test places the onus on the regulator and/or individual third parties to show that it is harmful rather than to assume that it is so. To date, the provision has not been amended in Australia due to strong lobbying by some consumer groups, but is likely to be amended following the Harper Review. On the basis of this evidence, it is difficult to recommend that the conduct be prohibited absolutely. The recommendation is that third line forcing should be dealt with in the competition provisions and be subject to a competition test.

Consumer warranties and guarantees. The consumer warranties and guarantees suggested in the Papua New Guinea report are similar to the former Australian provisions, that is, the consumer warranties and guarantees and manufacturers' liability provisions that existed in the Trade Practices Act (part V, divisions 2 and 2A).

In 2011, following formal consideration of the issue, Australia adopted a system of statutory consumer guarantees similar to those existing in New Zealand. These apply to consumer contracts. They contain more modern and understandable wording to assist consumers, retailers and manufacturers and importers to know their rights and obligations, although in the main they cover similar obligations to the earlier law. The provisions create statutory consumer guarantee rights where previously rights had merely been implied in contracts. The statutory consumer guarantees dispense with problems with privity of contract, which regularly occurred under the old regime, which was enforced by the parties to the contract in court. They also provide a system that eliminates a blame game between retailers and manufacturers, each of which formerly regularly argued that the other was liable when a consumer tried to make a claim. Product liability is also covered in the new system. There are also simpler statutory remedies that are well defined, whereas previously the remedies were in contract and more uncertain.

Whether the suggestions of the Papua New Guinea report are adopted or the newer Australian version is selected, the issue of who is a consumer needs to be determined for Papua New Guinea. In Australia the previous definition of consumer continues (goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption, or goods or services of any kind valued at less than $40,000 and not to be used up in business, etc.). This has worked well.

For this reason, it is recommended that reference be made to the Statutory Consumer Guarantees in developing the Papua New Guinea approach, which should provide a more reliable system for consumers in Papua New Guinea. Once again, the Australian experience is noted to ensure that all options for an effective system, including reports, etc., may be considered before a decision is made for Papua New Guinea.

Relationship with sale of goods law. There are good reasons to keep the sale of goods law, as these provisions still have a role in business-to-business transactions outside the statutory consumer guarantees. They may still be excluded by negotiation between parties.

Other product liability amendments. The suggested amendments to existing product liability provisions seem sensible.

Enforcement: Market conduct rules. The enforcement provisions of the ICCC Act provide for court enforcement and contain civil pecuniary penalties (up to K 500,000 for an individual and up to K 10,000,000 for a body corporate) by a court on a civil standard of proof for breaches of market conduct rules and the merger law (sections 87 and 89). (Criminal offences exist in relation to the other parts of the ICCC Act in part IX, division 2.) Different factors apply to the calculation of penalties by the court (section 87 (2) and section 95 (2)). Directors, employees and agents are prohibited from the benefit of indemnities for breaches of sections 50–67 but not section 69 (section 88). The Commission, under a transparent process, may apply for an order that those involved in contraventions in relation to sections 50–67 may be excluded from management of a body corporate and it is an offence to breach such an order (sections 90 and 91).

The ICCC may seek injunctions restraining conduct in contravention of sections 50–67 of the ICCC Act (section 93). Injunctions in relation to mergers (section 69) may impose additional conditions on the continued carrying on of the business (section 96). Various types of injunctions may be made (section 99).

Actions for damages exist for damage caused by contravention of these provisions within three years of the contravention (sections 94 and 97). Divestitures exist with respect to merger contraventions (section 98). Provision exists for other orders (section 101) and the attribution of conduct by employees or agents of a body corporate to that body corporate (section 102).

In addition to these detailed provisions, the Papua New Guinea report seeks a number of other remedies generally.

Enforcement: Consumer protection. The Papua New Guinea report suggests that all provisions should be enforced as civil prohibitions or criminal prohibitions but that the criminal provisions "should only be used in the case of blatant breaches and the need to say imprison".

A range of suggested remedies and relief is listed. All look sensible and consideration should be given to the range of options available and how they address particular recurring consumer issues. In particular, consideration should be given to the provisions in the laws in Australia and New Zealand, with particular reference to those that are often used and might be effective in addressing issues in Papua New Guinea.

Substantial fines imposed on wrongdoers are a substantial deterrent. Criminal sanctions are not available in relation to the general misleading conduct provision in Australia, which is proposed for the amendments and has proven the most useful weapon for eliminating conduct impacting consumers and others in the marketplace. The range of remedies and relief should be considered fully in the context of what the additional sanctions seek to achieve and balance that with the impact of additional work and burden-of-proof issues facing the ICCC in court.

3.3.2. General powers of the Commission

Currently, the ICCC takes action in court for contraventions of the ICCC Act. The Papua New Guinea report recognizes that other country models use courts, but states that this does not work well in Papua New Guinea and that "Papua New Guinea needs its own compliance model". The report suggests that the ICCC should be given a wide range of powers and that "the courts are the last resort, if at all."

The Papua New Guinea report sensibly suggests that compliance rather than legal action is important at this point in the development of the law and makes a number of suggestions to allow the ICCC to issue various notices rather than take matters to court. With respect to the proposed compliance notices, for example, the report states that it is "simply not feasible in Papua New Guinea to seek court interlocutory injunctions. It would take too long, the skills are not there and the courts are not yet able to consider such issues. A simple request to cease conduct does not work in Papua New Guinea, especially with State-owned enterprises".

Various provisions are thus suggested as general powers of the ICCC (i.e. applying to all investigations and enforcement), as follows:

- Substantiation notices. The suggestion of substantiation notices in relation to claims and representations is useful in relation to claims by advertisers, where a person is given 30 days to comply, after which failure to substantiate would be an offence.
- Compliance notices. A compliance notice would be issued to a person involved in an ongoing breach of the ICCC Act, demanding that the breach cease. The notice would be valid for 60 days and appealable to the court. The notice would be prima facie evidence of a breach, putting the onus on the recipient to show that the ICCC Act has not been breached. This would enable the ICCC to move swiftly to order an

undertaking to comply with the law. The Papua New Guinea report suggests that the ICCC should be cautious and not abuse this power. In this context, it would be appropriate to add the word "reasonable" before "opinion" in the draft. Liability for negligence on the part of the issuer would remain.

- Public warning notices. Such notices would be issued if the ICCC had reasonable grounds to suspect that conduct might constitute a contravention and if it was in the public interest. Liability for negligence on the part of the issuer would remain.
- Advisory notices in relation to consumer information. Such notices would allow the ICCC to comment on the sufficiency of consumer information, and non-compliance would be an offence.
- Guidelines. It is somewhat unclear what guidelines in relation to the administration of the Division would do, for instance whether they would cover the meaning of the laws or the way in which the ICCC is likely to interpret and enforce them. This should be clarified, as the ICCC may not wish to be constrained in all situations, and should be able to amend the guidelines immediately following a differing court decision.
- Enforceable undertakings. The ability to negotiate and accept such undertakings significantly enhances the ability of a regulator to deal flexibly with a range of issues. It creates flexibility particularly in a merger transaction, but also allows cases in other areas to be settled in appropriate situations without the time and costs involved in taking a matter to court. Publicity for such settlements is still available and may act as a deterrent for others. The ICCC will need to exercise judgement about which matters to settle in this way and which to pursue through the courts to ensure that there are sufficient cases to deter further breaches and also to obtain guidance from the courts. The balance between settlement and litigation is always a difficult one for a regulator. It is recommended that a provision covering all prohibitions be included in the ICCC Act. As this part concerns general powers, the provision is probably in the correct place.
- Commission to seek compensation. It is recommended that this be a general power in the ICCC to seek compensation for breaches of the ICCC Act.

Immunity policy. It is recommended that consideration be given to an immunity policy for cartel conduct, as suggested in the Papua New Guinea report. The approach to be taken will depend on the final form of the relevant provisions.

Lik Lik Court. Access to justice, particularly in consumer matters, is difficult in many jurisdictions. The ICCC cannot handle all consumer disputes throughout the country. A local system of resolving complaints is essential, and it is recommended that this option be given serious consideration.

ICCC right of appearance. Agreed, although it is recognized that there are likely to be problems in criminal matters.

Conduct between Papua New Guinea and neighbours. As noted, there are existing provisions between Australia and New Zealand that are rarely utilized and, therefore, this may not be essential.

3.3.3. Functions of the Commission

Various amendments are proposed to the structure and functions of the ICCC, and the Papua New Guinea report notes that the current list of functions "does not envisage a strong bias to compliance". This is certainly true.

The Papua New Guinea report suggests a number of amendments, and comments on these are provided as follows:

- With regard to the composition of the Commission, it seems important that the Commissioner position be full time at this stage and that part-time Associate Commissioners could be appointed for specific skills or matters. Legal qualifications and a small business background seem essential to the effective conduct of the Commission, and at least some of the members should have these qualifications.
- It is unclear why it is important to have the General Manager position formally recognized in the ICCC Act or why the Commissioner would not ordinarily affix a seal where necessary.
- Consideration of whether a Deputy Chair and more members are needed should be made with regard to the workload of individual members. It is impossible to reach conclusions on this issue without further consideration of all issues.
- Cross-membership with other relevant agencies is particularly useful to address areas of common regulatory interest and also to introduce different approaches into developing organizations, such as the ICCC. However, workload implications should be considered.
- With regard to the age limit, 70 is probably too young in the current climate, and it is suggested that 75 might be more appropriate, with five-year terms, as current. Whether it is sensible to limit members to one term is debatable. One does not want to see a body of entrenched members continually re-appointed, yet five years is a relatively short time to acclimatize to the role and make a substantial contribution. It may mean that members are reaching their most useful time when they are forced to leave. If there needs to be a limit on terms, it is suggested that members only be allowed to serve two consecutive terms.
- The part-time appointment of ICCC members to counterpart agencies abroad should be considered for the same reasons that they should be allowed cross-membership in domestic agencies. However, workload implications should be considered.
- The provision on vacancy should be amended to ensure that the ICCC is best able to continue working productively at all times.
- With regard to meetings of the Commission, various suggestions are made in relation to meeting procedures and control by the Commissioner. These cannot be evaluated without further consideration of the relationship to current and projected workloads and a number of other matters. These provisions should be amended to ensure that the ICCC is best able to continue to work productively at all times.

Information gathering. The Papua New Guinea report states that the ICCC has regularly used its formal investigation powers to obtain documents, to compel businesses to provide

written information and to attend meetings. The ICCC has recently used the power to obtain warrants to enter and gather information from two fuel sites to investigate compliance with pricing rules.

The Papua New Guinea report advocates the widening of the entry and search powers but does not outline in detail the additional powers sought nor state why the existing powers are not sufficient. The existing powers are reasonably broad. The Commission's powers appear broader in some respects than, for example, the powers in the Australian Competition and Consumer Act. These powers require the Chair or Deputy Chair of the Australian Competition and Consumer Commission to have the "reasonable belief" that a person to whom a notice is directed has information "relating to a contravention". This appears to be a higher threshold than that in the ICCC Act that the "Commission or an officer authorized in writing" may summon a person, etc. "where the Commission reasonably believes it is necessary or desirable to do so for or in connection with the performance of the Commission's functions". The phrase "performance of the Commission's functions" clearly has a broader ambit beyond relevance to a contravention.

Substantial powers in relation to entry and search already exist in section 129 and stronger arguments would be required to convince at this point that broader powers are required. This could be shown by examples of individual circumstances or general cases that a broader power would have assisted. The conclusion is that further evidence of real need is required before the entry and search powers of the ICCC should be expanded.

Access to information by third parties. It has already been recommended that material (except for that marked confidential) should be placed on a public register for authorization. A confidentiality claim by an applicant does not, however, necessarily determine a claim for confidentiality in Australia. Applicants routinely seek to have large portions of their applications redacted as confidential. Where the Australian Competition and Consumer Commission believes that this is overreach, it informs the applicant that it is not prepared to agree with confidentiality in relation to particular information. The applicant then has the opportunity to withdraw that part of the information. This is necessary since applicants generally wish to maintain confidentiality for things which are already in the public domain or are essential to the outcome of the application and are essential for transparency. This approach should be adopted in relation to both the authorization provisions and section 131, on the basis that unless the ICCC agrees to confidentiality, the applicant has the opportunity to withdraw that part of the information or to redraw the application.

Head office. There is perhaps no need to specify the location of regional offices to allow for flexibility in deployment, as it is unclear what purpose it would serve.

Protection of staff. Agreed.

Protection of witnesses or informants. This suggestion is not well defined, and it is unclear what protection is envisaged.

Special remedies. The Papua New Guinea report suggests that the ICCC should be given the power to recommend changes to other Papua New Guinea laws and policies that might overcome the impact of breaches of the ICCC Act, i.e. lower tariff barriers or issuing of more licences. This is an example of the ICCC advising Government where existing rules create barriers to competition. It would also be useful if the ICCC were given a similar general power to make recommendations to Government on the impact on competition of proposed laws and regulations. The anticompetitive impact of Government conduct on markets may be advertent or inadvertent, but is regularly substantial. A power to make recommendations to Government is extremely useful as legislators seeking to achieve laudable outcomes at times use methods that are quite anticompetitive in circumstances where there are other less anticompetitive ways of achieving the same end. Regulators in a number of jurisdictions have the powers suggested in the Papua New Guinea report.

The issue then becomes how best to ensure that these recommendations are viewed widely throughout Government and administrative agencies. The right to make submissions to other agencies appears sensible, and some mechanism to present the recommendations to Parliament at the time of introducing a bill should be considered.

The issue of State aids is much broader and requires detailed consideration, and the ICCC may not be best placed to deal with this issue.

Repeals. While it is agreed that the Commercial Advertisement (Protection of the Public) Act should be repealed, this report does not recommend repeal of the Sale of Goods Act for reasons set out herein.

Pricing provisions (Papua New Guinea regulated entities). The ICCC Act contains provisions on pricing that set up a scheme of regulated entities, goods and services and provisions dealing with a process of regulatory contracts. These provisions may apply to State-owned enterprises and others. The processes set out are transparent and appealable. Currently ports, electricity, harbours, the post and third-party motor vehicle insurance are regulated under these provisions.

In addition, the Prices Regulation Act provides for the pricing or monitoring of goods or services. Prices for water and sewerage, public motor vehicles and taxis and wholesale, retail and drum-filling margins for petrol, diesel and kerosene are set annually by the ICCC. Prices for sugar, jet A1 fuel, aviation gasoline and imports and exports of petrol diesel and kerosene, as well as import parity prices for petrol, diesel and kerosene are monitored monthly. Other staples such as rice, flour and stevedoring services are monitored monthly. The process for fixing these prices is transparent and based on legislated considerations, and interested parties are formally consulted. The Minister may review price control orders. It is an offence to countermand these orders.

The Papua New Guinea report notes the reluctance of some established jurisdictions to accept the appropriateness of price control. The report notes that competition in small economies such as Papua New Guinea “is often a myth and the need is more to curb monopoly power and to facilitate market entry”. Clearly in a small, fragmented, developing economy with

many relatively isolated pockets like Papua New Guinea there are special problems in relation to pricing essential products that would never manifest in a larger, more accessible or developed economy. Misuse of market power and exploitation in pricing of essential items are real risks in Papua New Guinea given the small overall market size and the other factors noted. The likelihood of meaningful market entry and competition for sales is fairly remote for some products and services, even if prices of these essential items rise. A number of the regulated services are natural monopolies and these are subject to some price or access regulation in other jurisdictions. Price control may be the best mechanism in some Papua New Guinea markets at this stage. However, the ICCC should ensure that it limits the application of price control to a small range of goods and services, regularly reviews the need for it and seeks out opportunities to attract additional competitors into any of these markets that could potentially be deregulated. Growing consumer sophistication about some of these products may open up markets.

Printed at United Nations, Geneva – 1511012 **(E)** – June 2015 – 1,124 – **UNCTAD/DITC/CLP/2015/2**