



# PUBLIC NOTICE

## ICCC 2018 Inaugural World Competition Day Celebration Theme: "Digital Economy, Innovation and Competition" -Promoting Competition in Papua New Guinea through Digital Innovation-

### Introduction

The Independent Consumer and Competition Commission ("ICCC") wishes to inform business houses and consumers of the requirement, the benefit, the process involved and penalties of the Market Conduct Rules (MCRs) under the Independent Consumer and Competition Commission Act, 2002 ("ICCC Act"). The MCRs play a key role in the promotion of a fair and competitive environment resulting in economic efficiency, lower prices, wide consumer choices and business innovations.

### The Benefits of Competition

**Low prices:** In a competitive market, prices are pushed down when there is rivalry between competitors. Not only is this good for consumers - when more people can afford to buy products, it encourages businesses to produce and sell more at competitive prices. This ultimately benefits the economy.

**Better quality:** Competition also encourages businesses to improve the quality of goods and services they supply - to attract more customers and expand market share. Quality can mean various things: products that last longer or work better, better after-sales or technical support or friendlier and better service being offered to customers.

**More choice:** In a competitive market, businesses will try to make their products different from the rest. This is called product differentiation. This results in greater choice - so consumers can select the product that offers the right balance between price and quality.

**Innovation:** Competition also encourages the adoption of innovation as companies evolve and new ideas are developed in the market place. To deliver this choice, and produce better products, businesses need to be innovative - in their product concepts, design, production techniques, services to customers, etc.

The following MCRs are prohibited under the ICCC Act; because they are harmful to competition and therefore, diminish consumers' benefit.

- Agreements that substantially lessen competition (Section 50);
- Covenants that substantially lessen competition (Section 51);
- Exclusionary provisions (Primary Boycott) (Section 52);
- Price Fixing agreements that lessen competition (Section 53);
- Taking advantage of market power (Section 58); and
- Resale price maintenance (Sections 59 and Section 60).

Each of these MCRs are discussed below:

### Agreements that substantially lessen competition (Section 50)

Section 50 prohibits a person or business from entering into and/or giving effect to a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has, or is likely to have the effect of substantially lessening competition in a market.

Such anti-competitive agreements include agreements that:

- Are exclusive in nature and promote exclusivity;
- Limit production;
- Allocate markets and customers;
- Are collusive (tendering and bid-rigging);
- Fix prices; and
- Fix resale prices.

This is a general prohibition against market conduct that is anti-competitive and can cover a range of conducts and arrangements.

### Covenants that substantially lessen competition (Section 51)

Section 51 prohibits a person or business from either, on his own or on behalf of an associated person or business from: (a) requiring the giving of a covenant; or (b) giving a covenant, that has the purpose or has or is likely to have the effect of substantially lessening competition in a market.

A Covenant is an agreement by lease, deed or other legal contract in regards to land and/or building properties.

Such covenants include agreements that:

- Give exclusivity or protection from competition, e.g. leases that prevent the landlord from leasing other premises to competitors of the tenant;
- Restrict the commercial freedom of a tangible trading partner; and
- Raise barriers to entry for potential competitors in the relevant market.

### Exclusionary provisions (Primary Boycott) (Section 52)

Section 52 prohibits exclusionary conduct between competitors in the supply or acquisition of goods and services. This includes contracts, arrangements or understandings between competitors where they agree not to supply to or acquire from another person or business, who is also a competitor to one of the parties to the agreement.

There is an exception to Section 52. It is a defence to prove that the exclusionary conduct will not result in substantial lessening of competition in the relevant market.

### Price fixing agreement that are deemed to lessen competition (Section 53)

Section 53 prohibits provisions of a contract, arrangement or understanding which have the purpose or effect of fixing, maintaining or controlling the prices of goods and services. Price fixing among competitors is seen as the worst form of anti-competitive conduct, due to the blatant disregard of consumer welfare i.e. setting high prices which can harm consumers. It is therefore a per se offence, meaning the effects of price fixing do not need to be proved. Entering into the agreement to fix price is bad enough as it is.

A price fixing arrangement does not necessarily need to specify a fixed price for selling the product. Setting or limiting rebates or discounts; fixing minimum margins or setting prices by a formula, can all amount to price fixing.

The ICCC Act prohibits price fixing arrangements between competitors. Price fixing arrangements are anti-competitive and have the purpose or effect of reducing competition substantially in a market. The prohibition also covers covenants over land, where the covenant has the purpose or effect of fixing prices.

Price fixing agents have the common goal of coordinating pricing for their benefit, but this is at the loss of consumers. Consumers always lose as fixed prices in the long-term will always be higher, than if the price was to be determined by competitive market forces.

Some examples of price fixing would include agreements between competitors to:

- Establish or agree to cooperate on fixed price discounts;
- Hold prices firm for sustained periods of time;
- Eliminate or reduce discounts;
- Adopt a standard formula for their prices; and
- Cooperate on a minimum fee or price schedule.

### Taking Advantage of Market Power (Section 58)

ICCC Act prohibits firms with a substantial degree of market power from taking advantage of that market power for a prohibited purpose. The prohibited purposes include:

- a) Restricting the entry of a person/firm into that or any other market; or
- b) Preventing or deterring a person/firm from engaging in competitive conduct in that or any other market; or
- c) Eliminating a person/firm from that or any other markets.

Market power refers to a firm's relative ability to influence the price of goods and services in the marketplace by manipulating the level of supply, demand or both. A firm with substantial market power has the ability to manipulate market price and thereby control its profit margin, and possibly the ability to increase obstacles to potential new entrants and existing competitors in the market.

Some businesses have substantial market power. This in itself is not illegal but, when a business that has a substantial degree of market power takes advantage of that power in an anti-competitive manner, then that can be harmful to competition. Competition ensures affordable prices of goods and services, promotes better quality, more choice and greater innovation for consumers.

There are three elements to section 58. A business is in breach of section 58 of ICCC Act if it:

- i. Has a substantial degree of market power;
- ii. Takes advantage of that power; and
- iii. Results in a prohibited purpose.

It is not illegal for a business to have a substantial degree of market power.

Businesses often obtain market power through being more efficient or innovative than their competitors. If obtained this way, market power can be seen as a reward for competing successfully. However, taking advantage of that power to restrict, prevent and or eliminate another competitor from competing in the same market is prohibited.

A business is generally free to offer goods or services at any price it chooses. High prices in themselves are not illegal. Imposing high prices, such as high access prices to competitors, will only be illegal if a business is taking advantage of its market power for an anti-competitive purpose.

In some markets, there may be little or no competition and little prospect of future competition. In these markets the ICCC may REGULATE, MONITOR or CONTROL PRICES of those goods or services for long term benefit of consumers.

Currently ICCC regulates:

- PNG Power;
- PNG Ports;
- Post PNG; and
- Motor Vehicle Insurance Third Party

Conducts that are associated by a dominant firm taking advantage of its market power include:

- Agreements that substantially lessen competition (Section 50);
- Covenants that substantially lessen competition (Section 51);
- Exclusionary provisions (Primary Boycott) (Section 52);
- Price fixing agreements that are deemed to lessen competition (Section 53);
- Resale Price Maintenance (Section 59 and Section 60);
- Margin Squeeze;
- Excessive, predatory or discriminatory pricing;
- Refusal to supply or provide access to essential facilities; and
- Tying (i.e. stipulating that a buyer wishing to purchase one product must also purchase all or some of his requirements for a second product).

### Resale price maintenance (Section 59 and 60)

These sections prohibit agreements or concerted practices between a supplier and a retailer with the objective of directly or indirectly establishing a fixed or minimum price level to be observed by the dealer when reselling a product or service to its customers. This is known as Resale Price Maintenance.

Resale Price Maintenance (RPM) occurs when a supplier tries to control the price for the onward resale or re-supply of its product below a certain price. It is a form of vertical price fixing between a supplier and retailer that restricts the ability of a retailer to compete on prices in the market.

The ICCC Act prohibits entering into an agreement which contain RPM terms. The refusal or threatened refusal of supply is, in fact, enforcement by the supplier of RPM requirements in its supply agreement with the reseller.

RPM occurs when a supplier:

- Makes known to a reseller that it will not supply goods unless the reseller agrees not to sell those goods below a specified price;
  - Induces or attempts to induce a reseller not to sell goods below a specified price;
  - Enters into an agreement with the reseller where one of the terms is that the reseller will not sell goods below a specified price; and
  - Withholds the supply of goods because that reseller, or a second reseller who has obtained goods from the first reseller, has sold goods below the specified price.
- The price which suppliers recommend to distributors should be a recommended price only. Resellers should not be forced to comply with the recommendation. A supplier cannot insist for a reseller to sell below a certain price, it could however insist that the reseller not charge 'more' than a certain price for a particular item supplied.

### Authorization for anti-competitive business conduct (Section 70)

There are exemptions under the ICCC Act which businesses or parties concerned can seek from the ICCC.

The ICCC may grant authorization for restrictive business conduct or trade practices, in certain circumstances provided the ICCC is satisfied that the anti-competitive

behaviour results in a benefit to the public that outweighs any anti-competitive detriments.

Public Benefits under an Authorisation Application may include:

- Promotion of fair/equitable dealings;
- Growth of export markets;
- Development of import replacements;
- Economic development, for example, development of natural resources through exploration, research and capital investment;
- Assisting efficient small business, industry harmony;
- Measures that improve the environment;
- Reducing corruption or the potential for corruption;
- Improvement in the quality or safety of goods and services and expansion of consumer choice;
- Supply of better information to consumers and business to permit informed choice in their dealings; and
- Lowering transactions costs.

Public Detriments resulting from an Authorization may include:

- A reduction in the number of effective competitors;
- Increased restrictions on entry;
- Restriction on competitiveness by market participants, affecting their ability to innovate effectively and conduct their affairs efficiently, competitively and independently; or
- Other negative effects on the society.

### Clearance and Authorization for Business Acquisition (Section 81 and 82)

The Independent Consumer and Competition Commission Act 2002 (ICCC Act) is responsible for the promotion of competition and fair trading in Papua New Guinea. Buying shares or assets of a business (business acquisition) may have the effect of substantially lessening competition in the market. Therefore it is important that the parties consider applying to the ICCC for clearance and authorization before the transaction occurs.

If the Commission grants a clearance and authorization, it gives the acquirer immunity from legal action by the ICCC or by an aggrieved third party.

Clearance will be granted if an acquisition under consideration does NOT have the effect of substantially lessening of competition, while Authorization is granted when the ICCC is satisfied that the anti-competitive behaviour results in a benefit to the public that outweighs any anti-competitive detriments.

### World Competition Day Seminar

As part of its advocacy to promote and foster effective competition in our market place, the Independent Consumer and Competition Commission ("ICCC") will be hosting a seminar to commemorate the World Competition Day on 5th December, 2018 at the Hilton Hotel. The ICCC is inviting various stakeholders to attend and participate. This is actually the first time the ICCC will be celebrating the World Competition Day and we are excited about the opportunity provided going forward.

The World Competition Day is held annually worldwide on 05th December to commemorate the United Nations adoption of the international standard for competition laws called the 'Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices', commonly known as the United Nations Set of Principles and Rules on Competition. These principles and rules have guided a large number of countries in formulating and enacting their competition laws.

The theme for this year's World Competition Day is "Digital Economy, Innovation and Competition". The ICCC has selected "Promoting Competition in PNG through Digital Innovation" as its national theme for 2018. The PNG economy is gradually fast moving towards a digital economy, hence the relevance of the national theme. The first session will see presentations from ICCC, Brent Fisse Lawyers, Department of Treasury, National Research Institute and PNG Business Council.

The second session comprises of two panel discussions. The first panel discussion will be on the ICT sector of PNG and will include representatives from National Information & Communications Technology Authority, Digicel PNG Limited, Telikom Limited and Bemobile-Vodafone. The second panel discussion will be on the technological innovations in banking services, which will involve participation from Bank of PNG, Bank of South Pacific, ANZ Bank and Kina Bank.

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