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Introduction of Competition Law and Change to Competition Law and Policy

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**INTRODUCTION OF COMPETITION LAW AND CHANGE TO COMPETITION LAW AND POLICY
IN PAPUA NEW GUINEA**

**FOR PRESENTATION AT THE MEETING OF THE APEC COMPETITION POLICY AND LAW
GROUP (CPLG)**

NINGBO, CHINA

FEBRUARY 21-22, 2014

**Presented By:
Dr Billy Manoka
Commissioner**

INTRODUCTION OF COMPETITION LAW AND CHANGE TO COMPETITION LAW AND POLICY

LEGISLATION

The Independent Consumer and Competition Commission of Papua New Guinea (ICCC) was established by an Act of Parliament in 2002.

The ICCC is not only a competition authority but also regulate utilities; calibrates taxi- metres and trade weighing equipment; conducts sectoral inquires for government; and is responsible for product safety and price regulation of goods and services declared by the Treasurer.

Part VI of the ICCC Act which provides for Competitive Market Conduct essentially sets out guidelines which are central to the functions of the ICCC. These provisions apply to all commercial dealings by all individuals and businesses including State owned and operated business.

The Competitive Market Conduct, in particular, prohibit engagement or conduct in business that has, or is likely to substantially lessen competition in a market as well as it prohibits engaging in trade practices which prevent fair trading among market participants.

The objective of the Competitive Market Conduct Rules under Part VI of the Act and also as envisioned in the Competition Policy is to protect and promote competition in markets as well as promote fair trade practices to enable efficiencies in operations in commerce and industries so they provide more and better quality goods and services at affordable and reasonable prices to the consumers.

MARKET CONDUCT RULES

These rules are designed to help identify anti-competitive market behaviour or conduct that is likely to lessen competition in the domestic market. These rules include;

- **Anti-competitive Arrangements**
The most broadest rule is the prohibition of contracts, arrangements or understandings which have the purpose or effect or likely effect of substantially lessening competition in a market. The prohibition applies both to making such contracts, arrangements or understandings and also to those who would give effect to such a contract which has already been made.
- **Anti -competitive covenants**
Covenants over land that have the purpose or effect of substantially lessening competition in a market are prohibited by the Act. The prohibition extends to requiring someone to give a covenant, the giving of a covenant or seeking to enforce a covenant.
- **Exclusionary Provisions**

The ICC Act prohibits contracts, arrangements or understandings which contain exclusionary provisions. Exclusionary provisions or primary boycotts are agreements between competitors that they will prevent or limit their dealings with a particular person or class of persons, where the person who is the target of the boycott is a competitor of one or both who agree not to deal with him.

- **Price Fixing**
Is an agreement between competitors to fix prices. Pricing fixing agreements are prohibited because they are deemed to have the purpose or effect or likely effect of substantially lessening competition without the need to prove that the substantial lessening of competition actual occurred.
- **Taking Advantage of Market Power**
Where a person or a company has substantial degree of power in a market, they are prohibited from taking advantage of that power for anti-competitive purposes including restricting the entry of a competitor into the market or another market, to prevent or deter someone from engaging in competitive conduct or to eliminate a competitor
- **Resale Price Maintenance**
The practice of a supplier requiring its retail customers not to sell its products below a certain price. Also applies when a manufacturer threatens to refuse to supply a retailer who was discounting the manufacturer's products when other retailers were not.
- **Mergers and Acquisitions**
The acquisition of assets of a business or shares if the acquisition would have the effect or likely effect of substantially lessening competition in a market.

EXCEPTIONS TO MARKET CONDUCT RULES

Like any other law there are exemptions to the Competitive Market Rules. These rules do not apply to the following;

- State Owned Enterprises

Section 65 of the ICC Act exempts application of the market conduct rules on any state owned enterprise that is established by an Act of Parliament.

There are a number of state owned enterprises that have been established by Acts of parliament which have monopoly over the following service industries.

- Telecommunications
- Electricity
- Postal Services
- Water and Sewerage
- Port Services
- Motor Vehicle Third Party Insurance

However, ICC regulates the conducts of this service provides through regulatory contracts by approving their tariffs and setting a price ceiling over a period of five years to ensure they meet their capital requirements to achieve their cost efficient level of operation to recover their cost at the same time provide the required minimum services standard for the price affordable to the consumer.

ENFORCEMENT AND REMEDIES

The market conduct rules are both self-enforcing through private legal action and enforced by the Commission as the competition regulator but in both cases through judicial action.

The Commission may take proceedings in the national court seeking pecuniary penalties not exceeding PGK500,000 for an individual and PGK 10,000,000 for a body corporate. These large penalties reflect the serious nature of illegal commercial behaviour and also recognise both the great

harm which can be caused and the great profits which can be made by some which engage in illegal activities.

The Commission may also apply for an injunction to restraint unlawful conduct and when applying for an interim injunction, the Commission cannot be required to give an undertaking as to the damages. The ICCC may also apply for a divestiture of assets which had been illegally acquired.

RECENT DEVELOPMENTS AND UPDATES

1. Review of the Independent Consumer and Competition Commission Act 2002 (ICCC Act)

The ICCC Act came into operation in 2002 and since then has not been reviewed. However, the type of law requires continuous review to ensure it keeps abreast of current commercial circumstances and how the economy is predicted to be like in future based on the current developments. There were a number of deficiencies in the ICCC Act when it was introduced and are now being reviewed. Importantly, the Act does not include consumer protection or fair trading provisions.

Competition laws need to be complemented by comprehensive consumer protection and fair trading provisions. Currently, competition laws prevent business from colluding on such things as price or engaging in other anti-competitive practices or business acquisitions. It does not prevent business from engaging in unethical conduct such as misleading or deceptive conduct to gain or retain market share against ethical traders. Also it does not prevent business using unfair or unconscionable conduct such as using its market power to force customers to accept unfair terms of trading. Businesses in PNG are increasingly taking advantage of the absence of these provisions in the law. Since 2012 the Commission has been conducting a review of the Act.

2. Introduction of a Leniency Policy

ICCC has plans of introducing a leniency program that would assist in identifying cartel operations in PNG. Since cartels are illegal, they are highly secretive and evidence of their existence is not easy to find. A leniency program would encourage companies to hand over inside evidence of cartels to the Commission.

3. Establishment of an Informal Merger Review Process

ICCC is also working towards establishing an informal merger review process besides the usual Clearance and Authorization processes for business acquisitions that would have, or is likely to have, the effect of substantially lessening competition.

4. Establishment of a Compliance Program

ICCC is currently working towards the development of a compliance program which will have the purpose to provide guidance to government agencies, SOEs, business and professionals as to the broad scope of PNGs competition and consumer laws and how the Commission will go about seeking compliance with those laws.

CHALLENGES

Although one can appreciate the existence of competition law in the domestic economy there are some challenges that ICCC face in the enforcement of its functions;

1. Lack of Competition culture
In a small economy such as PNG, not all businesses are aware that there are certain business conducts that may have anti-competitive effects and thus often do not comply with the market conduct rules. Lack of competition culture also makes it difficult for the ICCC to obtain information from market players on the market conduct rules.
2. Lack of Capacity Constraints
Due to lack of capacity constraints in terms of staffing and resources, growth of competition policy has been slow.
3. State owned entities exemption from the ICCC Act creates an environment conducive for anti-competitive practices. Two examples highlighted below;
 - State owned PNG Power Limited which has monopoly over the electricity industry;
 - InterOil Refinery Project Agreement.

The State and all state owned entities exempt from the ICCA Act creates a barrier for the ICCA to effectively regulate and monitors anti-competitive arrangements that are in existence.

4. It is difficult to obtain sworn statements from complainants.
5. With no leniency policy, it is difficult to identify the existence of cartels.

INTRODUCTION OF COMPETITION LAW AND CHANGE TO COMPETITION LAW AND POLICY

Presentation by: Dr Billy Manoka
Commissioner / CEO
Independent Consumer and
Competition Commission

LEGISLATION

- ❑ ICCC Act enacted by Parliament on 26th February 2002
- ❑ Part VI on Market Conduct Rules covers competitive markets and has the primary objective of enhancing the welfare of the people through:

LEGISLATION

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

MARKET CONDUCT RULES

- Rules designed to help identify anti-competitive market behaviour or conduct that is likely to substantially lessen competition in the domestic market arena;
- Anti-competitive Arrangements
- Exclusionary provisions
- Anti-competitive covenants

MARKET CONDUCT RULES

- Price Fixing
- Taking Unfair Advantage of Market Power
- Resale Price Maintenance
- Prohibitions of Business Acquisitions that substantially lessen competition

MARKET CONDUCT RULES

- ICCC may grant authorisation for anti-competitive arrangements or business acquisitions or mergers
- ICCC may grant clearance of business acquisitions where such acquisitions would not lead to substantial lessening of competition in the market

EXCEPTIONS TO MARKET CONDUCT RULES

- State owned entities have monopoly over the following service industries;
 - Electricity
 - Postal Services
 - Water and Sewerage
 - Port Services
 - Motor Vehicle Third Party Insurance

- Pecuniary Penalties not exceeding;
 - PGK500,000 for an individual
 - KGS10,000,000 for a body corporate
- Divestiture of Assets
- Private legal actions for damage
- ICCG or other persons may obtain injunctions to prevent breaches

RECENT DEVELOPMENTS AND UPDATES

- Review of the Independent Consumer and Competition Commission Act 2002 (ICCC Act);
- Introduction of a Leniency Policy;
- Establishment of an Informal Merger Review Process; and
- Establishment of a Compliance Program

CHALLENGES

- Lack of Competition Culture
- Capacity constraints
- Exemption of the State from the ICCA Act
- Difficulty of Obtaining sworn statement from complainants
- Difficulty of identifying cartels without a leniency policy