

While the completed Clearance and Authorisation Forms provide some essential information for considering the application, the Form should be accompanied by a detailed submission in support which sets out comprehensive facts and information about the acquisition which would enable the Commission to properly assess all of the issues in a timely manner. For example, section 69(5) of the Act sets out nine specific matters which the Commission must consider, among others, in assessing the competitive effect of the acquisition. The accompanying submission should address each of these matters in detail, insofar as they are relevant to the acquisition. It is for these reasons that you are urged to discuss with the Commission, before you lodge your application, what should go in the submission and how to go about it.

**IF YOU HAVE NOT SOUGHT AND BEEN GRANTED
CLEARANCE OR AUTHORISATION.....**

The ICCC Act contains severe penalties for breaches of the Market Conduct Rules contained in the Act: up to K10,000,000 pecuniary penalty for a corporation or up to K500,000 for an individual, and a management ban for up to five years. In addition, or instead, the Court could grant an injunction preventing the acquisition going ahead, or order divestiture of the acquired assets. Thus it is in everyone's interests to ensure that an acquisition of a business or shares that would have, or would be likely to have, the effect of substantially lessening competition in a market, does not proceed unless it has received clearance or authorisation from the Commission. The Commission is here to help you, so please discuss these issues with the Commission before making a business acquisition.

Remember:

Lodge a clearance or authorisation application using the correct form accompanied by the appropriate lodgment fee and a detailed submission in support of the application.



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**INDEPENDENT CONSUMER &
COMPETITION COMMISSION**

CREATING A COMPETITIVE AND FAIR
TRADING MARKET PLACE

BUSINESS ACQUISITIONS

Understanding

*Clearance & Authorisation Provision
of the ICCC Act 2002*

*Business acquisitions by competitors, although
may be anti-competitive, can be approved.*

BUSINESS ACQUISITIONS – WHAT YOU CAN DO AND CAN'T DO

The *Independent Consumer and Competition Commission Act 2002* is designed to foster competition and to prevent anti-competitive behaviour in commercial activity in PNG. One form of anti-competitive behaviour which is prohibited by the ICCC Act is mergers or acquisitions which have an anti-competitive effect. Specifically, section 69(1) of the Act provides that a person [which includes a corporation] shall not acquire assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market [in PNG].

But this prohibition is not absolute. A person who is proposing to make an acquisition which may have anti-competitive effects can apply to the Commission for a *clearance* or an *authorisation* which, if granted, gives the acquirer immunity from legal action under the Act, by the Commission or by a third party, for breach of the mergers prohibition in section 69 of the Act. Clearance and authorisation are simple administrative procedures where the Commission considers, without going to court, whether the proposed acquisition would be likely to substantially lessen competition and if so (in the case of authorisation applications) whether the public benefits of the acquisition are such that the acquisition should be allowed to proceed.

CLEARANCE – COMPETITION TEST

The proposed acquirer may apply to the Commission before completing the acquisition for a clearance from the Commission to allow the acquisition to proceed. Section 81(3) of the Act provides that if the Commission is satisfied that the acquisition will not have, and will not be likely to have, the effect of substantially lessening competition in a market, the Commission shall give a clearance for the acquisition. If the Commission is not so satisfied, it shall decline to give a clearance. The Commission must make its decision within 20 days after the date of registration of the clearance application, otherwise the clearance is deemed to be granted. This time frame can be extended by agreement, and/or by the time taken by the applicant to provide any further information requested by the Commission.

Proposed acquirers are encouraged to apply for clearance where the proposed acquisition may have some anti-competitive effects, even if you think it unlikely that the anti-competitive effects would be substantial, and where the public benefits of the acquisition are not relevant. The clearance process is relatively inexpensive and quick, and a clearance gives you complete protection against any potentially expensive litigation after the acquisition, by the Commission or by any private litigant, alleging that the acquisition was in breach of section 69 of the Act. It should be noted that the Commission does not give informal clearances outside the formal, statutory clearance process; any views expressed by the Commission in such circumstances would provide no legal protection for the acquirer and would thus be of no use.

AUTHORISATION – COMPETITION AND PUBLIC BENEFIT TEST

In some circumstances it is preferable to apply to the Commission, again before completing the acquisition, for an authorisation from the Commission to allow the acquisition to proceed. Authorisation under section 82(3) of the Act is a two stage process. After an authorisation application is lodged, the Commission first considers whether it is satisfied that the acquisition will not have, and will not be likely to have, the effect of substantially lessening competition in a market, in which case it shall grant a clearance. If it is not so satisfied, the Commission then considers whether it can be satisfied that the acquisition will result, or will be likely to result, in such a benefit to the public that the acquisition should be permitted to go ahead, notwithstanding any anti-competitive effects of the acquisition. In other words, this is a balancing process; for authorisation to be granted by the Commission, the public benefits of the acquisition must outweigh the detriment to competition.

Proposed acquirers should apply for authorisation where the proposed acquisition may have, or would be likely to have, anti-competitive effects, but where the proposed acquirer considers that benefits to the public from the acquisition would outweigh any lessening of competition from the acquisition. The authorisation process is longer and more complex than clearance, because of the need for a public benefit analysis, but is still relatively inexpensive and quick – the Commission must make its decision within 72 days after the application for authorisation is registered.

As with clearance, this time frame can be extended by agreement, and/or by the time taken by the applicant to provide any further information requested by the Commission.

DIVESTITURE UNDERTAKINGS

Some proposed acquisitions which might otherwise substantially lessen competition, may not do so if a part of the new, combined business were sold off or transferred to an independent third party. Accordingly, section 85 of the Act provides that the Commission can grant clearance or authorisation in such cases, conditional upon receipt of a binding undertaking from the acquirer to dispose of specified assets or shares.

HOW TO APPLY FOR CLEARANCE OR AUTHORISATION

Most business acquisitions involve substantial amounts of money and thus significant risks including the risk of possibly breaching the ICCC Act. Legal advisers are likely to have been involved, and you may wish to seek their assistance in making an application to the Commission for clearance or authorisation. But you are not required to use a legal adviser in dealing with the Commission – feel free to discuss the issues directly with the Commission's Competitive Markets & Fair Trade Division, as others have done in several (successful) clearance and authorisation applications in the past. Whether you use a legal adviser or not, we strongly suggest you discuss the application with the Commission before formally lodging the application.

All clearance and authorisation applications must be lodged with the Commission's Office on the correct form (Clearance on Form ICC2 and Authorisation on Form ICC3: the forms are available from the Commission's Head Office or from the ICCC website, (www.iccc.gov.pg) and must be accompanied by a cheque for the prescribed fee.