

ISLANDS AND SMALL STATES INSTITUTE

Occasional Papers on Islands and Small States

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No: 3 /2001

ISSN 1024-6282

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COMPETITION LAW AND POLICY IN PAPUA NEW GUINEA

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Abstract. This paper addresses, the need for an appropriate competition law and regime in Papua New Guinea and comments on the existing legal landscape are aimed at fostering competition. The paper also highlights the steps that are now being taken to devise a competition law regime, based on the two waves of attempts. The paper concludes with some personal assessments of the prevailing situation and gazes into the unknown, particularly in the implementation of the new regime. On current indications, the new Independent Consumer and Competition Commission should be up and running by the end of this year 2002.

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§Paper initially prepared for the International Conference: Competition and Competition Law in Small Jurisdictions, Valletta Malta, 21 - 23 May 1998 at the Islands and Small States Institute, University of Malta and subsequently revised for publication

Introduction

Whilst attempts have been made to formulate a consumer protection policy for Papua New Guinea (PNG) since 1977 with the PNG Law Reform Commission's (LRC, 1977) *Report on Fairness of Transactions* (LRC, 1981) and subsequently the LRC's Working Paper No. 17 on Consumer Protection, until the early 1990s, no attempts were to formulate a national competition policy and competition law. It is speculatively observed that this may have been due to the historical fact that PNG had just emerged as a nation (attained Independence on 16 September 1975) from an Australian colonial outpost and there was very little private sector investment in the economy. As a result, the government through its parastatals became the major investor usually as public sector monopolies. These parastatals were also legislatively vested with regulatory powers (Trebilcock, 1983; Whitworth, 1992). These conditions were therefore not conducive to encouraging competition. The end result was that competition policy and law were placed well and truly on the back burner. It was only in the early 1990s when the PNG Government rode on the international wave of corporatisation and privatisation that issues pertaining to competition policy and competition law began to be considered. In fact when the PNG Government (under then Prime Minister Pais Wingti) adopted an official corporatisation and privatisation policy, it became apparent that it also had to adopt a competition policy and competition law so that the objectives of its corporatisation and privatization programmes were not lost. Since the ultimate objective of the corporatisation and privatisation policy was to achieve allocative and productive efficiency and generate economic growth by removing all barriers to entry into a market and therefore encourage competition, it was vitally important that an appropriate competition policy and regime be set in place (Kalinoe, 1996).

An Appropriate Competition Law for Papua New Guinea

Since the ultimate objective of corporatisation and privatisation is to achieve allocative and productive efficiency and generate growth by deregulation (i.e., removing barriers to entry, etc..) and encouraging and enhancing competition, it is of vital importance that an appropriate competition policy and regime be put in place. Without these, the advantages of corporatisation and privatisation can easily be lost. This has undoubtedly been the catalyst for the conception of a competition law and policy.

More importantly, however, appropriate competition law and policy are needed to ensure that companies do not abuse their market power to the disadvantage of consumers and their competitors.

The paper considers the existing legislative framework relating to competition law and policy in Papua New Guinea. Following that, issues pertaining to the designing of an appropriate competition law and policy, will be considered in the light of recent economic policies and programmes adopted by the national government, in earnestly pursuing the processes of corporatisation, and privatisation of state-owned enterprises in the country.

Review of Country Situation

As alluded to earlier, Papua New Guinea does not, as at the time of writing, have specific legislation on competition law and its regulation, like the Trade Practices Act 1974 of Australia or the dual Commerce Act 1986 and the Fair Trading Act 1986 of New Zealand. Different and separate legislation do however provide varying degrees of regulation and or protection, focusing on consumer protection, regulating certain unfair trading practices and the misuse of market power. The first of such legislation is the Goods Act Ch. No.251 (Revised Laws), which protects consumers against the sale of defective goods, and attempts to provide a statutory bases for redress.

The second legislation is the Commercial Advertisement (Protection of the Public) Act Ch No. 352 (Revised Laws) which regulates commercial advertisements, prohibiting unfair and misleading statements in commercial advertising. The third legislation of relevance is the Consumer Affairs Council Act 1993 which in essence is a consumer protection legislation, rather than one that regulates competition and anti-competitive behaviour in markets. This legislation provides for the regulation of the conduct of traders and suppliers, in the provision of goods and services to consumers and to protect the interest of consumers in this connection. The Act therefore establishes the Consumer Affairs Council to enforce this legislation, and *inter alia* to formulate policies in relation to consumer protection and to advise the government accordingly.

The fourth legislation of reference in this regard is the Fairness of Transactions Act 1993 (No. 28 of 1993) which has eventually come into effect on September 25, 1998 upon gazettal. This legislation has an interesting background. It was initially mooted in the LRC Report No.6 of 1979 but was introduced as a private members bill, with the main objective of offering some protection to people who were referred to as 'illiterate' and who were invariably in 'economically weaker' positions, (a large majority of whom were indigenous Papua New Guinean customary landholders), against unfair economic development contracts, entered into with multinational corporations, particularly in forestry and mining. This legislation covers unconscionable conduct, applied to "all transactions" (s.3) and not those economic development contracts only.

The fifth legislation in this regard is the Prices Regulations Act Ch No. 320 (Revised Laws), particularly Part IV of the Act which prohibits the unfair market practices of speculating in goods (s.31) and the cornering and restriction of the circulation of goods (s.32). Section 32 (1) is of particular interest. It says: "A person who, with intent to corner the market or to restrain trade, holds or buys up goods and stores or restrains them in his possession or under his control is guilty" of an offence. The prescribed penalty involves the forfeiture to the State of the "whole of the goods" or such other quantity as ordered by the court.

Apart from these statutes, by the operation and application of Schedule 2.2 of the Constitution, which adopts the common law of England as at September 1975, to apply in

the country as part of the underlying law, the relevant common law principles concerning competition law as adopted under Schedule 2.2 of the Constitution, apply as well.

From the point of view of the government's push to deregulate and privatise what are virtually state-owned monopolies, particularly in the electricity, telecommunication, and air transport sectors, that is the need to develop and adopt an appropriate competition policy and law to complement its privatisation policy and program. This point is acknowledged by Asiamoney when they say:

"Other legal complexities which need to be addressed in the case of privatisation include the establishment of anti-trust legislation to protect against unfair dealing or creation or monopolies as well as a statutory body to ensure that essential goods and services reach all Papua New Guineans at a fair price (Asiamoney, 1993)."

An Appropriate Competition Law and Policy

Competition is the process of "striving or potential striving of two or more persons or organisations against one another for the same or related object (Denis, F.G., 1997). "The Hilmer Report explains that" the real likelihood of competition occurring (i.e. potential striving) can have a similar effect on the performance of a firm as actual striving. Thus, a market which is highly open to potential rivals known as a highly contestable' market may be of similar efficiency as a market with actual head-to-head competition (Hilmer Report, 1993)." The Hilmer Report goes on to explain that competition need not necessarily be between a large number of small firms but a few large firms since they may be able to provide more economic benefits due to economies of scale and scope in production, marketing technology and management (*ibid*).

The Report goes further to explain that competition "need not be between identical products or services. Economies have long recognised competition between substitutes. It is the striving to meet the same consumer need that is the essence of competition and this is reflected in the ways in which this is met by different market participants (*ibid*)"

Competition policy should be aimed at facilitating effective competition to promote efficiency and economic growth as well as accommodating situations where competition does not achieve efficiency or conflicts with other social objectives. Hence, the following broad policy objectives should be considered when developing a national competition policy.

These include:

- the need to limit any anti-competitive conduct of firms;
 - removing regulations which unjustifiably restrict competition;
 - reforming the structure of public monopolies to facilitate competition;
- and
- restraining monopoly pricing behaviour (*ibid*:7).

The objectives are hereunder considered separately.

Anti-Competitive Conduct

Anti-competitive conduct covers a wide range of anti-competitive behaviour. These may include (Healey, 1993; Miller, 1994; Heydon, 1993): any agreement, arrangements, understandings¹ or covenants that may have the effect of substantially lessening competition; price fixing where competitors enter into a contract, arrangements or understanding which has the purpose or effect of fixing, controlling or maintaining the price, discount, allowance, rebate or credit for goods or services;• misuse of market power where the firm in enjoyment of substantial market power take advantage of such market power to eliminate or damage competition e.g., by substantially damaging a competitor by predatory pricing and preventing someone from entering a market or deterring someone from being competitive (Pengilley, 1994); resale price maintenance where the supplier stipulates the minimum price at which the retailer can retail or advertise for sale at that price (Lindgren and Entekin, 1973) price discrimination, where the supplier has a dominant position in a market and is selling goods of the same grade and quality at different prices where the price differential is of such magnitude, or of such recurring character, that it is likely to have an effect of substantially lessening competition, unless the different can be justified in terms of costs or matching a competition offer; and where a merger or takeover of a rival competing company will have the effect of substantially lessening competition in a market (Senate Committee, 1991; Tonking, 1992).

Restructuring of Public Monopolies

Public monopolies should be restructured in a manner which separates regulatory functions from the commercial trading activities. The regulatory functions should then be transferred to a government body to act as regulator. It is interesting to note that in PNG, this process has been initiated in relation to the Post and Telecommunications in the Wingti Government when it initiated legislative process to "separate regulatory function from operation functions."

The restructuring of public monopolies should go further to providing access arrangements to certain facilities that are essential for competition such as for example access to the telecommunications network.

Further to the above, a price surveillance regime should be established to monitor, counter and restrain monopoly pricing behaviour (Hilmer Report).

1. Contracts, arrangements and understandings include even the most informal arrangements, as long as there is a "meeting of minds" or a common expectation about how the parties will behave then there is an understanding. Even if there is nothing in writing a wink and a nod is enough!

Competition Law Regime

The general purpose and scope of the competition law regime to be conceived in Papua New Guinea should contain provisions which proscribe and regulate agreements, arrangements and conduct aimed at procuring and maintaining competition in trade and commerce. Some of the specific concerns have been identified above. The objectives of the regime should be to: prevent anti-competitive conduct in order to encourage competition and efficiency in business, resulting in a greater choice for consumers in price quality and service; and further safeguard the position of consumers in their dealings with producers and sellers (Trade Practices Commission, 1992-93).

Recent Initiatives

As indicated earlier, there has been two waves of initiatives to promulgate a suitable competition law and policy. The period up to 1999 represents one wave and the second wave begins around mid 2000 when a different approach was taken to the original, and various new concepts have been introduced, but particularly directed at offering protection to consumers of goods and services of public utilities and such other services which the state-owned enterprises were performing immediately before privatization. We will therefore look at these two waves separately beginning with the first wave that came about in the mid to late 1990s.

Initiative in Connection with the 1996 Act

Actual steps to devise a competition law and policy in Papua New Guinea were taken after the establishment of the Consumer Affairs Council in 1995 under the legislative authority of the Consumer Affairs Council Act 1993. In many ways, the initiative and the drive to devise a suitable competition law and policy came from the founding Executive Director of the Council, Mr. Daniel Kapi. Upon assuming office, Mr. Kapi realized that the Consumer Affairs Council Act 1993 only provided for the regulation of the provision of goods and services to consumers and to protect the interests of consumers in this regard, but the Act did not provide for the regulation of unfair trading practices such as abuses of market power, price fixing arrangements, resale price maintenance and such other anti competitive behaviour which at the end of the intricate web of commerce, injured consumers. Mr. Kapi then began work on the draft legislation in 1995. The initial intention then was to amend the Consumer Affairs Council Act 1993 to give the Council additional powers relating to the regulations of competition or trade practices. This proposed legislation was to be known as the Consumer Affairs and Fair Trading Act 1996

The underlying policy behind this legislation is set out in the preamble of the draft legislation as being:

1. to provide for the regulation of the supply of goods and services and the protection of consumer interests;
2. to preserve competition in trade and commerce to the extent required by the public interest;

3. to establish the Consumer Affairs Council and other authorities and making provision for their composition function and powers; and
4. other purpose related or incidental to the above stated purposes.

In keeping with the underlying purpose (2), this particular draft legislation addressed the desired trade practices law and process under Part IV. Restrictive trade practices are dealt with under Division 2 of Part IV and other unfair trade practices under Division 3 of the same part. Resale price maintenance was considered under Part VIII of the draft legislation.

The general scope and purpose of provision dealing with restrictive trade practices should be to "proscribe and regulate agreements and conduct, aimed at procuring and maintaining competition in trade and commerce. Broadly speaking, those provisions should either control or proscribe the making of certain contracts or arrangements of the reaching of certain understandings, the giving or extracting or certain covenants in relation to land, the engaging conduct involving a secondary boycott, engaging in the practices of monopolisation, exclusive dealing or resale price maintenance, engaging in predatory price discrimination, and the increasing of market share by means of takeover or merger."

The various trade practices which the draft legislation attempts to restrict for their negative effect on competition are:

- (a) exclusionary contractual provision which are likely to have an anti competitive effect;
- (b) secondary boycotts aimed at hindering the supply of goods and services;
- (c) misuse of market power;
- (d) exclusive dealing;
- (e) resale price maintenance;
- (f) price discrimination; and
- (g) mergers and acquisition which would lessen competition.

Exclusionary Contracts Affecting Competition

Clause 90 (1) declared that a contractual provision that is aimed at excluding or lessening competition is *prima facie* unenforceable. Clause 90 (2) in particular provided: "A person shall not:

- (a) make a contract where;
 - (i) the proposed contract contain an exclusionary provision; or
 - (ii) a provision of the proposed contract, has the purposes or effect of substantially lessening competition. A contract entered into prior to the promulgation of the legislation that has exclusionary provisions or provisions which would have the effect of substantially lessening, are precluded from being given effect to under Clause 90(2) (b) of the Act."

Clause 92 of the draft legislation is in very similar terms too but is particularly aimed at the supply of goods and service.

Clause 92 (1) in particular reads:

“A covenant, whether the covenant was given before or after the commencement of this Act, is unenforceable in so far as it confers rights or benefits or imposes duties or obligations on a person or, where the person is a corporation, on a person associated with the corporation if the covenant has, or is likely to have, the effect of substantially lessening competition in any market in which the person or [corporation or associated corporation] supplies or acquires, or is likely to supply or acquire, goods or services [but for the covenant].”

Clause 93 of the draft legislation was aimed at rendering unenforceable covenants which may be aimed at or likely to have the effect of “fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired by the persons” in a given market.

All practices, including contracts, arrangements or understandings which may have the effect of substantially lessening competition are now addressed under Sections 51 and 52 of the new Independent Consumer and Competition Bill 2002. These clauses take a much more simplified approach in drafting in comparison to the approach taken in the 1996 draft legislation. Then by the operation of Section 47 of the 2002 Bill, it is intended that these provisions will have extra-territorial application and effect, particularly so to those who conduct and have business dealing with companies and such other entities in Papua New Guinea.

Secondary Boycotts aimed at Hindering the Supply of Goods and Services

A boycott is a situation where people combine and collectively refuse to deal with another person or corporation in an attempt to bring about a desired result (Healey, 1993). Boycotts can either be primary or secondary, depending on who the parties are:

- if employees boycott the goods and services of their employer, then that is a primary boycott situation;
- but if employees boycott the business of their employer with a view to bring about their desired result on another person, then that becomes a secondary boycott situation.

The 1996 draft legislation only covered a secondary boycott situation.

Clause 94 then rendered secondary boycotts unlawful accordingly stipulating at Clause 94 (1):

“... a person shall not, in concert with a second person, engage in conduct that hinders or prevents the supply of goods and services by a third person to a fourth person, or the acquisition of goods or services by a third person from a fourth person, if:

- (a) the third person is, and the fourth person is not a corporation and;

- (i) the conduct would have or be likely to have the effect of causing a substantial lessening of competition in any market in which the third person supplies or acquires goods or services; and
 - (ii) the conduct is engaged in for the purpose, and would have or be likely to have the effect, of causing a substantial lessening or competition in any market goods or services;
- or
- (b) the fourth person is a corporation and the conduct is engaged in for the purpose, and would have or be likely to have the effect, of causing substantial lessening of competition in any market in which the fourth person supplies or acquires goods or services.

The existing case law in other jurisdictions² indicate that secondary boycott conducted in the course of an industrial dispute may be caught by the operation of Clause 94.

Whilst the 1996 draft legislation addressed the anti competitive conduct of secondary boycotting in the terms set out above, the 2002 Bill does not. It therefore is a matter of concern to now realize that despite the well known anticompetitive effect of secondary boycott, it is now not addressed by the 2002 Bill. However under other Papua New Guinea law, secondary boycott may attract criminal liability (under Section 508 of the Criminal Code Act Chapter 262) as well as civil liability if it is not conducted within a lawfully constituted industrial dispute within the terms of the Industrial Organizations Act Chapter 173.

Misuse of Market Power

Clause 95 of the 1996 draft legislation declared illegal any misuse of market power by those who have a "substantial degree of power" in a market. Clause 95 (1) in particular read:

"A person that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:

- (a) eliminating or substantially damaging competition of a person, or if the person is a corporation, of a related corporation in that or any other market; or
- (b) preventing the entry of a person into that or any other market; or
- (c) deterring or preventing a person from engaging in competitive conduct in that or any other market."

The over riding aim of this Clause was no doubt to protect and advance competition in a competitive environment. It is specifically aimed at prohibiting person or corporations who have a substantial degree of market power in a given market for goods or services from taking advantage of that market power with the view to:

- (a) eliminating or substantially damaging its competitor or the competitor of a related corporation;
- (b) prevent the entry of another person into any market; or
- (c) deterring or preventing competitive conduct in any other market.

Under the 2002 Bill, this particular anti competitive conduct is now addressed under Section 58 but is pitched more at taking advantage of market power rather than to abuse

or misuse market power. Under the definition clause of Section 45 (2) of the Bill, "market" is used in this context to refer to a market in the whole country (Papua New Guinea) for goods or services, including substitutable imports.

Exclusive Dealings

Exclusive dealings was addressed under Clause 96 of the 1996 draft legislation. Under this clause, a person or corporation will be said to be engaged in exclusive dealing if that person:

- (a) supplies, or offers to supply goods or services; or
- (b) offers to supply such goods and services at a particular price; or
- (c) gives or allows, or offers to give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services; on the condition that the purchaser of the goods or services is restricted or prohibited from
 - (i) purchasing goods or services from a competitor of the person supplying; or
 - (ii) that the purchaser is restricted or prohibited from re-supplying goods and services of a particular kind or description acquired from a competitor of the supplier; or
 - (iii) in the case where the person supplies or would supply goods, but only on the condition that the purchaser will not except to a limited extent, re-supply the goods:
 - to particular customers or classes of customers or to customers other than the particular customers or classes of customers; or
 - in particular places or classes of places or in places other than particular places or classes of places.

Exclusive dealing was then rendered illegal under Clause 96 (1) of the draft bill particularly if the effect of these practices would be aimed at or in effect, actually lessening competition (Clause 96 (10)).

Clause 96 (12) was bound to raise concern in the particular economic circumstances of Papua New Guinea today. This clause was aimed at exempting exclusive dealing practices by related body corporate. In the prevailing economic climate in Papua New Guinea, particularly in wholesale and retail and the finance markets where these sectors are dominated by few corporations who are in actual fact subsidiaries of the few market players.

2. See for example the Australian Trade Practices Act Section 45D prohibiting both primary and secondary boycott: *Utah Development Co. and Others V. Seamen's Union of Australia Ltd* (1977) ATPR 49. *Tillmans Butcheries Pty Ltd V. AMIEU* (1979) ATPR 138 where Bowen CJ of the Full Federal court said: "... the fact that a Union and its members acting together have a union purpose does not necessarily exclude the possibility that they had, also, the purpose of causing substantial loss or damage to the business of a Corporation... Evidence in the case before us leads, in my view, to the conclusion that the respondents knew that the only pressure that would be effective against Tillmans was the prospect of actuality of loss or damage. To cause it was one of their purpose.

Giving exemptions for exclusive dealings may have significant anticompetitive effect. For example, in the wholesale retail market, the TST Group of Companies, Steamship Joint Venture (which incorporates Steamship Group of Companies, and Collins and Leahy Group of Companies who have in turn bought out the Burns Philip Group of Companies in Papua New Guinea) and Papindo are without doubt the dominant market players. The existence of Clause 96 (12) may allow the related companies of these three to engage in exclusive dealings which may substantially lessen competition to the disadvantage and economic hurt of the other smaller competitors.

It is noted that Clause 96 of the Bill was a cut and paste job of Section 47 of the Commonwealth of Australia Trade Practices Act 1974 (as amended). Clause 96 (12) in particular was a reproduction of Section 47 (12) of the Trade Practices Act 1974. The economic climate, in particular the wholesale/retail markets in Australia have many corporate participants and therefore when related corporations engage in restrictive dealings within the terms allowed under Section 47(12) (or our draft Clause 96(12)) the effect on the consumer may be less severe or if not negligible. Compare this to the situation in Papua New Guinea where there are only three key players in the retail /wholesale market now, it is not at all difficult to foreshadow major difficulties and serious problems for the eventual consumer. If these three key players in the market engage in restrictive dealings, the impact would be immediate and significant.

Strangely enough, exclusive dealings as described above, are not specifically covered and addressed under the 2002 Bill. The nearest that the 2002 Bill goes is Section 52 that regulates exclusionary provisions in contracts, arrangements or undertakings which may have the effect of substantially lessening competition. If left unregulated, exclusive or selective dealings, which are not dependent on exclusionary provisions, but are actual selective dealings, may have drastic effect in damaging and putting out of businesses small competitors as exclusive dealings are predatory in nature.

Resale Price Maintenance

Clause 97 of the 1996 Bill rendered illegal the practice of resale price maintenance regardless of its impact on competition. This clause is modelled upon Section 48 of the Australian Trade Practices Act. Speaking of this Australian legislation, Healey explains that: "Resale price maintenance is the practice of fixing the minimum sale price of a commodity at a subsequent stage in the distribution chain. When a supplier of goods stipulates that they are to be resold at (or not below) a price set by him, he is attempting to maintain the resale price of the goods."

The manifestation of resale price maintenance may come in various forms including offering inducements, threats and mutual agreements aimed at maintaining price at a level initiated by the supplier.

Undoubtedly there are some correlation between the operation of Clause 97 and Clause 91 which one must be aware of. Clause 91 is pitched at prohibiting contractual arrangements relating to price fixing, controlling, price maintenance, discount, allowance,

rebate or credit by competitors which would have the effect of substantially lessening competition. Clause 97 is aimed at vertical price fixing i.e., price fixing between parties who are not competing against each other. Clause 91 is aimed at horizontal price fixing – dealing with setting of prices by competitors which therefore would have the impact of lessening competition.

In this form, Clause 91 may exempt any price discount, allowance or rebate fixing, controlling or maintenance arrangements between joint venture partners or where the parties to such an arrangement include;

- “(a) not less than 50 persons (bodies corporate that are related to one another being counted as a single person) who supply in trade or commerce, goods or services to which the provision applies; or
- (b) not less than 50 persons (bodies corporate that are related to one another being counted as a single person) who acquire, in trade or commerce, goods or services to which the provision applies.”

Resale price maintenance is now dealt with under Sections 59 and 60 of the Independent Consumer and Competition Commission Bill 2002 in very similar terms to what was set out under the 1996 draft legislation as presented above.

Price Discrimination

Price discrimination refers to a difference in price “where a different price is charged to different customers for similar goods, irrespective of any cost difference incurred in supplying those customers. It may also refer to a difference in prices charged which goes beyond reflecting the difference in cost of supplying the different customers.”

Clause 98 of the 1996 draft legislation dealt with price discrimination.

Clause 98 (1) in particular was drafted in this form:

- “1. A person shall not, in trade or commerce, discriminate between purchasers of goods of like grade and quality in relation to:
 - (a) the prices charged for the goods; or
 - (b) any discounts, allowances, rebates or credit given or allowed in relation to the supply of the goods; or
 - (c) the provision of services in respect of the goods; or
 - (d) the making of payments for services provided in respect of the goods, if the discrimination of such magnitude as is of such a recurring or systematic character that it has or is likely to have the effect of substantially lessening competition in a market for goods, being a market in which the person supplies goods; “if the discrimination of such magnitude or is of such a recurring or systematic character that it has or is likely to have the effect of substantially lessening competition in a market for goods, being a market in which the person supplies goods”.

There were however defences or exemptions set out under sub clause 2. Such are situations where:

“(a) the discrimination makes only reasonable allowance for differences in the cost of manufacture, distribution, sale or delivery resulting from the differing places to which, methods by which or quantities in which, the goods are supplied to the purchasers; or
(b) the discrimination is constituted by the doing of any act in good faith to meet a price or benefit offered by a competitor of the supplier.”

Price discrimination as presented above is not included in the 2002 Bill. In other words, the Bill does not have a clause on price discrimination. This is a cause for concern. In a country like Papua New Guinea where there are a few independent competitors, in virtually all markets, either in terms of goods and services or in geographical terms, but consisting of few related participants, there is bound to be a anti competitive behaviour in price discrimination.

Mergers and Acquisitions which would lessen Competition

The underlying reasons for regulating mergers and acquisitions have been well stated by the Australian Trade Practices Act Review Committee (Trade Practices Review Committee Report, 1976) may be considered relevant and from the basis and rationale of Papua New Guinea's Clause 99 of the draft legislation.

That Committee stated that:

“In our view there are two main reasons for including merger provisions in any competition policy law:

- (a) merger provisions are necessary to prevent the possibility of achieving, by merger, anti-competitive results prohibited elsewhere in the same law.
- (b) merger provisions ensure that the control of significant capital assets in the community does not change hands in circumstances that disregard any anti competitive effects of the change.”

Clause 99 of the 1996 draft legislation dealt with the regulation of mergers and acquisitions so that dominance in a market is not achieved where such dominance of market power may have the ultimate effect of lessening competition. This clause was drafted and presented in this terms:

“A person shall not directly or indirectly:

- (a) acquire shares in the capital of a body corporate; or
- (b) acquire any assets of a person, if the acquisition would have the effect, or likely to have the effect, of substantially lessening competition in a market.”

Given the current state of the economy where there are few participants or players in the respective markets of the economy, a law prohibiting mergers and acquisitions which would have the effect of lessening competition is absolutely necessary in my view. In fact the current market dominance that Steamships Trading has through their various subsidiaries is a direct result of the gap that exists in our laws in this area of competition law and the regulation of anti-competitive behaviour. In the early 1990s, Steamships

Trading Company acquired the wholesale retail operations of Burns Philp Trading and the entire automobile business of New Guinea Motors.

Subsequently, Steamships were in turn acquired by the Bromley and Manton and Collins and Leahy group of Companies. As a result, the entire wholesale/retail market in the Highlands of Papua New Guinea is dominated and controlled by this Steamships/Collins and Leahy Group of Companies.

The Independent Consumer and Competition Commission Bill 2002 has dropped mergers from its regulatory purview but intends to regulate acquisitions under Section 69 by prohibiting those acquisitions which may have the effect of substantially lessening competition. There has been no explanation given in the explanatory notes to the Bill as to why mergers have been dropped from the current Section 69 of the Bill. Yet mergers between related competitors poses a strong anti-competitive threat for Papua New Guinea given the situation that most of the companies and such other business entities are actually related through share holdings or parent companies.

Initiatives under the 2002 Bill

After the General Elections in 1997, there was a change of government and consequently, change in personnel as well, where the then Executive Director of the Consumer Affairs Council no longer held office. Much of the impetus for the proposed legislative reform for the introduction of competition law and policy as discussed above in the 1996 draft legislation were now placed again on the back burner. Fortunately before the momentum in the first wave died down, there was a change in Government in mid 2000 and this saw the introduction of a much more aggressive privatization programme under the new Mekere Morauta Government. Henceforth the privatization programme propelled the new look competition law and policy that has now been unveiled in the Independent Consumer and Competition Bill 2002. In many ways, this Bill departs from the 1996 draft legislation, the pertinent clauses of which were presented above.

The 2002 Bill can be described as an all encompassing Bill which addresses under one legislation competition law and policy matters and establishes the Independent Consumer and Competition Commission (the ICCC) as a regulator of competition, chiefly through the process of regulatory contracts, and then deals with consumer protection and price regulation issues. To achieve these, the Bill proposes to repeal the Consumer Affairs Council Act 1993 and collapse those powers and functions into the new regulatory body it creates, the Independent Consumer and Competition Commission. In introducing this Bill to the Parliament, the Prime Minister is recorded in the Parliamentary Hansard, first as having declared that the Bill actually establishes a new industry regulator, the ICCC. Secondly, he is reported as having stated that the Commission is primed to play a pivotal role by promoting better business conduct, and where appropriate, closely regulating these conducts with the aim of attaining structural efficiency in the nations economy.

In summary, the 2002 Bill: (a) establishes the Commission (ICCC); (b) introduces a new regime for the regulation of certain industries, entities and goods and services, including

the regulation of price and related service standards under regulatory contracts; (c) allows the Commission to make codes or rules relating to regulated industries or entities; (d) provides for appeals from certain decisions of the Commission to an independent appeals panel; (e) states competition law policies and principles by introducing laws which prohibit certain anti-competitive market practices, which laws the Commission will be administering; (f) abolishes the Consumer Affairs Council and confers on the Commission all matters relating to consumer protection including price control functions and added powers allowing for the compulsory recall of unsafe products.

Some of the main features of the new 2002 Bill relating to the topic under consideration are discussed below:

Regulated Entities, Goods, Services and Contracts

Section 32 of the Bill allows the national government Minister responsible for treasury to declare an entity to be a "regulated entity" if that entity was in the first instance a state-owned enterprise or within 3 months after that state owned enterprise has been privatized. In addition, Section 32 allows the Minister responsible for treasury matters to declare goods or services supplied or capable of being supplied by such a regulated entity to be "regulated goods or services". Quite apart from the powers given to the Minister responsible for treasury matters by Section 32, the Commission is also given similar powers under Section 33 to declare an entity to be a regulated entity (irrespective of whether or not the entity is a former state-owned enterprise) and the goods or services supplied or capable of being supplied by that regulated entity to be regulated goods or services. The Commission can however make such a declaration only if it is satisfied that the entity concerned has a substantial degree of power in the market and the declaration is appropriate having regard to the Commission's objectives in regulating competition by guarding against anti-competitive conduct. The consequence of declaring an entity to be a regulated entity is that a regulatory contract regulating that entity may be made by the Minister responsible for treasury matters or the Commission, as the case may be.

Section 34 of the 2002 Bill then provides that where the Minister responsible for treasury matters has declared an entity to be regulated entity, the Minister may then issue a regulatory contract applying to that regulated entity. Likewise, where the Commission has exercised its powers under Section 33 of the Bill and declared an entity to be a regulatory entity, it can then proceed to issue a regulatory contract. Sections 34 and 35 are the provisions which set out the features of a regulatory contract where the former provision deals with regulated contracts to be issued by the Minister and the latter concerns itself with regulatory contracts to be issued by the Commission. The essential features of these regulatory contracts are as follows. These contracts:

- must be for terms under 10 years;
- must regulate the price at which regulated goods and regulated services may be supplied by the regulated entity over the term of the regulatory contract;
- must specify service standards the relevant regulated entity must meet, together with payments which the relevant regulated entity

- must make to customers and other persons (whether by way of rebate or otherwise), or price reductions which may be imposed, if the relevant regulated entity fails to meet those service standards;
- must specify a process for the issue of a new regulatory contract to replace that regulatory contract on the expiry of its term;
- must specify pricing policies and principles that are to be adopted in any regulatory contract that is issued in replacement of that regulatory contract on the expiry of its term; and
- must deal with such other matters as other Acts require to be dealt with in a regulatory contract (Subsections 34(2) and 35(3)).

A regulated entity must comply with the terms of any regulated contract as required by Section 37 of the Bill. Section 38 of the Bill then mandates the Commission to enforce these contracts by issuing appropriate compliance orders. Then under Section 39 of the Bill, failure to comply with such orders may result in the imposition of a fine of up to K10,000, 000 (about \$5,000,000 Australian). In addition, the Commission may recover from the regulated entity an amount equal to any profit made as a result of failing to comply with the imposed orders.

Conclusion

The recent initiatives, as represented by the two waves of attempts, to adopt an appropriate competition law and policy in Papua New Guinea are no doubt commendable. Prior to this, particularly in the mid to late 1970s the emphasis on law reform and policy formulation was more directed at consumer protection rather than the forces of competition and its ultimate negative impacts on the consumer. Given the Government's recent aggressive privatization program, it is imperative that appropriate competition law regime be instituted so that the advantages of privatization are not lost. Misuse of market power, particularly by the soon to be privatized state-owned enterprises which are in fact public monopolies, presents a real danger to the nation's economy. Hence the need for a strong competition regulator. The introduction of the Independent Consumer and Competition Commission Bill 2002 March early this year is therefore commendable. With the introduction of the concept of regulatory contracts, which in essence are contracts which the regulated entity will enter into with the ICCC as the regulator, concerning all matters of competitiveness, good trading practice, and reasonable pricing, as stipulated under Section 35 of the Bill, one can be confident that unfair trade practices and other anti-competitive behaviour will be properly scrutinized and brought under control.

The other matters of concern, as expressed in the body of the paper, relates to the lack of adequate coverage of the new 2002 Bill of certain anti-competitive behaviour, particularly those dealing with secondary boycotts, exclusive dealings, price discrimination and the effect of mergers on competitiveness.

In this regard, it is perhaps fair to comment that the first wave in the attempts to introduce a strong competition law regime, as reflected in the 1996 draft legislation, represented a

much more comprehensive effort than the second wave in the 2002 Bill. There is however still room for amendments later on. We can now only look forward to the actual implementation of the 2002 Bill. On current indications, the new Independent Consumer and Competition Commission should be up and running by the end of this year 2002.

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