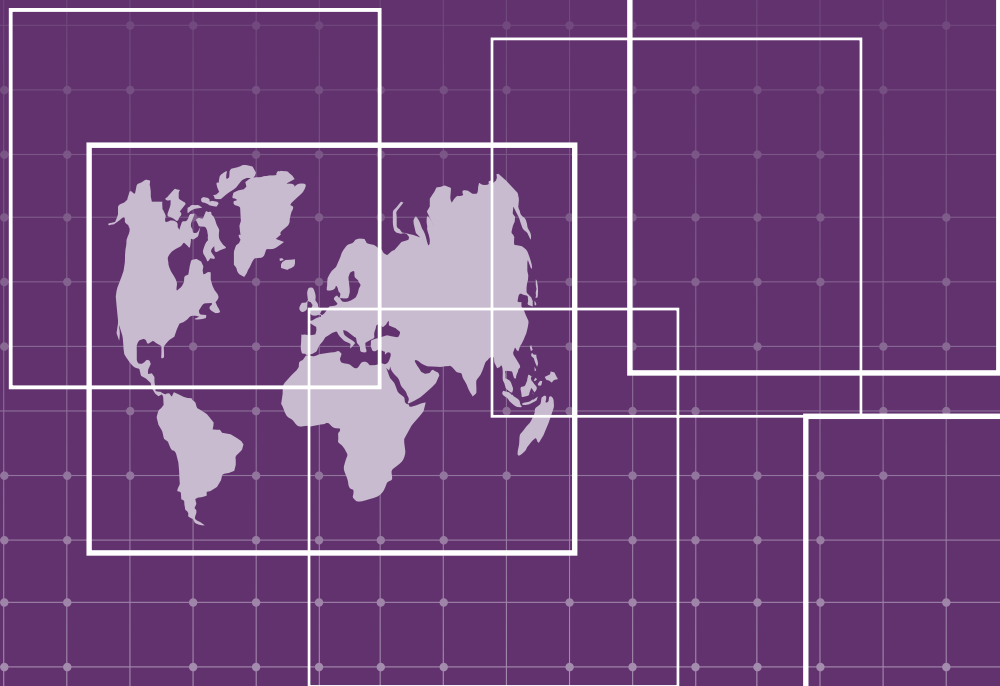




BIPARTITE VOLUNTARY PEER REVIEW  
OF COMPETITION LAW AND POLICY:

**FIJI AND PAPUA NEW GUINEA**

National Self-Assessment Reports



UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

**BIPARTITE VOLUNTARY PEER REVIEW OF  
COMPETITION LAW AND POLICY:  
FIJI AND PAPUA NEW GUINEA**

National Self-Assessment Reports



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# **FIJI**

## **SELF ASSESSMENT REPORT**

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## **1. Introduction**

Competition is one of the key principles of the Fijian economic strategy. Market competition spurs firms to be more efficient, innovative, and responsive to consumer needs. Consumers enjoy more choices, lower prices, and better products and services. The economy as a whole benefits from greater productivity gains and more efficient resource allocations.

Competition framework was established in 1992, with the establishment of the Fair Trading Decree. The Decree set up the unfair trade practices and restrictive trade practices in one law. The Decree formed the Department of Fair Trading and Consumer Affairs and the officers were responsible for enforcement of both unfair trade practices and restrictive trade practices.

In 1998 Fiji moved to having a separate competition law by the enactment of the Commerce Act, which also formed the Commerce Commission. However, in 1999 the Commission was dissolved to be later re-established in 2001 and has been in operation since then. In 2010, the Fijian Government via the Cabinet decision agreed to merge three institutions, namely the Prices and Incomes Board (“PIB”), the Department of Fair Trading and Consumer Affairs (“DFTCA”) and the Commerce Commission. With the merger of the three institutions, the decision was also made to merge the three legislations, namely the Commerce Act 1998, the Counter Inflation Act and the Fair Trading Decree 1992. The main reason for the decision was to merge the three functions of unfair trade practices, restrictive trade practices and pricing.

The plan was finalized and on 1 July 2010, the merged entity, Fiji Commerce Commission (FCC) was established under the merged legislation, Commerce Commission Decree 2010 (“CCD2010”). Today, FCC, established under Section 7 of the Commerce Commission Decree 2010 is the premier Competition and Consumer Protection Institution in Fiji and plays the role of a multi-sector regulator.

Fiji, like many other developing countries has its own share of obstacles in the implementation of the Consumer Protection and Competition laws. These problems include, but are not limited to, a lack of competition culture, high dependence on State regulation rather than self-regulations, and conflict between consumer protection and competition law.

The FCC since its inception has done a lot in the consumer protection areas, but its involvement in the competition matters has been gradual, greatly contributed to lack of expertise in some of the specialized areas, such as, cartel investigations, bid rigging and so on. This is compounded by non-availability of competition law lawyers and judges in Fiji. However, as the institution matures, greater efforts are being made to identify and arrest the restrictive trade practices.

The report focuses on the legal and institutional framework for competition and consumer protection laws in Fiji. The report evaluates the current legislation, practices and procedures in the enforcement of the consumer protection and competition law in Fiji and identifies the gaps and makes recommendations on how to further strengthen the competition policy, law and institution in Fiji.



## **2. Historical, Political and Economic Context**

### **2.1. Overview**

Fiji is described as middle-income country and one of the more developed of the Pacific island economies, although it remains a developing country with a large subsistence agriculture sector.

Fiji lies at the heart of the South Pacific, and is almost directly north of New Zealand and northeast of Sydney, Australia. Fiji consists of 18,376 square km of land and includes approximately 330 islands of which about 100 are inhabited. The four largest islands, Viti Levu, Vanua Levu, Taveuni and Kadavu are surrounded by coral reefs and have mountains located in the central region of each island, which cover a large portion of the land mass. The largest, most populous island is Viti Levu, followed by Vanua Levu.

83 percent of the land is owned communally by the indigenous Fijians, nine percent by the state and eight percent is freehold land. Only 16 percent of the country's landmass is suitable for intensive agriculture, and these areas are found mainly along coastal plains, river deltas and valleys.

87% of Fiji's 900,000 population inhabit the two major islands, Viti Levu and Vanua Levu. The capital city, Suva, sits on the coastline of Viti Levu. Ethnic Fijians at about 57.3% of the population, followed by Indo-Fijian at an estimated 37.6% predominantly make up the majority of the population. For various reasons the population of Indo-Fijians has declined significantly. Christianity, Hindu, and Muslim constitute the three largest practiced religions in the Republic. Due to the abundance of fish, forest and minerals, Fiji has one of the more developed economies of the Pacific Island realm. Fiji's economy depends heavily on the tourist industry and sugar exports.

### **2.2 Political and Governance System**

The Republic of Fiji is a sovereign and independent nation. In 2013 the Constitution of the Republic of Fiji was assented to by the President of Fiji. The Constitution, recognizes, the common and equal citizenry that gives every Fijian unprecedented rights and opportunities. It recognizes Fiji as the secular state that provides everyone with religious freedom and the right to follow their own beliefs; the guarantee of a truly independent judiciary and our right to freedom of speech and expression. It is the first Constitution that clearly defines the Bill of Rights.

The 2013 Constitution of the Republic of Fiji further recognizes the unprecedented social and economic rights it guarantees; the right to economic participation; the right to proper education and health services and the right to adequate food and water.

The first truly democratic elections were held in September 2014, which brought in by a landslide victory current Government led by the Honourable Rear Admiral (retd.) Voreqe Bainimarama as the Prime Minister.

The enriching history of the Republic of Fiji has made it a very resilient country. Today, Fiji is a modern-nation state, taking a pre-eminent role in the region and strengthening the Fijian voice and presence in the global community at large.

### 2.3. Economic Background

Fiji is an open economy generally classified as a middle income<sup>1</sup> country with a real gross domestic product (RGDP) per capita of FJ\$6,246.2<sup>2</sup>. The Fijian economic development has undergone a series of transformation guided by a adopted a number of policy changes after getting its independence in 1970. The country's industrialisation process between 1970 and 1980 was based on import-substitution, self-sufficiency, and extensive Government involvement in business. From the late 1980s Fiji's economic policy strategy moved towards a market-oriented and export-led growth strategy and adopted policies with emphasis on trade liberalization, deregulation, investment promotion and an increased role for the private sector. These strategies were aimed at improving operational efficiency and lowering cost for both private and public sectors.

As part of the broader development agenda, the Government in 2010 decided to embark on an ambitious approach to develop an overarching dedicated Trade Policy Framework which spells out the Government's long term vision and policy recommendations that will drive and enhance domestic and international trade as well as recognising the private sector as the engine for economic growth and development.

**Table 1: Medium Term Fiscal Targets (\$M)**

	2015 Budget	2016 Target	2017 Target
<b>Revenue:</b>	3,122.4	3,032.9	3,166.6
<i>As a % of GDP</i>	36.0	33.0	32.5
<b>Expenditure:</b>	3,336.3	3,216.7	3,312.8
<i>As a % of GDP</i>	38.5	35.0	34.0
<b>Net Deficit</b>	<b>(213.9)</b>	<b>(183.8)</b>	<b>(146.2)</b>
<i>As a % of GDP</i>	<i>(2.5)</i>	<i>(2.0)</i>	<i>(1.5)</i>
Debt	4,114.1	4,406.2	4,552.3
<i>As a % of GDP</i>	48.3	47.9	46.7
<b>GDP at Market Prices</b>	<b>8,668.8</b>	<b>9,190.5</b>	<b>9,743.4</b>

(Source: Ministry of Finance-Budget 2015)

### 2.4. Situational Analysis and Sector Growth

The structure of the Fijian economy constitutes services (70%), industry (15%) and primary sectors - including agriculture, forestry and fisheries (14%).

Between 1970 and 1999, the Fijian economy was growing at an average rate of 2.4 per cent. However, the average growth fell to 1.1% between 2000 and 2009,

This economic growth decline was partly caused by the spillover effects of the global slowdown, impacts of natural disasters and other structural impediments. The growth was further constrained by external factors such as the reduction in sugar preferential prices and the erosion of tariff margins for textiles and clothing exports.

<sup>1</sup> Based on World Bank classifications

<sup>2</sup> GDP per capita in 2011 calculated on 2008 rebase figures

It is worth noting that the Fijian economy recovered strongly from the economic glooms of the past decade. The economic outlook in the medium term looks very positive. This is mainly attributed to the Government sound macro-economic policies coupled with improvement in the general business environment for private sector growth.

As at 2014, the Fijian economy was experiencing one of the best growth cycles since independence averaging 3% and recorded its 5<sup>th</sup> year of consecutive growth from 2010. The growth of 4.6% in 2013, was the highest experienced by the Fijian economy since 2001. Further, in 2014, the growth rate was 4.2% (provisional) against a forecasted growth rate of 3.8%.<sup>3</sup>

The key indicators supporting growth for 2014<sup>4</sup> include; Government capital expenditure (43.5%), investment lending (11.3%), imports of investment goods (45.6%), new jobs advertised (12.8%), personal remittances (13.0%), visitor arrivals (5.6%) and domestic cement sales (17.6%).

Other contributors to the growth include increase in new commercial bank lending (43.8%), sugar production (25.8%), new vehicle sales (12.3%), new consumption lending (72.8%) and electricity consumption (1.9%).

In terms of the business expectations, the 2012 and 2014 Reserve Bank of Fiji Business Expectation Survey (BES) outlook for general business conditions results suggested an overall improvement in business confidence amongst the major sectors of the economy.

With respect to the sectoral growth 2009-2017, across the entire period, actual and projected growth in the services sector tends to move in parallel with the growth of the economy. On the other hand, growth in the manufacturing sector ran parallel to the overall economy growth rate but at a higher level in 2010 and is generally projected to do so over the time period. The agriculture sector recorded negative growth between 2009 and showed a strong rebound through to 2011, but was followed by a drop associated with flooding in 2012. Despite the drop in, the sector still posted positive growth from 2012 and is expected to remain stable over the time period.

Concerning investment levels, it is worth noting that the Macroeconomic Policy Committee of Fiji predicted that the target of raising investment to 25% of GDP would be achieved starting 2013. In 2013, investment estimates reached 29% of GDP, comprising 13% from the private sector, 10.2% from statutory bodies and public enterprises, and 5% from Government. In 2014, the estimated investment was above 25% of GDP and the forecasted investment in 2015 is also above 25% of GDP. In this regard, Fijian economy is on track on maintaining the investment target of above 25% of GDP for the third consecutive year

### **3. Competition Policy Framework of the Republic of Fiji**

#### **3.1 Objective of the Competition Law**

The objective of the competition law is to promote the efficient functioning of Fijian markets and at the same time enhance the competitiveness of our economy. The law seeks to prohibit anti-competitive activities that unduly prevent, restrict or distort competition. It recognizes that any regulatory intervention in the markets will impose costs. Therefore, there is a need to

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<sup>3</sup> Macroeconomic committee

<sup>4</sup> December 2014

balance the regulatory and business compliance costs against the benefits from effective competition in the markets. Instead of endeavouring to clamp all forms of anti-competitive activities, the principal focus will be on those that have an appreciable adverse effect on competition in the Fijian economy or that do not have any net economic benefit. In assessing whether an action is anti-competitive, it will also give due consideration to whether it promotes innovation, productivity or longer-term economic efficiencies. This strategy will ensure that it does not inadvertently constrain innovative and enterprising endeavours.

### **3.2 Fiji's Competition Policy Framework**

Fiji currently does not have a standalone, detailed or an extensive codified Competition Policy Framework. However, Chapter 7 of the Fijian Trade Policy Framework recognizes the significance and importance of competition, competition policy and the competition regulator. The Policy recognizes competition policy is a natural complement to trade policy. The primary document that provides a legal basis to competition policies and activities is the Commerce Commission Decree 2010 (CCD2010).

The CCD2010 establishes a regulatory framework that supports competition, provides mechanisms to deal with traders engaging in practices that may lessen competition and protects consumers from unfair business practices and protects businesses who comply with the legislation from unfair competition. The principle objectives of CCD2010 are to promote the interests of the consumers, promotion of the effective and efficient development of industry trade or commerce, promote competition, and ensure equitable returns for businesses with fair and reasonable prices charged to consumers.

Apart from the Documented Competition Policy, the position on Competition Policy is also made during annual National Budget Address and in other Cabinet Papers.

### **3.3 History of Fiji's Competition Laws and Competition Policy**

The inclusion of consumer, and to a limited extent competition, issues in Fiji gained recognition with the enactment and implementation of the Fair Trading Decree 1992. This was amended in 1998, when a complimentary Commerce Act was introduced to regulate access to services.

The Commerce Act 1998, was introduced as a result of economic policy changes in Fiji in the late 1980s to early 1990s to promote effective competition and informed markets, encourage fair trading, protect consumers and businesses from restrictive practices and controls prices of regulated industries and other markets where competition is lessened or limited.

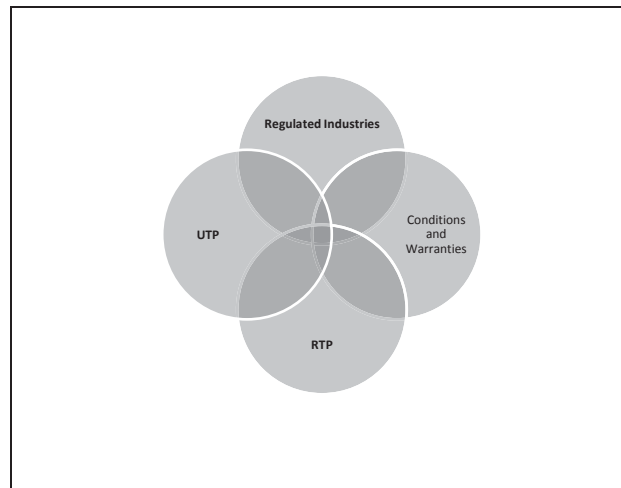
In 2005, minor amendments to the Commerce Act 1998 enabled more effective enforcement. A Cabinet decision later resulted in the merger, and repeal, of three pieces of legislations (Fair Trading Decree 1992, Counter Inflation Act and Commerce Act 1998) into a single piece of legislation, the CCD2010.

The merger also resulted into the amalgamation of the Prices and Incomes Board, Department of Fair Trade and Consumer Affairs and Commerce Commission into one single institution, now known as the FCC. The merger has greatly widened the scope and functions of the FCC,

which is legally obliged to promote competition in the market, enhance consumer welfare by promoting fair trade and removing obstacles to competition.

The CCD2010 is an extensive Competition and Consumer Protection Legislation for Fiji. The Decree establishes the Commission as a pricing regulator, competition regulator, as well as, a consumer protection institution. The broad aspects of the Decree is divided into parts to deal with regulated industries, Unfair Trade Practices (UTP), Restrictive Trade Practices (RTP) and Conditions and warranties in Consumer Transactions. It is summarized as follows:

***Diagram 1: Pillars of CCD2010***



### **3.4 Competition Policy**

**Competition policy** is a natural complement to the Trade Policy Framework. Whereas the Trade Policy focuses on the elimination of Government-imposed barriers that limit market access in international trade, the purpose of competition policy is to ensure that markets operate under conditions of competition. It does so by targeting business conduct that limits market access and reduces actual and potential competition.

#### ***Policy Recommendations:***

The Government will undertake the following:

Respond to the significant increase in competitive pressure in the Fijian economy anticipated from implementation of a Trade Policy Framework geared to international competitiveness, by reviewing the mandate of the Commission and the relevant laws and regulations, with a view to making changes where necessary to ensure consistency with a Trade Policy Framework.

Consider the introduction of a comprehensive competition policy framework in Fiji.

Ensure that the Commission is able to acquire the expertise needed to adequately carry out the core functions of a competition agency in an internationally competitive economy, including functions such as the investigation of cartels.

## **4. The Fiji Commerce Commission**

### **4.1. Overview**

The FCC is a Competition Authority and given the nature of the economy, Government has also tasked the Commission with other responsibilities such as being a multi-sector regulator, the enforcement of Counter Inflation Measures for selected goods and services and the guardian of and arbitrator of Unfair Trading Practices.

Ensuring compliance with its regulatory requirements is one of the Commission's principal objectives. This is achieved through the use of a variety of compliance tools, giving consideration to using the most appropriate tool necessary to obtain compliance, and when required, to promote general deterrence.

FCC seeks to maintain and encourage the competitive process with a view to promoting economic efficiency and consumer welfare. Its objective is to spur firms and individual players in the market to compete with each other to secure the patronage of customers in terms of, inter alia, competitive prices, good quality and greater choice for them. This objective of the Commission ensures a fair and equitable market and provides the stimulus for growth.

There is already substantial evidence of the benefits of competition regime in Fiji vis-à-vis economic development, greater efficiency in international trade and consumer welfare.

The Commission's experience and achievements to date, indicates substantial benefits from the strengthening of the application of competition policy principles in terms of "greater production, allocative and dynamic efficiency, welfare and growth." It has been observed that Commission's activities has resulted in improvement in the consumer and producer welfare and economic growth and competitiveness in international trade have all flowed out of competition policies, and surveillance over Restrictive Business and Trade Practices.

The Commission notes that competition rewards good performance, encourages entrepreneurial activity, catalyses entry of new firms, promotes greater efficiency on the part of enterprises, reduces cost of production, improves competitiveness of enterprises and sanctions poor performance by producers, the empirical evidence in the report suggests that competition ensures product quality, cheaper prices and passing on of cost savings to consumers.

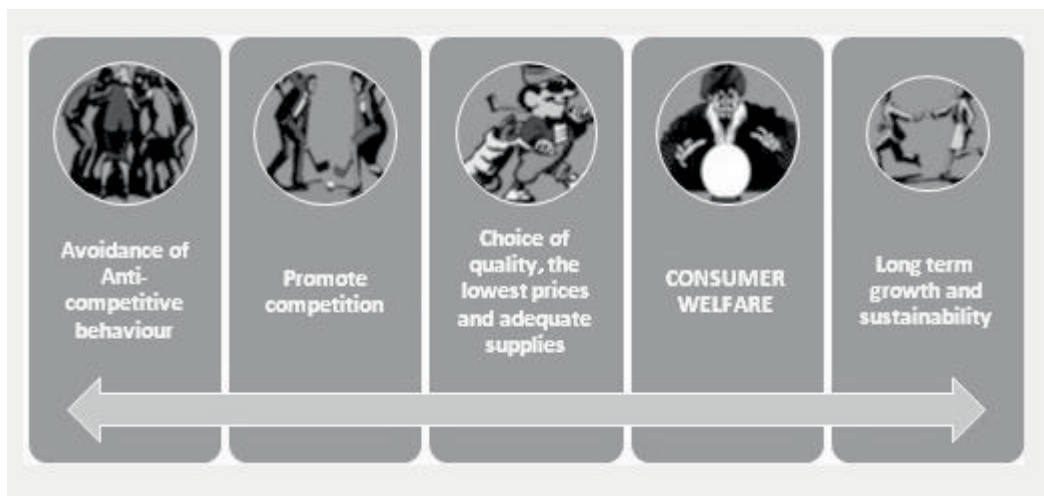
### **4.2. Objectives of the Commission**

The objectives of the FCC are clearly outlined in Section 2 of the CCD2010: the promotion of the interests of consumers; the promotion of effective and efficient development of industry, trade or commerce; the need to secure effective competition in industry, trade or commerce; and to ensure equitable returns for businesses with fair and reasonable prices charged to consumers.

The Commission also has objectives related to regulated industries and access regimes, namely: to promote effective competition in the interests of consumers; to facilitate an approximate balance

between efficiency and environmental and social considerations; and to ensure non-discriminatory access to monopoly and near monopoly infrastructure or services.

**Diagram 2: Objectives of the Commission**



#### **4.3. Functions of the Commission**

The functions of Commission are stipulated under Section 15 of the Commerce Commission Decree. The major function of the Commission includes administration of the CCD2010. In carrying out this function, the Commission is required to advise the Minister about the proposed access agreements and other matters relating to consumer protection and competition in the Fijian markets, arbitration of disputes about access to infrastructure facilities and services under access regimes, prompting consumer interest, promote interests, trade and commerce, receiving and considering consumer complaints, investigations into the consumer protection and competition matters, dissemination of information and price regulation, authorization of mergers and acquisitions, carrying out research amongst others.

#### **4.4. Commission Structure**

The Commission is an independent statutory body under the Ministry of Industry, Trade and Tourism. The Commission is headed by the Commissioners, with the Chairman of the Commission taking the key responsibilities. **Section 8** on the Membership of the Commission outlines the structure and the composition of the Commission, and stipulates that the Commission must have a membership of 4-6, with one member being appointed as the Chairperson and another as the Deputy Chairperson. There is also a requirement under the Decree that the members to have knowledge of or experience in industry, commerce, economics, law, accountancy, public administration, governance or consumer affairs.

Under the requirements of Section 8 of CCD2010, a member holds office for such term, not exceeding 5 years, as the Minister specifies in the member's instrument of appointment but is eligible for reappointment for a maximum of 3 years.

**Section 9** allows for the appointment of associate members only in relation to a matter or class of matters specified in the member's instrument of appointment. An associate member may attend and vote only at a meeting of the Commission relating to the matter or class of matters specified in the member's instrument of appointment (including a meeting at which matters incidental to that matter or class of matters are considered).

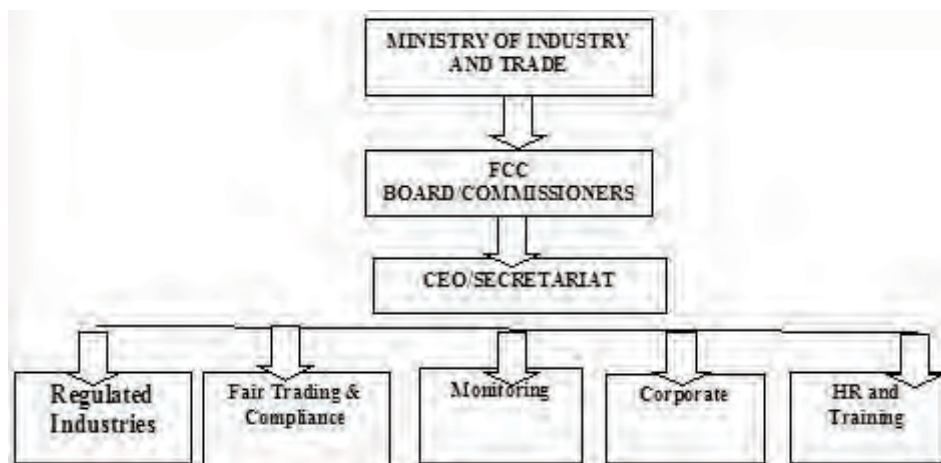
The Commission since its restructure in 2010 had a lot of challenges in its operations with the required membership composition due to the nature of work undertaken by the Commission.

Recommendation: The Ministry of Industry, Trade and Tourism to ensure that according to the Fiji Commerce Commission Decree 2010, the board composition must have at least a minimum of four members at a particular point in time.

#### 4.5. Departments

The Commission is divided into 6 Departments as follows:

Diagram 1: FCC Organizational Structure



The key functions of each department are as follows:

##### **Regulated Industry**

The department is responsible for undertaking independent analysis and research on regulated industries, such as, those engaged in the supply of electricity, water, sewage, post, broadcasting, telecommunications, ports, civil aviation or any other industry that is declared under Section 5 of the CCD2010 to be a regulated industry.

##### **Fair Trading and Compliance**

The function of the Fair Trading and Compliance Department is to promote the interests of Consumers and the effective and efficient development of industry, trade or commerce through the encouragement of fair competition and prevent the unfair or undesirable trade practices and to provide for an equitable, competitive and informed and safe market place, and provide for regulation, where necessary for supply of goods and services and for related purposes. The Fair Trading and Compliance Department comprises two sections: Fair Trading and Rents.

The Fair Trading and Compliance Department is mainly tasked to facilitate the enforcement of Part 7 and Part 8 and partially Part 6 of the CCD2010. Rent is a component of housing in the National Consumer Basket and is under price control by the FCC. Its control was inherited from the Counter-Inflation Act, Cap 73 and is now governed under the Commerce Commission Decree 2010.

##### **Legal Department**

The department's role is to provide legal advice to the Commission in relation to the provisions under the CCD2010 and any other applicable laws. The department consists of the Senior Legal Officer and the Prosecutors and is also responsible for the prosecution of traders for breaches of the CCD2010.



The Legal Department undertakes litigation work for the Commission and provides opinions on issues before the Commission and all other

### **Monitoring**

The Price Monitoring Section is in charge of ensuring that the traders are complying with the Prices set by the Commission pursuant to a Price Control order and the provisions of the CCD2010 via daily inspections, market monitoring and surveillance.

### **Corporate and Human Resource Department**

The Corporate Services and Human Resources Department is responsible for ensuring that the daily operations of the Commission runs smoothly and that adequate resources are made available for every department, division and staff member for the successful delivery of the Commissions legal obligations. The department consists of sub-sections such as the Finance Department, Registry, Filing Office, Human Resources Officer's Office, Chief Executive Officer's Office and other administrative staff members.

### **Staffing**

The Commission currently employs a total of Fifty Two (52) staff members. The staff members are spread over different part of Fiji. Politically, the Fijian archipelago is divided into four areas or 'divisions': the Northern Division which is composed of Vanua Levu and the neighbouring islands of Taveuni, Rabi and Qamea; the Western Division which consists of the western half of the main island of Viti Levu, including the Yasawa group to the north-west and Vatulele to the south; the Central Division made up of the eastern half of Viti Levu; and the Eastern Division, composed of the Lau, Kadavu and Lomaiviti groups.

The map of Fiji below shows the geographical demarcation off by Divisions.

**Figure 1: Fijian Geographical Locations by Divisions**



For the purpose of this report all the Commission staff based in main Vanua Levu (excluding Taveuni) are classified under the Northern Division. Western Division staff consist of staff based in Sigatoka, Lautoka and Rakiraki. Central /Eastern staff include staff based at the Commission Headquarters in Suva. Staff based in the Outer Islands include those based in parts of Fiji apart from Viti Levu and Vanua Levu. These staff members are based in Rotuma, Kadavu, Ovalau and Taveuni.

The breakdown of the staff members by Division and Department are as follows:

**Table 2: Staff Allocation by Department**

<b>Monitoring Section</b>					
<b>Position</b>	<b>Central Eastern</b>	<b>Western</b>	<b>Northern</b>	<b>Outer Island</b>	<b>Total</b>
SRO	1		1		2
RO	-	1	-		1
RA	-	-	-		0
PII	2	5	3		10
APII	1	1	3		5
RI	-	1	-		1
Support	2	-	-		2
<b>Total</b>					<b>21</b>

**Table 3: Staff Allocation by Department (Cont...)**

<b>Position</b>	<b>Central Eastern</b>	<b>Western</b>	<b>Northern</b>	<b>Outer Island</b>	<b>Total</b>
<b>Compliance and Rent Section</b>					
SRF	1		-	-	1
RI	1		-	-	1
APII	2		-	-	2
PII	1		-	-	1
AFTO	1		-	-	1
<b>Total</b>					<b>6</b>
<b>Regulated Industries (RID)</b>					
RO	2		-	-	2
RI	1		-	-	1
SO	1				1
RA	1		-	-	1
<b>Total</b>					<b>5</b>
<b>Department of Competition Law</b>					
Senior Officer	Legal 1		-	-	1
Senior Prosecutor	1		-	-	1
Prosecutor	1		1	1	3
<b>Total</b>					<b>5</b>
<b>Finance Department</b>					
Accountant	1		-	-	1
Assist. Accountant			-	-	
Accounts Clerk			-	-	
<b>Total</b>					<b>1</b>
<b>Corporate Department</b>					
CEO	1		-	-	1
PA	1		-	-	1
Receptionist	1		1	1	3
HR	1		-	-	1
Registry	1		-	-	1
Support	1		-	-	1
Driver	1		-	-	1
<b>Total</b>					<b>9</b>
<b>Outer Islands</b>					
Part Time Compliance Officer (Taveuni/ Kadavu/ Levuka/ Rotuma)					<b>4</b>
<b>Total Staff</b>					<b>52</b>

## 5. Competition and Consumer Protection Provisions

As outlined above, the main Fijian Competition and Consumer Protection legislation is the Commerce Commission Decree 2010. Divided into 12 parts and 10 Divisions, CCD2010 is an extensive Consumer Protection and Competition Law (Refer Annexure 1 for Summary).

### 5.1. Assessment of CCD2010

In what follows, key provisions of CCD2010 are summarized with recommendations to further strengthen the content and implementation of the competition policies and regulation in Fiji.

#### Part A –Preliminary

**Part A** of CCD2010 consists of Short title and Commencement, Objectives of the Decree, Application of the Decree, Interpretation, Regulated industries – Declarations, Application of this Decree to the State and Extension of the Application of Part 6 of this Decree.

**Section 1** is titled “short title and Commencement “The Decree is cited as Commerce Commission Decree 2010. The Decree states that the Decree shall come into effect on a date appointed by the Minister through the Gazette. The Decree has been in effect from 1 July, 2010.

**Section 2** outlines the objective of the Decree, while Section 3 defines the applicability of the Decree. Section 4 is on the interpretation of the Decree. The Commission is of the view that the following definitions must be included or amended to expand the application and make it more meaningful.

**Section 41** of CCD2010 states that controlled goods and services are not to be supplied except in accordance with authorized prices. The current definition of **authorization** defines describes authorization as an authorization granted by the Commission under Part 11.

Furthermore the definition of consumer also needs to be expended. Currently consumer is defined as a person who in relation to a particular transaction, whether a separate contract or separate transaction within a contract acquires goods or services as a consumer and shall be presumed hereunto unless the contrary is proved.

The definition of a **consumer** is essential in order to effectively promote consumer and trader interests and welfare. The current definition is vague and lacks clarity terms of the application of the Decree. It fails to address issues such as whether the Business to Business transactions can also be deemed as a consumer issue. It is suggested that the definition be expanded to include the business to business as well as a consumer to business transactions.

Another important definition that is currently missing from CCD2010 is the definition of **Markets**. Definition(s) of markets is an essential concept for a competition regulator. It is the key concept in assessing any restrictive trade practices and also pricing issues. It is also essential for defining the relevant product and geographical markets and assessing the relevant functional elements and time period. The CCD2010 does not define markets currently.

It is recommended that CCD2010 be amended to include a general definition for market. This will assist in bringing uniformity in the general definitions and also act as a building block for the proper definition of the product and geographical markets, and the functional and time elements.

#### Part 2 - Establishment of the Commission

Part 2 of CCD2010 is made up of 25 Sections and deals with areas such as the establishment of the Commission. membership of the commission, Associate members, Disclosure of interests, Procedure at meetings, Commission not subject to ministerial control, Functions and powers, Arrangements with

other entities, Delegation of Commission’s functions, Funds of Commission and other Miscellaneous matters.

**Section 8** deals with the membership of the Commission. The Section repeatedly makes reference to the appointment of the members, a term usually associated with the Board members.

It is suggested that the member’s appointment by the Minister should be called “Commissioners”. This will make the positions more meaningful and also bring about consistency with the international practices. It is also recommended that the Commissioners be of a good mixture of various industries experts and specialized. For example, to deal with matters relating to the telecommunications industry, Telecommunications commissioner should be appointed. Similar appointments should be made for other specialized areas such as electricity, aviation, etc. Such appointments will add depth to the Commission’ pool of knowledge and also ensure as fair and reasonable ruling.

**Section 13** deals with “Procedure at meetings”. It states that Schedule 2 has effect as to the procedure at meetings. Schedule 2 is not annexed in the Decree. It is recommended that Section 13 be amended to allow the Commission to decide and determine its own procedure at meetings. This will ensure greater flexibility and more effective operational and policy matters guidance.

**Section 15** of CCD2010 outlines the legislative functions of the Commission. It outlines 14 general functions and 5 functions in relation to the regulated industries.

It is recommended that additional functions be added to the list of existing functions to allow the Commission to capture other areas. Some recommended additions to the functions are:

- To make available to persons engaged in trade or commerce and other interested person’s general information for their guidance with respect to the carrying out of the functions or the exercise of powers of the Commission.
- To arbitrate or attempt to resolve any dispute arising out of any agreements, understanding, covenants, contracts or arrangements that affect issues of competition.

### Commission’s Funds

**Section 23** of CCD2010 highlights the sources of funds for the Commission for the performance of its functions under CCD2010. The funds of the Commission consist of all money appropriated by the Parliament, other money lawfully received by the Commission and all accumulations of income derived from money appropriated by the parliament and other money lawfully received by the Commission.

**Section 23A** states that the Commission may operate on a self-funding basis. It stipulates that the Commission may operate on the basis that, as far as is reasonably practicable, the operating costs of the Commission (including fixed costs, variable costs and overheads) are fully met by fees charged by the Commission in respect of the performance of its functions.

So far the Commission has relied heavily on Government grant for its operational and capital expenditure. It has not utilized the requirements under **Section 23A** due to factors, such as, the burden of such regulatory fees and charges on the business and the cost of goods and services, leading to the disadvantage to the consumers, the very people the Commission is also tasked to protect.

Table 4 provides summary of sources of funds for the Commission for the period 2013-2015.

**Table 4: Sources of Commission: 2013 to 2015**

<b>Year</b>	<b>Sources Of Income</b>	<b>Amount</b>	<b>Percentage</b>
<b>2013</b>	Government operating Grant - 2013	\$ 1,753,600.00	93%
	Other Source of Income	\$ 126,857.90	7%
<b>2014</b>	Government operating Grant - 2014	\$ 1,753,600.00	95%
	Other Source of Income	\$ 91,844.75	5%
<b>2015</b>	Government operating Grant - 2015	\$ 1,753,600.00	98%
	Est. Other Source of Income	\$ 43,546.44	2%

The current level of funding is not sufficient for given the fact that it is a multi-sector regulator as also a Consumer Protection Agency.

It is suggested that the level of funding be increased and a framework for the imposition of fees and charges by the Commission be developed and implemented by the Commission. This should be done via a regulation made by the Minister pursuant to the requirements under Section 162 of CCD2010.

### **Part 3 – Access Agreements**

“**Access Agreement**” is defined under Section 4 of CCD2010 as an agreement under an access regime for the granting of access to infrastructure facilities, or to services provided by means of infrastructure facilities.

**Sections 26, 27 and 28** require that a person who proposes to enter, vary or amend an access agreement in relation to infrastructure facilities in a regulated industry; or services in a regulated industry provided by means of infrastructure facilities must notify and provide the Commission a copy of the agreement at least 30 days before entering, emending or varying the agreement.

**Section 28** stipulates that failure to comply with **Sections 26 and 27** renders that agreement invalid and unenforceable.

While the Decree mandates the notification and supply of a copy of access agreements to the Commission and renders the agreements invalid and unenforceable for failure of adhering to **Sections 26 and 27**, it does not make it an offence if such agreements are not furnished or notified to the Commission.

It is suggested that a subsection be added in CCD2010 to make it an offence if a person does not notify and provide a copy of access agreements to the Commission.

### **Part 4 - Arbitration of Access Regime Disputes**

**Section 32** authorizes the Commission to arbitrate on disputes with respect to access regime. It states that a party to the dispute may refer the dispute for arbitration under Part 4. Section 32(2) reads:

*s.32 - (2): The Arbitration Act (Cap. 38) applies to arbitration under this Part subject to this Part and the regulations.*

It is suggested that FCC being a quasi-judicial body for the purpose of arbitrating on disputes relating to access agreements, must not be strictly guided and required to adhere to the Arbitration Act (Cap.38). Strict requirement to comply with the Arbitration Act may work against the Commission given its limited resources. It is suggested that while the intention and spirit of the Arbitration Act (Cap.38) be complied with, the following be added to CCD2010 under Section 32 as an exception.

In an arbitration hearing about an access dispute, the Commission:

- (a) is not bound by technicalities, legal forms or rules of evidence; and
- (b) must act as speedily as a proper consideration of the dispute allows, having regard to the need to carefully and quickly inquire into and investigate the dispute and all matters affecting the merits, and fair settlement, of the dispute;
- (c) may inform itself of any matter relevant to the dispute in any way it thinks appropriate
- (d) may determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties to an access dispute, and may require that the cases be presented within those periods; and
- (e) may require evidence or argument to be presented in writing

Under CCD2010, the Commission is only authorized to arbitrate on disputes relating to access agreements. This limits the Commission's ability to expand the arbitration services to other provisions, parts and divisions and provide effective and timely redress to the party that has been wronged under CCD2010. For all other provisions, the Commission is required to resolve the issues via mediation, failing which the matter has to be taken to court. This is an expensive and lengthy process.

It is suggested that amendments be made to CCD2010 to expand the Commission's arbitration services to the other Parts and Divisions of the Decree. It is further suggested that the amendments should recognize that a person appointed as arbitrator should have the power to act as an arbitrator to determine any dispute referred to it arising out of any agreement, contract, covenants or arrangements relating to matters affecting competition and this shall not necessarily be limited to access agreements. The amendments should recognise the following in relation to the arbitration of disputes by the Commission:

- (a) give a direction in the course of, or for the purposes of, an arbitration hearing;
- (b) hear and determine the arbitration in the absence of a person who has been summoned or served with a notice to appear;
- (c) sit at any place;
- (d) adjourn to any time and place;
- (e) refer any matter to an expert and accept the expert's report as evidence;
- (f) generally give all such directions, and do all such things, as are necessary or expedient for the speedy hearing and determination of the dispute

## **Part 5 - Control of Prices**

### **Price Control**

Price control is an important part of the Commerce Commission's role, although the number of items subject to price control has fallen from around 10,000 in 2010 to around 450-500 items today. Price control is a widely accepted instrument of competition policy in cases of natural monopoly, such the case with utilities. Price control in Fiji extends, however, well beyond the regulation of natural monopolies, with the prices of many basic retail items being regulated. It follows that some re-

orientation of competition policy will be highly desirable and arguably necessary when Fiji begins to engage in comprehensive trade liberalization.

The Commission has become increasingly interested in competition issues surrounding mergers and acquisitions, cartels, and other abuses of market dominance (such as retail price maintenance), all of which form a large part of the concerns of competition agencies in more open economies with well-developed competition frameworks. The Commission uses a threshold of “substantial market power” to determine the potential existence of anti-competitive behaviour.

The Commission also carries out investigations into competition conditions in industries or markets with perceived potential for the exercise of “substantial market power”, such as financial services, shipping, television, dairy, steel, hardware and school uniforms. The results of these reviews can lead to proposals for additional regulation of the industries or markets concerned.

The need for price control in Fiji is supported by a number of factors, *inter alia*, market failures arising from natural monopolies and small market size. Other factors prevalent in Fiji that support price controls are dominant firms at various functional levels, geographical dispersions leading to isolation and monopoly traders, and the infancy of consumer protection and competition laws. Currently price control extends to the following goods and services in Fiji:

**Table 2: Price Control Items – Fijian Economy**

<b>Goods/Services</b>	<b>Nature of Price Control</b>
Basic Food Items	Fixed Price Control
Essential Medicinal Items	Fixed Price Control
Essential Hardware Items	Fixed Price Control
Wheat Products (Sharp and Flour)	Fixed Price Control
Shipping Fares and Freight Rates	Fixed Price Control
Stationery	Percentage Price Control
Cement	Fixed Price Control
Steel	Fixed Price Control
Petroleum Products	Fixed Price Control
LPG	Fixed Price Control
Interconnection and Wholesale Bandwidth	Fixed Price Control
Aeronautical Services	Fixed Price Control
Ports and Marina Services	Fixed Price Control



## **Process of Price control and Pricing**

The Commission's pricing regulation is based on a systematic and scientific methodology. The process starts with research based scientific methodologies by the Commission into a particular sector/industry, to identify areas lacking competition or industries in which a particular player has substantial market power. During the research the Commission attempts to identify market player(s) with market power and any suggestive indicators of its abuse.

Following research, the investigation report and recommendations are given to the Minister for Cabinet decision. If Cabinet approves the Commission's recommendations, a Price Control Order is obtained. Upon the acceptance of the recommendation for the issuing of a Price Control Order by the Cabinet, the Commission gives 14 days intention notice to stakeholders, informs them of the Order and requests submissions. After 14 days the Commission analyses any submissions received and writes to stakeholders to inform that prices of the concerned goods or services are now controlled and requests submissions including costing documents, financial reports etc. Upon receipt of these documents and other requested information, the Commission begins its costing and pricing process. Once completed, the Commission releases a draft determination for comments and suggestions, giving reasonable time to respond.

After receiving feedback from stakeholders, the Commission relooks at and then finalizes the determination. This is then signed by the Commissioners and made public if made under Section 44 of the Decree or submitted for ministerial approval if made under section 39 of the Decree. Once the order/authorization has been issued, the Commission/Minister makes a public announcement and Commission's monitoring is undertaken.

### **Part 5A –Telecommunications Services**

Under Section 4(1) of CCD2010, "**regulated industry**" means-

- (a) an industry engaged in the supply of electricity, water, sewerage, post, broadcasting, telecommunications, ports or civil aviation services; or
- (b) Any other industry that is declared under Section 5 to be a regulated industry.

In recognition of the above function of the Commission, the Minister has issued the Commerce (Control of Prices of Interconnection Services Rates) Order, which empowers the Commission to control the prices or rates for the supply of Interconnection Services in all quantities and qualities, grades or classes. The current order expires in 2015.

From 2009, the Commission has been authorizing the charges for interconnection, wholesale bandwidth and infrastructure sharing. In Fiji, the Telecommunications Sector specific regulator is Telecommunications Authority of Fiji ("TAF"). TAF is established under the Telecommunications Promulgation 2008 ("Promulgation"). The objectives of this Promulgation are to provide a specific regulatory framework that promotes the long term interests of end users of telecommunications services, or of services provided by means of telecommunications services, and the efficiency and international competitiveness of the telecommunications industry in Fiji and, as consistently with that objective as is practicable: (i) to provide rapid expansion of reliable and as affordable as possible telecommunications services on an equitable basis, with particular improvement in rural areas; (ii) to promote efficient investment and innovation in telecommunications networks and services; (iii) to provide fair competition among service providers and allowing market forces to operate; and

(iv) to provide and promote appropriate consumer protection and other safeguards in relation to telecommunications services where market forces are insufficient.

The functions of the Authority as stipulated under Section 3 of the Promulgation are:

- (a) to implement the telecommunications policy in accordance with its powers under this Promulgation;

- (b) to assist through mediation the resolution of disputes between licensees or between licensees and consumers;
- (c) to manage State assets through allocating, assigning and supervising the use of radio spectrum and frequencies;
- (d) to manage State assets through allocating, assigning and supervising the use of numbering;
- (e) to promote investor confidence relating to telecommunications;
- (f) to protect consumer interests and promote consumer awareness relating to telecommunications;
- (g) to represent the Government in regional and international organizations and obligations, when the Minister has officially delegated such tasks to the Authority; and;
- (h) to perform any other functions assigned to it by this Promulgation or any other written law.

Under **Section 43B** (1) of CCD2010, the Commission is required to regularly consult the Telecommunications Authority on competitiveness in relevant telecommunications markets, and each shall forbear from exercising the powers under their respective Acts if the Commission determines that competitive effects of such market are sufficient to achieve the purposes of such powers in their respective Acts.

In recognition of the responsibilities of TAF and the Commission, the authorities have an understanding on each other's areas of responsibilities to avoid duplication. The Commission's main areas of responsibilities includes price authorizations for interconnection and bandwidth, *determination of access deficit charge, Arbitration of access disputes, Negotiations of access agreements, Registration of access agreements and handling of consumer complaints.*

Regulation of the Telecommunication requires technical knowledge as well. Currently the Commission does not have any Telecommunications specialist. Technical and personnel development assistance in this area is required.

### **Part 5B – Fixing and Declaring Prices**

As stated earlier, the Commission intervenes to regulate prices of goods and services whenever there is cartel formed in the Fijian market.

**Section 44 states that the** Commission may with the approval of the Minister, by order, fix and declare the maximum price or charges by any person (including the State) in the course of business for the sale of goods or the performance of services, either generally or in any specified part of or place in Fiji.

Section 45 concerns rents. In Fiji, certain activities of the residential rental market are regulated by the Commission. One such regulation is Rent Freeze or what is commonly known as Rent Increase Restriction Order. Motives of rent control have significantly changed since its inception in the early seventies. Traditionally the objective of imposing rent controls was based on its inflationary impact. However, rent controls in Fiji now serves broader functions including consumer protection in the absence of adequate landlords and tenants legislations, and ensuring that rents are affordable to ordinary tenants.

Rent freeze was first introduced in Fiji on 2 March 2007, after the Government moved to tighten its financial expenditure amidst the global financial crisis of 2007-2008. As such, the rent freeze was introduced to cushion the impact of the wage freeze and the devaluation of the local currency during that period. **The rent freeze has been extended since 2007 through Ministerial directives and the current Residential Rent Freeze Order, which will expire on 31 December 2015.**

Before the expiration of the existing rent freeze order, the Commission is obligated under Section 39 (4) of CCD2010 to advise its line Minister on existing market conditions, including its economic and social impact analysis with the objective of seeking Ministerial decision on the **Commerce (Rent Increase Restriction on Residential and Ground Rent) Order, 2013 (Annexure 1)**.

The rent control issue has been a subject of continued consultations and debates amongst policy-makers, educationists, property developers, investors and consumer lobby groups.

The imposition of a blanket Rent Freeze Order has served, to a great extent, the interest of consumers under existing economic circumstances. The landlords can increase the rent provided they have invested to renovate or improve the condition of the rented flat.

The Commission notes that efforts have been made to develop comprehensive rents legislations in Fiji, which is aimed at addressing the issues which the rent freeze order to some extent fulfils currently. With the enactment and enforcement of new legislation, consideration can be given to the removal of the regulation of residential and ground rents. The Fijian Government has taken into consideration the Fiji Commerce Commission's recommendation of developing a Residential Tenancy Law to ensure that the interests of landlords and tenants are protected.

### **Part 5C - Provisions Relating to Prices for Goods and Services**

**Part 5C, Sections 49-59** deals with provisions related to prices for goods and services, the Commission's intervention through monitoring activities conducted on price controlled items, trader's need to issue invoices upon sales and ensuring records and accounts in regards to any business undertaken are kept to the satisfaction of the Commission.

**Section 49** prescribes the **manner in which maximum prices are to be fixed**. The Commission's general line of action for breaches starts with the awareness of the traders. For breaches found during the first visit, the traders are advised about the key provisions of the Decree and the functions of the Commission. First Infringement Notice is issued and the offences noted. This notice is to serve as an advisory service.

For offences established during the second visit, verbal warning to given to the trader and the same is duly noted in the Inspection Forms and the records are kept at the Commission In the trader file. The trader is issued with the second Infringement Notice duly completed and signed on the spot. The second Infringement notice serves as the caution to the trader.

For the third breaches identified, third and final Infringement Notice is issued to the Trader. This notice serves as the final warning to the trader to comply with the CCD2010. For subsequent offences, Spot Fines as per the requirements of CCD2010 is imposed or the trader is warned for prosecution (for non-spot fine offences) and the report is submitted for legal team consideration and decision on prosecution.

**Section 52 on Prohibited acts** imposes restrictions on traders overcharging on price controlled items, providing or agreeing to provide or obtain or agree to obtain services at a greater price than such maximum price, applying different methods of fixing or ascertaining the prices of goods or services with intent to evade the provisions of the Decree and selling or agreeing to sell any goods or provide or offer to provide any service subject to a condition requiring the buying of any other goods or the provisions of any other services. Non-compliance to Section 52 attracts a spot fine.

**Section 53 on refusal to sell at maximum price** imposes a restriction on a trader from refusing to sell goods or supply services to any person tendering immediate payment at the maximum price fixed and declared for such goods or services by an order made. The penalty for breaching Section 53 is a minimum fine of \$5000 for a person and \$10,000 for a body corporate.

Currently the Commission has to file appropriate charges in court and await a ruling. It is recommended that spot fines be allowed to be imposed for offences under Section 53.

**Section 54** deals with the requirements for the traders to **clearly mark/display the prices of goods and services**. The current legislative requirement is as follows:

1. Price Control Items- prices to be clearly marked on individual products;
2. Non-Price Control Items- prices to be clearly displayed.

**Section 54** currently requires that the Commission get an order from the Minister to effect the above requirements.

The penalty for non-compliance with Sections 52, 54, 55 and 56 are prescribed under Section 59 of CCD2010 on the On-Spot Penalties. Under Section 59 the prescribed penalties is on-spot penalty for a minimum of \$500 to \$1000 for a natural person and between \$1000 and \$3000 for a body corporate payable within 21 days in the prescribed form. If the offender fails to make payments pursuant to subsection (1), the Commission may seek legal proceedings and if proven guilty is liable to pay a sum not exceeding \$15000 for a natural person and \$20,000 for a body corporate.

The current requirement to effect Section 54 is too cumbersome. The Commission has to obtain the approval of the Minister, by order to require that a person having such goods for sale by retail shall cause the same to be legibly and conspicuously marked/displayed with the price for public information. It is recommended that Section 54 be amended to make the requirements to mark/display prices under the Decree itself rather than a separate order be required. This will simplify the requirements and add more meaning and value to Section 54.

**Section 55 on Invoices** requires that a trader who sells by wholesale any goods at the maximum price of which has been fixed by an order made under the provisions of subsection (1) of section 44 shall supply at the time of sale to every purchaser an invoice. The penalty for non-compliance with Section 55 is the on-the-spot penalties, as prescribed under Section 59 of CCD2010.

Section 55 imposes the requirement on only the wholesalers to supply at the time of sale to every purchaser an invoice. In Fiji, a lot of traders are engaged in re-wholesale and re-retail. Section 55 in its current forms exempts other traders apart from the wholesalers of this requirement. It is recommended that Section 55 be amended to impose the requirement to issue invoices to all the trades rather than the wholesalers only.

**Section 56 on records** requires that traders keep records to the satisfaction of the Commission for at least three years. The penalty for non-compliance with Section 55 is the on-spot penalties as prescribed under Section 59 of CCD2010.

## **Part 6 – Restrictive Trade Practices**

The term **Restrictive Trade Practices** refers to any strategy used by market operators to restrict competition within a given market. By this Part, guidelines are in place to preserve competition in trade and commerce and prevent the adverse effects of misusing dominant position by companies in the market. This Part is different from the rest of the provisions of the Decree in that a contravention of this Part does not create any criminal offence. Any action taken will be in the civil contexts having civil remedies and will be dealt with by the civil courts.

Part 6 of the Commerce Commission Decree is divided into 16 sections and is made up of sections 60 to 73 of the Commerce Commission Decree.

It is desirable to include a cartel provision in this Part and make it an offence and have parallel civil remedies as well. Cartel is an agreement amongst competing firms where competitors' agree to fix prices, share markets and that restrict outputs. Rather than general clauses, specific clauses such as "A corporation must not make, or give effect to, a contract, arrangement or understanding that contains a cartel provision" should be added for more clarity.

**Section 60, on exclusionary provisions,** looks at contracts, arrangements and understandings in restraint of trade or commerce and that has or can substantially lessen competition. This section deals primarily with provisions or terms of the contract or understanding

If contracts, arrangements or understandings have an exclusionary provision or a provision that is likely to reduce competition, then by this section, the provision becomes void or unenforceable. This section also includes any license or lease, issued or made that can substantially lessen competition between corporations or businesses.

Exclusionary provisions are provisions that has the purpose of 'preventing, restricting or limiting the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions. Exclusionary provisions (also known as primary boycotts) mean terms when competitors agree not to supply (or buy) goods or services to a particular person or class of persons, or when competitors agree to prevent or hinder the acquisition of goods or services from a particular person or class of persons.

Some examples are market sharing agreements that allocate or divide customers, territories, acquisitions or sales, shopping centre leases or malls that prevent more than one supermarket operating in the mall, standard form of contracts and codes of ethics.

The section does not apply to contracts, which include a situation where an entity acquires any shares in the capital, or any assets of the body corporate. It also does not apply to contracts or arrangements where the only parties are entities which are related to each other such as subsidiary companies. There should be other exceptions to the rule of exclusionary provisions such as there would no breach if the dominant purpose of the agreement is for public or consumer interests or environmental protection.

**Section 61** deals primarily with provisions where **price is set to reduce competition.** This section deals with price fixing where a contract, arrangement or understanding with a competitor has the purpose or the effect, or the likely effect, of fixing, controlling or maintaining prices, discount levels, allowances, rebates or credits in relation to goods or services. This section applies not only to prices, but also to other terms that affect prices to consumers, such as shipping fees, warranties, discount programs, or financing rates.

This section does not apply to contracts, understandings or arrangements for the purposes of joint venture or where parties are related to one another (in which event related parties will be counted as one). Price fixing agreements do not have to be formal. The important point is not how the agreement or understanding was made or even how effective it is, but that competitors are working out their prices collectively and not individually.

There should be other exceptions to price fixing such as in case of Authorizations given by FCC or where there is collective acquisition of goods or services and proper notice is given to the Regulatory body. There should be included a criminal offence for price fixing as well as a civil remedy available for injured parties.

**Section 62** concerns **covenants affecting competition**, i.e. agreements that create positive or negative obligations. This section deals with the unenforceability of covenants that substantially lessen competition<sup>5</sup> and places a prohibition on demanding or giving covenants with the purpose or likely effect of substantially lessening competition. There are exceptions such as covenants affecting use of land solely for residential purposes or for religious, charitable or public benevolent institutions.

A clause should be added that states that the Commission can make covenant authorizations if the public benefit outweighs anti-competitive detriments. A criminal offence for covenants affecting competition should be included, as well as a civil remedy available for injured parties.

**Section 63** covers **covenants affecting prices and proposed covenants**. Section 63 (1) generally states that collective agreements that benefit the competitors are enforceable and have legal effect.

Section 63 of the Decree does not mention that restrictive covenants designed to fix, control or affect prices of goods and services are unenforceable if it lessens or restricts competition. This is desirable to be included in this section clearly. There ought to be inserted a clause in this section that states that the Commission can make Authorizations for covenants affecting prices if the public benefit outweighs anti-competitive detriments.

**Sections 64 and 65** can be called or are similar to **secondary boycott** sections found in the Competition Acts of other jurisdictions. Generally under this section, two persons cannot work together (act in concert) to hinder a third party from trading with a fourth party (the target) if the purpose or effect is to lessen competition or

- a. Cause substantial loss or damage to the business of the fourth party/ target.
- b. Cause substantial lessening of competition in any market in which the fourth party/ target supplies or acquires good or services

This section also prohibits two persons from working together for the purpose and effect to prevent or hinder the third person from engaging in trade or commerce either locally or internationally.

Under **section 64 (6) – (10)**, unions or organizations are prohibited from engaging in boycott conduct that will cause loss or damage or termination of employment of any employee. For the purposes of enforcing judgment and order, process can be issued and executed against the property of the organization.

Both these sections can be simplified and condensed in short clauses. There should be exceptions to this section such as there would be no breach if the dominant purpose of the conduct concerns protection or consumer/ public interest or in recognition of a national policy objective(s). Another inclusion to these sections can be on third line forcing. For example, when party A supplies goods to party B only on the condition that B acquires other goods or services from party C. Other examples are where a lender, as a condition of loan requires borrower to get insurance from a specific insurance company, where a car dealer as a condition of sale requires buyer to apply for loan from a specific lender.

**Section 66** explains what constitutes a **misuse of market power**. The prescribed purposes under the section are eliminating or damaging a competitor, preventing a person from entering a market, or deterring or preventing a person from engaging in uncompetitive conduct.

**Section 67** prohibits any person with **substantial market power** from engaging in conduct that can substantially lessen competition in that or another market.

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<sup>5</sup> An example of a covenant affecting land would be where vendor sells or leases property to a supermarket with a condition that the supermarket will not sell a particular product.

This is a general provision and more clauses should be added under this section relating to specific types of anticompetitive behaviour such as price signalling and predatory pricing. Price signalling is not cartel conduct although very similar. For example banks publically signalling future interests rates knowing that other competitor banks will not under cut. A section on Conduct involving providing Information disclosures to push prices up should also be included.

**Section 68** addresses **collective tendering**, also referred to as collusive tendering or bid rigging, which occurs when two or more competitors agree not to genuinely compete for tenders, allowing one of the cartel members to ‘win’ the tender.

This section is of great essence, especially to do public procurement.

Collective tendering can take a variety of forms. The form to which the section will apply should be specified.

Lack of knowledge and expertise in this critical area may subject the public procurement to collective tendering to the detrimental of the government finances and the quality of services to the citizens. It is suggested that the Commission staff be given training in this area and the same to be extended to the government’s procurement office to prevent cases of collective tendering.

**Section 69** outlaws **exclusive dealing** only if it has the purpose or is likely to lessen competition and includes product exclusivity, customer exclusivity and territorial exclusivity

**Sections 70, 70A, 70B** address **resale price maintenance (RPM)**, which occurs if a supplier pressures or threatens a business not to sell products below a certain price or punishes a business for failing to agree to sell below minimum price. This includes the specified price by supplier, any calculation or formula specified by supplier which determines price.

**Section 71** deals with **price discrimination**, i.e. when like goods or services are provided to different persons at different prices, the difference in price being unrelated to the cost of delivery or sale of providing the goods or services. Common examples occur when discounts or concessions are given to students or pensioners for the purchase of goods or services. The purpose is to protect small businesses from large buyers with market power seeking to secure unfair discounts from suppliers. To contravene this section, a corporation must take advantage of its market power to lessen competition substantially. A corporation needs some degree of market power for price discrimination to occur.

Internationally there is a debate on whether or not price discrimination should be maintained in legislation. Price discrimination will be anti-competitive when it is used to create a barrier to market entry or to force competitors from the market. On the other hand, price cutting, even if it is in favour of a large buyer and hence discriminatory, may be more pro-competitive than anti-competitive. It may engender competition from rival suppliers or in the market generally.

Although **Section 72** is titled mergers in the Commerce Commission Decree, it also deals with acquisitions or the terms are used interchangeably. Mergers or acquisition occurs when two corporations combine into one. Mergers that substantially lessen or are likely to lessen competition are prohibited. Corporations will not be prevented from making the merger or acquisition if a clearance or Authorization is granted to it by the FCC under section 150.

The main factors for mergers or acquisitions should be specifically stated in the legislation. This will also then be the test to grant clearance. The usual factors are inclusive but not limited to:

- a. The degree of countervailing power in the market

- b. The likelihood that the acquirer will be able to significantly able to increase profit margins or profits.
- c. The extent to which substitutes are available or likely to be available in market
- d. Dynamic characteristics of the market such as growth, innovation and product differentiation.
- e. Likelihood that it would result in removal of an effective competitor
- f. Nature of vertical integration in market
- g. The threshold.

**Section 73** sets out the procedure to be followed by corporations or business entities in Fiji which acquire controlling interest in a body corporate outside Fiji. Generally the steps are as follows:-

1. The body corporate makes declaration of controlling interests and makes application to Minister within 6 months
2. The Minister gives notice in writing setting up an inquiry into acquisition.
3. The Minister then allows, revokes or refuses the application upon providing reasons in writing.

### **Part 7 – Consumer Protection and Unfair Trade Practices**

Part 7 of the CCD2010 specifies various Unfair Trade Practices and goes on further to declare such practices as an offence. This Part is designed to ensure the rights of consumers are not impinged by engaging in fair trade. This is however outlined by expressing unfair trade practices and highlighting general ambiguous provisions as well as specific section to state what constitutes unfair trade practices. While the list may not cover all possibilities of unfair trade practices, Part 7 is still relatively comprehensive.

Part 7 of the CCD2010 is divided into four divisions, which includes 26 sections from Section 74 to Section 110.

#### **Division 1 – Consumer Protection**

Division 1 is broadly targeting aims to suppress deception and other conduct and market conditions that impede effective consumer comparison- and decision-making, while providing consumers with tools to make more informed choices.

**Section 74** under Division 1 of Part 7 of the Decree is an attempt to provide some clarity on **misleading representation**. It also provides the onus of proof to the person who makes the representation to have reasonable grounds while making the representation to ensure that the other party is not misled.

The whole division on consumer protection looks at the representation made and assess whether the same is or is likely to be misleading on the account of reasonableness. This section falls short on describing what constitutes reasonableness. For example, is an expiry date on a can of tuna a representation or not.

The section has sought to provide some guidance on representation and its assessment, however from the on-set creates ambiguity and allows various interpretations to the contents of the division. The section must be amended to include tests of what is misleading and or constitutes misleading representation.

**Section 75** seeks to establish the basic legal standard for **general conduct in relation to business operations**, including but not limited to when dealing with consumers. The terms of this general prohibition are very broad as subsection 2 makes clear the intention of the drafters of the legislation that the wide scope of this section is not limited by the more specific provisions that follow. The



section's generality means that in order to establish whether a particular conduct is misleading or deceptive or is likely to mislead or deceive is ultimately a matter for the courts to decide.

In the matter *CRW Pty Ltd v. Sneddon (1972) AR17*.<sup>6</sup> The court adopted a test as to what is misleading within the meaning of Section 52 of the Trade Practices Act as follows;  
*'the advertiser must be assumed to know that the readers will include both the shrewd and the ingenuous, the educated and the uneducated and the experienced and inexperienced in commercial transactions. He is not entitled to assume that the reader will be able to supply for himself or (often) herself omitted facts or to resolve ambiguities.'*

This section also does not give rise to an offence; however prima-facie contraventions of Section 75 would give rise to civil proceedings. It is suggested that Section to be amended to provide an offence creating section for criminal proceedings, a pecuniary penalty may be imposed by FCC for a contravention of this section.

**Section 76** deals with **unconscionable conduct**, which does not to have a precise legal definition but is rather a concept that has been developed by courts over time. Australian Competition and Consumer Commission v Lux Distributors Pty Ltd [2013] FCAFC 90 states:

*"That normative standard is permeated with accepted and acceptable community values. In some contexts, such values are contestable. Here, however, they can be seen to be honesty and fairness in the dealing with consumers. The content of those values is not solely governed by the legislature, but the legislature may illuminate, elaborate and develop those norms and values by the act of legislating, and thus standard setting..."*

Conduct may be unconscionable if it is particularly harsh or oppressive. To be considered unconscionable conduct, it must be more than simply unfair—it must be against conscience as judged against the norms of society.

It is suggested that a pecuniary penalty be allowed to be imposed by the Commission for a contravention of this section.

**Section 77** seeks to build on section 75, as such in addition to the general requirement that traders not engage in misleading or deceptive conduct, the section goes to prohibit particular **types of false or misleading statements or representations**. The provisions are not limited to consumers but also encompass transactions with other businesses. Contraventions of these aspects of the law can lead to prosecution for a criminal offence and the imposition of fines against firms or individual. Additionally, firms or individuals may also take private actions for damages and other compensatory orders.

**Section 78** deals with **false and misleading representation specific to advertisements**. False advertising is any published claim that is deceptive or untruthful, while Misleading advertising is any published claim that gives a consumer an incorrect understanding of the product they are interested in purchasing or using. The false and misleading advertising by companies of any product may result in the consumer suffering a financial loss, or another form of damage to the consumer.

**Section 79** deals with possible **false and misleading representation with regards to land** and goes on into specific areas where representations could be made such as price payable, location, characteristics and use.

This section must be amended to also include property sales (e.g. buildings with land). This will reflect the change in market trends for land/property acquisitions.

<sup>6</sup>Adopted in *World Series Cricket Pty Ltd v. Parish (1977) 2 TPC 303*.

**Section 80** deals with **misleading representation to the public**. The section widens the net for misleading representation by insert ‘engage in conduct that is likely to mislead, as such the conduct may not be misleading to some but may be liable to mislead other. Specifics such as nature, manufacturing process, characteristics, and suitability as stated for clarity.

This section needs to be amended to explain, the international property convention. Moreover, a pecuniary penalty should be assigned for contraventions.

**Section 81** deals with **misleading person(s) who seek employment**, that is to be offered, may be offered or is being offered with reference to the work/job/employment being available, the nature of the employment, terms and conditions of employment and then goes on to generalize the application of this section to ‘any other matters relating to employment’.

**Section 82** aims to make **full payment information available** to consumers/ purchases of goods and/or services. In such circumstances, if the payment constitutes partial payment then full price must be disclosed to the purchaser.

The application of this section would mostly be applicable in large commercial transactions, as an everyday item which is offered for sale has to have the price stated under Part 5B, Section 54 of the CCD2010. As such the application of this section is somehow limited as another provision of the Decree does not allow such circumstances to exist, unless, there would be large business to business transactions which fall outside the application of s.54. In this case the ‘certain circumstances’ must be defined to include or exclude such transactions. In any case the Commission must be provided with powers to arbitrate in such cases.

**Section 83** provides a general cover to conduct that may or may not be misleading, but may be **liable to mislead in relation to goods**. **Section 84** provides a general cover to conduct that may or may not be misleading, but may be **liable to mislead in relation to services**. The test in these sections is not provided for determining how a certain conduct can be liable to mislead would be tricky. The test provided for in CRW Pty Ltd v. Sneddon (1972) AR17 could be a good starting point.

Clarity should be provided on how the test can be undertaken; moreover the Decree should be amended to allow the Commission to impose a pecuniary penalty for a contravention of these sections.

**Section 85** deals with the offence of **offering gifts, prizes or other free items** in a promotion if the trader does not intend to provide them as offered. If the trader does advertise in this way, they must at the time of advertising, have a reasonable expectation of being able to provide the items as advertised. This includes gifts or prizes being supplied by another party.

This section should be amended to allow a consumer to be accorded the right to choose another gift of equal or higher value.

**Section 86** addresses **bait advertising**, which seeks to lure customers by advertising products which they are aware, ought to be aware that they will not be able to supply. This would get customers into the store and then other products could be sold. CCD2010 requires that “reasonable quantities “of stock be available for a ‘reasonable period’ having regard to the nature of the market and the nature of the advertisement. Whilst a statement like ‘while stocks last’ may seem innocent enough, it may be considered ‘bait advertising’ if a trader does not have sufficient stocks of an advertised product available to cater for the likely demand that the advertising will or is likely to bring.

A test for assessing what is reasonable, and requiring a disclosure of the magnitude of sale must also form part of this section.

**Section 87** prohibits **referral selling** and ensures that benefits are not promised to a person(s) on the basis the benefits would only be realized if assistance is provided in deriving consumer information or further sales.

**Section 87A** restricts engaging in schemes that provide an opportunity to sell and investment as opposed to selling goods and services, i.e. **pyramid schemes**.

This section should have a specific criminal penalty of imprisonment as well as a pecuniary penalty due to the serious nature and such schemes target a wide range of people that is more people are required. In most circumstances most people involved would not know that they are engaging in deceptive conduct. Such harsh penalties will be in public interest.

**Section 87B** deals with **debt recovery** and the actions and representations that the creditor should not engage in while seeking to recover the debt.

This section is very close to harassment as such similar penalties should be assigned for contravention of this section.

**Section 87C** makes it an offense if parties enter into **collective bidding at auctions**, to disclose to each other prices that they would bid upon in tenders. This ensures that the tender/bid process is fair and achieves its intentions.

**Section 87D** deals with **coupons, tokens or promotional items** that would serve as part of a price of a good or service and act as a discount.

**Section 87E** prohibits conduct that would constitute **bundling of goods and/or services**. Here a trader cannot refuse to sell a particular good or service on the basis that other goods or services are also purchased.

The section should be renamed to conditional selling and expanded to include refusal to sell. In many cases especially in rural areas where consumer and traders are known, when consumers lodge complaints against the conduct of traders, traders seek to penalize consumers by refuse to sell goods/service to them specifically. The rationale of this would be is trader is selling goods/service then they cannot refuse to sell this to a person(s) who is offering the price for which the good is being sold. A pecuniary penalty also may be imposed by FCC for a contravention of this section.

**Section 87F** deals with **adulteration conduct**, where a person may be altering the content of goods and supplying the same, and prohibits such a conduct. The section goes on to provide a defence for persons who are found to be supplying goods of adulterate product.

**Section 87G** deals with anomalies that **hoarding** may bring about in relation to rise in price of same or similar goods and restricts such conduct.

**Section 87H** prohibits **black marketing** and ensures that a seller should not sell good for the purpose of resale unless the seller is satisfied that the goods acquired are for legitimate business purpose and that the sale will not increase or tend to increase the prices above what is fair and reasonable whether or not the prices are controlled.

A requirement must be placed on traders who are selling the goods to have a test to determine what is reasonable.

### **Section 87I – Limited Offers and Failing to Supply as Demanded**

The section restricts placing a limitation on the number of items that may be purchased by one customer.

This section should be amended to allow traders to make an application to the Commission to impose restrictions on sales of any particular item in circumstances of market shortages. This is due to Fiji's small market and public interest that more customers are allowed to purchase goods which are limited in supply.

### **Section 87J – Statement of Price or Condition and Pull Date**

The section has three very distinct issues: statement of price; statement of condition; and pull dates. The issues of price and condition are explained, and the pricing portion of this section also has an overlap with section 54 of CCD2010, where prices are to be legible and conspicuously marked.

This section should be separated; the statement of price is well covered as well as conditions (discounts) attached to the sale. The pull date subsection should be separated and apart from the requirement for having pull dates marked, should include definition/explanations on 'best before, expiry dates'. Moreover, it should also be an offense to offer for sale expired items.

**Section 87K** restricts engaging the seller in **obligatory or compulsory situations** requiring purchase.

**Section 88** prohibits accepting payment if at the time when payment is being accepted, the person(s) knows or reasonably ought to know that they would **not be able to supply the good or service** for which they are receiving payments.

This section is similar to 'obtaining financial advantage by deception' in Fiji the maximum penalty for which is Imprisonment for 10 years. A contravention of this section should have similar penalties of imprisonment and a pecuniary penalty also may be imposed by FCC for a contravention of this section.

**Section 89** applies for **misrepresentation of risks and profitability** of businesses and covers sale and investment. The section prohibits making false and misleading representation and seeking to show a different picture from the reality that the business is really in.

**Section 90** restricts **the use of physical force or undue harassment** or coercion in sale of goods.

The section should also provide clarity on the interpretation of undue harassment or coercion. A pecuniary penalty also may be imposed by FCC for a contravention of this section.

**Section 91** limits the application of section 75, 77, 83, 84 and 89 on **prescribed information providers**.

The prescribed information providers should be required to make an application to be considered a recognized information provider by the Commission. This will allow the Commission to proactively limit breaches or perceived breaches of CCD2010.

## Division 2 – Unsolicited Goods and Service

**Section 92** restricts the **assertion of payment** or allowing demands for payments on goods/service which are unsolicited. The section provides further clarity on different situations and the rights and obligations on consumers in such circumstances.

Demand for payment for unsolicited goods/services may also constitute harassment. However, each case would be different, this section should be amended to allow the Commission to arbitrate on such matters.

**Section 93** outlines the **liability for payment for unsolicited goods** and explicitly states that a person receiving unsolicited goods is not liable for payments. The section also provides exceptions.

Since this section also includes exceptions and does not outright give liberty for non-payment. It is noted that each case would be different as such this section should be amended to allow the Commission to arbitrate on such matters.

**Section 94** provides that if false orders are made, by a person in the name of another person, when the goods are sent this would be unsolicited goods. It also provides the burden on the defendant to prove that they had authority for making such orders.

It is noted that each case would be different as such this section should be amended to allow the Commission to arbitrate on such matters.

## Division 3– Mock Auctions

**Section 95** outlines situations where auctions can be considered to be **mock auctions**.

## Division 4 – Door-to-door sales

**Section 96** provides **interpretation** for the division on **door-to-door sales**. It provides definitions and clarifications in case where ambiguities may arise.

The practical application of door-to-door sales is limited to clothing and apparels in Fiji, however, further technical assistance could be sought to ascertain if the application of this division can be extended to road shows, island visits by traders. Mainly, the traders in Fiji do not travel door to door but do travel to major towns and districts.

**Section 97** outlines the application of the division on **door-to-door sales** on the types of contracts and the situations where contracts are/maybe/would be entered into. **Section 98** prohibits certain contractual clauses/terms during **door-to-door sales**. Moreover 1(c) provides a very general cover for the application of this section.

Further technical assistance could be sought to ascertain if the application of this division can be extended to road shows, island visits by traders. Mainly, the traders in Fiji do not travel door to door but do travel to major towns and districts. If the application is extended, then a sub section to cater for such an inclusion must be inserted, and the Commission should be allowed to arbitrate on this matter.

**Section 99** provides **definitions of a prescribed contract** in relation to this division and the determination of contracts for the purpose of cooling-off period. Moreover, it specifically states which contracts may not be prescribed contracts.

**Section 100** provides the **requirements of prescribed contracts** and includes the monetary value, scope of work (for contracts that provides for carrying out of works), requires contract to be printed or typewritten, consumer sign off, a duplicate copy given to consumer, full contact details of dealer, the terms for cooling off which is to be placed above the consumer signature, consumer be given two notices before making the contract. The section goes on further to states that non-compliance with details provided is an offense under the Decree.

**Section 101** clearly states that no consideration (money) is to be accepted/ received during the **cooling-off period**, if the seller does so and offense is created.

**Section 102** provides restriction on **when a dealer can call** the person to whom the sale is intended for the purpose of negotiating the contract.

**Section 103** outlines the **general conduct of dealers** when engaging in door-to-door sales.

**Section 104** provides the consumer an opportunity to cancel/rescind contracts and provides circumstances where a consumer can **rescind the contract**.

**Section 105** requires that where a consumer chooses to **exercise his/her rights of rescission**, this right is to be exercised in writing and stating grounds for the termination.

**Section 106** outlines the **actions to be taken after cancellation of contracts** including return or refund to consumer, return or refund of goods supplied, payment to supplier for value of any service provided, liability for damages.

**Section 107** states that if a contract is rescinded/cancelled by the consumer any other **related contracts** would be cancelled.

**Section 108** states when a consumer is not competent or capable **to waive or surrender their rights**.

**Section 109** restricts **certain actions** where contracts are cancelled or are capable of being cancelled, including actions against the alleged claim of monies owed, legal action, and putting persons on a defaulters list.

**Section 110** provides explanation/assumptions on treatment of contracts and dealers with respect to evidence relating to provisions of the division on door-to-door sales during legal proceedings.

This section is meant to guide the understanding and provide clarity during proceedings. The section should be expanded to include treatment of representations made.

### **General Suggestion regarding Part 7 of CCD2010**

The review of Part 7 of CCD2010 suggests that while the Commission may be doing reasonably well in the enforcement of this part, a lot still needs to be done to ensure better compliance.

It is suggested that CCD2010 be amended to allow the Commission to arbitrate on the consumer protection matters. This will allow quick dispute resolution as well as save time and money.

It is further suggested that technical and financial assistance be provided to the Commission to develop guidelines for a more effective enforcement of these provisions. The difficulties in identifying elements and evidences for each provision may be affecting the Commission's effectiveness in the enforcement part.

## **Part 8– Conditions and Warranties in Consumer Transactions**

Division 1 deals with warranty, while Division 2 deals with Manufacturer and Importer Liability. Most of the Sections Division 1 are also part of the Sales of Goods Act of Fiji and inferences from this legislation are also drawn as part of the Commission’s assessment of the likely offences under part 8 of CCD2010.

**Section 119** allows an officer of the Commission in relation to any matter relevant to the operation or enforcement of this Decree, to require a person (either by oral or written requisition) to furnish -

- (a) any information;
- (b) any records or a copy thereof, in the person’s possession.

**Section 114(4)** makes it an offence to refuse or fail to provide information, or provide a response that is false or misleading in a material particular. The offence under Section 114(4) carries a penalty of \$1,000 and imprisonment for 12 months for a natural person and \$5,000 for a body corporate.

There is no imprisonment penalty prescribed for a body corporate. This needs to be included. Also clarity required in terms of whether the penalty is both, a fine and imprisonment or either of the two. In its current context, the use of the word “and” implies that a person who breaches Section 114(4) has to pay a fine as well serve an imprisonment term.

**Section 119(6)** imposes certain restrictions on the disclosure of information obtained by the Commission. It stipulates that a person providing information that would tend to incriminate them in any offence, other than an offence defined in paragraph (b) of subsection (4), then such information shall not be admissible in evidence against him in proceedings in any court or tribunal other than the Small Claims Tribunal.

The barring of sharing/disseminating incriminating information and the fact that the Small Claims Tribunal in Fiji only allows for claims up to \$5000, greatly disadvantages the Commission’s ability to co-operate and coordinate with other agencies.

**Section 121** on Disclosure of confidential information stipulates that a person must not disclose any confidential information obtained in carrying out the person's functions in relation to this Act, except in accordance with subsection (3).

The Commission proposes to disclose confidential information under section 119. It must first give any affected person written notice inviting the person to show cause, within 28 days after the date the notice is given, why the confidential information should not be disclosed.

## **Part 9 Enforcement and Remedies**

Part 9 of CCD2010 is divided into 2 divisions: Powers of the Officer of the Commission; and Offences, Court Enforcement and Remedies.

**Section 124** under Division 1 relates to Powers of Officers of the Commission. It allows for an Officer of the Commission at all reasonable times obtain information relevant for its investigations for the functions under CCD2010.

**Section 128** makes it an offence for any person who obstructs the officer of the Commission from exercising the powers under CCD2010.

Section 126 needs to be renumbered as Section 127. The error in numbering is a result of two sections being numbered as Section 121 under Part 9 of CCD2010. In its current form Section 126 allows Commission Officers a wide range of powers to enter premises and seize evidence relevant for the purposes of its investigations. However, attendance to the Commission for the purpose of interviewing likely offenders or seeking additional clarification is currently voluntarily. This makes it difficult for the Commission to complete its investigations on time and to adduce high probative value evidence before the court.

It is recommended that an additional section/subsection in section 126 be added under Division 1, to make attendance to the interviews at the Commission mandatory. This will allow for timely and more effective investigations and ensure that the principle of natural justice is always honoured.

Division 2 on Offences, Court Enforcement and Remedies is of great essence as it outlines the kind of teeth given to the Commission under CCD2010 to punish the wrong doers.

**Section 129 on Penalties** stipulates that for offences a fine not exceeding \$5,000 for a first offence and \$10,000 for a second or subsequent offence, for a person found guilty of an offence under this Decree for which no other penalty is provided or imprisonment for a term not exceeding three years. The maximum penalty is five times the fine provided for in the provision or, as the case may be, a fine that is five times the fine provided for. The court may order the convicted person to pay to the other person a specific amount of compensation for the loss. The court may make such an order whether or not it imposes a penalty for the offence.

**Section 130 on continuing offences** in relation to Section 119 states the person is liable to a penalty not less than \$1000 for each day during which the offence continues.

**Section 143 on Vicarious Liability** states that if a body corporate commits an offence against this Decree, each director or member of the governing body of the body corporate shall, subject to section 140, be deemed also to have committed the offence and is liable to be proceeded against and punished accordingly.

**Section 144 A on Pecuniary penalties** stipulates that the Court may order the person to pay to the State such pecuniary penalty, in respect of each act or omission by the person to which this section applies similar conduct. The pecuniary penalty payable is not exceeding \$1 million for each act or omission for body corporate and for a person other than a body corporate is not to exceed \$300,000 for each actor or omission to which this section applies.

**Section 114B** empowers the Commission to institute a proceeding for civil action for recovery of pecuniary penalties within six years after the contravention. Section 145 allows the Commission to obtain Injunctions from the court on application that supports that a person has engaged, or is proposing to engage, in conduct that constitutes a contravention of the Decree.

**Section 59** of CCD2010 also allows for the imposition of on-spot penalties from \$100 to \$1000 for a natural person and \$100 to \$3000 for a body corporate for offences under sections 52, 54, 55 and 56 of CCD2010.

While there are various forms of penalties presided under Part 10, apart from the on-spot penalties under Sections 42, 54,55 and 56 , the other matters have to be taken to court for a court decision. This is time consuming as well a costly activity.

The Commission recommends that a Tribunal be set up to hear on other matters. The Tribunal should be given the powers of a quasi-judicial court and any dissatisfaction with the ruling being contested by means of an appeal in the Court of Appeal under the Fijian Jurisdiction.



## **International Cooperation and Technical Assistance**

The Commission currently receives very little cooperation and assistance from the International competition authorities and agencies. However, the Commission has received cooperation and training assistance via workshops invitations from OECD-KPC, SSNED, ITU, and currently from UNCTAD. Similar the Commission does consult and receives assistance on technical matters from other similar agencies worldwide.

## **6. Conclusions**

Competition policies in Fiji comprises directives, instructions, measures and instruments used by Governments, often released during National Budget announcements or through Government press release, that provides a framework for the nature of the state and condition of competition that is expected to be in force on their markets.

FCC seeks to maintain and encourage the competitive process with a view to promoting economic efficiency and consumer welfare. Its objective is to spur firms and individual players in the market to compete with each other to secure the patronage of customers in terms of, inter alia, competitive prices, good quality and greater choice for them. This objective of the Commission ensures a fair and equitable market and provides the stimulus for growth.

There is already substantial evidence of the benefits of competition regime in Fiji vis-à-vis economic development, greater efficiency in international trade and consumer welfare. The Commission's experience and achievements to date, indicates substantial benefits from the strengthening of the application of competition policy principles in terms of "greater production, allocative and dynamic efficiency, welfare and growth."

The CCD2010 is the law that protects consumers from exploitative pricing collusion or other forms of cartelization, which are designed to prevent competition. The Decree does not prevent business firms from having or gaining a large market share for their products or services. However, the abuse of dominant position is anti-competitive and is strictly prohibited by the Decree.

In performing its functions under CCD2010, the Commission is usually encountered with a number of critical issues including but not limited to lack of expertise, ambiguity in policies, lack of competition culture, related business etc.

To make the Commission more effective and efficient, evaluation of its process and procedures are required. To assist the Commission in doing the same, the Commission was kindly requested that the following areas be assessed or examined by an independent;

1. Structure of the Commission, including the membership numbers, the appointment process and the powers;
2. SWOT analysis of the current policies, legislation, process and procedures
3. Does the Commission have adequate staffing and resources to successfully implement and evaluate CCD2010?
4. Is the FCC decision making process timely?
5. Does the Commission get adequate information to make decisions?
6. Are there proper matter recording and tracking systems
7. Does the Commission have an appropriate complaint handling and tracking system?
8. What is the quality of FCC correspondence to complainants and those complained of?
9. Is FCC's complaints handling and investigations process fair, transparent and adequate?
10. Does the Commission have adequate technical to handle its requirements effectively and within the bounds of its jurisdiction?
11. Are the current actions, process and procedures vulnerable to judicial review?

12. Is the FCC Standard Operating Procedures proper and adequate?
13. Do FCC staffs have adequate access to information source to properly do their work?
14. To what extent FCC staffs are collaborating and coordinating with other stakeholders and overseas counterparts?
15. Is all inward and outward correspondence properly logged?
16. IS FCC funding to perform its functions adequate? What should be the appropriate level of funding?
17. Are the ethical safeguards in place with Commissioners and staff to avoid conflicts, breaches of confidentiality or corruption sufficient?
18. Is the disclosure made by FCC in its annual reports sufficient?
19. Should there be a regular survey of staff on FCC processes and staff management?
20. Should there be external reviews of major ICCC decisions?
21. Is the FCC properly equipped to handle litigation?
22. Does FCC have enough resources to effectively implement Part 6 of CCD2010-the heart of competition regulation?
23. Do FCC and CCD2010 have sufficient and timely redress mechanism in place?
24. Does FCC require the establishment of an independent Tribunal to hear CCD2010 matters?
25. How does FCC and CCD2010 compare with other competition regulators- bench making will assist FCC improve on its conduct and procedures?
26. Should Price Control in its current form continue in Fiji?
27. Should Fiji have a separate and detailed competition policy?

The above together with any other comments, suggestions and recommendations will be highly appreciated.

## Annex 1: Organization of CCD2010

**Table 4: Organization of CCD2010**

<b>Part</b>	<b>Divisions</b>	<b>Description</b>
Part 1	6 Sections	Preliminary
Part 2	Sections 7-25	Establishment of the commerce Commission
Part 3	Sections 26-29	Access Agreements
Part 4	Sections 30-37	Arbitration of Disputes
Part 5	Sections 38-43	Control of Prices
Part 5A	Sections 43A- 43J	Telecommunication Services
Part 5B	Sections 44-48	Fixing and Declaring Prices
Part 5C	Sections 49-59	Provisions relating to Prices of Goods and Services
Part 6	Sections 60-73	Restrictive Trade Practices
Part 7	<b>Division 1</b> Sections 74-91	Consumer Protection and Unfair Practices
	<b>Division 2</b> Sections 92-94	Unsolicited Goods and Services
	<b>Division 3</b> Section 95	Mock Auctions
	<b>Division 4</b> Sections 96-110	Door-to-door sales
Part 8	<b>Division 1</b> Sections 111-116	Condition and Warranties in Consumer Transactions
	<b>Division 2</b> Sections 117-118	Manufacturer and Importer-Liability
Part 9	Sections 119-126	Information
Part 10	Sections 127-150	Enforcement and Remedies
	<b>Division 1</b> Sections 127-128	Powers of Officers of the Commission
	<b>Division 2</b> Sections 129-150	Offences, Court Enforcement and Remedies
Part 11	Sections 150A-150H	Authorizations and Notifications
	<b>Division 1</b> Sections 150A-150E	Authorizations
	<b>Division 2</b> Sections 15-F-150H	Notifications
Part 12	Sections 151-163	General

# **PAPUA NEW GUINEA**

## **SELF ASSESSMENT REPORT**

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# 1. Historical, Political and Economic Context<sup>7</sup>

## 1.1. Overview

Papua New Guinea (PNG) consists of the eastern half of New Guinea island, the two large islands of New Britain and New Ireland, more than 300 small islands and the autonomous region of Bougainville. The PNG mainland and islands have a total area of 463,000 square kilometres and a population of approximately 7.3 million. PNG shares a border with Indonesia's Papua province to the west and with Australia in the Torres Strait and Coral Sea to the south. PNG shares a maritime border with Solomon Islands to the southeast. The capital city, Port Moresby, is situated on a natural harbour on the south-west coast of PNG's mainland.

The terrain of PNG is characterized by jagged mountain ranges, deep valleys and rivers in the highlands, and coral reefs and mangrove swamps in coastal regions. Forest and woodlands cover about 70% of PNG's total land area, and permanent crops about 1.4%. PNG has occasional natural hazards, including earthquakes and mudslides. PNG remains one of the world's least explored, culturally and geographically, and many undiscovered species of plants and animals are thought to exist in the interior.

Most people living in PNG are Melanesian, but some are Micronesian or Polynesian. PNG has over 800 known languages. English, Tok Pisin (Pidgin), and Hiri Motu (the lingua franca of the Papuan region) are the official languages. Although among the most ethnically diverse in the world, PNG's population can broadly be divided into four geographic groups: New Guineans, Papuans, Highlanders and Islanders. The hundreds of distinct and separate communities that make up PNG's indigenous population are divided by language, customs and tradition. Despite these differences, traditional PNG societies have key things in common: they generally operate in a subsistence economy, recognize the wantok system of social obligation, allow for status to be inherited in some places and attained in other places, and have a deep attachment to communally held land.

Population growth is estimated to be 3.1 per cent annually, which creates challenges in some parts of PNG, including the Highlands region, as food security becomes an increasing issue. About 40% of PNG's population is under 15 years of age. According to the World Health Organization's 2009 figures, life expectancy at birth is 61 years of age for males and 65 for females. Many people in the country live in extreme poverty, with about one-third of the population living on less than US\$1.25 per day. Malaria is the leading cause of illness and death in PNG. Tuberculosis is also prevalent amongst the population. PNG has the highest incidence of HIV/AIDS in the Pacific. Lack of HIV/AIDS awareness is a major problem,

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<sup>7</sup> Most of information on the historical, political, and economic background is directly extracted from the following sources:

2<sup>nd</sup> edition, *Papua New Guinea, In Focus 2013-2014*, a Magazine of the Papua New Guinea High Commission in New Delhi, India, pp.-11) <http://www.pngfacts.com/png-economy.html#ixzz3UtkvAEU>  
<http://www.heritage.org/index/country/papuanewguinea>  
[http://www.indexmundi.com/papua\\_new\\_guinea/economy\\_profile.html](http://www.indexmundi.com/papua_new_guinea/economy_profile.html)  
<http://www.adb.org/countries/papua-new-guinea/economy>  
[http://en.wikipedia.org/wiki/Economy\\_of\\_Papua\\_New\\_Guinea](http://en.wikipedia.org/wiki/Economy_of_Papua_New_Guinea)  
[http://www.treasury.gov.pg/html/publications/files/pub\\_files/2011/2011-2015.png.mtdp.pdf9](http://www.treasury.gov.pg/html/publications/files/pub_files/2011/2011-2015.png.mtdp.pdf9)

especially in rural areas. A large proportion of the population is illiterate, with women dominating the statistics.

## **1.2. PNG's History**

It is believed that PNG's first colonizers arrived some 500,000 years ago from the islands now comprising Indonesia. Archaeological evidence points to the settlers in the Kuk Valley in the Highlands region being among the first humans to develop agricultural systems around the same time that gardening was first evolving in Mesopotamia and Egypt.

In the late 16th century, the Portuguese explorer Don Jorge de Meneses sighted New Guinea Island and named it Ilhas dos Papuas. The term 'New Guinea' was applied to the island in 1545 by Spanish navigator, Inigo Ortiz de Retes, due to a perceived resemblance between the New Guinea people and those found on the Guinea coast of Africa. In the mid-1800s, European missionaries and traders began to settle along the coast of New Guinea Island. However, the Highlands region was not explored by Europeans until the 1930s.

Following World War II, the United Nations gave Australia a trusteeship over Papua and New Guinea, and united the administration of the two areas. On 1 December 1973, the territories of Papua and New Guinea became the self-governing area of Papua New Guinea. The country became an independent state on 16 September 1975.

In 1988, Bougainville attempted to secede from Papua New Guinea. A nine-year conflict followed, with an estimated 20,000 people dying in the conflict. It ended with the signing of a peace agreement in 1997. Bougainville now has an autonomous government and four members in the PNG National Parliament.

## **1.3. Political and Administrative Structure**

PNG's political system is a constitutional democracy modeled on the Westminster system. The head of state is Queen Elizabeth II, represented by a Governor-General nominated by Parliament for a six year term. There are three areas of government under the constitution: executive, legislative and judicial branches. Power is shared between the National Government, which is headed by a Prime Minister, and 22 provincial governments including the Autonomous Region of Bougainville (ARB) and National Capital District (NCD). The Prime Minister is appointed by the National Parliament on a simple majority vote and makes all ministerial appointments.

PNG has a single house of parliament with 111 members who are elected every five years. Since independence, governments have been formed by coalitions, a product of the competitive and complex nature of politics in PNG, and the ethnic and cultural diversity of voters and candidates. To date, no single party has captured enough of the vote to form its own government. Since 2001, there have been stricter regulations on the formation, composition and funding of parties. This extends to how parliamentarians may vote during no-confidence motions, the circumstances of defections from political parties, and restrictions on independent MP's.

Following years of frequent changes of government, PNG governments are now protected under the Constitution from no-confidence motions for the first 30 months of a five-year term. A successful no-confidence motion after this moratorium results in an alternative Prime Minister being able to form a new government without calling an election-unless the change occurs in the last year of the government's term. The next national elections are scheduled for 2017.

#### **1.4. PNG's Economy**

Papua New Guinea (PNG) is richly endowed with natural resources, but exploitation has been hampered by rugged terrain, land tenure issues, and the high cost of developing infrastructure. The economy has a small formal sector, focused mainly on the export of those natural resources, and an informal sector, employing the majority of the population. With around 80% of Papua New Guinean's residing in traditional rural communities, the majority secure their livelihoods from subsistence gardens and small scale cash cropping.

The minerals, timber, and fisheries sectors are dominated by foreign investors. Extraction of these resources is dominated by foreign investors. In May 2014, PNG started exporting its first liquefied natural gas (LNG) from its first major gas project led by ExxonMobil and its joint venture partners. It is anticipated that it will boost overall GDP growth to 20% in 2015.<sup>8</sup> While exports from LNG will eventually provide revenue to the state, they are unlikely to be felt in the short term.

The second major LNG project, which is expected to be developed in 2016, which will be led by French oil company Total S.A, is expected to add to this growth. Other joint venture partners in the second LNG project are the US company InterOil Corp., and Australian company Oil Search. PNG Government has shares in each of the projects. There is also proposed submarine mining in the Bismarck Sea (by Nautilus Minerals).

With over a decade of resource boom with mineral deposits which account for nearly two-thirds of export earnings, PNG's economy has performed strongly since mid-2000s. This economic performance has been driven by high international prices for PNG's exports (including for agriculture), conservative fiscal policies and, more recently, construction activity related to the LNG project. It is anticipated that in 2015, PNG's GDP would be considerably boosted as a result of exports earnings from LNG.

In comparison to other Pacific island countries, Papua New Guinea is in a reasonably strong macro-economic position, with the savings it accrued during the commodity boom acting as a fiscal buffer against the global economic crisis, and its financial sector relatively sheltered from the impact of the global credit crunch.

There has been important progress in key areas of structural reform in recent years; in particular, opening markets in telecommunications and air transport has produced major welfare gains for the population. To diversify the economy and increase employment, attention is needed to challenges such as maintaining law and order, improving the business climate, commercializing state-owned enterprises, reducing the regulatory and licensing burden, and equitably accessing resources (including land) for development. Developing

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<sup>8</sup> <http://www.worldbank.org/en/country/png/overview>



infrastructure – electricity, telecommunications, road and other transport – continues to be a critical precondition for accelerated private sector-led growth.

Translating strong macroeconomic performance and extractive industry revenues into a broad improvement in living standards remains the key challenge for PNG. Ensuring the integrity of the public financial management for service provision, improving efficiency of sectoral spending, raising the performance of the civil service, and improving transparency and accountability in budget management will be crucial in converting the forthcoming windfall revenue into palpable improvement in service delivery.<sup>9</sup>

The management of land is intrinsically linked to Papua New Guinean culture. About 97% of PNG's land is held under customary ownership. This can provide a challenge for those seeking to secure land for commercial ventures. There is therefore an ongoing process of land reform in PNG. In March 2009, PNG's Parliament passed amendments to the Incorporated Land Groups Act and the Land Registration Act aimed at improving the system by which customary landowning groups can be legally recognized as landowners. The legislation simplifies the process by which landholders can lease out land for commercial development.

Papua New Guinea's major unit of currency is the Kina (PGK). There are 100 toea to a Kina.

### **1.5. Background to PNG Competition Law**

The Government of PNG established the Independent Consumer and Competition Commission (the ICCC) in 2003 following the enactment of the Independent Consumer and Competition Commission Act (ICCC Act) in May 2002. It is now a suitable time for a review. The 2002 Act was many years in the development with earlier unsuccessful attempts at competition and consumer legislation. Eventually pressure from the World Bank and acceptance by the PNG Government for the need for microeconomic reform led the Parliament to enact the current Act. The ICCC Act and the Commission have been a credit to PNG. In a short time, the ICCC became an effective agency in carrying out its mission.

PNG like other developing economies has its own challenges and opportunities in terms of competition and consumer protection matters. The country has had nearly 40 years of independence and there is still a lot to be done in terms of nation building, enhancing the lives of people and addressing development issues affecting businesses and consumers.

Some industries within PNG are highly concentrated and dominated by large well-resourced operators and increasingly some businesses are taking advantage of deficiencies in the law by engaging in conduct that disadvantages competitors, small businesses, farmers and the community. It is generally accepted that PNG needs better distribution of economic benefits. Targeted competition and consumer laws should focus on this, as well as economic development as such. Other important factors to be considered in relation to any review are:

- Understandable law for both ICCC staff and stakeholders.
- Transparency

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<sup>9</sup> Ibid

- Timely administration
- Enforceability of the law
- Professionalism of the regulator
- Support from the rest of government
- Support from the judiciary\

The OECD, the World Bank and the ICN tend to support a one fits all competition law, which and that is fine for the underlying rules, but there must be individual jurisdictional nuances. Even now there is work at the international level towards a competition law for developing economies, namely *Competition light*, which is well overdue.

Economic management itself is a mammoth task considering a population of over 7 million people with more than 800 languages and cultures, 75% of whom are living in rural-urban settings scattered all around the rugged terrains, valleys and coastlines. Many of those challenges and opportunities now facing the country are as a result of influences and demands exerted on the country to live up to and adopt to changing technology, global trade and competition expectations.

Professor Eleanor Fox from New York University, School of Law, is a strong proponent of *Competition light* and has stated that competition law for developing countries needs to focus on assisting economic development and benefiting consumers and small business, *Consumer Light* is to be considered as well. PNG should consider both. Such laws should focus on what is essential for PNG and not the whole suite of competition and consumer law baggage that older jurisdictions have. Fox says “Developing country antitrust should not be used to protect inefficient Davids against Goliath but it may and should be used to empower Davids against Goliath”.

We also need to be careful not to get carried away by comments that other jurisdictions laws are simpler. That may or may not be that case often that is subsidiary legislation or legal precedents that form part of the overall regime. PNG needs to assess its own needs.

## **2. PNG ICCC**

### **2.1. Objectives**

The primary role of the ICCC is to enhance the welfare of the people through promotion of competition and fair trading; to promote economic efficiency in industry structure, investment and conduct; and to protect the rights and interests of consumers by monitoring the standards and conduct of those engaged in the production and distribution of goods and services.

### **2.2. The agency**

The Commission budget for Personal Emoluments for 2015 is K6,160,006 while for Goods and Services is K9, 973,706 and Reviews is K2,145,000. Capital expenditure amounts to

K402,500. The Commission received a government appropriation for 2015 of K11,776,300 of which K2,145,000 is for reviews to be undertaken this year and some continued from last year. Internal revenue for 2015 is projected at K1,352,600, mainly from license fees from the electricity industry, PNG Ports, Trade Measurement fees, taxi meter inspections/calibrations, Clearance/Authorization application fees and other income.

The ICCC has an approved organizational structure of 77 staff, which excludes two Associate Commissioners. Currently there are 17 vacancies, which are in the process of being filled. The Commission staff have either Tertiary or other qualifications in areas of Business Management, Economics, Public Policy, Science, Law, Accounting, Arts, Administration, Engineering and Information Technology. Since its inception the ICCC has extensively used overseas consultants and has had help from overseas counterpart agencies.

The ICCC has 4 regional offices located in each of the 4 regions of PNG and each regional office oversees ICCC functions in 5 Provinces, with an estimated population of 1.5 million in each Province. 50% of the business houses and their economic activities are in the capital city, Port Moresby, and Lae, the industrial city, whilst the rest are scattered throughout the 18 Provincial towns. Each regional office has around 4 staff and they are required to cover each of the 5 Provincial towns, with an estimated town population of 50,000-100,000 people and between 10-20 business and government offices.

Unlike other jurisdictions, the ICCC is a relatively new organization housing both the competition, regulatory, pricing and limited consumer protection functions, including product safety and weights and measures.

It has been a challenging, but also exciting, experience for the ICCC in terms of its overall work. In the Consumer Protection and Enforcement work, most of the provisions in the ICCC Act are generic and relatively new but that has not stopped the ICCC making significant progress in terms of achieving its goals and objectives. Despite the lack of specific consumer protection law, other than product safety, the ICCC has successfully tackled many consumer issues and will continue to do so. However, there is a view the ICCC needs specific consumer powers. Particular focus should be the essential needs of the PNG consumer, often quite different to what similar agencies in more developed countries can expect.

PNG has largely adopted a developed economy competition law albeit with some local touches. The ICCC Act is similar to Australian and New Zealand law but the drafting is based on New Zealand law, as the Australian law has many constitutional quirks. In proposing amendments, the TOR states that we should be conscious that the ICCC must operate in the political, commercial and legal environment of this country. It is crucial that in proposing the amendments that we are conscious of that environment and that the proposals be pragmatic, comprehensive and effective in addressing issues that have arisen and are likely to arise in the future in PNG. Issues such as timeliness, market place and Government policy impacts are critical in a market such as PNG.

### **2.3. The ICCC to date**

The ICCC has had two Commissioners: Thomas Abe and the current Commissioner, Dr Billy Manoka. It has had 4 Associate Commissioners, including two non-resident Associates. The ICCC is structured based on its law and is as follows

- Executive
- Regulatory contracts
- Competition
- Consumer protection.
- Corporate

Its Corporate Plan outlines the following:

**ICCC's goals are:**

- 1. To promote and protect the bona fide interests of consumers with regard to price, quality and reliability of goods and services;**
- 2. To ensure that users and consumers (including low-income or vulnerable consumers) benefit from competition and efficiency;**
- 3. To promote and encourage competitive and fair trading practices;**
- 4. To ensure timely assessment of clearance and authorisation applications;**
- 5. To monitor the market place to prevent abuse of market power or other breaches of the Act;**
- 6. To promote and encourage the efficient operation of industries and efficient investment in industries;**
- 7. To ensure that regulatory decision making has regard to any applicable health, safety, environmental and social legislation;**
- 8. To ensure effective administration of the Trade Measurements Act;**
- 9. To ensure that issues raised at the Consumer Products Consultative Committee (CPCC) are effectively followed up;**
- 10. To seek effective outcomes for consumers' complaints;**
- 11. To ensure timely assessment of regulatory reviews;**
- 12. To ensure consistency with regulatory outcomes;**
- 13. To identify new industries for possible regulation or de-regulation;**
- 14. To ensure continuous improvement in Commission decision making processes;**
- 15. To continuously develop ways of meeting ICCC's present and future litigation needs and skills;**
- 16. To effectively manage ICCC finances and manpower resources; and**
- 17. To develop and implement a comprehensive training plan.**

## **2.4. ICCC activities**

Since its inception the ICCC has undertaken the following.

There have only been two “competition” cases: one a merger case that has been stuck in the PNG National Court at an interlocutory stage for some two years; and the other a challenge to a statutory notice that was settled. There have been several consumer protection/labelling/prices cases. No written decisions are available.

With regards to compliance on consumer protection (CP), the ICCC has recently prosecuted two Public Motor Vehicle (PMV) operators for charging higher fares than the maximum fares set by the Commission. Based on complaints received and investigations by the Commission, the operators were successfully prosecuted on 10th December 2014. These two cases set precedence in law for court proceedings for breach of the Prices Regulation Act (Chapter No.320), (the PR Act) by PMV operators and providers of other declared goods and services under that Act. PMV and taxi services in PNG are declared services for purposes of price control under the PR Act. The PR Act empowers the ICCC to determine and set the maximum PMV and taxi fare through a wider public consultation process and prosecute offenders.

In addition, seven potential CP prosecution cases were resolved through voluntary compliance, with businesses giving written understandings on terms proposed by the Commission as a measure to address the consumer detriment. The businesses who gave the undertaking are liable to prosecution for breach of the PR Act if they do not carry out their undertaking.

The ICCC is a relatively young competition authority with limited resources. Consistent with its Compliance Program, its efforts have been focused on building its capability and striking a balance between prosecution and voluntary compliance, as part of its information bridging and advocacy efforts to educate stakeholders about the requirement of the CP provisions under the ICCC Act and related legislation administered by the Commission. Although the number of CP cases brought before the court is limited thus afar, this is expected to increase over time.

For competition matters, the Commission has dealt with 76 complaints, 8 authorization applications and 17 clearance applications. The Commission’s first two court cases in competition are the Steamships merger case, which is before the courts now, and a challenge to the Commission’s exercise of its information gathering powers. The latter case was settled.

### ***Investigations, enforcement and injunctions***

The Commission has dealt with 15 competition investigation cases. However none have been prosecuted in court thus there has not been any injunction, penalties or damages awarded. Eleven of those cases have been closed while four cases are still undergoing investigations. Of the eleven cases that have been closed, five cases are due to lack of information or

insufficient evidence, two are due to the difficulty of proving intent or purposes, while four have been closed and administrative remedy imposed to rectify the issue.

### ***Authorizations and clearances***

The Commission has handled a substantial number of merger clearances/authorizations' and non-merger authorizations'. There have been 17 clearances and 17 authorizations'. Clearances were primarily mergers and authorizations', mainly non merger issues. Copies of the decisions can be obtained from the ICCC. That work is ongoing and takes up a lot of the ICCC's resources.

### ***Use of formal investigation powers***

Such powers are regularly used but mainly for documents. Regarding CP issues, the Commission has used its information gathering powers (Part IX of the ICCC Act) to compel businesses/individuals to provide written information and attend meetings called for by the Commission. These powers were exercised following failures by businesses/individuals to voluntarily cooperate.

With regards to inspection of premises involving compliance, the ICCC has recently applied for the first time and obtained Warrants to enter and gather information at two fuel pump sites in Port Moresby. This follows observations by the Commission during its monthly inspections that certain fuel pump operators have repeatedly failed to comply with the monthly maximum fuel prices, announced by the Commission under the PR Act, until specifically advised by the Commission. Refined petroleum products (Petrol, Kerosene and Diesel) are declared goods for price control purpose under the PR Act. The Warrants were not used when the monthly fuel price monitoring was conducted on 8<sup>th</sup> March 2015, as the fuel pump sites had complied with the March prices announced by the Commission, but the Commission will continue to apply for Warrants to enable it to inspect and seize a wide array of hard and soft copy information on site.

In some cases, where the Commission has reason to believe that information is withheld or it is necessary or desirable to obtain the information, the Commission uses its powers under Sections 127 and 128 of the ICCC Act. The Commission used similar powers under Section 12 of the PR Act to obtain information from an industry participant. They complied with the statutory notice that was issued by the Commission.

### ***Guidelines***

There are both short and long summaries of the ICCC Act. Guidelines are planned for mergers and misuse of market power. Brochures exist on **rpm**, price fixing, mergers and authorizations'. There are many brochures on consumer issues, especially product safety, and many more guides and brochures are in the pipeline.

On CP issues, the ICCC has developed short guidelines on how to lay a CP complaint, Product Recalls, Product Safety and Banned Small High Powered Magnets. The Commission will be releasing a "Guide on Advertising and Selling" soon.

In regards to competition, the ICCC does not have any formal guidelines in place; however we do have manuals that guide staff on the conduct of investigations. As a way of streamlining our systems and procedures, there are number of guidelines that are being drafted such as the Merger Review Guidelines, Abuse of Market Power Guidelines and the Immunity and Leniency Guidelines.

### ***Consumer issues “tackled”***

Primarily in the consumer product safety area, the ICCC has used its general CP role in Part VII of the Act to educate, persuade and influence. The Commercial Advertisements (Protection of the Public) Act is utilized to its extent. Further the trade measurements legislation that is administered by the ICCC is also utilized. However, this is all a bit of a mishmash and there needs to be a more holistic approach with better enforcement mechanisms. Further some of the legislation used is not easy to administer, e.g. need to prove misleading or false in a material particular.

The Commission has addressed both compliance and product safety issues mainly under Part VII - Division 3 of the ICCC Act. For example, the Commission’s work in the area of product safety is informed by monthly consumer product surveys and periodic interactions with the Australian Consumer and Competition Commission (ACCC), the Product Safety Consultative Committee (of the states, territories and Commonwealth of Australia and New Zealand) on product safety issues and other matters affecting consumers regionally. The Commission’s work is focused on safeguarding mainly children and disadvantaged consumers. These efforts have led to the Interim ban on certain baby dummies (expires 18th April 2015), Interim ban on certain aquatic toys (expires 21 February 2016), Interim ban on non-English Labelling Foodstuff (expires 1<sup>st</sup> December 2015), and Permanent ban on small high powered magnets. By March 2015, The ICCC will be issuing interim bans on certain baby walkers, certain bunk beds, and prams/strollers; and permanent bans on “Yoyo Water Balls” and “Novelty Cigarette Lighter” products.

## **3. Competition Legislation Administered by the ICCC**

### **3.1. The ICCC Act: an outline**

#### **Regulated entities, goods, services and contracts (ss.32-39)**

This regime is for the regulation of certain industries, entities and goods and services. Industries are electricity, ports and harbours, postal and third party motor vehicle insurance. Certain other goods and services are regulated by the Commission under separate legislation – the Prices Regulation Act - see below. Telecommunications is also a regulated industry but regulation is handled by the National Information and Communications Technology Authority (NICTA).

The Minister for Treasury (Treasurer) may declare an entity to be a ‘regulated entity’. If the ICCC is satisfied it is appropriate and an entity has a substantial degree of market power, it may declare an entity to be a regulated entity and goods or services supplied (or capable of being supplied) by a regulated entity to be regulated goods or services. The Commission may at any time (and with the consent of the regulated entity) revoke but not vary the declaration.

**Regulatory contracts** – The consequence of declaring an entity to be a regulated entity is that a regulatory contract may be issued by the Treasurer or ICCC. A regulated entity must comply with the terms of any regulatory contract and the ICCC must perform any functions that the regulatory contract imposes on the ICCC. If the ICCC believes an entity is not complying or may not comply with a regulatory contract the ICCC may make an order requiring it to comply. Failure to comply may result in a fine of up to K10million. Additional details of the Regulatory contracts regime including the interface with the prices regulations are at **Attachment A**.

#### **Codes and rules (s.40)**

The ICCC may make codes or rules relating to the conduct or operations of participants in a regulated industry.

#### **Panel of experts, Appeals Panel and appeals (ss.41-43)**

The Minister or regulated entity may appeal to a panel of experts to review decisions of the ICCC. There is a ten day time limit to lodge appeals and a six week time limit for the appeals panel to make its decision. The decision of the ICCC may be deferred pending the outcome of the appeal. In determining the appeal, the panel must only have regard to the information that was available to the ICCC. The Appeals Panel may affirm the decision of the ICCC or return it to the ICCC for reconsideration.

#### **Competitive market conduct rules (ss.44-102)**

Provisions here prohibit certain anti-competitive conduct. It also applies conduct engaged in outside of PNG by any person resident or carrying on business in PNG, to the extent that such conduct affects a market in PNG. The State is bound by the provisions of this Part to the extent that the State engages in trade.

**Practices that substantially lessen competition** – the Act prohibits the entering into or giving effect to any contract, arrangement or understanding or any covenant that has the purpose or effect, or is likely to have the effect, of substantially lessening competition in a market. It also prohibits entering or giving effect to any contract, arrangement or understanding that contains an exclusionary provision. This is sometimes referred to as a primary boycott which is an arrangement between persons in competition with each other that excludes or limits dealings with a particular supplier or customers or particular class of suppliers or customers.

**Price fixing**–arrangements between persons that have the purpose or effect, or are likely to have the effect, of fixing, controlling or maintaining the price for any good or service or any discount, allowance, rebate or credit for any good or service is deemed to substantially lessen



competition and is a breach of the ICC Act. There are exceptions, namely joint ventures – this applies to two or more parties, whether or not in partnership, entering into a joint trading activity or if a corporation carries out such an activity on behalf of two or more persons; Recommendations as to prices, discounts, etc. – this must include not less than 50 parties who supply or acquire goods or services in trade;<sup>10</sup> and joint buying or advertising arrangements – this applies to the price of goods or services collectively acquired or for the joint advertising of the prices of those goods and services for resupply.

***Taking advantage of market power*** – the ICC Act prohibits a person that has a substantial degree of market power from taking advantage of that market power for the purpose of restricting entry into that or any other market; preventing or deterring a person from engaging in competitive conduct in that or any other market; or Eliminating a person from that or any other market.

A business has substantial market power when its activities are not significantly constrained by competitors, suppliers or customers. It is not illegal to have market power; only if the conduct is engaged in for an illegal purpose is there a contravention. The ICC takes the view that the illegal purpose need not be the only purpose, or even a dominant purpose. It is enough that it be one of the purposes, and a substantial one.

Whether or not a business has a substantial degree of market power depends on the surrounding circumstances. The Commission will take into account which activities of the business in the market are constrained by the conduct of their competitors, or potential competitors, or by the behaviour of those to whom it supplies or those who supply it. “Purpose” may be inferred from a business’s conduct and from any other relevant circumstance. A business with a substantial degree of market power might misuse that market power in circumstances such as refusal to supply or buy, predatory pricing, exclusive dealing, or in exceeding a statutory, property or intellectual right.

The ICC cannot authorize (or exempt) the conduct of misuse of market power whereas it can with other competitive market conduct.

***Resale price maintenance (RPM)*** – this is where a supplier takes certain defined steps to ensure that a **potential** purchaser of goods or services does not advertise or resell those goods or services at a price less than that specified by the supplier. It includes withholding supplies for specific reasons. The prohibition does not prevent a supplier from recommending a price, provided it is a genuine recommendation and the supplier takes no action to influence the reseller not to resell below that price. A supplier may set a maximum as opposed to a minimum resale price.

The Act prohibits a person from engaging or threatening to engage in conduct, either alone or in concert with other(s), that will hinder or prevent the supply of goods to or acquisition of

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<sup>10</sup> Note in this regard that the Commission takes the view that arrangements that purport to recommend prices but in fact fix prices are not caught by this exception

goods or services from another person for the purposes of inducing that other person not to sell at less than a specified price.

**Statutory exceptions** – there are a number of exceptions: conduct specifically authorized by an Act or a regulation under an Act – this does not include an exception in legislation that is in nonspecific terms; conduct relating to a partnership agreement; conduct related to work restrictions during or after termination of employment or contract for the provision of services; provision for the protection of the purchaser of a business for goodwill of that business; matters relating to product or service standards approved by a prescribed body or association; conduct related to remuneration, conditions of employment and other employee matters; a provision in a contract relating solely to the export of goods; Conduct in connection with a licence of a statutory intellectual property right but not for misuse of market power or rpm.

**Business acquisitions** – acquisitions of businesses or shares in a business are prohibited if the acquisition would have, or be likely to have, the effect of substantially lessening competition in a market in PNG. In deciding if an acquisition is in breach of the ICCC Act the following matters must be taken into account: actual and potential level of import competition in the market; nature and effect of barriers to entry in the market; the number of buyers and sellers in the market; the degree of countervailing power in the market; the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins; the extent to which substitutes are available, or are likely to be available in the market; the dynamic characteristics of the market including growth, innovation and product differentiation; the likelihood that the acquisition would result in the removal from the market of a sustainable, vigorous and effective competitor; and the extent of vertical integration in the market.

**Authorization** – a person may apply for exemption from certain provisions of the ICCC Act. On receipt of an application for authorization the ICCC must inform all parties who have or are likely to have an interest in the subject matter of the application that the Commission will be considering the application. It will provide details of the application and invite interested parties to lodge a submission in relation to the application.

In considering an application the ICCC may only grant authorization if it is satisfied that in all the circumstances the conduct for which authorization is sought results, or is likely to result, in a benefit to the public and this benefit outweighs the lessening of competition that would result, or be likely to result or is deemed to result from the conduct.

A slightly different test applies to rpm and exclusionary provisions. Here the ICCC must be satisfied in all the circumstances that the conduct results or is likely to result in a benefit to the public and that the conduct should be permitted.

Before deciding an application the ICCC must issue a draft determination (including reasons for its proposed decision). This is sent to the applicant and all interested parties. The applicant or an interested party may request a conference with the Commission to discuss the

application.<sup>11</sup> Before finally deciding an application the ICCC must take into account any information provided at the conference (if held) and any further submissions received. The ICCC determination (with reasons) is sent to the applicant and interested parties and may be issued subject to specified conditions.

***Business acquisitions – clearances and authorizations*** – Clearance and Authorization are both available. Time limits apply in respect of both a clearance notice and an authorization application. The ICCC has 20 days in relation to a clearance and 72 days for an authorization. In both cases the time limit can be extended in certain circumstances.

The relevant test for clearance is that the acquisition would not have the effect of substantially lessening competition in the market. Clearance is deemed to be automatically granted if a decision is not made by the ICCC within the time limit (or any extension thereof).

With an authorization application the ICCC shall, within the time limit, clear the acquisition if it does not result in a substantial lessening of competition in the market; or grant authorization if it is satisfied that the acquisition results, or is likely to result, in a benefit to the public that it should be permitted; or decline to give clearance or grant authorization if it is not satisfied of either of the above.

In granting authorization or clearance the ICCC may accept a written undertaking to dispose of assets or shares given on behalf of the applicant. Before deciding a clearance or authorization the ICCC may hold a conference with the applicant and interested parties to discuss the application or notice.

***Enforcement and penalties*** – where the National Court considers a person has contravened any of the market conduct provisions outlined above; or aided and abetted, counselled or procured a contravention; or has been knowingly concerned in a contravention; or has conspired to contravene a provision; the Court may, on application by the Commission, order a **pecuniary** penalty of up to K500,000 for an individual or K10million for a body corporate. In determining the amount of the pecuniary penalty, the Court may have regard to the amount of gain arising from engaging in the conduct. Other penalties also apply.

On application of the ICCC or any other person the Court may order the grant of an injunction restraining a person from engaging in conduct that may constitute a contravention of any of the market conduct provisions or engaging in an ancillary offence. There is provision for damages in relation to a contravention by a person of the market conduct rules and business acquisitions or conduct constituting an ancillary offence. On application of the ICCC, the Court may order disposal of assets or shares for a contravention of the business acquisition provisions.

### **Consumer protection (ss.103-121)**

Apart from consumer product safety, as outlined below, the ICCC Act only includes general consumer protection provisions.

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<sup>11</sup> The ICCC may also decide to hold a conference.

**Consumer product safety** – the ICCC has specific wide ranging powers in relation to consumer product safety. It takes its responsibility under these provisions seriously and will take immediate action when it becomes aware of a product that can affect the health or safety of consumers. Failure to comply with these requirements may result in a heavy fine or imprisonment.

ICCC powers include warning consumers of the possible danger of particular goods and conducting an assessment of the risks involved; recommending to the Minister to declare a standard that suppliers of the product must meet or for the provision of information in relation to such a product; issuing interim bans where the Commission is of the view that such goods will or may cause injury; issuing of permanent bans on unsafe goods; and requiring compulsory recall of products that are unsafe, or not compliant with a product or information standard.

The Act provides that the ICCC may in certain circumstances hold a conference with any supplier who may be adversely affected by its actions.

### **General Powers of the ICCC (ss.127-149)**

**Information gathering** – the ICCC has power to summons witnesses to give evidence to the ICCC and to produce documents; require a person to provide information to the ICCC or to answer questions before the ICCC; enter and search premises to inspect any document or goods and to take documents or make copies of the them.

**Confidentiality** – any member or person employed by the ICCC shall not disclose information designated ‘confidential’. Each member of the ICCC, advisors and staff has signed an undertaking to this effect.

**Enforcement and penalties** – The ICCC may prosecute all offences under the Act.

**General penalties** – the Act provides substantial penalties and imprisonment for an offence. In addition, the Court may order the forfeiture of any money or goods in respect of which an offence has been committed.

### **3.2. The Commercial Advertising (Protection of the Public) Act – an outline**

The purpose of the Act is to protect the public from untrue, inaccurate or misleading commercial advertisements. An advertisement means every form of advertising in the country inviting the public to purchase the goods or services advertised or to do certain other things. The Act recognizes the need to protect the people because of the general lack of sophistication and educational standards of the people of PNG and the general tendency to rely on almost any form of advertising, and regulates the right to freedom of expression and publication granted under the Constitution. Under the Act it is an offence to publicize any unfair statement in any commercial advertisement. A commercial advertisement means any

advertisement for gain or benefit of any kind to the advertiser or some other person, directly or indirectly, as a consequence of persons responding to the advertisement

The penalty for an offence is up to K1,000. However, it is a defence for the advertiser to have believed on reasonable grounds that the questionable statement was not unfair or that it was not likely to deceive or mislead the complainant.

### **3.3. The Prices Regulation Act (PRA) - an outline**

The Minister for Treasury may declare a good or service to be regulated or monitored by the Commission. Services and goods that are regulated or price controlled are Water & sewerage; public motor vehicles (PMV) and taxis; and wholesale, retail and drum filling margins for petrol, diesel and kerosene. Prices for water & sewerage and PMV & taxis and margins for petrol, diesel and kerosene are set annually by the Commission.

In terms of its monitoring role, the Commission undertakes it in different time periods for each of the monitored goods and services, which include monthly monitoring of the prices of sugar, jet A1, aviation gasoline, imports and exports of petrol, diesel and kerosene; export and import volume of petrol, diesel and kerosene; and Import Parity Prices for petrol, diesel and kerosene, and quarterly monitoring of the prices of rice, flour and stevedoring and handling services; and domestic road and sea freight for petrol, diesel and kerosene.

A person selling declared good may be required to exhibit particulars relating to the declared goods and services (s. 18).

If the Commission intends to fix a **maximum price** at which goods may be sold, it must publish a notice of such in daily newspapers at least 30 days before making the order. The notice will set out the details and invite interested parties to make submissions. Prior to making an order, the Commission must consider submissions received. It must publish a statement of reasons for any order it publishes and orders declaring the maximum price at which the goods or services may be sold. The Commission may also set a different maximum price according to differences in quality or description, or in the quantity of goods sold, or the value supplied or sold or in respect of different forms, modes, conditions, terms or localities of trade, commerce, sale or supply, etc.

When making an order, Section 21(2A) sets out what factors the Commission must take into account. They include the need to protect consumers and users of declared goods or services from misuse of market power; the cost of making, producing or supplying the declared goods or services; the desirability of encouraging greater efficiency; the need to ensure an appropriate rate of return on investment; existing standards of quality, reliability and safety; the effect of any proposed order on general price inflation over the medium term; and the economic and social impact of any proposed order.

***Review of price control*** – at any time after a price control order is made the Minister or a supplier of the declared goods or services may apply to the Commission for the order to be

reviewed .The Commission must review the price if it has been at least 12 months since the last review.

The Commission will have 90 days in which to review the maximum price (and this period may be extended by the Commission). If the review is not completed the order will be varied in the manner proposed by the applicant. The Commission is required to invite submissions of interested parties in conducting a review and take those submissions into account.

***Evasion of prices regulation*** – s. 27 allows the Commission to take action to prevent a person from evading price regulation.

***Control of sales by auction*** – s. 29 allows the Commission to make orders here.

***Declared monitored goods and services*** – the Commission is allowed to declare goods or services to be monitored and the Commission’s information gathering powers will permit the monitoring of prices and any matters concerned with those prices.

***General offences under the PRA*** – the PRA lists a number of general offences including selling or supplying above maximum prices – this includes substantially identical goods; refusal to sell at declared prices; refusal to supply at a fixed price; delivery of less or inferior goods; lowering quality of declared goods; and falsely advertising that prices have been approved by the Commission or otherwise subsidized.

### **The ICCC also administers the PNG Weights and Measures Legislation**

#### **3.4. Comments on the current PNG Regime**

PNG has, in view of some, been hampered in the administration of the law by certain conditions, namely that: (i) competition is often a myth in small economies and the need is more to curb monopoly power and to facilitate market entry; (ii) the global competition mafia scorns price control but query whether that is the right approach for PNG in relation to businesses with market power; (iii) the global competition mafia does not like authorization, yet it is one of the greatest tools for industry reform; (iv) a need for the ability by small businesses to collectively negotiate with large customers or suppliers; (v) overseas models very much use the Courts, this often works badly in those economies let alone economies such as PNG, PNG needs its own compliance model; (vi) PNG does not have mandatory merger pre-notification and clearance; (vii) the ICCC should have the power to recommend to the Government steps to overcome otherwise anti-competitive or anti-consumer conduct; (viii) the ICCC should have a direct legislation review role and advise Governments on the anti-competitive or anti-consumer impact of proposed legislation or exercise of legislative power; (ix) the skills needed to administer the Act are limited in PNG and hence the law needs to be structured so that compliance is a reality; and (x) lack of strong consumer protection provisions.

PNG does not have the constitutional limitations that jurisdictions such as Australia, United States and Canada have. Yet it has a legal tradition that many Asian jurisdictions do not. The PNG environment allows policy makers to create an effective ICCC.

Consumer law in PNG should include some elements of price control. Further, strong compliance tools be built into the Act and to the extent possible avoid ICCC reliance on the Courts, yet have ICCC actions be subject to appeal in the Courts or Tribunals.

## **4. Consumer Protection and the ICCC Act**

### **4.1. Background**

The type of generic consumer issues that PNG faces and the ICCC Act needs to accommodate are poor service standards from State Owned Entities (SOEs); high fuel prices; poor public transport services (PMVs & Taxis); poor labelling of imported products; contraband, unsafe & illegal Products; misleading commercial advertisements; housing and real estate service standards; and scams, such as pyramid selling.

That competition and consumer law should be seen as one subject, not two, is also the position of the former head of the Federal Trade Commission in the United States, Timothy J Muris; in a paper he gave in October 2002, in which he said,

*“Sometimes robust competition alone will not punish or deter seller dishonesty or renegeing...well-conceived competition policy and consumer protection policy take complementary paths to the destination of promoting consumer welfare.”<sup>12</sup>*

Professor Alan Fels, former Chair of the ACCC, has said a number of times that the consumer provisions of the legislation keep the agency at the forefront and mean that the politicians are loath to call for the abolition of the agency, calls that competition issues will often generate.

#### **Regulation of Competition/ Consumer Protection in the one Body**

There are many good reasons to have competition and consumer laws administered by one regulator. The major policy reason is that the goals of the two laws are intertwined.

However, there are also a number of administrative reasons why they should be administered by the one regulator. They include:

- essentially the same industries and businesses are being regulated and it is more efficient and less expensive for business to deal with one regulator;

<sup>12</sup> Timothy J Muris, “The Interface of Competition and Consumer Protection”, speech to the Fordham Corporate Law Institute’s 29<sup>th</sup> annual conference on International Antitrust Law and Policy

- following from above, the regulator can educate business on both aspects and not have an artificial break up of responsibilities;
- the amalgamation of the regimes adds strength and in particular the normally more important competition regime assists in giving leverage to the consumer regime;
- consumer and competition issues are often very much intertwined;
- the skill needs are in many ways the same and in a climate of scarce resources this pooling is important;
- it is generally far less expensive to have one body rather than two in relation to infrastructure, technology, etc.;
- it is always difficult to get a good regulatory officials for such bodies and hence to combine the role is more effective and can utilize the limited leadership and decision-making skills; and
- experience has been that overtime the combined bodies are seen as corporate conduct watch-dogs and are given more and more responsibilities. The fact that they are normally not all that expensive assists greatly, as new role does not add a lot of cost compared to setting up new body.

#### 4.2. Consumer protection provisions for the ICCC Act 2002- general outline

The current **ICCC Act** has some consumer protection functions: promoting and protecting the bona fide interests of the consumers and businesses in relation to the acquisition and supply of goods and services; making available information in relation to matters affecting the interest of consumers and businesses, including information with respect to the rights and obligations of persons under Papua New Guinea laws that are designed to protect the interest of consumers; investigating complaints concerning matters affecting or likely to affect the bona fide interests of consumers and businesses in relation to the acquisition of goods and services and to enforce compliance with laws relating to such matters; and strong provisions relating to product safety and recalls. Furthermore the ICCC administers national trade measurement and packaging laws.

However whilst the ICCC Act has very important CP functions it lacks some important and prohibitions or business obligations, namely laws dealing with misleading or deceptive or unfair conduct (**Pre-sales law**) and warranties (**Post Sales law**). PNG law does have some general prohibitions against false advertising (**Commercial Advertisement (Protection of the Public) Act 1976**) but not in the ICCC Act and in any case the prohibitions are very limited. Further PNG does have **sale of goods legislation** but the protections build into the law for consumers /purchasers can be excluded and cannot be enforced by any public agency. Importantly for PNG, legislation targets the retail seller and does not apply to the manufacturer/importer.

It is not suggested that PNG adopt the gamut of consumer legislation that exists in more developed economies but there is a case for basic consumer protection laws and administration. Such laws should cover unfair conduct aimed at consumers, and to some extent small businesses, and that suppliers of consumer products stand behind their products.



## **Definition of ‘consumer’**

Before we get into the actual protections, there is the fundamental threshold issue of who is to be protected, namely the definition of “consumer”. The ICCC Act has section 103, which defines ‘consumer’ as “goods and services ordinarily acquired for private or domestic use”. This issue has been and is subject to considerable discussion in other jurisdictions, in particular whether it should include small businesses or be confined to the traditional consumer.

In the TPA there is a compromise. Most of the consumer protection unfair conduct provisions are not limited to consumers. In relation to warranties, such laws cover all transactions up to AU\$40,000 and over that goods and services of a kind ordinarily acquired for private or domestic use. That means that all transactions under AU\$40,000 are covered by post sales law; no matter that it is a consumer or business transaction. In the PNG context, it is suggested that the pre-sales protections apply to everyone in commerce but for post sales, to limit that to the section 103 definition.

## **The proposed consumer protection amendments - overview**

Consumer protection laws cover a lot of matters and involve issues such as prohibitions of unfair conduct, warranties, licensing and much more. We need to fashion something for PNG’s needs, something that builds on existing PNG law and also law that can be both self-enforcing and administered by the ICCC.

### **4.3. Suggested Consumer Protection and related Amendments to the ICCC Act 2002**

#### **Part VII of ICCC Act 2002**

#### **Fair Trading- (pre sales)**

#### **General prohibition**

1. A person, in the course of business, shall not engage in conduct that:
  - a) Is misleading or is likely to be misleading.
  - b) Is deceptive or is likely to be deceptive.
  - c) Is unfair or is likely to be unfair.
2. For the purposes of the application of subsection (1) in relation to a proceeding concerning a representation made by a person with respect to any future matter, the person shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation.
3. Subsection (1) shall be deemed not to limit by implication the meaning of a reference in this Division to a misleading representation, a representation that is misleading in a material particular or conduct that is misleading or is likely or liable to mislead.

## **Specific prohibited conduct**

In addition to the general provision above a number of specific prohibitions are suggested. These are blatant anti-consumer conduct and in any case, in some cases, will not be picked up by the general prohibition above. The list also gives a clear message as to what is unacceptable.

**Harassment in relation to debt collection** - unacceptable tactics in debt collection.

**Pyramid selling, including the power to ban named schemes** - includes PONZI schemes

**Third line and full line forcing, unless approved by ICCC on public benefit ground** - these sit in the competition provisions in the Australian law but are not a comfortable mix.

**Failure to meet statutory guarantee/ warranty and product safety requirements** - when businesses do not warranty and guarantee obligations.

**Unsolicited goods or services** - sending and charging for product not requested, includes credit services.

**Accepting money without supplying within a reasonable time** - taking money up front and then not supplying what is paid for.

**Supplying products without English or acceptable PNG labelling** – goods in PNG should have understandable labelling.

**Not advertising the full price of goods or services** - this will pick up the GST issue and failure by airlines to state full prices.

**Offering gifts but not providing gifts** - promising gifts as part of buying goods and services but then not supplying.

## **Consumer guarantees and warranties - (post sales)**

These are essentially the Sale of Goods provisions, but cannot be excluded, and include warranties as to services. These need to be far simpler than the sale of goods law and enforced by the ICCC and the Courts. These should apply to all suppliers into PNG, including importers and manufacturers. Supply includes lease, hire and gifts. It covers all goods and services, including second hand goods: the latter being important in PNG.

## **What are the guarantees?**

Goods must meet the guarantees of acceptable quality, including safety considerations, fitness for particular purpose, matching description, matching sample or demonstration model, the retailer having the right to sell goods, reasonable price (when the price is not set), spare parts and repair facilities being available (manufacturers), and the terms of manufacturer's express guarantee (i.e. their warranty) being met.

If a guarantee is not met, consumers will have rights against the retailer (or in some cases the manufacturer) to put the problem right and have compensation where appropriate. Injury to the person, including death, is one of the events that will attract a legal remedy. There is the option of having separate product liability provisions but that will simply add to complexity. The legislation should make it clear that the possible damages are not simply those in contract but also in tort.

### **What are the warranties?**

Service providers warrant that their services will be fit for the particular purpose they were supplied for, completed within a reasonable time, a reasonable price, if no price or pricing formula has been previously agreed, and done with due care and skill.

These proposals on warranties and guarantees will aim to ensure that PNG citizens are treated fairly when they buy goods and services and that business stands behind the goods and services they supply. The ICCC and/or Lik Lik Courts should enforce these provisions in addition to the normal Courts.

### **Product safety – tidy up**

Product safety is already in the ICCC Act, is a relatively strong law and is well used by the ICCC but like all ICCC legislation it is 10 years old. It is suggested that the ICCC be given power to order or to remove banned products from the market place. In such cases, a search warrant may be required. Currently all standards must be approved by the National Institute for Standards and Technology (NIST), which slows down and even blocks the process. It is suggested that NSIT must be consulted but not “approve”.

## **5. Suggested Compliance Amendments to the ICCC Act**

The following are suggestions, covering all aspects of the Act, for further powers for the ICCC to become compliant with the law. The underlying rationale is to give the ICCC a wide range of powers and for it to ensure compliance; the Courts are a last resort, if at all.

### **5.1. Part IX of ICCC Act**

#### **Substantiation Notice**

1. The Commission may give a person who has made the claim or a representation a written notice that requires the person to give information and/or produce documents to the Commission that could be capable of substantiating or supporting the claim or representation.
2. The notice must specify a time for compliance being no more than 30 days.
3. A person who receives such a Notice must properly comply.
4. Failure to properly comply is an offence under this Act.

The ICCC will then be able to demand justification for claims made by advertisers. Failure to substantiate will be an offence.

### **Compliance Notice**

- (1) Where the ICCC is of the opinion that a person may be involved in an ongoing breach of the Act it may issue a written compliance notice,
- (2) Such notice will specify the possible breaches of the Act and demand that the person cease the conduct.
- (3) Such notice will be valid for a period of 60 days.
- (4) A person receiving such a notice can appeal the validity of the notice to the Court at any time of the duration of the notice.
- (5) A notice will be accepted as prima facie evidence by a Court of a breach of the Act in any application by the Commission for interim orders within the period of the notice,
- (6) The Commission is not immune to any action for damages arising out of its issuing a notice.

ICCC will be able to order a trader to comply with the law. This is a critical power and ensures that the ICCC can move swiftly to stop market place problems. In using this power, the ICCC has to be cautious and not abuse it.

In order for there to be effective compliance such powers are vital for the ICCC, with appropriate safeguards. It is simply not feasible in PNG to seek Court interlocutory injunctions. It would take too long, the skills are not there and the Courts not yet able to consider such issues. A simple request to cease conduct does not work in PNG, especially with SOEs.

### **Public Warning Notice**

1. The Commission may issue to the public a written notice containing a warning about the conduct of a corporation if:
  - (a) The Commission has reasonable grounds to suspect that the conduct may constitute a contravention of a provision of this Division; and
  - (b) The Commission is satisfied that one or more persons has suffered, or is likely to suffer, detriment as a result of the conduct; and
  - (c) The Commission is satisfied that it is in the public interest to issue the notice.

2. The person involved must be given reasonable notice of the issuing of such a public notice, including a copy of the notice.

3. The Commission is not immune to any action for damages arising out of such a notice.

ICCC will be able to issue public warnings without fear of being sued unless negligent.

### **Advisory notices in relation to consumer information.**

1. Where the ICCC becomes aware of lack of proper consumer information in advertising or labelling, the ICCC can issue an interim Notice to the business or businesses advising them of appropriate changes to their conduct.

2. Such Notice expires in 3 months and has to be reviewed by the ICCC during that period. In that period the ICCC is to consult with stakeholders.

3. If the ICCC is of the view that the Notice should be made permanent, it is to recommend to the Minister to issue a permanent Notice.

4. If during the period of the Interim Notice the businesses do not comply with the Notice that is to be an offence.

This is an unusual power but will provide a flexible tool to ensure proper consumer information.

### **Guidelines.**

1. The Commission must issue guidelines in relation to its administration of this Division and must make them widely available.

2. The Commission must review these guidelines every three years by way of a public process.

3. A Court shall take note of the guidelines but is not bound by them.

This is something that the ICCC does but these recommendations put some teeth into that function.

### **Enforceable Undertakings**

1. The Commission may accept enforceable undertakings from a person in relation to any of its functions and powers under the Act.

2. The Commission can accept an undertaking, whether or not it is satisfied that there has been a breach of the Act but the Commission must be satisfied that it is in the public interest to accept the undertaking.
3. The person may withdraw or vary the undertaking at any time, but only with the consent of the Commission.
4. If the Commission considers that the person who gave the undertaking has breached any of its terms, the Commission may apply to the Court for an order under subsection (5)
5. If the Court is satisfied that the person has breached a term of the undertaking, the Court may make all or any of the following orders:
  - (a) An order directing the person to comply with that term of the undertaking;
  - (b) an order directing the person to pay to the Commission an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
  - (c) any order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;
  - (d) any other order that the Court considers appropriate.

This is a critical and flexible power and needs to cover the whole Act and not just mergers. This will give the ICCC much needed flexibility to settle issues with positive outcomes, and business should welcome this flexibility. It is also suggested that all such undertakings be listed on the ICCC website.

### **Commission to seek compensation**

1. The Commission may apply to the Court to seek compensation on behalf of any person suffering loss or damage by conduct prohibited by the Act.
2. The Commission, when making such an application, must be satisfied that there is a contravention of the Act.
3. The Court may accept an undertaking from the person alleged to have been in breach, even though the Court has not found that person to be in breach of the Act.

This will allow the ICCC, in appropriate cases, to help victims of conduct in breach of the Act and is an important power in PNG as victims will not have to go to the Courts.

### **Codes of Practice.**

#### **Preparation of code of practice by the Commission**

1. The Commission may, and must if the Minister so directs, prepare for submission to the Minister a code of practice,

- a) Between a particular class of suppliers and any purchasers; or
  - b) By a particular class of persons and a particular class of purchasers; or
  - c) In relation to the supply of a particular kind of goods or services.
2. In making such a submission the Commission must consult with the relevant industry and with consumers and publish a draft code as part of that consultation.
  3. If the Minister approves that code it will become law from a date to be specified by the Minister.
  4. Sections [tbc] of the ICCC Act will apply in relation to breaches of the Code.
  5. The Commission must review the code every three years, or earlier if the Commission considers it appropriate or the Minister so directs.
  6. The Commission shall report to the Minister on any review, including recommendation for any changes to the code.
  7. It will be an offence under this Act if a person claims to be entitled to claim that it adheres to a code when that is not the case.,

(Note – 2 Codes that could be introduced were attached to the ICCC Housing Report – relating to Real Estate and Building Services)

This will allow effective industry self-regulation with ICCC oversight and enforcement, and allows flexible and cost effective co-regulation. The test used to determine whether a Code is to be accepted is net public benefit.

### **Enforcement.**

All consumer protection prohibitions, including product safety, to be enforced as either civil penalties or criminal sanctions. The choice of action will depend on the ability to meet the necessary onus of proof and the desired outcome. It is expected that criminal sanctions will only be used in the case of blatant breaches and the need to say imprison.

As part of the suite of remedies the following should be considered: injunctions, both mandatory and declaratory, corrective advertising and related orders, re-do contracts, declare contracts void, damages, imprisonment, banning orders, recalls, and good behaviour agreements.

Interlocutory Orders should be available and the ICCC will not have to give an undertaking as to damages. These recommendations provide for flexible enforcement options.

## **5.2. Part II of the ICCC Act**

### **Section 3 - Binding the State.**

Section 48 adds to Section 3 and limits the application to when the State engages in business. This is proper but “business” needs to be clearly defined. It would be best if all is consolidated into Section 3.

It is important for the commercial activities of the State to be covered, especially in PNG where the State has heavy involvement in the economy. This is even more important if specific consumer protection provisions are added.

### **Section 6 - Functions of the Commission.**

The list of functions here does not include the authorization and clearance processes. Nor does it envisage a strong bias to compliance.

### **Section 8- Composition of the Commission.**

It is suggested that the Commissioner can be either full time or part time. Part time members could be appointed for specific matters or skills. In that regard, it is suggested that at least one member should be legally qualified and another should have a small business background.

The General Manager position should be formally recognized and that position formally keep the seal and affix it where necessary. If there is no General Manager then the Commissioner should have this power.

Consideration should also be given to having more members than the current three, including a Deputy Chair to cover when the Commissioner is absent, and the age limit of 70 should be removed. Consideration might be given to provide for cross membership with other relevant PNG agencies such as NICTA (the telecommunications regulator) and overseas.

The above changes would give the ICCC more flexibility, better decision making structures and a better skills base. However some of the changes will weaken the position of the Commissioner.

### **Section 9-Appointment of Members**

This might include a provision that ICCC members can accept part time appointments to overseas counterpart agencies and vice versa. This would allow cross membership to counterpart overseas agencies, and help with information exchange and skills transfer.

### **Section 15 -Vacancy.**

There is no provision for acting appointments when the Commissioner or an Associate is on leave or ill. This means that each time this occurs the appointing authority must appoint an Acting Commissioner, which is cumbersome.



This section should be amended to provide that, where an Associate position is vacant for more than 90 days, the automatic reappointment is until such time as the appointing authority appoints or reappoints. If the size of the Commission is increased or provision is made for appointment of Acting Associate until the vacancy is filled, this issue is alleviated.

This would aid flexibility and structure to meet unforeseen circumstances.

### **Section 19 (10) - Meetings of the Commission.**

It is suggested that only the Chair (Commissioner) can call meetings, not any Commissioner as is the current situation. Further the Commissioner should be able to sit in Divisions, such as a mergers Division, a consumer protection Division and a regulated contracts Division. However the Divisions' power to make final decisions should be limited and always be endorsed by the Full Commission.

This will be very valuable if more members are appointed and will give the Commissioner greater control of the agency. Also the Divisions will facilitate a spread of the workload.

### **Section 22 – Delegation**

It is suggested that anyone exercising a delegation must report to the Commission, and that meeting be minuted.

Actually there can be more delegations to the Commissioner and General Manager but then there must be accountability of the exercise of such delegations. Many delegations can be temporary and reviewed. Urgent issues, such as product safety, may need specific and temporary delegations.

This recommendation will provide accountability, spread the workload and facilitate timely decision making processes.

### **Section 27 - Agreement with counterpart bodies.**

It is recommended that the Minister may approve agreements with an overseas body, rather than only the Head of State. Such agreements are important but should not be hindered by overly formal approval processes.

### **Section 65 – Statutory exceptions**

In this section, “specifically authorized” needs to be defined. A suggested definition is that it means there is an express reference to the ICCC Act not applying, applicable to all legislation adopted after the introduction of the ICCC Act.

This is an important issue and the main exemption process should be via authorization. If there is specific authorization it needs to be very clear and time limited.

### **Section 70 - Authorization for restrictive trade practices.**

The Act does not provide for Interim authorization. It is suggested that it be amended to cover that issue and will facilitate flexibility and quick, albeit, interim exemption.

### **Section 76 - Procedure for applications and register of applications.**

The Act seems to assume prescribed forms. It is suggested that no forms be prescribed but that this is a matter for the ICCC to decide. Further, whilst the Act seems to imply public processes in relation to authorizations and clearance there is no formal provision for a Public Register.

A flexibility issue in relation to the form of the Public Register, this is a critical transparency and accountability issue. There should be a Public Register and it needs legislative backing to avoid legal challenges to the provision of public information by the ICCC.

### **Section 81 - Clearance.**

The current 20 days' timeframe for clearance is too short. A more realistic timeframe is needed in the circumstances of the ICCC and it should be changed to 30 working days. Consideration might be given to the New Zealand rule, where time is stayed from 15 December until 15 January.

### **Section 85-undertakings.**

These are currently limited to divestiture undertakings in business acquisitions. It has been very strongly suggested that something like the Australian law apply to all the provisions of the Act and not be confined in any way.

It is not at all clear under the Act how these are to be enforced. In Australia these can be enforced in the Court. They must be capable of quick enforcement if not complied with. In PNG, they can be made a condition of any authorization or clearance but it is hard to enforce once the merger has happened. It may be that the merger cannot proceed until the undertaking has been completed but that will delay matters and in any case that power is not in the Act.

Enforceable undertakings are one of the most important tools of an agency such as the ICCC. That power should not be limited, as such undertakings allow quick outcomes. They should also appear on a Public Register.

### **Authorizations**

It is not clear from the Act that the Commission can impose conditions, yet a breach of a condition is a ground for revocation. This needs to be clarified, as the ICCC has used the condition tool.

### **Appeals**

There are appeals to an Appeals Panel for ICCC regulatory decisions but not authorization or clearance, which should be considered although appeals will be possible under the normal

legal processes. This will also raise the issue of stays of any action after the ICCC decision and pending any appeal. Parties other than the applicant will need to be informed very fast of ICCC decisions, particularly in merger matters.

### **Regulations**

Whilst the regulations provision gives broad power to the Government on Regulations it does not specifically refer to fees and that should be remedied. ICCC should be able to levy fees for some all or some of its service and keep such funds for its own use

### **Section 129 - Information gathering**

Information gathering powers are essential to agencies such as the ICCC and need to be workable and enforceable. The entry and search powers are limited and might be widened. It has been suggested that penalties for non-compliance be doubled and importantly that the ICCC can apply to the Court to seek compliance with any request. Failure to comply will then be a contempt of Court. Whilst phone tapping powers are common in many overseas jurisdictions, its use in PNG would need to be considered with care.

### **Section 131 -Access to information**

This provides that the Commission can make information available to the public, unless it is designated 'confidential' by the person who submitted it. However, this leaves responsibility with person submitting, even if the claim is spurious, and does not sit well with the authorization and clearance processes. Sub section 3 helps but is a bit tough and leaves the Commission open to challenges.

In the authorization and clearance regime parties can claim that material is confidential and the ICCC can still use the material in its decision. This seems sensible, as in Australia the material cannot be used. However it does lack transparency and it is suggested that whilst the ICCC uses the information, it should be required to show it to interested parties on a confidential basis and then only to those interested parties who, in the view of the ICCC, have a real and direct interest in the outcome of the application.

### **Section 146 - Head office**

**This section** says nothing about Regional Offices and should be amended.

### **Other issues**

The Act should be amended to **protect staff** from issues such as defamation, negligence, when they are engaged in their proper duties. Further there should be provision to **protect ICCC witnesses or informants**. Experience overseas shows the benefit of effective protection.

## Repeals

It is suggested that the following be repealed if new consumer protection provisions are enacted: *Commercial Advertisements (Protection of the Public) Act*; and *Sale of Goods Act*

### 5.3. Part VI of the ICCC Act 2002

The following suggestions will substantially streamline the PNG ICCC Act 2002, yet will still fit within the accepted global prohibition framework. Many take the view that the tools to seek compliance are often more important than the specific detail of the prohibitions. The role of the ICCC is to seek compliance with the ICCC Act; the role of business is to comply with the ICCC Act.

#### Cartels or anti-competitive agreements – section 50.

It is suggested to change the heading of section 50 to “**Cartel Conduct**”. This brings the terminology in line with modern language even though the basic prohibitions will not change dramatically. Further, the inclusion of an omnibus provision that prohibits all agreements, horizontal or vertical, which have the purpose and/or the effect or likely effect of substantially lessening competition - to be called the ‘cartel’ provision.

This not just covers agreements between competitors but covers all commercial agreements, horizontal or vertical, and would be similar to the New Zealand law.

#### *Sanctions*

This provision is to be a civil prohibition plus all the other orders set out earlier in this self-assessment. All persons involved in such activities to be at risk of sanction, not just any corporate entity. Criminals are onerous and too difficult in PNG. There will not be too many PNG cartels except small traders but PNG needs cartel law to handle the few domestic cartels and global cartels that impact on PNG.

#### *“Deemed” anti-competitive conduct*

As a part of the ‘cartel’ provisions, certain specified conduct should be “deemed” to result in a substantial lessening of competition and hence per se prohibited. These are: **price fixing**, when competitors agree on a pricing structure rather than competing against each other; **sharing markets**, when competitors agree to divide a market so participants are sheltered from competition; **bid rigging**, when suppliers communicate before lodging their bids and agree among themselves who will win and at what price; **controlling output or limiting the amount of goods and services** available to buyers; and **primary boycotts**, when parties (two or more of whom are in competition) agree with the purpose of 'preventing, restricting or limiting', (i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or (ii) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions by all or any of the parties.

All of these provisions aim to simplify and focus the PNG law on cartel conduct and move it away from the complicated Australian model. Hardcore cartel conduct is proposed as civil offence, as a classification as a criminal is offence onerous and too difficult in PNG. There will not be too many PNG cartels except small traders but PNG needs a cartel law to handle the few domestic cartels and global cartels that impact on PNG.

### *Sanctions*

These specific provisions should be subject to either civil or criminal sanctions plus other remedies, with criminal sanctions acting as leverage for compliance and forward looking. In reality, court action is not expected for some time, except the occasional completed merger, and neither civil nor criminal sanctions are needed. However ICN and others advocate criminal sanctions for hard core cartels. There may be some international cartels where action is warranted in PNG.

### **Resale price maintenance and inducing (RPM) - Section 59**

Here the drafting may be simplified and consider removing the need for a “specified price”, as this requirement may complicate the provision and make the provision hard to enforce. Consideration to include some defences to resale price maintenance, such as the reseller selling the product below cost. Some might argue that RPM should be subject to a competition test. The case against that is that it would make it hard to prove RPM cases.

### **Taking advantage of market power - Section 58**

This section should include reference to ‘purpose or effect or likely effect’, remove the words ‘taking advantage’ to ‘use’ and consequently rename section 58 to “**Misuse of market power**”

The legislation should make clear that conduct aimed at **competitors**, as well as **competition**, is covered. In Australia, the Courts and the ACCC have effectively, by their interpretation, taken competitors out of the section and only look at issues effecting on competition. To endless arguments about who has market power, a rebuttable provision should be made such that the company alleged by the ICCC to be in breach has to show that it does not have market power. There is an argument that the section should have a competition test but this would make the conduct hard to prove. In PNG it is not too difficult to judge who has market power but no doubt all kinds of spurious arguments can be put up to counter that contention. This needs to be avoided. Some specific examples should be included on the use of market power and the resulting prescribed outcomes as set out in section 58 (2). The specific examples could be predatory pricing, including selling below cost, discriminatory dealings between like customers, bundling, and refusal to grant access to essential facilities.

Furthermore a rebuttable presumption should be included that when someone has engaged in such specified conduct there is a likely breach, unless they can show that any of the prescribed outcomes in section 58 (2) have not occurred or could not have occurred. There will be a need to define some if not all of the specific prohibitions, which will not be an easy task.

There is also the view that dominance rather than substantial degree of market power and more detail about which type of conduct might in breach. This should be further explored before changes are made.

### ***Unfair conduct (inter action with Section 58)***

It is suggested in the main that there be a general prohibition on unfair conduct. This will likely impact on conduct under **Section 58** and may be a better remedy in some cases. It is suggested that both sections co-exist. In this regard we refer to the ***PNG (Fairness of Transactions) Act 1993*** for a precedent in PNG for this type of legislation.

Of particular likely concern is conduct where suppliers are in competition with their business customers/ resellers and /or where small businesses are in a ‘captive ‘situation. Unfair is likely to be an issue generally in such circumstance and not only in relation to those with market power.

“Unfair” will need some definition, the following are some suggestions.

### **Examples of unfair contract terms**

#### **(These cover both business and consumer situations)**

- (a) A term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
- (b) A term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
- (c) A term that penalizes, or has the effect of penalizing, one party (but not another party) for a breach or termination of the contract;
- (d) A term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
- (e) A term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;
- (f) A term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;
- (g) A term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the land to be sold or granted, under the contract;
- (h) A term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;

- (i) A term that limits, or has the effect of limiting, one party's vicarious liability for its agents;
- (j) A term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;
- (k) A term that limits, or has the effect of limiting, one party's right to sue another party;
- (l) A term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;
- (m) A term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;
- (n) A term of a kind, or a term that has an effect of a kind, prescribed by the regulations.

(It may be that the above type of list is not in the legislation but in ICCG guidelines)

### **Conduct between PNG and neighbours**

Australia and New Zealand have provisions in their competition law that prohibits the Trans-Tasman misuse of market power, namely using market power in one jurisdiction to do damage to competition or competitors in the other.<sup>13</sup> The legislation has not been utilized much since its introduction in the 1990s, but it serves as a deterrent. If this is considered for PNG and its neighbours, counterpart legislation will be needed in both jurisdiction pairs.

### **Business acquisitions. Section 69**

Although the basic prohibition may remain, changes could be made to the review processes. In particular, a single joint process of formal clearance and authorization to speed up the process should be considered, where appropriate. Further, a mandatory pre-notification and clearance/authorization of business acquisitions, with time frames set in the legislation and deemed clearance and /or authorization after set times. These times should be relatively short for the initial assessment phase, extended when the ICCG determines there might be an issue.

The appropriate threshold for mandatory merger pre-notification is always an issue. It is suggested that all horizontal mergers in PNG be subject to mandatory notification, all foreign acquisitions and any other acquisitions have a K10million transaction threshold for mandatory pre-notification. A specific provision to pick up offshore acquisitions that impact on PNG may also be considered.<sup>14</sup>

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<sup>13</sup> See Section 46A of the Australian Act and section 36A of the New Zealand Act.

<sup>14</sup> See Section 50A of the Australian Act.

Finally there should be a provision that the ICCC can open up a cleared merger, within 6 years, if the parties have submitted incorrect information or have not complied with a condition.

### **Exemptions by ICCC**

All the listed prohibitions should be subject to voluntary authorization and voluntary clearance, with the exception of merger where it is not voluntary, subject to a threshold. This exemption process should include misuse of market power. Further to add that provision of an ‘effects’ test and that beneficial conduct can be subject to **Section 58**. See later comments about the authorization process itself. Certain conduct could be subject to a notification process but may place a large regulatory burden on the ICCC, with the need for accurate public registers.

### **Collective negotiation by small business**

This is a very important initiative for small business, especially in primary producer groups and agriculture. This may be subject to a very simple notification regime, a one, and give exemption in 14 days. Notifications must relate to a single target, if not, then authorization is appropriate. To amend **Section 46** of the Act and make it clear that efficiency focus in authorizations’ is **not** the only public benefit factor to be considered by the ICCC. There could be a non-exclusive list of possible public benefit factors.

### **Special remedies**

Another compliance tool may be added, along with a provision for the ICCC to recommend to the Government, by way of overcoming the impact of breaches of the Act, that changes are made to other PNG laws or administration, e.g. lower tariff barriers or issue more licences to facilitate entry into a certain industry.

## **5.4. Other issues for possible attention**

Clarify definition of ‘**market**’ in **Section 45(2)**, which needs to specifically cover parts, as well as the whole, of PNG.

**Exemptions by law**, Section **65- 67**. These should be reviewed and in particular the shipping exemption in section 66 (3), the export cartel exemption in section 66 (1) (f) and the intellectual property exemptions.

Delete the provisions regarding **covenants**. **Section 50** and the related provisions cover these issues. **Section 51** and **Section 57** to be deleted.

Clarify the **extra territorial provisions** - **Section 47**. This issue may need assistance from PNG government legal advisors experienced in international law.



**Restraint of trade and law of confidence, Section 49.** This is potentially anti-competitive and should be assessed as a breach or not. Can be authorized or even a notification process.

**Section 54, the joint venture pricing provision** may be too complex, and could be left to clearance or even a notification regime

Remove **Section 55- recommended price issues** – as this may hide anti-competitive conduct.

**Section 56-joint buying and promotion.** This might be covered by a notification regime, rather than be an exemption.

#### **Authorization Division 4, Sections 70 -86.**

Most of the competition prohibitions can currently be authorized on public benefit grounds except section 58, which should also be subject to possible authorization. The authorization process is critical to a developing economy, and even developed economies, as it builds in some flexibility into competition regulation and gives the regulator an ability to influence markets. However authorization sometime takes on a life of its own and processes become cumbersome.

The following changes may be adopted: Interim authorization to be able to be granted by the ICCC; strict and short time frames to be adhered to by the Commission, with some time stopping mechanisms: no mandatory draft determination process, unless the ICCC considers a draft appropriate; pre-decision conference only to be at the behest of the ICCC; no need to fully assess market definitions as an application for authorization implies that there is a breach of the Act and market issue becomes secondary to public benefit assessment; and short decisions.

#### **Appeals**

There is currently no appeal for ICCC authorization/clearance decisions. This lack of appeal issue may arise in the amendment process and will be hard to resist. This pressure will be all the greater as authorization processes are streamlined.

#### **Overseas information/evidence**

In many overseas jurisdictions some competition cases, particularly cartel cases, are based on information and evidence from overseas counter parts. This exchange of information is usually based on treaty agreements. Entering in such agreements should be considered, as otherwise ICCC will not obtain evidence in relation to global cartels (and other conduct) that relate to PNG. The ICN processes may assist in information exchange to some degree but more is probably needed.

## **Immunity policy**

Consideration should be given to an immunity policy. Overseas cases not only show the importance of overseas evidence but also the importance of whistle blowers. An initial, low-key immunity policy, based more on principles of leniency than the full blown immunity policies that exist in other jurisdictions, should be considered.

## **5.5. Other relevant issues for future inclusion**

### **State Aid and/or legislation review**

The ICCC may have a role to review legislation and regulations for anti-competitive and anti-consumer impact. Part of this role could include a right to make submissions to other agencies and inquiries on issues within the ICCC's role, along with the right to appear in any PNG Court on such issues. This power is particularly important in the EU and exercised by other agencies in Australia. It is important as part of an advocacy role of the ICCC. The Government would not be bound by such notices.

### **Collective bargaining**

This is a competition issue and it is suggested that there be provisions to encourage collective bargaining by small business and the ICCC be empowered to exempt such conduct from the cartel provisions of the ICCC Act. This is a particularly important provision for small farming industries. A notification regime should be introduced and collective bargaining encouraged.

### **“Lik Lik” Court**

Consideration should be given to the establishment of a Lik Lik Court to handle individual consumer disputes. The ICCC would handle wider systemic issues and the Lik Lik Court would handle party to party disputes throughout PNG and particularly in regional areas. If the ICCC gets consumer protection powers, it will not be able to handle all complaints and a local dispute resolution scheme would be valuable.

### **Right of appearance by ICCC in Court.**

It is suggested that the ICCC itself has the right of appearance in the relevant Court on any matters brought by the ICCC or against the ICCC in relation to the ICCC Act. This will save costs and give the ICCC more control of its cases but will mean that it will need to employ in house lawyers.

### **Community input into ICCC processes.**

It is suggested that the Act specifically require the Commission to set up a community consultative body to provide community input to the ICCC, and would serve as a good accountability and transparency tool.

## **Immunity policy, with or without, legislation,**

Such a policy is widely used in other jurisdictions and should be developed in PNG, on a trial basis initially. This is mainly relevant to cartels but not exclusively so. It can be complex and hard to manage but it is important.

## **ICCC Processes**

In the suggested amendments, there are a number of governance structure and process issues, but such issues are by no way all legislation and may also concern good administration. The governing principles of ICCC administration should be Timeliness, Transparency, Consistency, Fairness, Accountability, and Professionalism. Some of these overlap or intertwine.

**To meet the above the following needs to be assess or examined.** Does the Commission have a Priorities Statement and focus on Compliance. Does the Commission meet as often as it should? Is the ICCC decision making process timely? Is it transparent and fair? Does the Commission get adequate information to make decisions? Are the ICCC decisions properly reasoned and recorded? Are there proper matter recording and tracking systems for Commission, complaints, investigations and projects? Is there a Public Register of statutory decisions and other decisions made public by the ICCC? Is the Public Register up to date and accessible? What is the quality of ICCC correspondence to complainants and those complained of? Are ICCC information collection processes fair and effective? Is ICCC investigation of breaches done in a professional manner? Are ICCC staff adequately trained and is the training updated? Is there a proper ICCC Staff Manual? Do ICCC staff have adequate access to information source to properly do their work? How adequate are the ICCC own library resources and staff access to past ICCC matters? To what extent do ICCC staff liaise with overseas counterparts on current common issued and on past issues that may assist the ICCC? Are ICCC staff properly doing document handling and recording? Is all inward and outward correspondence properly logged? To what extent does the ICCC use technology? Is there any system to allocate costs to matters or projects or areas? What ethical safeguards are in place with Commissioners and staff to avoid conflicts, breaches of confidentiality or corruption? Should the ICCC issue an Annual Report? Should there be a regular survey of staff on ICCC processes and staff management? Should there be external reviews of major ICCC decisions? Should there be a regular survey of external stakeholders in PNG? Is the ICCC properly equipped to handle litigation? How is the ICCC in its people management role? How does the ICCC handle its finances? How does the ICCC interface with other parts of the PNG Government? How well does the ICCC use legal services? Does the ICCC have an appropriate mix of staff? Is ICCC information secure? How does the ICCC handle complaints against it? What should the ICCC look like in another 10 years?

## **Appendix A**

Questions raised concerning the regulatory contracts regime.

**Service standards for the SOEs - are all of these in licences, are they in the laws or are some in regulatory contracts? Are provisions in the regulatory contracts likely to be additional to other service standards?**

All are part of regulatory contracts. No additional regulated service standards but some voluntary ones. Service standards for the SOEs - are all of these in licences, are they in the laws or are some in regulatory contracts?

**Are provisions in the regulatory contracts likely to be additional to other service standards?**

The ICCC Act (section 35(3) (c)) requires Regulatory Contract to contain service standards. Therefore the Service Standard requirements for all the regulated SOEs are captured in the respective Regulatory Contracts.

Not all SOEs have licences. The only SOEs that have licences are PNG Ports and PNG Power. The service standards of PNG Ports, PNG Power, Motor Vehicles Insurance Limited (MVIL), Post PNG are enforced through the various regulatory contracts that these SOEs have with the Commission. The other two SOEs are Eda Ranu and Water PNG. They do not have licences or regulatory contracts and their service standards are enforced using the Water and Sewerage Report and Price Orders. Recently the Commission has started tying the annual tariff adjustments for all the above SOEs to the level of service standards.

**Presumably not all SOEs are regulated entities subject to regulatory contracts?**

There are four (4) existing regulated SOEs that the ICCC regulates under the ICCC Act and are subject to the Regulatory Contracts. These regulated entities are PNG Power Ltd; PNG Ports Corporation Ltd; Motor Vehicles Insurance Ltd; and Post PNG Ltd.

There are two water utilities (both SOEs i.e. Water PNG Ltd and Eda Ranu) that are regulated under the PR Act and the price path and regulatory requirements are set out in a final report (of their pricing review) and Price Orders. There is no Regulatory Contract for these two water utilities.

**Are the services issues just with those which are not subject to regulatory contracts or do the regulatory contracts not work? What are the service standards for the others?**

The service standards for the four regulated SOEs vary from each another based on the industry and the actual service under regulatory oversight. For the electricity industry, PNG Power continues to fail to meet its minimum service standards therefore we continue to have unreliable power supply. The service requirements are in regard to having a minimum amount of unplanned power outages relative to planned outages and late connections must be less than 2% of total new connections within a quarter. For other regulated SOEs, like Post PNG and PNG Ports, the service requirements are relatively easy to comply with. For

example for Ports, the service standards are just to do with having adequate facilities at the port to provide regulated services. This includes proper fencing, power supply, water, telecommunications, etc. The Commission is trying to introduce key performance indicators for PNG Ports to improve general regulatory oversight. This includes berth availability - % of ships waiting more than 2 hours, Berth Availability (Average wait time), Berth Utilisation Storage Utilisation, Average days dwell time. There are also provisions stipulated in the regulatory contracts that allow for penalties should the regulated SOEs fail to meet a certain target or fail to comply with the service standard set.

The SOEs that have service issues include both those that have regulatory contracts and also those that have no regulatory contracts. Regulatory contracts have worked however some of the regulated entities have not been able to meet all the service standards. Eda Ranu and Water PNG are not subject to regulatory contracts. The service standards for Eda Ranu and Water PNG as specified in the Water and Sewerage Report are:

- ✓ Daily continuity of water supplies;
- ✓ Adequacy and quality of water supply system;
- ✓ Effective transportation of sewerage effluent;
- ✓ Long term continuity of water supply services; and
- ✓ Long term continuity of sewerage services.

#### Water PNG

- ✓ Town population coverage;
- ✓ Service reliability measures;
- ✓ Product quality assurance measures;
- ✓ Service connection measures; and
- ✓ Customer complaints measures.

Eda Ranu and Water PNG have also failed to meet all their service standard targets

#### **Presumably not all SOEs are regulated entities subject to regulatory contracts?**

Most are, especially those in a monopoly position - which is most. Power, Ports. Post and Motor vehicle third party insurance are. Telecommunications is but now undertaken by a specific regulator. Water is a declared service and hence price regulated and that brings in service issues.

#### **Are the service issues just with those which are not subject to regulatory contracts or do the regulatory contracts not work? What are the service standards for the others?**

Service issues are across the economy and often a result of lack of competition or proper consumer laws. Competition has been introduced in the generation sector in the electricity industry and will be guided by the Third Party Access code and the Grid code. The government has purchased the Motukea port (formerly owned by Curtain Brothers) in Port Moresby to replace the current Port Moresby port operated by PNG Ports. Motukea port will

be operated by a private port operator while PNG Ports will remain the landlord. The new Lae port, funded by the ADB will also be operated by a private port operator but a different operator to that of Motukea. The current thinking is to move away from regulatory contracts and the cost plus model (sometimes referred to as the Building Block model or the Rate of Return Model) and manage both ports via a PPP contract and pricing to be based on benchmarking. The usual service standards and penalties will be in the PPP contracts. The plan is for PNG Ports to manage CSO (community service obligation) ports to be subsidized from concession payments from the private operators. These reforms are part of the government's efforts to reform the SOEs to stamp out inefficiencies and rising charges. The Commission is working closely with the government to achieve this outcome.

