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Competitive Market & Fair Trade Division

SECTIONS 81, 82 AND OTHER PROPOSED AMENDMENTS IN THE INDEPENDENT CONSUMER AND COMPETITION COMMISSION ACT 2002

DISCUSSION PAPER

This discussion paper relates to the proposed amendments to sections 44, 70A, 80 81, 82 and 83 of the *Independent Consumer and Competition Commission Act 2002* (ICCC Act) insofar as:

1. Amending the provisions on authorization and clearance to make notification compulsory.
2. Creating an offence under the Act for when a merger or acquisition is not reported to the Commission.
3. Creating an offence under the Act for when a clearance or authorization application is not submitted to the Commission, when the Commission has issued directions for a party to apply.
4. Creating a provision that allows the Commission to impose conditions on a clearance or authorization determination.
5. Creating a provision that allows the Commission to vary or revoke a clearance or authorization determination.
6. Including a definition for the word 'condition' in interpretation, in Division 1 of the Act.
7. Creating a provision that allows the Commission to have guidelines in place.

As a general proposition, the amendments will be clearly reflected in our business acquisition guidelines, our application forms etc. If there is no clarity, there is no transparency hence this discussion paper is intended to promote debate to reach an agreed position.

1. Making authorization and clearance application compulsory under sections 81 and 82 of the ICCC Act

<p>What is the current law?</p>	<p>Section 69 of the ICCC Act prohibits certain acquisition of assets of a business or shares that would have or would likely to have the effect of substantially lessening competition in a market.</p> <p>Under the current regime, the pre-merger notification is made by applying for a clearance or an authorization; and this is voluntary. Sections 81 and 82 both use the word “may” which renders the process of applying to be optional, companies may choose to either apply for clearance or authorization or simply continue to complete their transaction before the Commission becomes aware.</p> <p>If clearance or authorization has been granted, the parties are exempt from legal proceedings and the Commission cannot file proceedings under the Act.</p> <ul style="list-style-type: none"> (a) The ICCC has powers to investigate all consummated business mergers and acquisitions that raise competition concerns (b) The ICCC has powers to bring proceedings if it finds that the merger or the acquisition has or is likely to have the effect of substantially lessening competition in a market; and (c) The ICCC can also summon witness and obtain information <p>However all these powers are not preventive because the system of voluntary notification allows parties the liberty to consummate businesses without the consent of the Commission and this has proven to be detrimental for a market economy that is highly concentrated.</p>
<p>What is wrong with the current law?</p>	<p>We have identified 6 key issues the Commission is currently facing with the current voluntary reporting regime and these are:</p> <ol style="list-style-type: none"> 1. Due to there being a voluntary pre merger notification processes under the ICCC Act, there have been numerous occasions where the Commission is left to conduct post market inquiries when we would instead prefer to conduct pre-acquisition or pre-merger market inquires to determine the implications (if any) on the relevant markets, as opposed to after the transaction has been completed. 2. There is increasing cases of ‘creeping’ acquisitions as a result of the voluntary regime. Such acquisitions make the market more concentrated and increases the structural barriers to entry. 3. More resources are consumed when the ICCC investigates consummated merger/acquisitions, especially when it comes to taking enforcement actions e.g. filing proceedings in court; 4. The difficulty of enforcement in the PNG judicial system, the uncertainty of timing of the outcome may defeat the purpose of enforcement action; 5. CMFTD analysts prefer that companies understand the effects mergers/acquisitions have on the market and be more proactive in terms of providing the information required under section 69 of the ICCC Act. This can easily be incorporated into the application forms and will prompt companies to justify the acquisition. 6. We lack both human and monetary capacity to take immediate enforcement action as all technical officers (both lawyers and economists) are not expert in competition.
<p>Why do we need to change the law?</p>	<p>We need to amend the law so it allows the Commission a more influential position in regulating competition in an economy that is very concentrated. We also avoids costs involved in investigation and subsequent enforcement action if the acquisition potentially breaches the ICCC Act and if we amend the legislation we anticipate the following:</p> <ol style="list-style-type: none"> 1. The Commission would have the opportunity to stop mergers/acquisitions that would substantially lessen competition before they even take place.

	<p>2. We appreciate that not all mergers/acquisitions are anti-competitive and so parties will seek the Commission's advice on whether or they should apply for clearance or authorization.</p>
<p>How does the law need to be changed?</p>	<ol style="list-style-type: none"> 1. Repealing section 81 by removing the word 'may' and replacing it with the word 'to'. <ul style="list-style-type: none"> 81. Commission to give clearance for business acquisitions. 2. Repealing section 81 subsection 1, by inserting the following new subsection: <ul style="list-style-type: none"> (1) A person who proposes to acquire assets of a business or shares shall inform the Commission, and in so doing, the Commission will advise in writing, within 14 days, on whether or not a notice seeking clearance for the acquisition is required. 3. Repealing section 81 subsection 3, by inserting the following new subsection: <ul style="list-style-type: none"> (2) If the Commission advises a person, that a notice seeking clearance must be submitted under this section, then subject to subsection 5, within 40 days after the date of registration of the notice, or such longer period as the Commission and the person who gave the notice agree, the Commission shall either: 4. Repealing section 82 heading by removing the word 'may' and replacing it with the word 'to' <ul style="list-style-type: none"> 82. Commission to give authorization for business acquisitions. 5. Repealing section 82 subsection 1, by inserting the following new subsection: <ul style="list-style-type: none"> (1) A person who proposes to acquire assets of a business or shares shall inform the Commission, and give the Commission a notice seeking authorization for the acquisition. 6. Repealing section 82 subsection 3 by inserting the following new subsection: <ul style="list-style-type: none"> (3) Subject to subsection 6, within 90 days, after the date of registration of the notice, or such longer period as the Commission and the person who gave notice agree, the Commission shall:

2. Creating a provision for an offence if mergers and acquisitions are not cleared or authorized under sections 81 and 82 of the ICC Act

<p>What is the current law?</p>	<p>Under the current regime, it is not an offence if the Commission is not notified of a merger/acquisition before it is completed. The current law states that although the pre-merger/acquisition notification regime is voluntary companies that merge or acquire assets, shares etc without seeking clearance or authorization run the risk of being sued by the Commission or any aggrieved third party for a potential breach of the ICC Act.</p>
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Why do we need to change the law?	If we make merger notifications compulsory, the law must also change to create an offence if parties do not comply with the compulsory notification process. Without creating the offence, the Commission cannot hold companies liable when they fail to notify of a merger/acquisition.
How does the law need to be changed?	<p>7. Amending section 81 by inserting a new subsection 7.</p> <p>s81.(7) A person who –</p> <p>(a) refuses or fails to inform the Commission under subsection 1; or</p> <p>(b) refuses or fails to submit a notice seeking clearance under subsection (3),</p> <p>is guilty of an offence and is liable to a fine of up to K500, 000.00 for an individual and up to K10, 000 000.00 for a corporation.</p> <p>8. Repealing section 82 by inserting a new subsection 8.</p> <p>s82.(8) A person who refuses or fails to inform the Commission, or refuses or fails to submit a notice seeking authorization under subsection 1 is guilty of an offence and is liable to a fine of up to K500, 000.00 for an individual and up to K10, 000 000.00 for a corporation.</p>

3. Creating a provision that allows the Commission to impose conditions on an authorization determination

What is the current law?	There is no express provision that allows the Commission to impose conditions on an authorization determination, rather it is implied because any application under section 81 and 82 will be treated as though it were an application under section 70 of the Act (see section 81 subsection 2) and section 70 applications entail the right to impose conditions (see section 77 subsection 2).
Why do we need to change the law?	In considering an application for authorization, the Commission looks at two tests, whether there is substantial lessening of competition (SLC) test and the public benefit test. It is paramount that the Commission looks at whether there will be a substantial lessening of competition and if there is SLC, whether the merger/acquisition benefits outweigh the detriments of SLC. Without the power to impose conditions the Commission cannot ensure public benefit and in many ways this has led to SLC.
How does the law need to be changed?	<p>9. Amending section 83 by inserting a new subsection 6.</p> <p>s83.(6) Any authorization granted pursuant to section 82 may be granted subject to such conditions not inconsistent with this Part and for such period as the Commission thinks fit.</p> <p>10. Amending section 44 by inserting the definition of ‘conditions’</p> <p>s44.(1) “conditions” means a condition under Division 4, a breach of which gives the Commission the right to vary or revoke</p>

4. Creating a provision that allows the Commission the power to vary or revoke an authorization

What is the current law?	There is no express provision that allows the Commission the power to vary or revoke an authorization it is implied because any application under section 81 and 82 will be treated as though it were an application under section 70 of the Act (see section 81 subsection 2) and section 70 applications entail the right to vary and revoke (see section 80).
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Why do we need to change the law?	Without the power to vary or revoke being expressly stated, the Commission is bound by whatever determination it gives, and where it has revoked or varied in the past, this has left the Commission open for lawsuit. We would like it expressly stated in our legislation so it allows the Commission that flexibility to protect consumers and ensure effective competition.
How does the law need to be changed?	<p>11. Repealing section 80 by inserting the following new subsection.</p> <p>s80(1) Subject to subsection 2, if at any time after the Commission has granted an authorization under section 70 or under section 82, a person informs the Commission or the Commission on its own accord is satisfied that</p> <p>-</p>

5. Creating a provision for guidelines

What is the current law?	There is no provision allowing the Commission to create guidelines for matters associated to or to facilitate Part VI of the ICCA Act.
Why do we need to change the law?	We would like to create a provision that allows the Commission the power to create guidelines that will be used by the Commission to assess authorization or clearance applications. These guidelines will also be available to the general public and for corporations who wish to acquire shares or assets of a business.
How does the law need to be changed?	<p>12. Inserting the following new provision:</p> <p>70A. GUIDELINES</p> <p>(1) The Commission may make guidelines relating to the content of an application of authorization and the conduct of the persons to which the application applies to, under section 70 or section 82.</p> <p>(2) The Commission may vary or revoke a guideline made under subsection (1).</p> <p>(3) The Commission shall, before making, varying or revoking a guideline, consult with the Minister, and such other persons or representative bodies as the Commission considers appropriate.</p> <p>(4) A guideline may apply or incorporate, wholly or partially and with or without modification, a document referred to in the guideline, as in force from time to time or as in force at a particular time.</p> <p>(5) The Commission shall-</p> <p>(a) give a copy of any guideline, a copy of any variation to any guideline and notice of the revocation of any guideline to the Minister; and</p> <p>(b) Ensure that copies of the guideline (as in force from time to time) are available for inspection and purchase by members of the public.</p> <p>(6) Notice of the making of a guideline , or the variation or revocation of a guideline shall be published in the National Gazette</p> <p>(7) A guideline, or variation or revocation of a guideline, takes effect on the date on which it is notified in the National Gazette or a later date specified by the Commission in the guideline.</p> <p>(8) The Commission shall keep the contents of the guidelines, under review with a view to ensuring their continued relevance and effectiveness.</p> <p>(9) Any inconsistency in any part of the guideline and this Act, will not make the entire guideline void, but the guidelines will be void in so far as it relates to that part of that which is inconsistent.</p>